

NO. 34442-4

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

JOHN LEONARD STRAND,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

ROB MCKENNA
Attorney General

JENNIFER T. KAROL
Assistant Attorney General
WSBA # 31540
800 5th Avenue Suite 2000
Seattle, WA 98104
206-389-2004

03/11/11 12:50:00 PM
JENNIFER T. KAROL
Assistant Attorney General

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I. ISSUES PRESENTED

A. **Does the lack of a verbatim report of proceedings for the testimony of one witness require reversal of Mr. Strand's commitment?**

1. Has Mr. Strand waived his right to a verbatim report of proceedings by failing to supplement the record?
2. If not, is the record sufficiently complete?
3. Has Mr. Strand shown he was prejudiced by the lack of a verbatim report of proceedings?

B. **Are Mr. Strand's claims with respect to the psychological evaluations meritorious?**

1. Did Mr. Strand waive his right to bring claims regarding the psychological evaluations and his own testimony by failing to raise an objection relating to them at the trial court level?
2. Do Mr. Strand's claims rise to the level of manifest errors affecting constitutional rights?
3. Does Mr. Strand have a statutory right to counsel at a pre-filing psychological interview?
4. Does Mr. Strand have a constitutional right to counsel at a pre-filing psychological interview?
5. Were Mr. Strand's Fifth Amendment rights violated?
6. Is Mr. Strand susceptible to criminal liability?
7. Did Mr. Strand receive effective assistance of counsel?

C. **Is Mr. Strand's claim regarding a voluntariness hearing meritorious?**

1. Did Mr. Strand waive any right to a voluntariness hearing by failing to raise the issue to the trial court?

2. Would a voluntariness hearing have been appropriate in these proceedings?
3. Did the failure to request a voluntariness hearing constitute ineffective assistance of counsel?

D. Should this Court review the trial court's decision to admit Mr. Strand's statements placing him at the location of his adjudicated crimes to establish, in part, the foundation for evidence relating to prior unadjudicated crimes?

E. Should this Court review the trial court's decision to admit victim testimony to establish, in part, the foundation for evidence relating to prior unadjudicated crimes?

II. STATEMENT OF THE CASE

On February 7, 2005, the State filed a petition alleging that Mr. Strand was a sexually violent predator (SVP) as defined in RCW 71.09. CP at 11-12. The petition, accompanied by a certification for determination of probable cause, relied in part on a January 5, 2004, mental health evaluation of Mr. Strand conducted by Dr. Kathleen Longwell pursuant to RCW 71.09.025. CP at 104.

On May 16, 2005, the trial court found probable cause to believe that Mr. Strand was a SVP. RP at 11-12 (5/16/05)¹. After the finding of probable cause, and in accordance with the trial court's order directing an

¹ The verbatim report of proceedings is not numbered chronologically for Mr. Strand's entire SVP trial. Instead, it is numbered chronologically only by day of proceeding and/or trial. Accordingly, Respondent will refer to the record by the page of the proceedings and the date on which they occurred.

evaluation pursuant to RCW 71.09.040(4), Dr. Longwell met with Mr. Strand a second time on November 8, 2005. RP at 128 (01/31/06).

On January 30, 2006, pre-trial motions were argued before the trial court. RP at 9 (1/30/06). Mr. Strand raised several objections regarding the testimony of unadjudicated sexual offense victims, arguing that their testimony was irrelevant and prejudicial to him. CP at 50. After hearing argument from both parties, the trial court determined that, if the State could show by a preponderance of the evidence that Mr. Strand was the individual who committed the sexual offenses, the testimony would be permitted. RP at 26-30 (1/30/06).

A lengthy inquiry was then made by the trial court into the history and factual circumstances of each witness the State intended to call at trial. RP 16-44 (1/30/06). The trial court determined that, although the testimony of all sexual assault victims was prejudicial to Mr. Strand, such testimony was relevant to whether Mr. Strand suffered from a mental abnormality and whether he was more likely than not to engage in sexually violent acts in the future. RP at 28 (1/30/06). The trial court held that the testimony of M.K. regarding a sexual assault for which Mr. Strand was charged but not convicted was admissible because it constituted a charge for a sexually violent offense. RP at 27 (1/30/06). The trial court held that the testimony of Sandra Banks, A.M., and A.W. was admissible

because each witness explained the details and locations of the incidents that took place. RP at 28 (1/30/06). Furthermore, during his deposition, Mr. Strand acknowledged having had contact with the girls in the specific areas that these incidents were alleged to have taken place. RP at 29 (1/30/06).

The State's first witness at trial was M.L. RP at 20 (1/31/06). M.L. testified that she was living in Clallam County in 1992 when she was three years old. RP at 21 (1/31/06). She was playing with a friend outside her apartment complex, and a kitten they had been chasing went under the apartment building. RP at 22 (1/31/06). M.L. testified that she and her friend were squatting down by the apartments when Mr. Strand approached them and asked if they needed help getting the cat out. RP at 22-23 (1/31/06). M.L. told Mr. Strand that they needed help, and Mr. Strand proceeded to touch her in her vaginal area. RP at 23-24 (1/31/06). M.L. then went inside the apartment and told her mother what had happened. RP at 25 (1/31/06). Mr. Strand was later convicted of Child Molestation in the First Degree for this crime. Ex. 4.

The State next called M.K. RP at 26 (1/31/06). M.K. testified she was four or five years old when she encountered Mr. Strand outside of a police station in Forks, Washington in 1991. RP at 16 (1/31/06). M.K. explained that she lived next door to the police station and was riding her

bicycle. RP at 27-28 (1/31/06). Mr. Strand approached her and offered her a penny to allow him to reach down her pants and touch her vaginal area. RP at 29 (1/31/06). M.K. testified that she accepted the penny, and Mr. Strand reached down inside of her underpants and put his fingers inside of her. RP at 29-30 (1/31/06). After the incident, she went home and told her father what had happened. RP at 30 (1/31/06). Mr. Strand was then charged with an amended count of Attempted Child Molestation in the First Degree. Ex. 1. That charge was later dismissed after a hearing was held under RCW 9A.44.120, and the court determined M.K. was unavailable and her testimony could not be corroborated. Ex. 2.

A.W. was the next witness called by the State.² RP at 33 (1/31/06). A.W. testified that she was molested by Mr. Strand in 1986 when she was nine years old and living in Salt Lake City, Utah. RP at 34 (1/31/06). A.W. explained that she was playing outside with friends, when Mr. Strand approached her and requested that she follow him to the porch of his duplex. RP at 37-38 (1/31/06). When they got to the porch, Mr. Strand pulled A.W. by her wrist into the duplex. RP at 38 (1/31/06). A.W. explained that Mr. Strand pulled her into the back bedroom of the duplex and attempted to pull down her shorts. RP at 38-39 (1/31/06). While he was doing this, he was massaging her between her legs on her

² A.W., A.M., Sandra Banks, and B.W.'s testimony were all presented to the jury by way of perpetuation video depositions. RP at 14 (1/30/06), RP at 33 (1/31/06).

vaginal area. RP at 39-40 (1/31/06). A.W. began to struggle, attempted to escape from the duplex, and Mr. Strand eventually opened the front door and let her outside. RP at 41-43 (1/31/06). A.W. indicated that she remembered testifying about the incident in court at a later time. RP at 45 (1/31/06).

A.M. was the next witness to testify. RP at 50 (1/31/06). A.M. explained that in 1991, when she was ten or eleven years old, she encountered Mr. Strand in a Sears Department store in Salt Lake City, Utah. RP at 51 (1/31/06). A.M. wandered away from her mother inside the store, and was approached by Mr. Strand. RP at 52 (1/31/06). Mr. Strand came up behind A.M. and asked her if she had any hair on her private parts. RP at 52 (1/31/06). A.M. walked away from Mr. Strand to find her mother, began crying, and told her mother about the incident with Mr. Strand. RP at 54-56 (1/31/06). It appears that Mr. Strand was never formally charged with a crime as a result of this incident. RP at 62 (1/31/06).

The next witness called by the State was Sandra Banks³. RP at 68 (1/31/06). Ms. Banks explained that in 1989 her three year old daughter, M.G., was molested. RP at 69, 76 (1/31/06). M.G. was outside playing

³ At the time of Mr. Strand's trial, M.G. did not recall the incident. RP at 19 (1/30/06). The trial court ruled that her mother Ms. Banks, could testify regarding the incident under the excited utterance exception to the hearsay rule. RP at 31-32 (1/30/06).

with friends when Ms. Banks noticed she was missing. RP at 71 (1/31/06). Ms. Banks called out for her daughter several times and walked down the alley by her home to look for her. RP at 71-72 (1/31/06). M.G. responded to Ms. Banks's calls, and Ms. Banks discovered M.G. standing in the alley looking scared and upset with her bib overalls unsnapped and hanging at her sides. RP at 72 (1/31/06). Ms. Banks carried M.G. into the house. RP at 75 (1/31/06). When they got into the house, M.G. told her mother that a man had put his penis between her legs and squeezed her legs together. RP at 76 (1/31/06). The police were called, and M.G. was taken to the hospital for an examination. RP at 77, 82 (1/31/06). The case was not prosecuted because M.G. refused to submit to the examination at the hospital. RP at 83 (1/31/06).

Mr. Strand's sister, B.W., was the next witness to testify. RP at 91 (1/31/06). B.W. explained that when she was eight or nine years old, Mr. Strand came into a downstairs bedroom, got on top of her, and threatened to have sex with her. RP at 95-96 (1/31/06). B.W. started to cry and asked him to get off of her. RP at 97 (1/31/06). Mr. Strand eventually left the bedroom, but told B.W. that if she reported the incident she or someone else would get hurt. RP at 98 (1/31/06). B.W. also testified that Mr. Strand touched and massaged her vaginal area and

buttocks on eleven to twelve different occasions while they were growing up. RP at 99-101 (1/31/06).

The jury next heard from Dr. Kathleen Longwell, a psychologist with extensive experience evaluating sexual offenders under the SVP statute. RP at 114-121 (1/31/06). Dr. Longwell testified about her diagnosis and risk prediction analysis of Mr. Strand. RP at 133 (1/31/06). She stated that during her interviews with him, Mr. Strand had categorically denied committing any sex offenses. RP at 176 (1/31/06). Dr. Longwell testified that while she could not totally discount Mr. Strand's denial of wrongdoing, neither could she negate his extensive record of offenses simply based upon the fact that he denied committing them. RP at 162 (1/31/06).

Dr. Longwell diagnosed Mr. Strand with three mental abnormalities: (i) Pedophilia: Sexually Attracted to Female Children, Non Exclusive type (Pedophilia), (ii) Alcohol Dependence, and (iii) Antisocial Personality Disorder. RP at 136 (1/31/06). Dr. Longwell testified that in her professional opinion, Mr. Strand's Pedophilia causes him serious difficulty controlling his behavior, and makes him likely to engage in predatory acts of sexual violence. RP at 164-165 (1/31/06).

Mr. Strand was the final witness called by the State. RP at 127 (2/1/06). During his direct examination, Mr. Strand denied committing

sexual acts with any of the victims, but admitted to being in the same locations as them. Mr. Strand admitted to speaking with M.L. and touching her on the inside of her leg, but denied touching her anywhere else. RP at 136 (2/1/06). Mr. Strand admitted to talking with M.K. at the Forks, Washington police department, but denied sexually molesting her. RP at 133-134 (2/1/06). Mr. Strand denied molesting A.W., but admitted to being in the duplex with her, yelling at her, and physically grabbing her by the arm. RP at 129 (2/1/06). Mr. Strand admitted talking with A.M., but denied touching her in a sexual manner. RP at 132-133 (2/1/06). Mr. Strand denied touching M.G., but testified that he remembered her and remembered going to her home to look for a dog with his wife. RP at 131-132 (2/1/06).

As his only witness, Mr. Strand called Dr. Theodore Donaldson, a psychologist. RP at 6 (02/06/06). Due to human error, the recording device in the courtroom was not activated during Dr. Donaldson's testimony, and the testimony was not preserved. RP at 4 (02/02/06). The error was discovered and brought formally to the parties' attention on February 6, 2006. RP at 5-6 (02/06/06). Upon questioning by the trial court, both parties indicated that there had been no significant objections during Dr. Donaldson's testimony. RP at 6-7, 14 (02/06/06). Though Mr. Strand's attorney indicated informally she would be moving for a

mistrial, she never made a formal motion for a mistrial to the trial court. RP at 8 (02/06/06). After conferring with the parties, the trial court determined that the case would proceed forward to allow the jury to make a determination as to whether Mr. Strand was a sexually violent predator. RP at 16 (02/06/06).

After hearing closing argument and deliberating, the jury determined that the State had proven beyond a reasonable doubt that Mr. Strand is a sexually violent predator. RP at 54 (02/06/06), CP 9-10. The trial court then ordered the parties to prepare a reconstructed record of the missing testimony of Dr. Donaldson. RP at 54-55 (02/06/06).

On March 2, 2006, the parties met to formally reconstruct the record. RP at 4 (3/2/06). Mr. Strand brought a motion for a new trial based on the failure of the trial court to record the testimony of Dr. Donaldson. RP at 5 (3/2/06), CP at 39. Mr. Strand also submitted objections to the State's proposed narrative report of proceedings. CP at 44. The parties then proceeded to reconstruct a detailed record of the proceedings on the day Dr. Donaldson testified. RP 6-38 (3/22/06). After reconstructing the record, the trial court denied Mr. Strand's motion for a new trial. RP at 38-40 (3/22/06). Mr. Strand's appeal followed. CP at 6.

III. ARGUMENT

A. The record in this case is sufficiently complete, and the lack of a verbatim report of proceedings during the testimony of one witness does not require reversal of Mr. Strand's commitment.

Mr. Strand argues that his commitment must be overturned because the testimony of his expert, Dr. Donaldson, was not preserved by the trial court by way of a verbatim report of proceedings. Appellant's Brief (App. Br.) at 6-7. This argument is meritless. The record in this case was painstakingly reconstructed by counsel, and is sufficiently complete to allow appellate review. To the extent there are any deficiencies in the record, Mr. Strand has waived objection to those deficiencies, by not taking the steps necessary to complete the record. Finally, beyond making conclusory assertions regarding prejudice, Mr. Strand is unable to identify any way in which he has been prejudiced by the failure to have a verbatim record.

1. The existing record is sufficiently complete

Mr. Strand asserts that the record of Dr. Donaldson's testimony is inadequate for purposes of appellate review. App. Br. at 7-9. He is mistaken. Mr. Strand has no constitutional right to a verbatim report of proceedings. *See State v. Wilcox*, 20 Wn. App. 617, 619, 581 P.2d 596 (1978); *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). To satisfy due process, a *criminal* defendant is constitutionally entitled to a

“record of sufficient completeness” for purposes of mounting an appeal.⁴ *State v. Larson*, 62 Wn.2d 64, 67, 381 P.2d 120 (1963). A “record of sufficient completeness,” however, does not necessarily mean a complete verbatim report of proceedings. *Tilton*, 149 Wn.2d at 781. As long as another method is sufficient to permit effective review, such method will be constitutionally permissible. *Id.* Remand for a new trial is only appropriate “where the trial court’s report of proceedings is inadequate” for purposes of executing an appeal, and when appropriate affidavits are insufficient to adequately supplement the record. *Id.* at 783; *State ex. rel Henderson v. Woods*, 72 Wn. App. 554, 550, 865 P.2d 33 (1994).

The record of Dr. Donaldson’s testimony was sufficiently complete to allow appellate review in this case. The inadvertent taping error was discovered the day after the error occurred. RP at 5 (2/6/06). In the ensuing discussion about the error, Mr. Strand’s trial counsel conceded that nothing of significance was objected to during the course of Dr. Donaldson’s testimony. RP at 6-7 (02/06/06).

The trial court acted quickly, asking each party to document their recollection of the testimony. RP at 15 (02/06/06). As such, both parties were on notice to prepare narrative reports of proceedings within days of

⁴ Though Mr. Strand is not a criminal defendant, the liberty interest at stake in SVP proceedings arguably places him within the ambit of due process concerns.

the testimony, before memories had gone stale.⁵ *Id.* When the State presented its proposed narrative report, Mr. Strand's trial counsel made numerous objections. CP at 44, RP at 7-38 (03/02/06). After those objections had been presented and argued to the trial court, the trial court determined the twenty-one page narrative report was sufficiently detailed to adequately preserve the testimony of Dr. Donaldson. RP at 38-39 (03/02/06).

In addition, the trial court also determined that Dr. Donaldson's lengthy deposition would be incorporated into the narrative report of proceedings because it was substantially similar to Dr. Donaldson's trial testimony. CP at 38; RP at 34-35 (03/03/06). Dr. Donaldson's deposition contained his opinions related to Mr. Strand's diagnosis and risk prediction analysis. RP at 143.

Mr. Strand does not demonstrate that the combination of Dr. Donaldson's deposition and the narrative record is insufficient for appellate review. Although he makes various conclusory claims to the effect that trial counsel's hampered recollection of Dr. Donaldson's testimony impaired the sufficiency of the narrative report of proceedings, and that the jury may have been precluded from hearing important testimony, (App. Br. at 8-9), trial counsel conceded that Dr. Donaldson's

⁵ In fact, the State had prepared a narrative report of the proceedings in anticipation of the trial court's ruling. RP at 8 (2/6/06).

professional opinions at trial were substantially similar to his deposition testimony, which was made part of the record. RP at 36-38 (03/03/06). Moreover, the trial court made a specific finding that the deposition reflected the same testimony that was given by Dr. Donaldson at trial. CP at 231; RP at 35 (03/03/06). Because Mr. Strand has not made any showing that the record is insufficient or incomplete, his argument must be rejected.

2. Mr. Strand has failed to supplement the record.

Assuming *arguendo* that the record was not complete, Mr. Strand has waived his right to a more complete record because he has not made any attempt to supplement the narrative report of proceedings prepared by the parties.

RAPs 9.2-9.4 set forth three different methods of reporting trial proceedings to an appellate court: a verbatim report, a narrative report, or an agreed report. As long as the record is adequate, the manner in which it is recorded may vary. *Henderson*, 72 Wn. App. at 550.

The usual remedy for defects in the record is to supplement the record with appropriate affidavits. *State v. Miller*, 40 Wn. App. 483, 488, 698 P.2d 1123 (1985). Such a remedy will only be ordered where the party asserting that the record is deficient demonstrates (1) that some prejudice resulted from the defect, and (2) that he or she attempted to cure

such defects with affidavits of the trial court or counsel. *Id.* The party asserting that the record is deficient waives the right to a complete record where he or she fails to attempt to obtain affidavits from the trial court and counsel concerning the missing portion of the record. *Id.*

Though he argues that the lack of a verbatim report of Dr. Donaldson's testimony is prejudicial to him, Mr. Strand has not made any attempt to procure affidavits from Mr. Strand's trial counsel, Dr. Donaldson, or the trial court. This omission effectively waives any claim Mr. Strand raises with respect to any alleged defects in the record.

3. Mr. Strand has not shown that he was prejudiced by the lack of a verbatim report of proceedings.

Mr. Strand argues that the failure to record the testimony violated his right to due process and his right to appeal his commitment as a SVP. App. Br. at 7. However, he has failed to identify any potentially significant issues that could affect his appeal. Immediately after trial, both parties agreed that there were no significant objections during Dr. Donaldson's testimony. RP at 6-7 (02/06/06). Additionally, the trial court determined Dr. Donaldson's testimony was substantially similar to the testimony in his deposition, which was made a part of the record for purposes of this appeal. CP at 38; RP at 36-38 (03/03/06). That testimony included the diagnostic and risk assessment opinions of Dr. Donaldson.

CP at 143. Mr. Strand has not pointed to any issues within the narrative report or deposition that are of appellate significance. Accordingly, his request for reversal on this basis must be denied.

B. The psychological evaluations were conducted properly.

Mr. Strand argues that his rights were violated because he was subjected to a psychological evaluation before the SVP petition was filed against him. App. Br. at 9. He argues that he had a statutory and constitutional right to have an attorney present at that psychological evaluation, and that his Fifth Amendment rights were violated because no attorney was present. *Id.* at 18. In addition, he alleges that the failure of his attorney to object to statements he made during the subsequent psychological evaluation, his deposition, and during his own testimony constituted ineffective assistance of counsel. *Id.* at 25.

Mr. Strand never raised any of these issues to the trial court, and has waived his right to bring them before this Court. However, should this Court wish to reach these arguments, they are without merit. Any right to counsel in SVP actions attaches only after the initiation of SVP proceedings, and even then, does not encompass the right to have counsel present at a psychological evaluation conducted pursuant to statute. Furthermore, the lack of counsel at his pre-filing psychological evaluation did not result in any violations of any Fifth Amendment rights he may

have. Finally, Mr. Strand's trial counsel was not ineffective by failing to raise objections to these issues.

1. Mr. Strand has waived objection to the conduct of the psychological evaluations, the deposition, and his trial testimony.

Mr. Strand seeks to raise several arguments regarding the conduct of his pre-filing psychological evaluation, as well as the conduct of his post-filing evaluation, his deposition, and his testimony at trial, for the first time on appeal. An alleged error will only be preserved on appeal if it was called to the trial court's attention at a time that afforded the court an opportunity to correct it. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). Under most circumstances, a reviewing court is unwilling to permit an appellant to claim error on appeal after having gone to trial "before a trier of fact acceptable to him, speculate on the outcome and after receiving an adverse result claim error for the first time on appeal. . . ." *Id.* at 642-43.

There is nothing in the record indicating that Mr. Strand objected to a pre-petition psychological evaluation or lack of counsel at that psychological evaluation. Nor did Mr. Strand ever raise a claim of a Fifth Amendment privilege during the psychological evaluations, his depositions, or his testimony during trial. Such objections could have been brought to trial court's attention on numerous occasions. With

respect to Mr. Strand's Fifth Amendment claims, had the objection been raised, and sustained by the trial court, the State could have modified its witness list to introduce additional evidence and/or testimony of the statements Mr. Strand made through other means. He cannot now raise these claims after he has deprived the State of the opportunity of responding to them, and deprived the trial court of the opportunity to consider and rule on their merit. Mr. Strand has not preserved these issues for appeal, and therefore this Court should decline to consider them.

2. Mr. Strand's claims are not manifest errors affecting a constitutional right.

Having failed to raise his claims of right to counsel and violations of his Fifth Amendment rights below, Mr. Strand cannot raise them at this time. The question of whether a litigant may raise an issue for the first time on appeal is governed by RAP 2.5(a)(3), which provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in an appellate court:

...(3) manifest error affecting a constitutional right. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground...

Because RAP 2.5(a)(3) is an exception to the general rule that parties cannot raise new issues on appeal, this Court has construed the exception

narrowly. *State v. WWJ Corporation*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). RAP 2.5(a)(3) was not designed to allow parties “a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” *Id.*

The process for conducting an inquiry under RAP 2.5(a)(3) requires the court to preview the merits of the claimed error to determine whether the argument is likely to succeed. *State v. Sanchez*, 146 Wn.2d 339, 346, 46 P.3d 774 (2002). The error is considered “manifest” under RAP 2.5(a)(3) if the facts necessary to review the claim are in the record and the defendant is able to make a showing of actual prejudice. *Sanchez*, 146 Wn.2d at 346.

Here, Mr. Strand fails to raise any issues of constitutional magnitude. Mr. Strand had no right to counsel at the pre-filing psychological evaluation, and made no statements during either evaluations or during his testimony that would expose him to criminal liability. *See* sections 3-6, *infra*. Even if the issues are of constitutional magnitude, they are not manifest because Mr. Strand cannot show any actual prejudice resulting from them. As such, his argument fails.

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3. There is no statutory right to counsel at a pre-filing psychological interview.

Mr. Strand asserts that the State violated RCW 71.09.040 by subjecting him to a pre-filing psychological evaluation. App. Br. at 9. He claims that *In re Detention of Williams*, 147 Wn.2d 476 491, 55 P.3d 597 (2002) provides RCW 71.09.040 is the exclusive means for evaluating an individual to determine if they are SVPs. *Id.* at 9-10. Mr. Strand's pre-petition interview, however, is governed by RCW 71.09.025, not RCW 71.09.040. There is nothing in the language of RCW 71.09.025 or *Williams* that supports Mr. Strand's assertion of a statutory right to counsel at psychological evaluations that occur prior to the initiation of formal SVP proceedings.

RCW 71.09 requires that when an offender appears to meet the definition of an SVP, the agency with jurisdiction over the offender must refer the offender to the appropriate prosecuting authority three months prior to release. RCW 71.09.025(a). The referring agency is required to provide a list of documents to the prosecutor along with the referral. RCW 71.09.025(b)(i) - (v). Such documents must include "a current mental health evaluation or mental health records review." RCW 71.09.025(b)(v). This evaluation is different than and separate from

the evaluation under RCW 71.09.040, which is ordered after the SVP petition has been filed and probable cause found. RCW 71.09.040(2).

Given the liberty interest involved in SVP matters, it is important that the prosecutor considering whether to file an SVP matter is provided with as comprehensive an evaluation as possible. An investigatory evaluation pursuant to RCW 71.09.025 is conducted, however, regardless of whether the offender chooses to participate in an interview with the evaluator. *See Detention of Marshall v. State*, 156 Wn.2d 150, 125 P.3d 11 (2005) (Evaluation of expert found sufficient when based upon only records review.) If the offender refuses, the evaluation is done on a records review.

When complete, the evaluation is sent to the prosecutor, who makes the decision as to whether to file an SVP action. If an SVP action is filed, the respondent has a right to counsel at all stages of the proceedings including the 72-hour probable cause hearing (RCW 71.09.040(3)(a)), after the probable cause hearing and through the initial commitment trial (RCW 71.09.050(1)), and after commitment during post-commitment release proceedings (RCW 71.09.090(2)(b)). The plain language of the statute, however, does not confer a right to counsel at any phase prior to the initiation of formal SVP proceedings.

The Legislature's failure to provide the right to counsel prior to the filing of the SVP action indicates its intent that no such right attaches at that time. Omissions from a statutory scheme are deemed to be exclusions. *Williams*, 147 Wn.2d at 491. "To express one thing in a statute implies the exclusion of the other." *Id.*

Mr. Strand asserts that the statutory framework of RCW 71.09 and the case of *Williams* provide for an evaluation only after the initiation of formal SVP proceedings and the attachment of the attendant right to counsel. App. Br. at 9. However, this is an incomplete – and incorrect – reading of the statute. As noted above, the statute requires that the referring agency provide the prosecutor with a current mental health evaluation of the offender referred as a potential SVP. RCW 71.09.025(b)(v). The statute explicitly requires such an evaluation, and makes no mention of any right to counsel at that evaluation.

Nor does existing case law provide any support for Mr. Strand's position. *Williams* does not stand for the proposition that RCW 71.09.040 is the exclusive means for evaluating a person under the SVP law as Mr. Strand suggests. Instead, the *Williams* court held that CR 35 mental examinations are not appropriate within the context of SVP cases due to the special nature of SVP proceedings, in which mental evaluations are provided specifically by the SVP statute. *Williams*, 147 Wn.2d at 491.

The appellate courts of Washington have not considered the question of the right to counsel at the pre-filing evaluation. To the extent the courts have considered the broader question of a right to counsel at psychological evaluations, however, they have rejected it. This issue was first considered by the Washington Supreme Court in *In re Detention of Petersen*, 138 Wn.2d 70, 92, 980 P.2d 1204 (1999). There, the offender argued that RCW 71.09.050(1)'s grant of the right to counsel "at all stages of the proceedings" in SVP cases must be read to confer a right to counsel at any evaluation conducted pursuant to RCW 71.09.090. The court rejected this argument, holding that, in the absence of "a clear declaration from the Legislature," there is no right to counsel during statutorily mandated post commitment psychological evaluations. *Id.*

More recently, this Court considered the question of whether an individual was entitled to the presence of counsel at a statutorily mandated psychological evaluation pursuant to RCW 71.09.040. *In re Kistenmacher*, 134 Wn. App. 72, 79, 138 P.3d 648 (2006). There, as here, the appellant argued that the term "proceedings" found in RCW 71.09.050(1) included not just legal proceedings, but also psychological evaluations associated with SVP actions. *Id.* at 77. Rejecting this argument, this Court ruled that the language of

RCW 71.09.050(1) cannot be read to guarantee the right to counsel at a psychological evaluation:

[A]n evaluation under RCW 71.09.040(4) is not the equivalent of a “stage” or “proceeding” under RCW 71.09.050(1). To hold otherwise, alleged sexually violent predators would have a right to counsel at every counseling appointment, every visit with a worker at the Special Commitment Center, and every other dispositional activity in a sexually violent predator civil commitment case. [Appellant’s] interpretation of the statute leads to absurd results and we reject such an interpretation.

Id. at 79.

Mr. Strand asks this Court to “reconsider” *Kistenmacher* within the context of this case. First, this case provides no occasion to reconsider this Court’s decision in *Kistenmacher* in that, unlike Mr. Kistenmacher, Mr. Strand was accompanied by counsel at his RCW 71.09.040 evaluation. Even if this Court were inclined to reconsider *Kistenmacher*, there is no reason to do so here. Stare decisis requires a clear showing that a rule is incorrect and harmful before it is abandoned. *In re Stranger Creek and Tributaries in Stevens County*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Though Mr. Strand asks that *Kistenmacher* be reconsidered, he has failed to make a showing that the rule of *Kistenmacher* is both incorrect and harmful. As such, both the Supreme Court’s decision in *Petersen* and this Court’s decision in *Kistenmacher* control and mandate the rejection of Mr. Strand’s argument that the

language of RCW 71.09.050(1) can be read so broadly as to confer a right to counsel at any psychological evaluation.

4. There is no constitutional right to counsel prior to the filing of formal legal proceedings.

Mr. Strand also asserts he has a constitutional right to counsel at the pre-filing psychological evaluation.⁶ As previously noted, the United States and Washington State Constitutions “do not entitle an alleged sexually violent predator to the presence of counsel” at the .040 evaluation. *Kistenmacher*, 134 Wn. App. at 80-81. The creation of such a right in this context would run contrary to all legal precedent and would impose immense practical problems in its enforcement and limitation.

Mr. Strand attempts to limit the *Petersen* court’s holding to post-commitment psychological examinations. However, the *Petersen* holding was not so narrow. The *Petersen* court noted that persons whom the State has petitioned to be civilly committed as SVPs have no constitutional right to counsel under either the Fifth or Sixth Amendments to the U.S. Constitution. *Peterson*, 138 Wn.2d at 91-92. By the literal language of those amendments, the right to counsel attaches only in criminal cases. SVP cases are civil, not criminal, and so those amendments do not apply. *Id.*, citing, *In re Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993).

⁶ Mr. Strand also claims a right to counsel at the post-filing .040 evaluation. As noted above, this case does not provide an occasion to address that issue, in that Mr. Strand’s counsel was present at his .040 evaluation.

Any constitutional right to counsel, then, must “flow from considerations of fundamental fairness.” *Petersen*, 138 Wn.2d at 91. The court determined, however, that fundamental fairness does not require the presence of counsel at psychological evaluations in SVP cases because any concerns regarding the conduct of a State psychologist can be cured by the offender’s statutory right to have his or her own expert appointed. *Id.* at 92. The same reasoning holds true in the pre-filing context.

Mr. Strand has failed to identify any persuasive authority for the proposition that persons against whom the State petitions for civil commitment as an SVP have a constitutional right to counsel at a pre-petition psychological evaluation. Mr. Strand’s claim must be rejected.

5. The Fifth Amendment does not apply in this case.

Mr. Strand claims that his Fifth Amendment rights were violated because he was denied counsel at the psychological evaluations. App. Br. at 17-22. He claims that had he had counsel at the pre-filing evaluation, he would have been advised to remain silent, and that he would not have been committed as a SVP. *Id.* He is greatly mistaken. First and foremost, Mr. Strand has no Fifth Amendment right to remain silent within the context of the SVP proceeding. *Young*, 122 Wn.2d at 51-52; *Peterson*, 138 Wn.2d at 91-92. The Fifth Amendment is only

applicable to Mr. Strand in the context of his vulnerability to future criminal liability. *Id.*

However, even within that context, the Fifth Amendment only prohibits testimony that is compelled and incriminating. *Brown v. Walker*, 161 U.S. 591, 598 (1896). There is absolutely no evidence that Mr. Strand was compelled or required to participate in the RCW 71.09.025 psychological evaluation. RP at 104. Furthermore, his statements during the evaluation were not compulsory or coerced. Dr. Longwell is a mental health provider, not a law enforcement officer whose presence could be interpreted as coercive.

This evaluation would have been completed with or without Mr. Strand's participation and with no penalty to Mr. Strand had he chosen not to participate. Mr. Strand was informed that the interview and evaluation were not confidential, and that information that he provided could be used against him in the SVP case. CP at 104. After being notified of this, Mr. Strand signed a form consenting to be interviewed by Dr. Longwell. *Id.* Mr. Strand was not under any court order to participate in the evaluation, and the purpose of the evaluation was not to gather information for an uncharged crime, but for diagnosis, risk assessment, and sex offender treatment under RCW 71.09, a civil statute.

Throughout the evaluation, Mr. Strand categorically denied any sexual misconduct and made no self-incriminating statements. CP at 124-125; RP at 176 (01/31/06). As such, Mr. Strand has presented no evidence that his disclosures resulted in him revealing any “self-incriminating” statements. Nor does he identify what abuses may have been cured by the presence of counsel. The only “abuse” Mr. Strand claims is that he made statements during the psychological examination that contributed to Dr. Longwell’s conclusion that Mr. Strand appeared to meet the definition of an SVP. Mr. Strand does not allege the statements were coerced, that Dr. Longwell used improper interview techniques, or that Dr. Longwell misrepresented his statements. Indeed, all of the evidence presented demonstrates that Dr. Longwell’s interview with Mr. Strand was conducted in an appropriate fashion. His argument must be rejected.

6. Whether Mr. Strand may be subject to criminal liability in the future is not an issue ripe for review in this appeal.

Mr. Strand argues that he remains vulnerable to criminal prosecution for the incidents with M.G. in Utah, and M.K. in Washington. App. Br. at 20. With respect to the incident with M.G., Mr. Strand claims that the statute of limitations was tolled when he left Utah in 1991. *Id.* With respect to the incident with M.K., Mr. Strand claims that the crime

could still be prosecuted because the statute of limitations has not yet expired. *Id.*

It is important to note that Mr. Strand's real concern does not appear to be the possibility of exposure to criminal liability. Rather, as he himself effectively admits, his real concern is avoiding commitment as a SVP.⁷ This is, however, precisely the purpose of the forensic evaluation.

The problems associated with the treatment of sex offenders are well documented, and have continued to confound mental health professionals and legislators. The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, the [offender's] cooperation with the diagnosis and treatment procedures is essential.

Young, 122 Wn.2d at 52.

To prevail on a claim of a violation of the Fifth Amendment, there must be a "realistic threat of self incrimination" in a subsequent proceeding. *State v. King*, 130 Wn.2d 517, 524, 925 P.2d 606 (1996). Though the statute of limitations on these crimes may still technically permit prosecution, there is no realistic probability that Mr. Strand would face criminal liability for the crimes now. Mr. Strand completely denied committing the crimes during his interviews with Dr. Longwell. RP at 176 (01/31/06). Furthermore, the statements Mr. Strand made about

⁷ Mr. Strand states in his brief: "[i]f Mr. Strand had asserted his privilege against self-incrimination, the state would have been unable to meet the foundation for introducing allegations of uncharged criminal conduct." App. Br. at 21.

the crimes during his deposition and court testimony show nothing other than the fact that he was in the area at the time the incidents occurred. RP at 131-134 (2/1/06). As such there is no realistic threat that Mr. Strand incriminated himself.

Even if Mr. Strand had been compelled to incriminate himself, reversal for a new trial is not the appropriate remedy. “A witness protected by the [Fifth Amendment] privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later [proceeding].” *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136 (1984) (emphasis added).

In the extremely unlikely event that Mr. Strand were ever prosecuted for any of the crimes that he discussed in his psychological evaluation and testimony, and in the even more unlikely event that the prosecutor sought to use those statements against him, those statements would be inadmissible.⁸

⁸ In 1989, when Mr. Strand was investigated for sexually molesting M.G., he was not charged with a crime because M.G. refused to submit to a physical examination. RP at 83 (1/31/06). M.G. now has no recollection of the incident. RP at 84-85 (1/31/06). Though her mother, Sandra Banks, was able to provide testimony at the SVP trial about what happened, Ms. Banks was unable to identify Mr. Strand as the perpetrator. RP at 84

Mr. Strand was not compelled nor did he make any incriminating statements in this SVP proceeding. As such, Mr. Strand's Fifth Amendment claims are not properly before this court. In the unlikely event a future prosecution was pursued against Mr. Strand for these incidents, his Fifth Amendment claims would be appropriate for review in those proceedings.

7. Mr. Strand received effective assistance of counsel

Mr. Strand argues that the failure of his trial counsel to object to the lack of counsel at the psychological evaluations, as well as to his deposition and trial testimony, constitutes ineffective assistance of counsel. App. Br. at 25. However, he cannot show that his trial counsel's actions were objectively unreasonable or could have resulted in the jury making the determination that he was not a sexually violent predator.

Offenders subject to an SVP action have a statutory right to counsel during all stages of the commitment trial.

In re Detention of Stout, 128 Wn. App. 21, 27, 114 P.3d 658 (2005). On

(1/31/06). Nor do Mr. Strand's statements during the SVP proceeding provide any proof that he committed the crime. As such, it would be highly unlikely that any prosecutor could show beyond a reasonable doubt that Mr. Strand committed the crime.

In 1991, Mr. Strand was charged with attempt to commit child molestation in the first degree as a result of the incident with M.K.. Ex. 1. In 1992, this charge was dismissed after the court determined under RCW 9A.44.120 that M.K. was not available as a witness and that there was insufficient evidence to corroborate her testimony. Ex. 2. The court's ruling terminated prosecution of the charge and resulted in Mr. Strand being released from custody. *Id.* There is no reason to assume that the State's case has improved in the intervening fourteen years.

review, there is a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984)).

In determining the effectiveness of counsel, courts apply the *Strickland* analysis. *Stout*, 128 Wn. App. at 28; *Strickland*, 466 U.S. at 668. Under *Strickland*, the burden is on Mr. Strand to establish that: (1) counsel's actions fell below an objective standard of reasonableness, and; (2) but for counsel's deficient assistance, a reasonable probability exists that the outcome would have been different. *Id.*

a. Trial counsel's actions were objectively reasonable.

In considering the first prong of the *Strickland* analysis, "[a]n attorney's legitimate trial strategy or tactics cannot constitute ineffective assistance." *Stout*, 128 Wn. App. at 28. A failure to object to a procedure proper under the superior court civil rules does not constitute ineffective assistance of counsel. *In re Detention of Greenwood*, 130 Wn. App. 277, 21, 122 P.3d 747 (2005).

The record in this case indicates that Mr. Strand's trial counsel took action well within the standard of reasonableness of her profession.

That she did not make every possible objection regarding the mental health evaluations performed on Mr. Strand or his deposition or trial testimony is not dispositive of whether she provided ineffective assistance of counsel.

Trial counsel's decision to object to some issues (i.e., lack of complete record) and not others (i.e., pre-petition evaluation) were in all likelihood a conscious choice relating to trial strategy. Considering that Mr. Strand made no incriminating statements during the evaluations or his testimony, but only further confirmed information already available to the State through other discovery, it is reasonable to assume that Mr. Strand's trial counsel chose not to object to these issues for tactical reasons.

Similarly, Mr. Strand's trial counsel's failure to raise any Fifth Amendment claims was entirely reasonable in that nothing in Mr. Strand's trial or deposition testimony is incriminating. Trial counsel's other actions during trial demonstrate appropriate, zealous representation. Trial counsel made appropriate objections throughout the trial, often specifically citing to her concern of providing an adequate record. RP at 7 (01/30/06); RP at 8 (01/31/06). For example, trial counsel chose to attack admission of the deposition testimony of Mr. Strand's alleged victims. RP at 24-25 (01/30/06). She also raised significant concerns to the tribunal after the failure to record Dr. Donaldson's testimony was discovered, as well as

after some jurors reported that they had experienced difficulty hearing perpetuation video depositions. RP at 7-13 (02/01/06); 9-11 (02/02/06). Trial counsel's conduct was well within an objective standard of reasonableness.

b. There is no evidence that any of trial counsel's alleged errors affect the trial's outcome.

In order to prevail on a claim of ineffective assistance of counsel, Mr. Strand must "show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Day*, 51 Wn. App. 544, 553, 754 P.2d 1021 (1988) (citing *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Dr. Longwell testified that during her interviews with him, Mr. Strand categorically denied committing any sex offenses. RP at 176 (01/31/06). Dr. Longwell stated that, while she could not totally discount Mr. Strand's denials in reaching her diagnosis, neither could she negate his extensive record of offenses simply because he denied committing any crimes. RP at 162 (01/31/06).

As such, Mr. Strand has failed to provide sufficient evidence of a reasonable probability that the elimination of the interview statements from trial would have affected Dr. Longwell's testimony or opinion.

There is no reason to believe that the jury found Mr. Strand to be a sexually violent predator based on statements that Mr. Strand made during his interviews with Dr. Longwell. The evidence in this matter overwhelmingly showed that Mr. Strand met the criteria as a sexually violent predator. That trial counsel chose not to object to the interviews of Mr. Strand by Dr. Longwell does not undermine confidence in the outcome of the trial.

C. Mr. Strand's claim to a voluntariness hearing is without merit.

Mr. Strand claims that the trial court should have held a voluntariness hearing to determine the admissibility of his statements, and the failure of his trial counsel to request such a hearing constitutes ineffective assistance of counsel. App. Br. at 22-24. Mr. Strand did not preserve this issue for appeal. However, even had he done so, a voluntariness hearing would not have been appropriate in this case because no statements made by Mr. Strand were self-incriminating. Furthermore, the failure to request a hearing, when it most certainly would have been denied by the trial court, does not constitute ineffective assistance of counsel.

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1. Mr. Strand waived any right to a voluntariness hearing by failing to raise the issue to the trial court.

As discussed above, an alleged error will only be preserved on appeal if it was called to the trial court's attention at a time that afforded the court an opportunity to correct it. *Wicke*, 91 Wn.2d at 642. There is nothing in the record indicating that Mr. Strand requested a voluntariness hearing regarding statements he made to Dr. Longwell, in his deposition, at trial, or otherwise. Any such objection could have been brought to the immediate attention of the Court before or during trial. Mr. Strand has not preserved the issue of a voluntariness hearing for appeal, and the issue is not properly before this Court.

2. A voluntariness hearing in this proceeding would have been inappropriate.

Even if this Court does find the issue preserved for appeal, a voluntariness hearing was not called for. First, Mr. Strand does not demonstrate that a voluntariness hearing is appropriate in this context. Mr. Strand cites *Jackson v. Denno*, 378 U.S. 368, 376 (1964), for the proposition that he is entitled to a hearing to determine whether his statements were voluntary. App. Br. at 23. However, *Jackson* applies to criminal cases, and the SVP proceeding is civil, not criminal. *In re Young*, 122 Wn. 2d 1, 51-52, 857 P.2d 959 (1993).

Nor is there any reason to reach this issue in this case. There is no evidence that Mr. Strand's commitment is founded on an involuntary confession or self-incriminating statements. In fact, there is nothing in the record even pointing to or suggesting evidence of self-incriminating statements made by Mr. Strand. Thus, whether the right to a voluntariness hearing extends to SVP cases need not be reached because there is nothing to indicate that self-incriminating statements were made, presented at trial, or considered by the jury in their decision to commit Mr. Strand as an SVP.

3. The failure of trial counsel to request a voluntariness hearing does not constitute ineffective assistance of counsel

Because the State's case was not based upon an involuntary confession or self-incriminating statements, Mr. Strand's trial counsel's decision not to raise the issue was entirely appropriate. Moreover, Mr. Strand cannot show that the outcome of his trial would have been different had his trial counsel raised these issues. Instead, it is clear that trial counsel knew that the trial court would be unlikely to grant such a hearing due to the civil nature of the SVP proceedings and the lack of self-incrimination in the statements made by Mr. Strand.

D. Mr. Strand's objections regarding statements he made placing him in the vicinity of his unadjudicated victims are not properly before this Court for review.

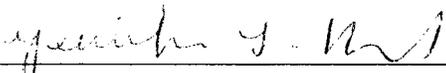
Mr. Strand asserts that the trial court erred in admitting his statements placing him in the vicinity of his unadjudicated offenses in order to establish, in part, the foundation for the admission of evidence of those offenses. App. Br. at x, xii. In addition, he asserts error regarding the trial court's decision to admit witness testimony regarding his unadjudicated offenses in order to establish, in part, the foundation for the admission of evidence of those offenses. *Id.* Mr. Strand has failed to present any arguments on either of these issues. "Absent argument and authority, review is not proper." *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 663, 935 P.2d 555 (1997). Moreover, simply asserting the errors, without more, cannot become the basis of a finding of abuse of discretion. A trial court has broad discretion in admitting evidence. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). Accordingly, a reviewing court will not overturn a trial court's decision absent an abuse of discretion. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994). These arguments should be rejected.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Mr. Strand's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 7th day of December, 2006.

ROB MCKENNA
Attorney General



JENNIFER T. KAROL, WSBA #31540
Assistant Attorney General

NO. 34442-4-II

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

In re the Detention of:

JOHN L. STRAND,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION OF
SERVICE

2006 DEC -7 PM 4:31
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COURT OF APPEALS
DIVISION II
SEATTLE, WA

NISHA MATHEW declares as follows:

On December 7, 2006, I deposited in the United States mail, first-class postage prepaid, addressed as follows:

Jodi R. Backlund & Manek R. Mistry
Attorneys at Law
331 N.W. Park Street
Chehalis, WA 98532

a copy of the following documents: RESPONDENT'S BRIEF and DECLARATION OF SERVICE.

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

DATED this 7th day of December, 2006.


NISHA MATHEW
Legal Assistant

ORIGINAL