

FILED
9-15-16

Court of Appeals
Division I
State of Washington

NO. 73727-9

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

IN RE THE DETENTION OF PATRICK MCGAFFEE,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Patrick McGaffee appeals the Order of Commitment entered following an unconditional release trial and jury verdict pursuant to RCW 71.09. McGaffee, who was convicted in 1992 of the attempted rape of a 15-year-old boy and who admits to multiple adjudicated child victims, suffers from pedophilic and fetishistic disorders. After a fair trial, the jury determined that McGaffee continued to be a Sexually Violent Predator (SVP). On appeal, McGaffee challenges the trial court's evidentiary rulings regarding standard risk assessment instruments, and claims the State committed prosecutorial misconduct which should have resulted in a mistrial. However, McGaffee's arguments should be rejected because McGaffee failed to prove the trial court abused its discretion when it issued rulings regarding the admission or exclusion of evidence, and further that the State's use of analogy and example in closing argument was not misconduct. Moreover, the trial court's decision not to ask a question posed by a juror was not an abuse of discretion and did not prevent McGaffee from presenting his case. Finally, the trial court correctly ruled that the State's criticism of McGaffee's expert's unsupported risk assessment was proper argument and not burden shifting. The Order of Commitment should be affirmed.

II. RESTATEMENT OF THE ISSUES

- A. **Did the trial court abuse its discretion when it allowed relevant expert testimony regarding a statistical measure in an actuarial tool commonly used in sexually violent predator evaluations?**
- B. **Did the trial court properly determine that a tool that was developed using well-accepted methodology that allows evaluators to consider dynamic risk factors in a structured way satisfies the *Frye*¹ test?**
- C. **Did the trial court abuse its discretion by precluding speculative testimony regarding potential future research on a particular actuarial instrument?**
- D. **Did the trial court abuse its discretion when it declined to ask a witness a question posed by a juror following McGaffee's trial expert's testimony where the question went beyond the scope of the direct and cross examination of the witness and where McGaffee chose not to recall the witness?**
- E. **Did the State commit prosecutorial misconduct by relying on simple analogies to explain complicated scientific information in his closing argument?**
- F. **Was the State's criticism of McGaffee's expert's unsupported opinion impermissible burden shifting?**

III. RESTATEMENT OF THE CASE

Patrick McGaffee is a sexually violent predator who suffers from pedophilic disorder, and a fetishistic disorder focused on the clothing of boys and young men whom he finds sexually arousing. RP 06/17/15 at 1065. During his early adulthood, McGaffee approached boys and solicited sex from them at playgrounds and parks in Everett, Washington.

¹ *Frye v. U.S.*, 54 App. D.C. 46, 293 F. 1013 (1923).

RP 06/11/15 at 473-474. He frequently sought out children to victimize and rode his bicycle to areas where they were known to congregate. RP 06/11/15 at 475. After a few minutes of observing the boys, who were as young as six, he would approach potential victims when there was no adult supervision. RP 06/11/15 at 474. According to McGaffee's own statements, he would offer money, candy, or toys in exchange for some form of sexual contact. RP 06/11/15 at 483, 484, 487, 488, 489-490, 491, 493. At trial, McGaffee admitted to orally and anally raping these boys and then taking their socks as mementos. *Id.* He later used the sock as a masturbatory aid. *Id.*

McGaffee's hands-on victims since adulthood number between one and 14 depending on the source. McGaffee testified during a recorded deposition that was played for the jury on the first day of testimony. RP 06/11/15 at 473. He testified that he had molested 14 boys since he had turned 18 years old. RP 06/11/15 at 475. In the same deposition he reduced that number to five or six. *Id.* Then he reduced that to two. RP 06/11/15 at 476. While testifying at trial, McGaffee was confronted by a sexual history assignment he authored, in which he acknowledged eight hands-on victims. RP 06/11/15 at 494. In an interview conducted by the State's expert Dr. Harry Goldberg, McGaffee said he had two victims, only to later claim he had but one. During a polygraph McGaffee told the

examiner that he had 14 hands-on victims. RP 06/11/15 at 503-504. McGaffee told the jury he liked young boys because of their eyes, young facial features, hair, lack of pubic hair, soft skin, and slender build. RP 06/11/15 at 514. He also found the boys' clothing sexually arousing, particularly their socks. RP 06/11/15 at 515.

In late 1991, McGaffee became infatuated with a 15-year-old boy with the initials of R.M. The boy was of slight build, light colored hair, and looked younger than his age. RP 06/16/15 at 791; RP 06/11/15 at 513. McGaffee never met R.M. but began stalking him. CP at 1096. McGaffee's behavior escalated from following R.M. home and calling his phone and threatening to rape R.M. to then breaking into R.M.'s house and stealing mementoes from his room. CP at 1097-1099. Eventually, McGaffee was caught after he had broken into R.M.'s house with the intent of raping R.M. CP at 1099. McGaffee was arrested and charged with several counts. CP 1121-1122. He pleaded guilty to residential burglary and attempted second degree rape, a sexually violent offense, in 1992. CP 1121-1122.

Following McGaffee's prison sentence, the State of Washington petitioned for commitment under RCW 71.09. CP 2136. McGaffee was committed in 1998 and has resided in total confinement under the control, care, and treatment of the Department of Social and Health Services

(DSHS) since. CP 2136. During his commitment, McGaffee inconsistently participated in sex offender treatment where he struggled with transparency and other topic areas. RP 06/16/15 at 844. Ultimately, he discontinued treatment in 2012. RP 06/17/15 at 967. While at the SCC McGaffee satisfied his sexually deviant interest in children by engaging in sexual activity with young-looking, special needs residents. RP 06/16/15 at 822-823. McGaffee traded items for the resident's clothing and used the clothing to fanaticize about sex with children. RP 06/17/15 at 974-975. He also obtained child-themed media (books, movies, and video games) with a particular focus on Daniel Radcliff, the child actor who portrayed Harry Potter. RP 06/16/15 at 822-823.

McGaffee petitioned for, and was granted, an unconditional release trial in 2013. CP 2061-2082. The trial began on March 3, 2014, but was continued that same day because McGaffee belatedly moved to exclude an instrument known as the Structured Risk Assessment: Forensic Version (SRA-FV). RP 06/03/15 at 14. The trial court properly noted the *Ritter* decision, which required a hearing pursuant to *Frye. Id., In re Det. of Ritter*, 192 Wn. App. 493, 500, 372 P.3d 122, 126, *as amended* (Apr. 12, 2016), *review denied sub nom. Det. of Ritter*, 185 Wn. 2d 1039 (2016). The *Frye* hearing was held over multiple days and ultimately

resulted in the trial court finding the SRA-FV satisfied *Frye* and would be admissible at trial. RP 10/21/14 at 4-7.

At trial, the State presented evidence from Dr. Harry Goldberg, who diagnosed McGaffee with pedophilic disorder and fetishistic disorder and concluded those disorders amounted to a mental abnormality. RP 06/17/15 at 1065. Dr. Goldberg also assessed McGaffee's risk using a method known as structured clinical judgment. RP 06/18/15 at 1137. He used multiple actuarial tools to consider static (unchanging) risk factors, an instrument intended to assess dynamic risk factors (also referred to as psychological vulnerabilities), considered protective factors, and looked at case-specific factors. RP 06/18/15 at 1139-1140. Dr. Goldberg concluded McGaffee was likely to reoffend. RP 06/18/15 at 1135-1136.

McGaffee called Dr. Brian Abbott, who testified that he did not believe McGaffee suffered from a mental abnormality. RP 06/23/15 at 1533-1534. As a result, Dr. Abbott did not conduct a risk assessment. *Id.* He did, however, criticize Dr. Goldberg's methodology including Dr. Goldberg's use of an instrument called the Violence Risk Appraisal Guide – Revised (VRAG-R) and the SRA-FV. RP 06/23/15 at 1610-1614, 1620-1621. Dr. Abbott testified McGaffee was not more likely than not to reoffend but he did not testify regarding the basis for that opinion. Following testimony the jury was permitted to ask questions of all of the

witnesses – including Dr. Abbott. RP 06/24/15 at 1778-1786. The court declined to ask one question of Dr. Abbott that specifically related to his opinion about McGaffee’s risk. *Id.*

In closing, the State argued Dr. Abbott’s opinion was unsupported and properly compared and contrasted Dr. Goldberg’s testimony to Dr. Abbott’s. RP 06/24/15 at 1833. McGaffee objected to this process claiming the State had impermissibly shifted the burden of proof. *Id.* The court overruled the objection and denied McGaffee’s motion for a mistrial. *Id.* The jury found McGaffee continued to meet the definition of an SVP. RP 06/25/15 at 1886. McGaffee now appeals the commitment order.

IV. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion When Making Evidentiary Rulings Because the Decisions Were Well Founded in the Rules of Evidence.**

1. **Standard of Review**

Although he claims constitutional defects, the issues McGaffee raises are evidentiary, not constitutional, in nature. “While the Constitution certainly affords a criminal defendant a meaningful opportunity to a complete defense that right is not without limits.” *U.S. v. Waters*, 627 F.3d 345, 353-354 (2010) (internal quotations omitted). The criminal defendant and civil detainee cannot “constitutionalize” the exclusion of evidence by simply claiming he was deprived his right to a

defense. *Id.* (See generally *State v. Turnipseed*, 162 Wn. App. 60, 72, 255 P.3d 843 (2011)). Rather, he must follow the well-established rules of evidence. *Id.* “The accused... must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence” *Id.* (citing *U.S. v. Perkins*, 937 F. 2d 1397, 1401 (9th Cir. 1991)).

A trial court’s rulings based on the evidentiary rules are reviewed for abuse of discretion. *State v. Finch*, 137 Wn. 2d 792, 810, 975 P.2d 967 (1999); *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 253, 722 P.2d 819 (1986). Evidentiary rulings reviewed for abuse of discretion include rulings under ER 403 and ER 702. *Riggins*, 44 Wn. App. at 253; *State v. Green*, 182 Wn. App. 133, 146, 328 P.3d 988, *review denied*, — Wn.2d — —, 337 P. 3d 325 (2014). For a reviewing court to find error, McGaffee must prove abuse of discretion. *Williams*, 137 Wn. App. at 743 (citing *State v. Hentz*, 32, Wn. App. 186, 190, 647 P.2d 39 (1982)). “A court abuses its discretion when its evidentiary ruling is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Williams*, 137 Wn. App. 736, 743, 154 P. 3d 322 (2007) (internal quotations omitted).

Consequently, the trial court's decision is reviewed for abuse of discretion – not de novo. *Holmes v. S. Carolina*, 547 U.S. 319, 326–27 (2006).

[W]ell-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Id. Because the trial court included or excluded evidence based on well-established rules of evidence, the standard of review is abuse of discretion. Here, McGaffee's challenges fail because he not only failed to show any constitutional defect, but he also did not show the trial court's evidentiary rulings were manifestly unreasonable or exercised on untenable grounds.

Evidence, including expert testimony, is admissible only if it is relevant. ER 402; see generally *State v. Campbell*, 78 Wn. App. 813, 822-823, 901 P.2d 1050 (1995). Relevant testimony has “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues...” ER 403. Exclusion of relevant evidence under ER 403 is considered an extraordinary remedy

Expert testimony is admissible under ER 702 “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Such testimony is generally helpful to the trier of fact when “it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury.” *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004). As long as helpfulness is fairly debatable, a trial court does not abuse its discretion by allowing an expert to testify. *Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 835 (2001). And even where the helpfulness of expert testimony is doubtful, we favor admissibility. *State v. King County Dist. Court W. Div.*, 175 Wn. App. 630, 638, 307 P.3d 765, *review denied sub nom. State v. Ballow*, 179 Wn. 2d 1006, 315 P.3d 530 (2013). An expert witness may testify regarding the foundation for his or her opinion as long as the foundation is based on facts and data “reasonably relied upon by experts in the particular field.” ER 703, 705:5. In such cases, the evidence provided to the jury is not substantive evidence but rather offered to allow the fact finder to evaluate the reasonableness of the opinion. ER 703; WPI 365.03; Tegland, Karl B. Courtroom Handbook on Washington Evidence §§ 703, 705 (2015-2015 Ed.).

2. Evidence Regarding Percentile Rankings Was Properly Admitted Because it Was Reasonably Relied Upon by the State's Expert and Was Not Confusing or More Prejudicial than Probative.

McGaffee claims the trial court erred in admitting evidence related to "relative risk estimates" because it was irrelevant, confusing, and prejudicial. Brief of Appellant (Brf. Of App.) at 3, Assignment of Error 5. The argument fails because percentile ranking was relevant to Dr. Goldberg's risk assessment, it was reasonably relied upon by Dr. Goldberg when he formed his opinion, and the trial court's evidentiary determination was not "manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Williams*, 137 Wn. App. at 743.

a. McGaffee's Argument Misstates the Relevant Statistical Concept.

Both here and below, McGaffee misstated the statistical concept he challenges. McGaffee uses "relative risk ranking" or "relative risk" throughout the record but Dr. Goldberg testified regarding a concept of "percentile rankings."

Q: So it's my understanding that we're here to talk about risk ratios under the Static-99R. Is that your understanding?

A: Well, I -- I'm not talking about risk ratios. I'm talking about percentile ranks.

Q: Okay. So what are percentile ranks?

A: Percentile is how the individual compares to other sex offenders based on their -- based on their percentiles *compared to studies that were done as far as how risky they are.*

RP 06/17/15 at 1001 (emphasis added). Despite this correction, McGaffee's counsel continued referring to "relative risk ratios" in argument and examination. RP 06/17/15 at 1012, 1017. Goldberg repeatedly tried to correct McGaffee's counsel use of the term "because relative risk is not -- I'm talking about percentile rank. There's two different studies for both relative risk and percentile rank." RP 06/17/15 at 1022. Dr. Goldberg further explained that the two concepts are different.

In his Brief of Appellant, McGaffee continues to conflate the term "Relative Risk Ranking" with "Percentile Ranking" which Dr. Goldberg discussed. Brf. of App. at 40, 42-44. Percentile rank addresses where the person's score falls compared to other offenders scored on the tool. *Id.* at 1001-1002. Furthermore, it provides the expert with a sense of how rare the score is in comparison to other offenders. For example, if a person's score places him in the 95 percentile, one can know that approximately 5 percent of individuals scored higher on that particular instrument.

b. The Facts That Form the Basis for Dr. Goldberg's Opinion on Risk are Relevant.

The State must prove that the SVP's mental abnormality makes him more likely than not to commit predatory acts of sexual violence if

not confined in a secure facility. RCW 71.09.020(18). While “more likely than not” has been explained in a numerical concept as more than 50 percent, the State is not required to prove any particular actuarial tool estimates risk that exceeds 50 percent. *In re Meirhofer*, 182 Wn. 2d 632, 645, 343 P.3d 731 (2015). “[T]he SVP act does not limit experts to the results of actuarial tests...” *Id.*

When completing a risk assessment in SVP cases, experts generally use tools that assess both static and dynamic risk factors and consider their own clinical judgment. *In re Det. of Sease*, 190 Wn. App. 29, 44, 357 P.3d 1088 (2015) (citing *Meirhofer*, 182 Wn. 2d, at 646). The preeminent professional organization for sex offender treatment and assessment – the Association for the Treatment of Sexual Abusers (ATSA) – supports this process as well. RP at 1722-1724. Dr. Goldberg followed ATSA’s recommendation and common practice when he assessed McGaffee’s risk.

As Dr. Goldberg testified below, percentile ranking is helpful to show how rare a particular score is and provides a baseline for the expert to begin a risk analysis. RP 06/17/15 at 1002-1003. It also provides the expert with specificity. RP 06/17/15 at 1017. Dr. Goldberg testified that the percentile ranking is frequently relied upon by others in his field and that it is “a standard practice.” RP 06/17/15 at 1023. Based on the

testimony and argument, the trial court found the evidence was relevant and admissible, and would be helpful to the jury. The judge's determination on relevance was reasonable given the facts before her and was not exercised on untenable grounds.

c. The Trial Court Properly Balanced the Percentile Ranking's Probative Value Against the Risk of Unfair Prejudice.

McGaffee argues evidence regarding percentile ranking should have been excluded on the additional grounds that it is confusing/misleading and prejudicial. Brf. of App. at 44. He complains that "this information bolstered the State's case." *Id.* at 43. His argument fails first because the evidence does not confuse the issues and did not unfairly prejudice McGaffee. Furthermore, McGaffee fails to apply the correct standard: that the probative value of the evidence is "*substantially outweighed* by the danger of unfair prejudice [and] confusion of the issues..." ER 403 (emphasis added).

When considering the exclusion of evidence based on unfair prejudice or confusion of the issues, courts conduct a balancing test between the probative value and the risk. See generally *State v. Scherner*, 153 Wn. App. 621, 657-659, 225 P.3d 248 (2009). The burden to show the balance favors exclusion of evidence is on the opponent of the evidence. *Carson v. Fine*, 123 Wn. 2d 206, 225, 867 P. 2d 610 (1994). If the balance

is even, the evidence is admitted. *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 722 P. 2d 826 (1986). Furthermore, exclusion of evidence under ER 403 is generally considered an extraordinary remedy. Tegland, Karl B., Courtroom Handbook on Washington Evidence § 403:2. Unfair prejudice arises when the evidence “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action.” *Carson*, 123 Wn. 2d, at 223 (internal quotations omitted).

McGaffee asserts the unfair prejudice lies in the number 94 percent. Brf. of App. at 43. Essentially his argument is that the jury is incapable of understanding that different percentage values mean different things depending on the context and, further, that the jury’s lack of intellectual reasoning would lead to emotions overwhelming reason if the jury heard a high percentage. The trial court gave the jury its proper credit and recognized that a percentile ranking would not be “likely to arouse an emotional response rather than a rational decision among the jurors.” *Carson*, 123 Wn. 2d, at 223. The probative value of a percentile ranking is not substantially outweighed by the risk of unfair prejudice.

Furthermore, the probative value of the percentile rank is not outweighed by the risk of confusion. First, “percentile ranking” is not a foreign concept to most adults because the rankings are used in everyday

life. For example, most parents are likely to hear from their pediatrician that their child is in the “X” percentile for weight or motor development. Additionally, most students are likely to encounter percentile rank in the context of any number of standardized tests. Percentile rank is used in sports, economics, and medicine – nearly every part of modern life. It is unreasonable to conclude the concept is too confusing for a jury.

Second, even if percentile ranking was not a common statistical measure used on a regular bases, the concept was thoroughly explained by Dr. Goldberg, as well as the significance it had on his opinion, and the percentile rank was contrasted with absolute risk several times. Dr. Goldberg explained that “that’s just comparison with other sex offenders. He’s not 94 percent chance of reoffending.” RP 06/18/15 at 1150. On cross examination, he was asked about the percentile rank and he explained that the 94 percentile is just a comparison among other sex offenders. RP 06/22/15 at 1418-1419. Then, when asked by a jury to clarify the two numbers he again explained: “When you say he’s in the 94th percentile, what that means, in comparison to other sex offenders” and went on to say, “but that doesn’t mean he’s a 94 percent risk for reoffense. That’s a totally different issue.” RP 06/22/05 at 1507.

If the meaning of percentile ranking was not clear enough by Dr. Goldberg’s testimony, Dr. Abbott provided additional clarity:

A percentile rank just gives you relative standing -- probably the easiest way to explain it, **it describes the unusualness of a score** that a person receives compared to whatever group you're comparing them to.

RP 06/23/15 at 1625 (emphasis added). Dr. Abbott also clarified that the 94th percentile number was not McGaffee's actual risk of reoffending. RP 06/23/15 at 1625-1626.

The percentile rank evidence was significant to Dr. Goldberg's opinion, and he repeatedly clarified the specific manner in which it was used as the basis of his opinion. He explained how and why the number was relevant to the overall question of risk. The trial court did not abuse its discretion in determining that this testimony was not so confusing or prejudicial as to warrant exclusion under ER 403. This court should reject McGaffee's argument and affirm.

3. The Trial Court Did Not Err When It Found the SRA-FV Risk Assessment Tool Met the *Frye* Standard and Was Otherwise Admissible.

McGaffee alleges that the trial court erred in finding that the SRA-FV satisfies *Frye* and that any limitations related to this particular use of the psychometric measure are for the finder of fact to weigh. (Brf. of App. at 2-3). He is wrong. Every court that has considered this issue has ruled that the SRA-FV satisfies the *Frye* test, and that McGaffee's criticisms go to the weight of the evidence, not the admissibility. Despite

his claims to the contrary, over a year before McGaffee filed his brief, the Court of Appeals found that “the SRA–FV has been generally accepted in the scientific community. ... The sources available, both at the *Frye* hearing below and in the scientific literature, suggest that most practitioners accept the SRA–FV as one of many useful tools to evaluate risk of future sexual offenses.” *In re Det. of Pettis*, 188 Wn. App. 198, 209–10, 352 P.3d 841, 848, *review denied*, 184 Wn. 2d 1025, 361 P.3d 748 (2015) (internal citations omitted).² “[T]here is no dispute that the principles underlying the SRA–FV are generally accepted in the scientific community. It is based on research linking dynamic risk factors with the probability that a sex offender will reoffend in the future.” *Ritter*, 192 Wn. App. at 500. Both courts also agreed there are generally accepted methods of applying the SRA–FV in a manner capable of producing reliable

² The *Pettis* Court cited several articles regarding the instrument: “In December 2013, after Pettis’s trial, Dr. Thornton published a peer-reviewed article describing the SRA–FV. David Thornton & Raymond Knight, *Construction and Validation of SRA–FV Need Assessment*, *Sexual Abuse: A Journal of Research and Treatment* XX(X) 1–16 (2013). The SRA–FV has been described favorably in some books: “For non-disabled clients, the [SRA–FV] (Thornton, 2002) ... enjoy[s] relative degrees of favor, depending on the jurisdiction in which each is used.” Robin J. Wilson & David S. Prescott, *Understanding and Responding to Persons with Special Needs Who Have Sexually Offended*, in *Responding to Sexual Offending: Perceptions, Risk Management and Public Protection* 128, 134 (Kieran McCartan, ed., 2014); *see also* Alix M. McLearn et al., *Perpetrators of Sexual Violence: Demographics, Assessments, Interventions*, in *Violent Offenders: Understanding and Assessment* 216, 231 (Christina Pietz, et al., eds., 2014) (describing the SRA–FV as a “research-guided multistep framework for assessing the risk presented by a sex offender and provides a systematic way of going beyond static risk classification”). *In re Det. of Pettis*, 188 Wn. App. 208–09.

results. *Id.* at 127, *citing Pettis*, 188 Wn. App at 211. All of McGaffee's arguments go to the weight of the expert's opinion, not its admissibility. Moreover, the State's expert used a different (and unchallenged) dynamic risk instrument that resulted in the identical finding regarding McGaffee's risk, and resulted in the exact same score as it would have been without the SRA-FV. The testimony regarding the expert's use of the SRA-FV was but a small portion of his overall opinion, and encompasses less than three pages in a record that is several thousand pages long. This Court should affirm.

a. Standard of Review on *Frye* Issues.

Whether scientific evidence is admissible presents a mixed question of law and fact which is reviewed *de novo*. *Pettis*, 188 Wn. App at 204-5. Scientific testimony is admissible under *Frye* if a two-part test is satisfied: (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 175, 313 P.3d 408 (2013). The core concern is whether the evidence being offered is based on established scientific methodology. *State v. Cauthron*,

120 Wn. 2d 879, 889, 846 P.2d 502 (1993). Courts do not evaluate whether the scientific theory is correct, but whether it has gained general acceptance in the relevant scientific community. *State v. Riker*, 123 Wn. 2d 351, 359-60, 869 P.2d 43 (1994). Moreover, the *Frye* standard does not require unanimity among scientists for evidence to be generally accepted. *Id.* at 176 (citing *State v. Gore*, 143 Wn. 2d 288, 302, 21 P. 3d 262 (2001)). *Frye* requires “general acceptance,” not “full acceptance.” *State v. Russell*, 125 Wn. 2d 24, 41, 882 P. 2d 747 (1994). There is no numerical cut off for determining the “reliable results” prong. *Lake Chelan Shores*, 176 Wn. App. at 175.

b. A structured analysis of dynamic risk factors using the SRA-FV leads to a more reliable prediction than clinical judgment alone.

Psychologists and others conducting risk assessments have traditionally used their clinical judgment to consider and weigh dynamic risk factors, and our courts have consistently recognized that consideration of such factors is integral in SVP evaluations. *See e.g. In re Det. of Jacobson*, 120 Wn. App. 770, 777, 86 P.3d 1202 (2004) (noting the evaluator’s consideration of dynamic risk factors as part of an overall risk assessment); *In re Det. of Danforth*, 153 Wn. App. 833, 840, 223 P.3d 1241 (2009) (noting the evaluator’s consideration of dynamic risk factors as part of an overall risk assessment); *In re Det. of Reimer*, 146 Wn. App.

179, 196, 190 P.3d 74 (2008) (noting the evaluator's use of dynamic risk factors commonly used in SVP evaluations). While the consideration of dynamic risk factors is recognized as important, clinical judgment has been criticized as lacking in the same structured methodology as the actuarial approach. Thus, a more structured method of measuring dynamic factors was necessary. Dr. David Thornton, one of the developers of the Static-99, which is commonly recognized as the best actuarial available, used the same scientific method used to create the Static-99 to develop the SRA-FV. The *Ritter* court succinctly summarized the history and development of the SRA-FV, and its application in conjunction with the Static 99:

In 2010, a meta-analytic study was published on the research into dynamic risk factors comparable to the 1998 study and provided the statistical basis for developing an instrument based on those dynamic factors. The SRA-FV was released to the psychological community for use that same year, essentially providing a structured application of the meta-analysis. Subsequently, in 2013, Dr. Thornton published a peer-reviewed article establishing the development and validity of the SRA-FV.

A professional administering the SRA-FV looks to their diagnostic interactions with the individual and to facts available in that person's record, and then scores each dynamic risk factor against an operational guideline, from 0 to 2: 0—the factor is absent; 1—the factor is present; 2—the factor is strongly present. Those factors are then weighted and summed to arrive at three domain scores, corresponding to those three constructs the instrument is assessing. Higher overall scores on each domain

correspond to a higher absolute probability of reoffense. However, the SRA-FV does not return any actual probability of reoffense, but is instead used in conjunction with the Static-99R.

Because the statistical data underpinning the Static-99 was derived from many different studies, those studies were amalgamated in order to create a large population base. However, different data sets involve different types of people. Consequently, as the Static-99 was refined, the instrument was adjusted to account for the varying inherent recidivism rates in the studied populations by separating the studies into several normative groups. Under the revised Static-99R, the examiner must score the static risk factors, then compare that score against one of the normative groups to arrive at a probability that the offender will be convicted of a future sex crime. The SRA-FV is used to sort the individual into one of those normative groups.

Ritter, 192 Wn. App. at 498-99 (internal reference omitted).

The majority of McGaffee's argument focuses on issues unrelated to the *Frye* standard. He complains that use of the SRA-FV instrument has not been endorsed in a peer-reviewed article, that it lacks construct validity, suffers from poor inter-rater reliability, and has yet to be cross-validated on a modern population. (Brf. of App. at 5.) These arguments are not relevant to the inquiry about its admissibility, and the trial court correctly ruled that the jury could weigh those arguments. (10/21/14 RP 7.) The evidence roundly supported the notion that the SRA-FV is generally accepted and widely applied in the manner described by the state's expert witnesses. Dr. Thornton published a peer-reviewed article in

2013 that describes the SRA-FV, its creation, and its cross-validation on a split sample. *Construction and Validation of SRA-FV Need Assessment*, *Sexual Abuse: a Journal of Research and Treatment* XX(X) 1-16 (2013). Additionally, the SRA-FV was initially adopted in 2011 by the State of California as the State-authorized dynamic risk assessment instrument, because it added incremental validity to the Static 99. RP 8/15/14 at 27-28.³

c. The scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community.

Both *Pettis* and *Ritter* determined that the first prong of the *Frye* test was easily satisfied, because the SRA-FV was developed using “essentially the same process used in applying static risk factors” in actuarial instruments. *Ritter*, 192 Wn. App at 500-01. Because the SRA FV leads to an “incremental increase” in predictive accuracy in the Static-99 results, it is widely used in SVP proceedings around the country and in Federal Adam Walsh Child Safety and Protection Act cases. RP 8/15/14 at 27-28; *In re Pettis*, 188 Wn. App at 207-08;

³ The *Pettis* court noted that in 2013 California stopped using the instrument “without explanation.” 188 Wn. App at 208. The record below explains that California switched to a similar tool called the Stable-2007 because it was more applicable to out-of-custody cases, whereas the SRA-FV is more appropriate to in-custody cases such as those being considered for commitment pursuant to RCW 71.09. California’s change was not due to any flaw in the SRA-FV. RP 8/15/14 at 30.

Here, Amy Phenix, Ph.D. testified at length regarding the development and application of the SRA-FV. (RP 8/15/14 3-139). She confirmed that the methodology used in the development of the SRA-FV, “a meta-analytic process that establishes an association with recidivism risk,” is the same as that used to develop the actuarials. RP 8/15/14 at 16. Dr. Phenix testified that using the SRA-FV is significant in risk assessment because certain factors can change, “they may be present for part of an offender’s life and then they improve. They’re always the target of treatment, because that’s how you can ultimately lower risk of a sex offender.” RP 8/15/14 at 18. Dr. Phenix testified that the leading professional organization in the field, ATSA, recommends consideration of dynamic risk factors using a structured tool. RP 8/15/14 at 38-41.

The evidence below regarding the broad use of the instrument, and the testimony about its development supports the trial court’s conclusion that the SRA-FV is based upon a scientific principle that is generally supported in the relevant field.

d. There are generally accepted methods of applying the SRA-FV in a manner capable of producing reliable results.

Contrary to McGaffee’s claim that there is no authority to use the SRA-FV score to select a Static-99 normative group (Brf. of App. at 24-27), Dr. Phenix explained how the SRA-FV score is used to select the

normative group for scoring the actuarial. RP 8/15/15 at 41-45. She further explained that the Static-99, the most widely used and accepted actuarial, on its own has only “moderate predictive accuracy” (RP 8/15/14 at 47), but when used with the SRA-FV the predictive accuracy increases.⁴ RP 8/15/14 at 47-53. *Ritter* noted that the statistician hired to testify against the admission of the SRA-FV confirmed Dr. Phenix’s testimony that the instrument “showed a significant incremental improvement in predictive accuracy” and no witness “suggested that the SRA-FV was inaccurate or produced invalid results.” 192 Wn. App at 501.

Here, at the hearing conducted in 2014, Dr. Phenix acknowledged that the early study on inter-rater reliability showed poor results, (RP 8/15/14 at 50) but she noted that the SRA-FV has a coding manual, operational directions and is easy to use, and thus inter-rater reliability will improve with training. RP 8/15/14 at 48-51. *Ritter* subsequently held that the rates of inter-rater reliability are well-within the range accepted in the relevant psychological field, and there are generally accepted methods of applying the SRA-FV. *Id.* (citing *Pettis*, 188 Wn. App. at 210).

⁴ The predictive accuracy is “the likelihood that a randomly selected recidivist would have a higher score than a randomly selected non-recidivist.” RP 8/15/14 at 52.

e. The trial court did not abuse its discretion in allowing the State's expert to testify about his use and application of the SRA-FV.

Under the deferential standard of ER 702, a trial court does not abuse its discretion by allowing an expert to testify when the helpfulness of the expert's testimony is fairly debatable. *Green*, 182 Wn. App. at 146, 328 P.3d 988; *Miller*, 109 Wn. App. at 147, 34 P.3d 835. *In re Pettis*, 188 Wn. App. at 211.

Dr. Harry Goldberg, the State's expert at trial, conducted a comprehensive risk assessment to determine the likelihood that McGaffee would reoffend if he were to be unconditionally released from total confinement. Dr. Goldberg used several tools when he conducted his risk assessment, including several actuarial instruments, the Static-99R; Static 2002 R; VRAG-R (RP 6/18/15 at 1147) the PCL-R, and the MMPI. He conducted a personal interview with McGaffee, and conducted a survey of McGaffee's criminal history and treatment records. RP 6/18/15 at 1186-87. He used two dynamic instruments – the Stable 2007 and the SRA-FV. RP 6/18/16 at 1161-62. Goldberg was trained to use and score the SRA-FV by Dr. Thornton, the developer of the SRA-FV and the Static-99. RP 6/18/16 at 1162.

McGaffee's raw score of 7 on the Static-99 places him in the high risk category. RP 6/18/15 at 1149. On the Static-2002, he received a score

of 8, which puts him in moderate high risk. RP 6/18/15 at 1152-53. In McGaffee's case, three separate instruments provided essentially the same answer: that McGaffee was a moderate high to high risk for sexual re-offense. RP 6/18/15 at 1158. Dr. Goldberg told the jury that the actuarial scores were only estimates, and there is no way to reliably measure one's actual risk. RP 6/18/15 at 1159. The actuarials measure the likelihood of arrest or recharge, and they underestimate the actual risk of sexual offending because many crimes go undetected. RP 6/18/15 at 1159-60. Although McGaffee argues that Dr. Goldberg used the SRA-FV to "increase the probability estimate of the Static-99" (Brf. of App. at 24), the record does not support his contention. In fact, dynamic factors can ameliorate risk, because while static factors do not change, dynamic factors can. Thus, an offender can "acquire these skills or some of those factors can improve as time goes on." RP 6/18/15 at 1161. Furthermore, an increased number of dynamic risk factors doesn't necessarily correlate to higher risk on the Static-99, because at some of the higher levels on some of the dynamic scales, some of the risk percentages are higher for the routine sample than they are for the high risk/high needs group.⁵ RP 6/19/15 at 1366. McGaffee's score placed him in the high risk/high

⁵ There are three normative groups of risk categories in the Static-99 samples, called "routine", "treatment" and "high risk/high needs". RP 6/18/15 at 1163.

needs category. RP 6/18/15 at 1162-63. Even if Dr. Goldberg had not used the SRA-FV, the results of the risk assessment would have been the same. Dr. Goldberg also scored McGaffee on the other dynamic tool: the Stable 2007.⁶ RP 6/19/15 at 1367. His score there also places Mr. McGaffee in the high risk group on the static instruments. RP 6/18/15 at 1175; RP 6/19/16 at 1367; RP 6/22/15 at 1393.

Here, Dr. Goldberg's testimony was helpful to the jury. He provided scientific, specialized knowledge about risk factors that would assist the jury in determining the likelihood that McGaffee would reoffend if released. His opinion, based on a comprehensive evaluation including several risk assessment tools, was helpful to the jury by describing risk factors, risk assessment tools, and the likelihood of reoffense based on those tools. Furthermore, even if the SRA-FV had not been admitted, because he relied on another similar dynamic risk instrument, Dr. Goldberg's opinion that McGaffee was likely to reoffend would have been exactly the same.

⁶ McGaffee did not challenge Dr. Goldberg's use of the Stable 2007 or his testimony relating to the scoring of any of the actuarials as a result. Indeed, most of the testimony regarding the use of the Stable 2007 was during McGaffee's cross examination of Dr. Goldberg. RP 1367-1394.

f. McGaffee's other arguments are meritless.

McGaffee claims that applying the SRA-FV to the Static-99 to select the normative group is inappropriate. But, Dr. Phenix, who is the author of the coding rules for scoring Static-99, Static-99R, Static-2002, and Static-2002R, testified to the contrary. RP 8/15/14 at 12. Furthermore, Dr. Thornton created the coding rules for the SRA-FV, and a significant part of the training is how to use the coding rules and select a normative group. RP 8/15/14 at 45-46. The testimony below belies his claim.

McGaffee further argues that the SRA-FV “allegedly quantifies an offender’s level of risk beyond what is already captured by the venerable Static-99R actuarial tool.” Brf. of App. at 5. This is incorrect. It merely increases the predictive accuracy of the Static-99. RP 8/15/14 at 47-52. Dr. Goldberg correctly used the SRA-FV to determine which Static-99R reference group against which to compare McGaffee’s risk, and nowhere does he claim that the SRA-FV test results increase the risk above the Static scores.

McGaffee also alleges that the cross-validation is flawed because Dr. Thornton used a “split-sample” in the cross-validation study. The *Ritter* court addressed the same claims regarding the use of a split-sample and found it a non-issue, because “[e]mploying the SRA-FV in

conjunction with the Static-99R leads to an incremental increase in predictive accuracy from .68 to .74.” 192 Wn. App. at 499.

And finally, McGaffee’s complaint regarding the inter-rater reliability was determined to be “not low enough to be considered invalid.” *Ritter*, 192 Wn. App. at 496–99. This Court should also find that the SRA-FV satisfies the *Frye* test and affirm McGaffee’s re-commitment.

4. McGaffee’s Expert’s Criticisms of the VRAG-R Were Properly Excluded Because He Could not Meet Basic Foundational Requirements for Admissibility.

a. Speculative Statements Regarding Whether the VRAG-R Study Will Be Replicated in the Future Were Properly Excluded.

Evidence, including testimony from an expert, is admissible only if it is relevant. ER 402. Relevant testimony has “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401. Speculative testimony is irrelevant (and thus inadmissible) and is not made more relevant because it was said by an expert. *State v. Lewis*, 141 Wn. App. 367, 389, 166 P. 3d 786 (2007). “When an expert’s opinion is based on theoretical speculation and strays beyond his or her area of expertise, it is properly excluded.” *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 735, 959 P. 2d 1158 (1998), rev’d in part, 138 Wn. 2d 248, 978 P. 2d 505 (1999) (citing *Queen City Farms, Inc. v. Central Nat’l*

Ins. Co., 126 Wn. 2d 50, 102-03, 882 P. 2d 703 (1994)). More succinctly put: “Speculative testimony is inherently unreliable” and inadmissible. *Ollier v. Sweetwater Union High School Dist.*, 768 F. 843, 861 (2014).

Dr. Abbot was prevented from testifying about his thoughts on what *might* be the results of future research. RP 06/22/15 at 1616. The limitation was proper because any testimony on that topic would be speculation. As the trial judge put it: “I’m sustaining the objection because you can’t predict into the future.” *Id.* There is no evidence that Dr. Abbott was involved in VRAG-R replication studies or has special knowledge regarding the likely outcomes of specific studies on the VRAG-R. Rather, he was guessing about what he assumed would happen – the very definition of speculation. The court properly excluded irrelevant, speculative evidence.

Moreover, the standard of review remains abuse of discretion and McGaffee fails to show that the trial court manifestly abused its wide discretion.

b. Discovery

The trial court correctly found an additional basis for excluding Dr. Abbott’s opinion regarding Dr. Goldberg’s use of the VRAG-R. The court properly excluded this piece of his testimony because he failed to disclose it to the State prior to Dr. Abbott’s testifying despite numerous

formal discovery requests, which included two depositions, subpoenas for records, and interrogatories to the parties. RP 06/23/15 at 1597-1607.

The parties have an obligation to follow the court rules related to discovery and, specifically to experts, the parties may use interrogatories to obtain information on the opinion of each expert and the basis for that opinion. CR 26(b)(5)(A)(i). Failure to make discovery can result in a variety of sanctions including exclusion of evidence. CR 37. If the discovery violation is discovered pretrial, courts must consider lesser sanctions before excluding testimony. *Mayer v. Sto Industries, Inc.*, 156 Wn. 2d 677, 132 P. 3d 115 (2006). “The purposes of sanctions are to deter, punish, compensate, educate, and ensure the wrongdoer does not profit from the wrong. The court should impose the least severe sanction that will adequately serve these purposes.” *Roberson v. Perez*, 123 Wn. App. 320, 337, 96 P. 3d 420 (2004).

Before excluding evidence as a discovery sanction prior to trial, the trial court must conduct an inquiry into what is commonly referred to as the *Burnet* factors. *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 933 P. 2d 1036 (1997). However, if the discovery violation is not discovered until after the trial has commenced, exclusion of the evidence that was not disclosed is proper even without considering the *Burnet* factors. *Jones v. City of Seattle*, 179 Wn. 2d 322, 373, 314 P. 3d 380 (2013). In fact,

exclusion is the only available remedy that can prevent the wrongdoer from benefiting from the discovery violation.

In this case, the State specifically requested that McGaffee “identify the subject matter or areas on which the person will or is expected to testify... [and] state the substance of the opinions to which the person is expected to testify and summarize the grounds for each such opinion.” RP 06/23/15 at 1604. As was clear from the record, McGaffee failed to identify Dr. Abbott’s opinion regarding the VRAG-R not being ready for forensic use. *Id.* The court then properly determined:

Having a general critique on whether the VRAG should be used in a forensic setting seems to me a slightly different issue, because you’re using your doctor’s testimony to I guess challenge the testimony of the State’s expert, and that seems to be something that if you’re planning on bringing that in, it should have been disclosed.

RP 06/23/15 at 1601. Having failed to disclose Dr. Abbott’s opinion about the VRAG-R, the court properly determined that McGaffee had violated the discovery rules as to interrogatories, and exclusion of that discrete bit of testimony was proper.

Additionally, Dr. Abbott’s explanation to the jury of why he did not use the instrument (see below) was clearly an indictment of Dr. Goldberg’s use of it. Dr. Abbott was permitted to testify to all the different reasons *he* thought a psychologist should not use the VRAG-R.

Consequently, because he was essentially able to offer his opinion regarding the use of the tool, any error in excluding Dr. Abbott's critique of Dr. Goldberg's use was harmless.

c. Even if Exclusion of Dr. Abbott's Opinion Was Error, It Was Harmless

McGaffee claims that the trial court prevented his expert from testifying that the VRAG-R had not been generally accepted by fellow scientists. However, even if this Court finds that Abbot's critique was improperly excluded, any error would be harmless because Dr. Abbott's opinions about the instrument were admitted nonetheless. During direct examination, Dr. Abbot was able to offer extensive testimony about all of the different flaws related to the VRAG-R. RP 06/23/15 at 1610-1619. While McGaffee asserts that Dr. Abbott "was only allowed to say that he does not use the instrument." or that "the trial court barred Dr. Abbott from sharing this criticism of the instrument with the jury" (Brf. of App. at 47) the record belies this claim. Dr. Abbott testified the instrument should not be used because the sample used to norm the instrument was not like McGaffee,⁷ and that the results from the instrument have not been reproduced or cross-validated.⁸ He stated that he did not use it "because it's not ready for forensic use based on its limitations" which include the

⁷ RP 06/23/15 at 1614.

⁸ RP 06/23/15 at 1615.

fact that it was “developed on a very unique sample in Canada of offenders who are in a forensic hospital because of not guilty by reason of insanity, psychotic, mental retardation. So they’re committed pretrial, preadjudication criminally because of these offenses.”⁹ He further testified that he does not use it because “it’s also a complete Canadian sample, so there are no studies done with the VRAG-R on any other sample at this point.” *Id.* He specified that “the results could only be applied to that sample upon which it was developed.” *Id.* Thus he had “no confidence the results from that sample would apply to any other group of its time.” *Id.* Dr. Abbot was permitted to explain precisely why he thought these limitations made the test unreliable in a forensic setting. *Id.*

Furthermore, despite the court’s ruling regarding his belief about future research, Dr. Abbott’s testimony was rife with predictive statements about the replication of the VRAG-R study. Dr. Abbott was allowed to offer the possibility that, “the results of the original research [might] diminish or decline.” RP 06/23/15 at 1618. Additionally, Dr. Abbott testified that “I don’t think it’s appropriate to use the instrument results when we have one study that we don’t know if results will reproduce as they are in the original sample.” *Id.* “... [W]e don’t know if the risk estimates that they found in the VRAG sample will reproduce in any other

⁹ RP 06/23/15 at 1611.

group.” RP 06/23/15 at 1612. Dr. Abbott repeatedly testified he did not know if the results would reproduce. Even though the court properly prohibited speculative testimony about the future of the VRAG-R, Dr. Abbott was still able to provide complete testimony about his prediction.

B. The trial court properly exercised its discretion to not ask a question that related to a topic that had been strategically omitted from the witness’s testimony.

In civil cases, jurors are permitted to submit questions to be asked of witnesses during the witness’s testimony. CR 43(k); *In re Det. of Greenwood*, 130 Wn. App. 277, 287, 122 P.3d 747 (2005). The court may rephrase, reword, or refuse the question posed by a juror. CR 43(k). Further, it is long established that “[t]he trial court has broad discretion in propounding questions to witnesses in order that it may gain all the information possible to aid in correctly determining the disputed questions presented by the respective parties.” *Jarrad v. Seifert*, 22 Wn. App. 476, 478, 591 P.2d 809 (1979) (citing *In re Estate of Ward*, 159 Wn. 252, 292 P. 737 (1930)). The court’s decision to allow or disallow particular questions from a juror should be reviewed for abuse of discretion. *Id.*

Here, Dr. Abbott testified McGaffee did not suffer from a mental abnormality. RP 06/23/15 at 1533. Because Dr. Abbott did not find a mental abnormality, he did not conduct a full risk assessment that

considers whether McGaffee is more likely than not to engage in predatory acts of sexual violence. RP 06/23/15 at 1535. He did, however, criticize the State's expert, Dr. Goldberg, on his risk assessment. *Id.* Without actually providing the jury with any basis for his opinion, Dr. Abbott concluded McGaffee was not more likely than not to reoffend. RP 06/23/15 at 1595-1596. On direct, Dr. Abbott complained that the VRAG-R was not ready for forensic use (see argument A.5.); explained that percentile rank is different from recidivism risk (see argument A.3.); and criticized the use of the SRA-FV (see argument A.4.). Dr. Abbott did not testify about instruments *he* used or the method by which *he* arrived at the conclusion that McGaffee was not more likely than not to engage in predatory acts of sexual violence.

When Dr. Abbott finished testifying, the court allowed the jury to ask questions of Dr. Abbott. On its own motion, the trial court refused the following: "You testified you completed a risk assessment to compare with Dr. Goldberg's. What instruments did you use and what were the scores?" RP 06/24/15 at 1778. The court considered that the question was beyond the scope of direct, that there may have been strategic reasons why Respondent did not ask questions about Dr. Abbott's scoring of

instruments, and that it made its decision “with not really any objections from either [party].” RP 06/24/15 at 1784-5.¹⁰

The court’s conclusion that there was likely a strategic reason for not going into Dr. Abbott’s risk assessment is supported by the facts. As the extensive record indicates, McGaffee’s lawyers zealously advocated for their client during every level of the litigation and argued about minute details of the case. Furthermore, the lawyers representing McGaffee had spent days cross examining the State’s expert on issues related to risk assessment. RP at 1191-1454, 1490-1503, 1504-1506. Second, after the juror question at issue here, the lawyers had the opportunity to recall Dr. Abbott and inquire regarding his risk assessment and scores. The decision not to recall this witness was strategic and fit into McGaffee’s overall case presentation.

McGaffee further claims that the decision not to ask this juror’s question “limited McGaffee’s right to present a defense.” Brf. of App. at 4. McGaffee flatly asserts that “the reasonable interpretation of the court’s ruling is that the trial court deemed the subject matter inadmissible.” Brf. of App. at 51, note 14. The record does not support McGaffee’s position. The trial court did not make a decision as to admissibility of evidence but,

¹⁰ As will be addressed later, Respondent did not take a position on whether the question should or should not be read until after the court ruled on the issue and after the witness had been told he could leave the witness chair. RP 06/24/15 at 1785.

rather, determined the juror question would not be asked. McGaffee was not *prevented* from offering the evidence – he chose not to. The State did not move to exclude the evidence and the court’s decision not to ask the juror question was a discreet decision on a particular question – not a determination on the admissibility of evidence.

C. The State’s Attorney Did Not Commit Prosecutorial Misconduct.

Questions not raised below cannot be raised on appeal unless the error is of constitutional dimension and the error is manifest. RAP 2.5; *Collins v. Fidelity Trust Co.*, 33 Wn. 136, 73 P. 1121 (1903); *Sullivan Estate*, 40 Wn. 202, 82 P. 297 (1905); *State v. Mohamed*, 187 Wn. App. 630, 350 P.3d 671 (2015). When appellant alleges prosecutorial misconduct for the first time on appeal, he must establish the alleged “misconduct was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Hecht*, 179 Wn. App. 497, 503, 319 P. 3d 836 (2014). Absent a showing of “flagrant and ill-intentioned” misconduct reviewing courts will reject the claimed misconduct.

A trial court’s granting or denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Rodriguez*, 146 Wn. 2d 260, 269-270, 45 P.3d 541 (2002); *State v. Lindsay*, 180 Wn. 2d 423, 430, 326

P.3d 125 (2014). An abuse of discretion occurs when no reasonable judge would have reached the same conclusion. *State v. Pete*, 152 Wn. 2d 546, 552, 98 P. 3d 803 (2004); *State v. Balisok*, 123 Wn. 2d 114, 117-18, 866 P. 2d 631 (1994). A trial court's denial of a motion for mistrial "will be overturned only when there is a 'substantial likelihood' the prejudice affected the jury's verdict." *State v. Russell*, 125 Wn. 2d 24, 85, 882 P. 2d 747 (1994), *Rodriguez*, 146 Wn. 2d, at 270.

When challenging a trial court's denial of motion for a mistrial based on prosecutorial misconduct, an appellant fails on appeal unless he can "prove that the prosecutor's conduct was improper and that this improper conduct prejudiced his right to a fair trial." *State v. Dixon*, 150 Wn. App. 46, 53, 207 P. 3d 459 (2009); see also *Lindsay*, 180 Wn. 2d, at 430. Furthermore, appellate courts "review a prosecutor's comments during closing argument in the context of the total argument, 'the issues in the case, the evidence addressed in the argument, and the jury instructions.'" *Id.* (quoting *State v. Dhaliwal*, 150 Wn. 2d 559, 578, 79 P. 3d 432 (2003)). Here, McGaffee's arguments fail because he did not and cannot prove the state's attorney committed misconduct or that any alleged misconduct could have affected the jury's verdict.

1. The State’s Analogy Did Not Diminish Its Standard of Proof.

McGaffee complains about an analogy used to explain a psychological concept – risk assessment – and cites to cases where prosecutors used a puzzle analogy to explain reasonable doubt. Brf. of App. at 57. He then equates the risk assessment to a “key legal concept” like “beyond a reasonable doubt” and does so with no support or authority for his assertion other than a reference to an irrelevant literary work. *Id.*

Analogies are frequently used by both prosecutors and defense attorneys during their argument. *State v. Barajas*, 143 Wn. App. 24, 40, 177 P. 3d 106 (2007). Objections to analogies in Washington usually arise when discussing the concept of reasonable doubt. *State v. Fuller*, 169 Wn. App. 797, 825, 282 P. 3d 126 (2012) (Prosecutor’s use of a jigsaw puzzle analogy to explain beyond a reasonable doubt was not misconduct); *State v. Johnson*, 158 Wn. App. 677, 682, 243 P.3d 936 (2010); c.f. *State v. Lindsay*, 180 Wn. 2d 423, 434, 326 P. 3d 125 (2014) (Prosecutor’s use of a jigsaw puzzle analogy to explain beyond a reasonable doubt was misconduct in that circumstance). Analogies generally become problematic when they trivialize the standard of proof.¹¹

¹¹ An analogy that compared the facts of a criminal case to a “mangie (sic), mongrel dog” protecting its food was considered improper but the Court did not reverse because the defendant used the analogy in his closing as well. See *generally Barajas*, 143 Wn. App. at 40.

This court should reject McGaffee's arguments here. First, McGaffee failed to object to the challenged slide or to the "soup analogy." He only objected after – and about – the State's attorney's criticism of Dr. Abbott's incomplete risk assessment.¹² McGaffee's complaint on appeal is merely that the soup analogy "trivialized a key legal concept." Brf. of App. at 57. Even if McGaffee's position that the risk assessment process in an SVP case is a "key legal concept" and that prosecutors are not permitted to trivialize such a concept, McGaffee's argument still fails because the misconduct was not "flagrant" or "ill-intentioned." Nor can McGaffee show that any possible prejudice could not have been cured by an instruction. At worst, the soup analogy was a clunky attempt to explain a complicated scientific topic to lay jurors using a concept everyone understands.

Second, Prosecutors are afforded wide latitude to draw and express reasonable inferences from the evidence. *State v. Brown*, 132 Wn. 2d 529, 565, 940 P. 2d 546 (1997). That latitude extends to closing argument. The analogy used by the State merely explained in plain language how a risk assessment is incomplete if it does not contain all of the various

¹² McGaffee asserts that he objected to the soup analogy during the State's rebuttal closing. Brief of McGaffee at 58. The record belies this contention, and shows that the State did not use the soup analogy in its rebuttal closing. RP 06/24/15 at 1868, line 25 to RP 06/24/15 at 1872, line 25.

components. This conclusion was reasonably drawn from both the testimony of Dr. Goldberg and Dr. Abbott. Even Dr. Abbott, after being confronted during cross examination with the Association for the Treatment of Sexual Abusers guidelines, acknowledged risk assessment includes static and dynamic factors. RP 06/24/15 at 1722-1724. The State drew the reasonable inference that a risk assessment that does not contain both static and dynamic assessments is incomplete. The inference was then explained using an analogy; a process that is well within the latitude afforded prosecutors in closing argument. McGaffee's argument fails to establish misconduct.

2. The State Did Not Argue that Lack of Evidence Proved Its Case.

McGaffee's complaint about the "vacuum" example should be rejected outright; first, because he failed to preserve his objection for appeal pursuant to RAP 2.5, and second, because McGaffee fundamentally mischaracterizes the State's closing argument.

The State used a "vacuum" in an effort to explain circumstantial evidence.¹³ "There are things in the world that you cannot observe directly, but you know are there." RP 06/24/15 at 1869. A vacuum, as the

¹³ Given that the appellate courts review closing argument in light of all of the surrounding argument, issues, evidence, and jury instructions, this court is encouraged to review RP 1868, line 25 to RP 1872, line 25.

State somewhat in-artfully defined it, is “like the absence of air.” *Id.* In order to determine whether a vacuum exists, one looks at the effect it has on things around it; in other words, circumstantial evidence confirms the existence of the thing. The State suggested that the jury “look at the evidence around it to determine whether the condition still exists.” *Id.*

The State referred to various pieces of evidence that reasonably supported the conclusion that McGaffee suffers from a mental abnormality. For instance, the attorney pointed to a PPG taken in 2008 that “indicated clinically significant arousal to children, not adults.” *Id.* Additionally, the attorney argued that the content of McGaffee’s media provided evidence of his pedophilic attraction. RP 06/24/15 at 1870. Further, the prosecutor argued McGaffee’s choice to leave sex offender treatment was related to a recent relapse of behavior and an inability for him to take criticism or be challenged by his treatment provider and peers. RP 06/24/15 at 1872. Finally, the attorney pointed out that McGaffee was inconsistent regarding how many children he had molested; having previously indicated to his treatment group that he had abused 14 or 15 children contrasted with his testimony at trial, which was that he had only molested one child since turning 18 years of age. RP 06/24/15 at 1872. The State argued the discrepancy supported a conclusion that the statements in trial were self-serving and examples of McGaffee’s lack of

transparency. *Id.* This was entirely proper and McGaffee's argument should be rejected.

Contrary to McGaffee's claim, the State did not argue to the jury "that the absence of evidence of a current pedophilic disorder proved such a mental abnormality existed." Brf. of App. at 62. The State's attorney did exactly the opposite and encouraged the jury to look at the evidence when he asked the jury to "draw the conclusion based on the surrounding evidence." RP 06/24/15 at 1872.

Furthermore, because McGaffee did not object to the vacuum example – like the soup analogy above – McGaffee must show the prosecutorial "misconduct was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Hecht*, 179 Wn. App., at 503. Even if the court accepts McGaffee's strained interpretation of the State's closing argument, the analogy was neither flagrant nor ill-intended, and he has failed to show that an instruction could not have cured any prejudice. Because he has failed to show any misconduct, this Court should reject his argument.

3. Criticism of McGaffee's Expert's Lack of Risk Assessment Was Not Burden Shifting.

The petitioner in an SVP case has the burden of proving its case beyond a reasonable doubt. RCW 71.09.060. Consequently, it would be generally improper for a prosecutor to comment on the respondent's failure to present evidence because he has no duty to do so. *State v. Thorgerson*, 172 Wn. 2d 438, 453, 258 P. 3d 43 (2011) (citing *State v. Cheatam*, 150 Wn. 2d 626, 652, 81 P. 3d 830 (2003); *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P. 2d 546 (1990)). However, "a prosecutor has wide latitude to argue reasonable inferences from the evidence." *Thorgerson*, 172 Wn. 2d at 453. Furthermore, both parties have the right to draw those inferences from all of the evidence, not just evidence presented by the State. *Provins v. Bevis*, 70 Wn. 2d, 131, 137, 422 P. 2d 505 (1967). "All parties benefit or suffer from the testimony of all witnesses." *Id.* (see also WPI 1.02 "Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.")

While an SVP respondent (or criminal defendant) need not present evidence, if he does, the prosecutor may – and may have a duty to – criticize that evidence. Wa. Const. art. I, § 22.¹⁴ "A defendant in a criminal

¹⁴ "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against

case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.” *State v. Caffee*, 117 Wn. App. 470, 482, 68 P. 3d 1078, 1084 (2002), as amended (Apr. 15, 2003) (citing *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (citing *State v. Austin*, 59 Wn. App. 186, 194, 796 P. 2d 746 (1990)). The right to present evidence does not extend to evidence that violates the Rules of Evidence. *Id.* Nor does the right extend to provide a protection from the prosecutor criticizing or challenging the offered evidence.

The State here did nothing different from what is done in every case in which a criminal defendant or civil respondent puts on evidence. The expert, Dr. Abbott, testified that McGaffee’s risk of re-offense “falls below the threshold of more likely than not... He’s not more likely than not.” RP 06/23/15 at 1595-1596. Dr. Abbott’s opinion was offered as an expert opinion, based on facts, tests, and special knowledge. However, Dr. Abbott did not explain how he reached the opinion that McGaffee is not more likely than not to reoffend. Dr. Abbott’s failure to support his opinion was properly pointed out in closing argument.

The State’s attorney specifically told the jury McGaffee had no burden:

him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf...” Wa. Const. art. I, § 22

When the respondent puts on a case, you can evaluate the case that he puts on. So the respondent doesn't have to. He has no burden. He could have not called any witnesses, but he chose to call a witness, and so you can evaluate what that witness said. And that witness told you Mr. McGaffee is not more likely than not to reoffend. He sat on the stand and he told you that. That's the opinion that he shared, and you have to evaluate whether you believe the opinion.

RP 06/24/15 at 1868.

McGaffee cites to several cases in support of his argument but none are particularly helpful. First, in *State v. Kassahun*, 78 Wn. App. 938, 952, 900 P. 2d 1109 (1995), the prosecutor argued the defendant was being untruthful "because he failed to offer objective evidence to support his belief that his business was being overrun by gangs" after the prosecutor moved *in limine* to prevent admission of evidence about gang affiliation of some of his witnesses. *Id.* However, McGaffee's case is distinguishable from *Kassahun*. *Kassahun* was prevented from offering evidence whereas McGaffee presented evidence by way of expert testimony but Dr. Abbott failed to support his opinion without any motion or objection from the State. McGaffee was never prevented from asking supporting questions like "how did you arrive at your conclusion." McGaffee was not even prevented from recalling the witness after the jury question on that issue was asked. He strategically chose not to. It is simply incorrect to claim "the trial court had stopped the defense from eliciting

the nuts and bolts of Dr. Abbott's risk assessment opinion." Brf. of App. at 61. The trial court decided not to ask a question by a juror *after* McGaffee had already finished with Dr. Abbott.

Similarly, *State v. Pierce*, 169 Wn. App. 533, 553, 280 P. 3d 1158 (2012), provides no guidance because it holds no similarity to the issues argued in this case. *Pierce* discussed a prosecutor who told the jury a murder victim pleaded for mercy for himself and his wife when there was no evidence that such a plea took place. *Id.* at 555. Here, the State's attorney neither argued facts not in the record nor played to the jury's passions, as was problematic in *Pierce*. He simply pointed out that McGaffee's expert failed to support his opinion with any evidence.

More importantly, the context in which the State argued is important. In its closing, the State discussed the opinion offered by Dr. Goldberg, and emphasized the evidence supporting the opinion. Specifically, the State's attorney went through the Static and Dynamic instruments, the protective factors, and case-specific factors that informed Dr. Goldberg's opinion. The jury was then asked to compare the differing opinions of the two experts to see which was more credible regarding the conclusion. RP 06/24/15 at 1833. The State closing was a reasonable argument based on the evidence and did not shift the burden. Nor were the comments anywhere close to the level of misconduct. The trial court did

not abuse its discretion when it properly denied McGaffee's motion for a mistrial.

V. COSTS

The State additionally asserts that if it is the substantially prevailing party on review, it should be awarded costs pursuant to RAP 14.2. Costs should include an assessment for actual expenses incurred by the State, and costs associated with preparation of its brief(s) as outlined in RAP 14.3.

VI. CONCLUSION

This Court should affirm McGaffee's commitment because he failed to prove reversible error. The trial court did not abuse its discretion in making evidentiary rulings. The State did not commit prosecutorial misconduct when it used analogies and criticized McGaffee's expert's unsupported opinion. This court should affirm.

RESPECTFULLY SUBMITTED this 15th day of September, 2016.

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NO. 73727-9-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention of:

PATRICK MCGAFFEE,

Appellant.

DECLARATION OF
SERVICE

I, Elizabeth Jackson, declare as follows:

On September 15, 2016, I sent, via electronic mail, true and correct copies of Respondent's Brief, and Declaration of Service, postage affixed, addressed as follows:

Mick Woynarowski
Washington Appellate Project
wapofficemail@washapp.org

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

DATED this 15th day of September, 2016, at Seattle, Washington.


ELIZABETH JACKSON