

NO. 35363-6-II

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

FRANK JOHNNY,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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OPENING BRIEF OF RESPONDENT

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I. FACTS AND PROCEDURAL HISTORY

The State filed an action on August 11, 2003, seeking Frank Johnny's involuntary civil commitment as a sexually violent predator (SVP) pursuant to RCW 71.09 *et seq.* CP 1-21, 24-34. Mr. Johnny has a lengthy criminal history that includes several sexual offenses. *Id.*

The first of these offenses occurred on October 9, 1975, when Mr. Johnny was arrested and charged with attempted first-degree rape. CP 25; 6RP 466, Ex 1, 2, 3¹. On that date, Mr. Johnny pulled a sawed-off shotgun on a sixteen-year-old girl, directed her to a nearby yard, tripped her to the ground, and choked her until she passed out. *Id.* When the girl regained consciousness, Mr. Johnny was on top of her, her bra was pulled up, her overalls were unbuttoned, and her underpants were pulled down around her thighs. *Id.* Mr. Johnny released her only when a car drove by. *Id.*

The victim contacted the police and Mr. Johnny was arrested. *Id.* He subsequently pled guilty to attempted first-degree rape, a sexually violent offense within the meaning of RCW 71.09.020(15), and was sentenced to ten years in prison. *Id.*

¹ For the Court's convenience, Appellees will use the Verbatim Report of Proceedings citation system utilized by Appellant as outlined in Appellant's Brief at page 3, footnote 2.

Mr. Johnny's next sexual offense occurred on January 12, 1986. CP 28-29; 3RP 158-162; 6RP 467, Ex. 7, 8, 9, 10. On that date, Mr. Johnny attacked a woman in the bathroom at his sister's house. *Id.* While the woman was sitting on the toilet, Mr. Johnny came into the bathroom, choked her, shoved her against the back of the toilet, and attempted to penetrate her. *Id.* Mr. Johnny then dragged her to the bed in the living room, continued to choke her, and raped her for three hours, stopping briefly a few times to perform oral sex on her. *Id.* Throughout the assault, Mr. Johnny kept his hand on her neck and choked her when she resisted. *Id.*

A bench warrant was issued for Mr. Johnny's arrest. *Id.* He was later found guilty of simple assault, and was sentenced to five months in jail. *Id.*

On September 5, 1987, Mr. Johnny was arrested and charged with attempted second-degree rape. CP 25-26; 3RP 173-177; 6RP 467, Ex. 11, 12, 13. On that date, Mr. Johnny entered the women's bathroom at a YMCA in Spokane, where he approached a woman showering. *Id.* Mr. Johnny began masturbating as the woman washed her hair with her eyes closed. *Id.* When the woman opened her eyes, Mr. Johnny grabbed her by the throat, threw her to the ground and choked her, stating, "Don't scream or I'll kill you." *Id.* A lifeguard came into the shower area, saw what was

happening and called the police. *Id.* Mr. Johnny jumped up, pulled his pants on and ran out of the building. *Id.*

On March 10, 1988, Mr. Johnny pled guilty to second-degree assault for this offense. *Id.* He was sentenced to twenty months of incarceration, to run concurrently with his conviction on a second count of second-degree assault. *Id.*

This other offense also occurred on September 5, 1987. CP 26; CP 149-151; 3RP 169-170; 6RP 467, Ex. 11, 12, 13. On that date, Mr. Johnny approached from behind a woman walking in an area close to Gonzaga University in Spokane. *Id.* Mr. Johnny reached between her legs and fondled her vaginal area through her running shorts. *Id.*

Mr. Johnny was initially charged with indecent liberties, which was subsequently amended to second-degree assault with intent to commit indecent liberties. *Id.* Mr. Johnny pled guilty to this offense in March, 1988, and was sentenced to twenty months of incarceration. *Id.*

On June 7, 2001, Mr. Johnny was arrested and charged with Indecent Exposure and Residential Burglary. CP 27; CP 53; CP 55-69; CP 175-182; 3RP 183-184; 6RP 468, Ex. 14, 15, 16. On that date, 13-year-old Mystery G. looked out her bedroom window and saw Mr. Johnny with his penis pressed up against her window, masturbating. *Id.* Mystery G. yelled at Mr. Johnny to leave and he did. *Id.*

At about 4:00 a.m., Mystery awoke when Mr. Johnny reached through her window and touched her leg. *Id.* He had cut through the screen of her bedroom window with a lawn mower blade. *Id.* She slapped his hand and went to tell her father, who chased Mr. Johnny from the property. *Id.* When police later questioned Mr. Johnny about the incident, he admitted watching Mystery G. through her bedroom window, masturbating, ejaculating on the window screen, cutting the screen with a lawn mower blade and reaching in to pull on her blankets. *Id.*

Mr. Johnny pled guilty to Indecent Liberties and Residential Burglary on October 5, 2001, and was sentenced to a total of 38 months. *Id.* Mr. Johnny was incarcerated for this offense when the State filed the SVP action against him. *Id.*

Prior to the commitment trial, the State requested that the trial court find that the Residential Burglary and Indecent Exposure convictions for the offense against Mystery G. constitute a “recent overt act” within the meaning of RCW 71.09.020(10).² CP 41-80. The State’s motion was based upon *In re the Detention of Marshall*, 156 Wn.2d 150, 125 P.3d 111 (2005), in which the court held that if a trial court finds that a person is incarcerated on the date the SVP petition is filed for an offense that meets

² A recent overt act is “any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.” RCW 71.09.020(10).

the statutory definition of a recent overt act, the State is not required to prove current dangerousness at the commitment trial through evidence of a recent overt act. At the hearing on this motion Mr. Johnny's counsel conceded that the motion should be granted, stating:

I don't have an argument contrary to counsels. I have reviewed the cases, I'm very much aware of them. I cannot think of a reason or credible argument that the behavior alleged did not constitute a recent overt act and thus you're not receiving any responsive brief or anything with regard to that issue. I wish the State had to prove it at trial but I think that she is correct certainly under *Marshall* that the State Court can find it as a matter of law that in fact it was and again, I know of no factual or legal argument that would credibly say this was not a recent act.

1RP 4-5. The trial court granted the State's motion, ruling that, as a matter of law, Mr. Johnny's convictions of indecent exposure and residential burglary constitute a recent overt act as defined by RCW 71.09.020(10). CP 81-82.

The commitment trial was held in August, 2006. At trial, the parties stipulated to and presented ten jury instructions to the Court, which were subsequently given to the jury. CP 199-215; 9RP 744. Mr. Johnny never requested that the trial court give the jury an instruction requiring that the jury reach a unanimous decision with regard to whether Mr. Johnny suffered from a mental abnormality or a personality disorder. *Id.*; 6RP 405-406; 9RP 700-701.

After hearing several days of testimony, the jury returned a unanimous verdict finding Mr. Johnny to meet the statutory definition of an SVP. CP 220; 10RP 3-5. The trial court subsequently entered an order indefinitely committing Mr. Johnny to the care and custody of the Department of Social and Health Services (DSHS). CP 218-219.

II. ARGUMENT

A. **The Trial Court Properly Determined That Mr. Johnny's 2001 Convictions For Indecent Exposure And Residential Burglary Are A Recent Overt Act.**

Mr. Johnny argues the trial court erred in reaching the legal conclusion that his 2001 convictions for indecent exposure and residential burglary are a recent overt act. Specifically, he contends that the trial court should have decided this issue of law using a beyond-a-reasonable-doubt standard. He is incorrect.

Mr. Johnny's argument confuses the standard of proof applicable to the ultimate issue for the jury – whether he is currently dangerous – with the preliminary legal determination of whether that ultimate fact need be proven by a particular type of evidence, a recent overt act. The trial court properly determined that Mr. Johnny's 2001 indecent exposure and residential burglary convictions are a recent overt act.

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1. The recent overt act doctrine and relevant appellate authority.

Civil commitment is constitutionally permissible only if the State can demonstrate that the person who is the subject of the commitment action is mentally disordered and, as a result of that disorder, is a danger to others. *In re Marshall*, 156 Wn.2d 150, 156-57, 125 P.3d 111 (2005). In certain cases, dangerousness must be proven, at least in part, by evidence of a recent act demonstrating the person's dangerousness – a recent overt act. *Id.* at 157. The rationale for the rule appears to be that the accuracy of a finding of current dangerousness can be enhanced if the evidence of current dangerousness includes recent behavior demonstrating that dangerousness. *See, Lessard v. Schmidt*, 349 F.Supp. 1078 (E.D. Wis. 1972), cited by, *In re Harris*, 98 Wn.2d 276, 284, 654 P.2d 109 (1982), relied upon by, *In re Young*, 122 Wn.2d 1, 39-40, 857 P.2d 989 (1993).³

³ It should be noted that the logic underlying the recent overt act doctrine is dubious at best. While it may be true that evidence of recent behavior can help prove dangerousness, the opposite is not true. Put another way, just because a person does not engage in an overt act does not mean that he or she is not dangerous.

This is particularly true in SVP cases where the risk to be assessed is whether the offender, at any time in his or her expected lifespan, is likely to engage in predatory acts of sexual violence. The faulty logic underlying the recent overt act doctrine is reflected in the vast number of jurisdictions that have either abandoned or rejected the doctrine. *Project Release v. Prevost*, 722 F.2d 960, 972-75 (2nd Cir. 1983); *United States v. Sahhar*, 917 F.2d 1197 (9th Cir. 1990); *Colyar v. Third Judicial District Court for Salt Lake County*, 469 F. Supp. 424, 434-35 (D. Utah 1979); *United States ex rel. Mathew v. Nelson*, 461 F. Supp. 707, 709-12 (N.D. Ill. 1978); *Matter of Maricopa County Cause No. MH-90-00566*, 840 P.2d 1042, 1049 (Ariz. Ct. App. 1992); *People v. Stevens*, 761 P.2d 768, 771-774 (Colo. S. Ct. 1988); *Matter of Snowden*, 423 A.2d 188, 192 (D.C. 1980); *People v. Sansone*, 309 N.E.2d 733, 739 (Ill. App. 1974); *Matter of Albright*, 836 P.2d 1, 5-6 (Kan. Ct. App. 1992); *State v. Robb*, 484

Therefore, if the person is free in the community on the day the State files the SVP petition, the State is obligated to include a recent overt act as part of its proof of current dangerousness. *In re Young*, 122 Wn.2d at 41; RCW 71.09.060(1). If, however, on the day the State files the SVP action, the offender is incarcerated for a sexually violent offense *or for an act that would itself constitute a recent overt act*, the State is not constitutionally or statutorily obligated to prove a recent overt act at the commitment trial. *In re Marshall*, 156 Wn.2d at 157, citing, *In re Detention of Henrickson*, 140 Wn.2d 686, 695, 2 P.3d 473 (2000). The rationale for this latter rule is that, “for incarcerated individuals, a requirement of a recent overt act under the Statute [RCW 71.09] would create a standard which would be impossible to meet. . . . Due process does not require that the absurd be done before a compelling state interest

A.2d 1130, 1134 (N.H. S. Ct. 1984); *Commonwealth v. Rosenberg*, 573 N.E.2d 949, 958-59 (Mass. Sup. Jud. Ct. 1991); *Matter of Sonsteng*, 573 P.2d 1149, 1155 (Mont. S. Ct. 1977); *Scopes v. Shah*, 398 N.Y.S.2d 911, 913 (1977) (proof of a recent overt act is “too restrictive and not necessitated by substantive due process. The lack of any evidence of a recent overt act . . . does not necessarily diminish the likelihood that the individual poses a threat of substantial harm to himself or others.”); *In the Matter of Salem*, 228 S.E.2d 649, 652 (N.C. App. 1976) (“An overt act may be clear, cogent and convincing evidence which will support a finding of imminent danger, but we cannot agree that there must be an overt act to establish imminent dangerousness.”); *In re Slabaugh*, 475 N.E.2d 497, 500 (Ohio Ct. App. 1984) (“We do not believe, as contended by appellant, that a mentally ill person can be said to be dangerous only if there is evidence that the person recently committed a dangerous overt act or threatened one.”); *Matter of Giles*, 657 P.2d 285, 287-88 (Utah S. Ct. 1982); *In re L.R.*, 497 A.2d 753, 756 (Ver. S. Ct. 1985). The only jurisdiction, other than Washington, that continues to hold on to the ROA rule is Iowa. *Matter of Mohr*, 383 N.W.2d 539 (Iowa S. Ct. 1986).

The State understands that Washington still recognizes the recent overt act doctrine. However, the dubious rationale for the doctrine certainly militates in favor of not extending it any further.

can be vindicated.” *In re Young*, 122 Wn.2d at 41 (internal quotations omitted).

The determination of whether an offender is incarcerated for a recent overt act on the date the SVP petition is filed is a question for the court, not a jury. *In re Marshall*, 156 Wn.2d at 158. The *Marshall* court described the analysis that must be done:

First, an inquiry must be made into the factual circumstances of the individual’s history and mental condition; second, a legal inquiry must be made as to whether an objective person knowing the factual circumstances of the individual’s history and mental condition would have a reasonable apprehension that the individual’s act would cause harm of a sexually violent nature.

Id. at 158, citing, *In re McNutt*, 124 Wn. App. 344, 350, 101 P.3d 422 (2004).

2. **The beyond-a-reasonable-doubt standard that applies to the ultimate issue of whether a person meets the criteria of civil commitment as a sexually violent predator is inapplicable to the preliminary legal determination of whether current dangerousness need be proven in part by evidence of a recent overt act.**

At the hearing held on the State’s motion to have the trial court determine whether Mr. Johnny’s most recent convictions constitute a recent overt act, pursuant to *In re Marshall*, Mr. Johnny’s attorney conceded that the convictions are a recent overt act. 1RP 1-10. The trial court agreed with the parties. Its written order states:

It is hereby ordered: That Frank D. Johnny's October 5, 2001 convictions for Residential Burglary and Indecent Exposure constitute a recent overt act, and the Petitioner is relieved of the burden of proving a recent overt act at the civil commitment trial.

CP 82.

Mr. Johnny now argues, however, that the trial court's *Marshall* finding should have been made using the beyond-a-reasonable-doubt standard of proof. His argument is without merit since he confuses the standard of proof applicable to the ultimate factual issue of whether Mr. Johnny is currently dangerous and a sexually violent predator with the legal issue of whether current dangerousness must be proven in part by particular evidence: a recent overt act.

As noted, the State bears the ultimate burden of proving beyond a reasonable doubt that a person subject to commitment as an SVP is currently dangerous. The State's burden on this issue is both statutory and constitutional. RCW 71.09.060(1) ("the jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator"); *In re Marshall*, 156 Wn.2d at 157.

However, *Marshall* makes clear that the determination of whether proof of current dangerousness must include evidence of a recent overt act is a preliminary legal issue for the court to determine. *Marshall* does not provide that this determination must be made using the

beyond-a-reasonable-doubt standard of proof. Indeed, Mr. Johnny cites no cases which provide that preliminary legal determinations such as that at issue in *Marshall* are subject to any particular burden of proof. Burdens of proof are applicable to factual issues, not legal ones such as that at issue in this matter.

Mr. Johnny's true argument appears to be an attempt to have this Court reverse the holding in *Marshall*. That case, and the recent overt act cases upon which it relies, clearly hold that in certain factual contexts, such as that present in this case, the State is not required to prove dangerousness at trial through proof of a recent overt act and that the determination of whether the State would be required to prove a recent overt act at trial would be made by the court. Mr. Johnny's argument seeks to undermine *Marshall* by again imposing on the State the obligation to prove, by the highest standard of proof, a recent overt act; an obligation the Supreme Court in *Marshall* unequivocally held is unnecessary in a case such as this. This Court should reject such an argument.

3. The trial court's determination that Mr. Johnny was incarcerated for a recent overt act when the State filed the SVP action was correct.

Even if a court's *Marshall* inquiry is subject to a beyond-a-reasonable-doubt standard of proof, that standard has been met

in this case. Mr. Johnny's actions that led to his conviction for residential burglary and indecent exposure for the offense against Mystery G., when considered in the light of his pervasive history of sex offending, clearly demonstrate those offenses are a recent overt act within the meaning of RCW 71.09.020(10).

A court's determination of whether a person is incarcerated for a recent overt act is a mixed question of law and fact. *In re Marshall*, 156 Wn.2d at 158; *see also, In re McNutt*, 124 Wn. App. at 350. An appellate court reviews trial court decisions on mixed questions of law and fact using the error of law standard. *Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn. App. 586, 596, 49 P.3d 894 (2002). This standard provides that the trial court's factual determinations are given deference and will be upheld if there is sufficient evidence to persuade a rational person of the truth of the facts as found by the trial court. *Id.*; *In re Personal Restraint of Davis*, 152 Wn.2d 647, 680, 101 P.3d 1 (2004). When error is not assigned to the trial court's findings of fact, however, they are considered verities on appeal and will not be questioned. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The

trial court's determination of issues of law is reviewed de novo. *Evergreen Freedom Foundation*, 111 Wn. App. at 596.⁴

As noted, Mr. Johnny has an extensive history of engaging in non-consensual sexual acts with females. This is reflected in his 1975 conviction for attempted second degree rape, 1986 conviction for simple assault, and 1987 convictions for two counts of second degree assault. 6RP 466, Ex. 1, 2, 3; 6RP 467, Ex. 7, 8, 9, 10; 6RP 467, Ex. 11, 12, 13. He has been diagnosed as suffering from Paraphilia NOS (Nonconsenting Persons) based in part on his history of sexually assaulting women. CP 12-21. ("However, from his repeated behavior following several opportunities to learn that coerced sex with nonconsenting others is unacceptable, it can be strongly inferred that Mr. Johnny at least episodically experiences intense fantasies and urges involving themes of coercion and violent, forced sex."). Mr. Johnny has also been diagnosed with Exhibitionism and Substance Dependence, in a controlled environment and has been diagnosed as suffering from Antisocial Personality Disorder. *Id.* The combination of these four diagnoses

⁴ In addition, it should also be noted that even if the trial court had not engaged in any sort of recent overt act inquiry, this Court could do so for the first time on appeal. *In re McNutt*, 124 Wn. App. at 350-51 ("Although the trial court did not engage in a factual analysis on the record for this appeal, we conclude from the record that only one conclusion is reasonable: McNutt's acts at the time of the crime for which he remained incarcerated create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person who knows the history and mental condition of the person engaging in the act, as required under RCW 71.09.020(10).").

“affects Mr. Johnny’s volitional control regarding his sexual behavior, such that it predisposes him to commit sexual acts, particularly against nonconsenting females, such that it would endanger their health and well being.” CP 18. These diagnoses reduce Mr. Johnny’s ability to control the sexually deviant impulses that flow from his Paraphilia:

While some individuals may have a paraphilia, even these, and not act on it with others, such is not the case with Mr. Johnny. Despite incarceration brought about by engaging in the behaviors, multiple arrests and prosecutions, and ample opportunities to learn that engaging in the behavior is socially and legally unacceptable, he has nonetheless continued to do so. Under such circumstances, it appears that Mr. Johnny has a strong biological and/or psychological imperative that he has great difficulty controlling.

CP 19.

Given Mr. Johnny’s history and mental condition, the trial court properly concluded that Mr. Johnny’s 2001 conviction for exposing himself to a 13-year-old girl, cutting her window screen in the middle of the night and reaching into her bedroom and touching her on the leg while she was sleeping, is a recent overt act.

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B. Mr. Johnny Did Not Object To The Jury Instructions He Now Challenges And Has Not Established Error

Mr. Johnny argues that the trial court erred by not giving a unanimity instruction. App. Br. at 15. Mr. Johnny waived this issue by not proposing a unanimity instruction at trial.

An appellant must take exception to a jury instruction at trial to preserve the issue for appeal. *State v. Salas*, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995); CR 51(f); CrR 6.15(c); RAP 2.5(a). The objection “must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal.” *Id.* (quoting *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990)). Without an objection, the instructions normally become the law of the case. *Id.* at 182 (quoting *State v. Hardwick*, 74 Wn.2d 828, 831, 447 P.2d 80 (1968)). Opposing parties should have an opportunity at trial to respond to allegations of error “rather than facing newly asserted errors or new theories and issues for the first time on appeal.” *In re Detention of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006). Mr. Johnny waived this issue by not objecting at trial.

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C. The Trial Court Did Not Err By Not Giving A Unanimity Instruction Because No Such Instruction Was Requested Or Required.

Where several distinct criminal acts have been committed by a criminal defendant who is not charged for each act, the prosecutor must elect the acts she or he is relying upon, or the jury must receive a unanimity instruction. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Unanimity rules are applicable in SVP cases. *Detention of Halgren*, 156 Wn.2d 795, 809, 132 P.2d 714 (2006). Unlike the defendant in *Petrich*, Mr. Johnny did not raise a unanimity issue in the trial court by making a proper motion and obtaining a ruling on the issue. 101 Wn.2d at 571-2. In any event, no unanimity instruction was required because substantial evidence supported the alternative means of finding that Mr. Johnny is dangerous.

In an SVP trial presenting alternative disorders that allegedly make a respondent dangerous, no unanimity instruction is required if substantial evidence supports each alternative. *Halgren*, 156 Wn.2d at 810-11. To the extent the jury below was presented with alternative means of finding that Mr. Johnny suffers from a personality disorder or mental abnormality, substantial evidence supported each alternative.

The testimony of Richard L. Packard, Ph.D., and the criminal history of Mr. Johnny himself, provided the jury with substantial evidence that Mr. Johnny suffers from Paraphilia NOS (nonconsent), Exhibitionism, Substance Dependence, in a controlled environment, and Antisocial

Personality Disorder. Mr. Johnny's argument rests on the fact that Dr. Packard was the first licensed sex offender treatment provider and Ph.D. who diagnosed him with Paraphilia NOS (nonconsent), Exhibitionism, and Antisocial Personality Disorder after previous clinicians had not made these diagnoses. The fact that Dr. Packard was the first to make these definitive diagnoses does not defeat the substantial evidence standard.

The evidence presented by the State, and articulated in Dr. Packard's testimony, demonstrates that the previous evaluations done by clinicians were not done by individuals trained in diagnosing sex offenders. In fact, in the evaluations done by Dr. Iris Rucker, an individual who is not a specialist in diagnosing sex offenders, she recommended that Mr. Johnny be evaluated "by psychologists and/or psychiatrists who meet the competency requirements to assess persons accused on violent, predatory sexual offenses." CP 74. Additionally, Dr. Paul Daley, an individual who is not a specialist in diagnosing sex offenders, also advised that "an examination by a psychologist trained in the assessment of sexual offender is recommended". CP 75.

In his testimony at trial, Dr. Packard identified that he knew the credentials of the clinicians who had previously examined and diagnosed Mr. Johnny and that none of them was specially trained in diagnosing sex

offenders.⁵ Additionally, Dr. Packard provided extensive testimony articulating the bases for each and every one of his diagnoses and how those diagnoses impacted Mr. Johnny's volitional control. CP 12-21; 260-261; CP 356-363; 4RP 257-321; 5RP 339-363. Substantial evidence supported the jury's determination that Mr. Johnny suffers from a mental abnormality or personality disorder, as defined by RCW 71.09.020.

Mr. Johnny argues that Dr. Wollert's disagreement with Dr. Packard's diagnoses demonstrate that substantial evidence did not support the jury's finding. However, although Dr. Wollert, in direct examination, stated that he did not believe that Paraphilia NOS (nonconsent) is a valid diagnosis, when questioned on cross-examination, he conceded that he has used the diagnosis in previous sexual violent

⁵ "Q And to your knowledge Dr. Daley is a certified sex offender treatment provider?

A No, he is not.

...

Q And are you aware of whether Dr. Chan is licensed?

A Yes. No, Dr. Chan is not licensed as a psychologist.

Q Is he a certified sex offender treatment provider to your knowledge?

A No, he is not.

...

Q Doctor, are you familiar with Dr. Man numb [sic]?

A I don't know Dr. Man numb [sic] personally. I have read a number of reports from Dr. Manimum [sic].

Q To your knowledge is he licensed?

A No, he is not.

...

Q To your knowledge Dr. Rucker is a certified sex offender treatment provider?

A No, she is not."

CP 451; CP 457-458.

predator cases. 8RP 627-629. Additionally, Dr. Wollert also conceded on cross-examination that he was not familiar with the entirety of Mr. Johnny's file including statements made by Mr. Johnny in recent treatment that he "had raped at least one time," "had beat someone during sex," "had hurt someone during sex," "had desires to have sex with a child" and he "was attracted to a child." 8RP 637-638.

Also during Dr. Wollert's direct testimony, he stated that Mr. Johnny does not fit the diagnosis for Exhibitionism. Again, however, on cross-examination, Dr. Wollert was unable to articulate which criteria of an Exhibitionism diagnosis Mr. Johnny did not meet, instead stating, "So in terms of my own experience and working with exhibitionists who are clearly exhibitionists, Mr. Johnny is a borderline case and so as a borderline case, I wouldn't be sure of that diagnosis at all." 8RP 639. This does not defeat the substantial evidence provided by Dr. Packard's testimony and Mr. Johnny's history. Additionally, nowhere in Dr. Wollert's testimony does he refute that Mr. Johnny suffers from Antisocial Personality Disorder, but instead focuses on the fact that Mr. Johnny is over the age of 25 and, therefore, less likely to re-offend. However, Dr. Wollert's theory about age and its application to determining likelihood of re-offense is not a theory that is generally accepted in the sex offender diagnosis/therapeutic community. 8 RP 684-

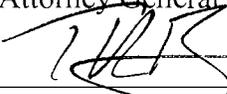
687; 9RP 727-733. In light of Dr. Packard's testimony, the issues with Dr. Wollert's testimony, as articulated above, and Mr. Johnny's history, substantial evidence supported the alternative means presented to the jury and there was no unanimity issue.

III. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Frank Johnny's commitment as an SVP.

RESPECTFULLY SUBMITTED this 9th day of July, 2007.

ROBERT M. MCKENNA
Attorney General

 #25274 for
SARAH J. OLSON, WSBA#33003
Assistant Attorney General
Attorneys for the Respondent

NO. 35363-6-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

In re the Detention of:

FRANK JOHNNY,

Appellant,

DECLARATION OF
SERVICE

MARTHA NEUMANN declares as follows:

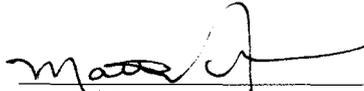
On July 9, 2007, I deposited in the United States mail, first-class
postage affixed, addressed as follows:

SARAH M. HROBSKY
GREGORY C. LINK
WASHINGTON APPELLATE PROJECT
1511 3rd Avenue, Suite 701
Seattle, WA 98101

a copy of the following documents: OPENING BRIEF OF
RESPONDENT; 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 9th day of July, 2007, at Seattle, WA.



MARTHA NEUMANN
Legal Assistant

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