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STATE OF WASHINGTON
BY *[Signature]*

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

IN RE DETENTION OF MYOUNG PARK,

STATE OF WASHINGTON,

Respondent,

v.

MYOUNG PARK,

Appellant.

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

The Honorable Bryan E. Chushcoff, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ASSIGNMENT OF ERROR.....	1
Issue Pertaining to Assignments of Error.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	10
1. THE COURT ERRED IN PROHIBITING THE JURY FROM CONSIDERING RELEVANT EVIDENCE ON THE ISSUE OF WHETHER PARK WAS LIKELY TO COMMIT FUTURE ACTS OF PREDATORY SEXUAL VIOLENCE.....	10
a. <u>The Court Issued An Outdated WPIC Instruction That Misstated How The Jury Was To Apply The Law to The Facts.....</u>	11
b. <u>The Instructional Error Is Of Constitutional Magnitude And Prejudiced Park's Right To Present A Complete Defense And To Have A Verdict Based On Sufficient Evidence.....</u>	17
D. CONCLUSION.....	25

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Berger v. Sonneland,
144 Wn.2d 91, 26 P.3d 257 (2001)..... 21

Gardner v. Seymour,
27 Wn.2d 802, 180 P.2d 564 (1947)..... 21

Harris v. Robert C. Groth, M.D., Inc.,
99 Wn.2d 438, 663 P.2d 113 (1983)..... 21

In re Detention of Audett,
158 Wn.2d 712, 147 P.3d 982 (2006)..... 11, 20

In Re Detention of Bedker,
134 Wn. App. 775, 146 P.3d 442 (2006)..... 21

In re Detention of Thorell,
149 Wn.2d 724, 72 P.3d 708 (2003)..... 17, 22

In re Welfare of Hansen,
24 Wn. App. 27, 599 P.2d 1304 (1979)..... 17

Prentice Packing & Storage Co. v. United Pac. Ins. Co.,
5 Wn.2d 144, 106 P.2d 314 (1940).20

Schmidt v. Pioneer United Dairies,
60 Wn.2d 271, 373 P.2d 764 (1962) 20, 22

State v. Allen,
89 Wn.2d 651, 574 P.2d 1182 (1978)..... 23

State v. Becker,
132 Wn.2d 54, 935 P.2d 1321 (1997)..... 17

State v. Borsheim,
140 Wn. App. 357, 165 P.3d 417 (2007) 13

TABLE OF AUTHORITIES (CONT'D)

Page

STATE CASES (CONT'D)

<u>State v. Clausing</u> , 147 Wn.2d 620, 56 P.3d 550 (2002).....	14
<u>State v. Colquitt</u> , 133 Wn. App. 789, 137 P.3d 892 (2006).....	21
<u>State v. Crediford</u> , 130 Wn.2d 747, 927 P.2d 1129 (1996).....	19
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	20
<u>State v. Jackman</u> , 156 Wn.2d 736, 132 P.3d 136 (2006).....	15
<u>State v. Jacobs</u> , 121 Wn. App. 669, 89 P.3d 232 (2004).....	20
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	19
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996).....	13, 14, 16
<u>State v. McLoyd</u> , 87 Wn. App. 66, 939 P.2d 1255 (1997).....	16
<u>State v. Miller</u> , 131 Wn.2d 78, 929 P.2d 372 (1997).....	23, 24
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	23

TABLE OF AUTHORITIES (CONT'D)

Page

STATE CASES (CONT'D)

State v. Noel,
51 Wn. App. 436, 753 P.2d 1017 (1988)..... 14

State v. Simon,
64 Wn. App. 948, 831 P.2d 139 (1991),
reversed in part on other grounds,
120 Wn.2d 196, 840 P.2d 172 (1992)..... 14

State v. Snider,
70 Wn.2d 326, 422 P.2d 816 (1967)..... 19

State v. Tili,
139 Wn.2d 107, 985 P.2d 365 (1999)..... 23

State v. Wanrow,
88 Wn.2d 221, 559 P.2d 548 (1977),
superseded on other grounds by statute,
Lewis v. Dep't of Licensing, 157 Wn.2d 446, 139 P.3d 1078 (2006).....
.....16, 18, 23

State v. Wittenbarger,
124 Wn.2d 467, 880 P.2d 517 (1994)..... 17

State v. WWJ Corp.,
138 Wn.2d 595, 980 P.2d 1257 (1999)..... 24

FEDERAL CASES

Foucha v. Louisiana,
504 U.S. 71, 112 S. Ct. 1780,
118 L. Ed.2d 437 (1992).....17

In re Murchison,
349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955).....17

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

Jackson v. Virginia,
443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) 19

Washington v. Texas,
388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)..... 18

RULES, STATUTES AND OTHERS

Comment for WPIC 365.1413

Former WPIC 365.14.....12

Laws of 2001, ch. 286 § 1..... 13

RAP 2.5(a)(3)..... 17, 24

RCW 71.09.020(8).....21

RCW 71.09.020(16).....11

RCW 71.09.060(1).....11, 12

U.S. Const. amend. XIV17, 19

WPIC 365.1412

A. ASSIGNMENT OF ERROR

1. The trial court erred by issuing an instruction that barred the jury from considering relevant evidence. CP 22 (Instruction 6).

Issue Pertaining to Assignments of Error

1. Did the trial court err when it instructed the jury to disregard evidence relevant to whether appellant was likely to commit predatory acts of sexual violence if not confined to a secure facility, thus violating appellant's right to present a defense and compelling the jury to resort to speculation in deciding this element of the State's case?

B. STATEMENT OF THE CASE

Appellant Myoung Park grew up in Korea, where he led an ordinary life. Exh. 13 at 8;¹ RP² 348. He was a successful student, an accomplished martial artist, and served honorably in the military. RP 348-49, 361; Exh. 13 at 11-13. When he was 22, Park suffered a serious head injury from a motorcycle accident. Exh. 13 at 13-15. His IQ fell into the mildly mentally retarded range. RP 351, 361. The injury affected his motor skills, resulting in partial paralysis of his left arm and leg. Exh. 13 at 15; RP 350-51, 538. He wore a brace on his leg for support and walked

¹ The jury watched Park's redacted videotaped deposition. RP 645, 649-50, 654-55. The redacted transcript of the deposition, cited herein, was admitted as an illustrative exhibit. RP 648.

² The verbatim report of proceedings is referenced as follows: RP - 3/24/08; 3/25/08; 3/26/08; 3/27/08; 3/31/08; 4/1/08; 4/2/08; 4/3/08; 4/4/08.

with a cane. Exh. 13 at 15-16. A part of his skull was caved in. RP 347, 538. He underwent rehabilitation for three years and then moved to the United States with his mother. RP 610; Exh. 13 at 8-9, 13.

Park had no history of dysfunctional behavior before sustaining his traumatic head injury. RP 347-48. In 2001, Park pled guilty to second degree child molestation. Exh. 4 and 5. Park lived in the same apartment complex as 13-year-old R.B. Exh. 15³ at 5. R.B. had finished playing with other children in the apartment courtyard when Park came up behind her and rubbed her breast. Exh. 15 at 7-8. She eventually broke free from his grasp and ran off. Exh. 15 at 9-10.

Park was also convicted of second degree assault with sexual motivation as part of the same case. Exh. 5. In 2001, he rubbed a three-year-old girl above the waist. RP 371-72. When the girl's mother protested, Park grinned, let the girl go, and returned to his apartment. RP 372.

Park received a Special Sex Offender Sentencing Alternative (SSOSA) sentence for these offenses. RP 233. Park was classified as a level one offender, meaning he was at a lower risk to reoffend than others. RP 246-47, 253. Sentencing conditions included sex offender treatment

³ The jury watched R.B.'s videotaped deposition. RP 284. The transcript of the deposition, cited herein, was admitted as an illustrative exhibit. RP 279-81.

and no contact with minors. RP 236-37. Park attempted to engage sex offender treatment as part of his community custody, but the proposed doctor was unable to provide treatment due to the lack of a Korean interpreter for Park. RP 238-39.

On two occasions, Park walked into his probation officer's office with his pants unzipped and no underwear. RP 242. The officer said Park "was a little like dealing with a child sometimes." RP 242. When confronted with his behavior, Park apologized, said he was a nice man, and asked for a hug. RP 242-43. His probation officer eventually arrested Park in part for having contact with minors and his SSOSA was revoked. RP 244-45. Before Park was released from confinement, the State filed a sexually violent predator (SVP) petition. CP 1-2.

At trial, the State presented evidence of a number of unadjudicated events in addition to the above referenced index crimes. In 1997, Sarah Dube met Park at a mall. Exh. 21 at 9-10.⁴ She sat next to Park because he had a cane and seemed to be in distress. Exh. 21 at 10-11. Park asked her if she would be his wife or girlfriend and said he wanted to have her babies. Exh. 21 11-12, 19-20. He started touching her and told her to "come on honey, let's go." Exh. 21 at 12-13, 19-20. When Dube tried to

⁴ The jury watched Dube's videotaped deposition. RP 268-71. The transcript of the deposition, cited herein, was admitted as an illustrative exhibit. RP 263-65.

get up, Park grabbed her and touched her breasts. Exh. 21 at 12. She broke away and alerted mall security. Exh. 21 at 14-16.

In 1998, Park introduced himself to 27-year-old Camay McClure sitting on a bench in a shopping mall. RP 156-58. After some conversation, he touched her thigh. RP 158-59, 163. She moved his hand away and told him to stop. RP 159. Park said he was sorry. RP 159. After more conversation, Park scooted closer and grabbed her butt. RP 160-62. McClure stood up and alerted security. RP 161.

In 2002, Park went to Stephanie Hembroff's house and knocked on her door. RP 167-68. He asked if her son was home. RP 168. After further conversation, he asked Hembroff for a hug. RP 169. She gave him a hug, at which point Park grabbed her and pulled her to his groin. RP 169-71. Park left after her husband intervened. RP 171-72.

19-year-old Stephanie Pesacall lived with Hembroff. RP 167, 181. Later that month, Park forced his way into Hembroff's house when Pesacall was alone and would not leave. RP 172, 176. Pesacall called Hembroff. RP 172, 176. Park chased her around the house while she was on the phone with Hembroff. RP 177. When Pesacall told Park she had Hembroff on the phone, Park took the phone and asked "Stephanie, where are you. I come for you." RP 176. Hembroff told him to leave the house

and he said no. RP 176. He then gave the phone back to Pesacall and left. RP 176-78.

In 2002, Park entered Charmaine Smith's front yard and when she asked if he needed help, he said "You see me. I'm your friend. I'm a good man." RP 188. Park was tired, so Smith let him rest on her porch while she went back inside the house. RP 189. While doing laundry, Smith heard her front door open and saw Park standing in the front entrance. RP 189. Park said he was going to leave and when she went to shut the door, said "I shake your hand." RP 189. Smith shook his hand, at which point Park pulled her to him to give her a hug and grabbed her butt. RP 189-91. Park left after she asked him to leave. RP 191-92. Smith did not believe Park meant her any further harm. RP 196.

In 2002, Park engaged Maria Buchanan in conversation outside her house. RP 201, 213. They were neighbors at the time. RP 210. Buchanan thought he was retarded. RP 213. Park gave Buchanan a hug. RP 214. Buchanan's nine-year-old daughter, H.B., came outside. RP 201-02. She introduced H.B. to Park. RP 202. Park wanted to hug H.B. RP 202. Her mother said it was okay and told her daughter to give him a hug. RP 202, 214. Park kissed H.B. when she went to give him a hug and she ran off. RP 202. After this event, Park asked Buchanan for a hug when he

saw her. RP 217. "He would just say, 'Hug.' If I said, 'No.' He said 'Why? We not friends?'" RP 217.

Park started entering her house without invitation through an unlocked door. RP 217-18. On one occasion, Park entered and asked for a hug. RP 218-19. Buchanan said no. RP 219. Her husband appeared, and then Park grabbed her breast. RP 219. Her husband told him to get out. RP 219. Park responded "Why? I good man" and said "I want to be friends. Are you not my friend?" RP 219. He then left. RP 219. On other occasions when Park entered her house unannounced, Buchanan was busy and told him to leave, which he did. RP 221.

Lisa Bell, R.B.'s mother, saw Park squeezing his penis over his clothes three or four time while watching children play in the courtyard. Exh. 23 at 5, 10-12, 16.⁵ R.B. also saw Park exposing and grabbing his penis on two or three occasions. Exh. 15 at 10-12. She did not remember if he was urinating at the time. Exh. 15 at 17. On another occasion, R.B. saw Park attempt to pick a little girl off her tricycle. Exh. 15 at 14. The girl screamed and the encounter ended when R.B. notified an adult. Exh. 15 at 14- 15.

⁵ The jury watched Lisa Bell's videotaped deposition. RP 284. The transcript of the deposition, cited herein, was admitted as an illustrative exhibit. RP 265-66.

The jury heard Park's deposition testimony. Exh. 13. Park denied assaulting R.B. and said he only touched the three-year-old girl's face. Exh. 13 at 34, 38-39. Park did not remember or denied the unadjudicated allegations involving neighbors. Exh. 13 at 45-50. Regarding the 1998 mall incident, Park said McClure touched him first. Exh. 13 at 52-54. He denied urinating outside or exposing himself. Exh. 13 at 34-35, 69. He maintained his accusers had fabricated the incidents because of his disability. Exh. 13 at 70. He agreed it was bad to touch females without permission or touch a child in a sexual manner, but denied ever having done so. Exh. 13 at 61-62. He did not think he needed sex offender treatment because he had a "pure heart." Exh. 13 at 61-63.

If released, Park planned to live with his sister for a while and then return to Korea. Exh. 13 at 63-64. He would not seek sex offender treatment. Exh. 13 at 66. He said parents of young girls had no need to be concerned about him touching people in the future. Exh. 13 at 67. He had no concerns about touching women or children in the future. Exh. 13 at 71-72. He would not come close to women in the future to remove the basis for an unfounded allegation. Exh. 13 at 70-71. He said he would not "do anything to women if I released, definitely." Exh. 13 at 70.

Dr. Douglas Tucker testified as the State's expert. RP 284-644. Dr. Tucker diagnosed Park with five mental abnormalities. RP 340-43.

These included (1) personality change due to traumatic injury - disinhibited type; (2) cognitive disorder (not otherwise specified); (3) pedophilia, sexually attracted to females, non-exclusive type; (4) frotteurism (arousal by touching or rubbing against non-consenting person); and (5) exhibitionism (arousal by exposing genitals to non-consenting persons). RP 343-44.

All these mental abnormalities stemmed from Park's brain injury suffered as a result of the motorcycle accident. RP 417-18, 550. The injury grossly impaired Park in all areas of functioning, including disinhibited sexual behavior, physical aggression, irritability and impatience, exclusiveness, entitled and demanding behavior, poor boundaries, inappropriate social approach behavior, and poor impulse control. RP 354-58. Park had impaired frontal lobe functioning in his brain. RP 363. The frontal lobe is responsible for social judgment and impulse inhibition. RP 363.

Dr. Tucker opined with a reasonable degree of medical certainty that Park was likely to engage in predatory acts of sexual violence if not confined to a secure facility. RP 436, 641. In reaching this opinion, Tucker relied on actuarial instruments and clinical judgment to calculate risk of reoffense. RP 443-46. Tucker used the Static-99 and the MnSOST actuarial instruments. RP 449-50. Tucker scored Park as a 6+ on the

Static-99, which falls into the high risk category, which translated into a 52 percent likelihood of sexual recidivism within 15 years. RP 442-43, 461. Tucker scored Park in the high risk category for MnSOST, which correlated to a 70 percent rate of sexual recidivism within six years. RP 471. RP 467. Tucker also considered a number of static and dynamic risk factors to conclude Park's risk of reoffense was higher than the actuarial instruments indicated. RP 475, 499-500.

Tucker testified the community placement conditions Park would be under if released would be insufficient to mitigate Park's risk of reoffense because those conditions were less than the conditions imposed by his SOSA sentence, which he violated. RP 500-501. Park's planned placement with his family upon release was likewise insufficient because his family did not appreciate the risk he posed and could not control him. RP 501-02. In speaking with Tucker, Park alternated between denying he did anything wrong and declaring he would never do anything like that again. RP 355, 423, 426. Park understood that forcing sexual activity on a non-consenting woman is illegal and inappropriate. RP 583.

In closing, defense counsel argued Park's desire to hug others was motivated by the desire for social contact, not sexual gratification, but that perhaps an autonomic response kicked in when he made contact that caused him to escalate his behavior. RP 741, 753-54. His touching was

wrong, but Park had not raped or seriously assaulted anyone. RP 744. Park did not present such a serious risk to society to call for the drastic measure of involuntary commitment. RP 754. He suggested supervision by the Department of Corrections would be enough to protect the community. RP 755. If released, a condition of community custody would be to complete a State-approved sexual deviancy program. Exh. 6.

Counsel further argued the State had not proven beyond a reasonable doubt that Park was likely to reoffend because Tucker's methodologies were flawed. RP 749-53. Tucker wrongly scored the Static-99 and neither the Static-99 nor the MnSOST had been normed on a Washington sample. RP 749-51.

The jury returned a verdict finding Park was an SVP. CP 41. The court ordered him indefinitely committed at the Special Commitment Center. CP 42-43. This appeal timely follows. CP 44.

C. ARGUMENT

1. THE COURT ERRED IN PROHIBITING THE JURY FROM CONSIDERING RELEVANT EVIDENCE ON THE ISSUE OF WHETHER PARK WAS LIKELY TO COMMIT FUTURE ACTS OF PREDATORY SEXUAL VIOLENCE.

An instruction misled the jury into believing it must ignore expert testimony and other relevant testimony bearing on the issue of future dangerousness. Reversal is required because the instruction violated

Park's right to present a complete defense and forced the jury to base its verdict on speculation rather than proof beyond a reasonable doubt.

- a. The Court Issued An Outdated WPIC Instruction That Misstated How The Jury Was To Apply The Law To The Facts.

The State needed to prove beyond a reasonable doubt that Park met the definition of an SVP. RCW 71.09.060(1). In order to uphold commitment, the jury must have sufficient evidence to find the following elements under RCW 71.09.020(16): (1) That the respondent had been convicted of or charged with a crime of sexual violence; (2) That the respondent suffers from a mental abnormality or personality disorder; and (3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility. In re Detention of Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006). The third element is at issue here.

The court instructed the jury as follows:

"Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding.

In determining this issue, you may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention in this proceeding.

CP 22 (Instruction 6) (emphasis added).

Instruction 6 used the language of former WPIC 365.14, which has since been revised. WPIC 365.14, as amended, now reads as follows:

"Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding.

[In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue. In considering [placement conditions or] voluntary treatment options, however, you may consider only [placement conditions or] voluntary treatment options that would exist if the respondent is unconditionally released from detention in this proceeding.]

WPIC 365.14 (as amended in 2006) (brackets in original, emphasis added).

The language of former WPIC 365.14, upon which Instruction 6 was based, tracked an isolated section of RCW 71.09.060(1) addressing the "likely to engage" element in relation to "placement conditions and treatment options." As reflected in the revised version of WPIC 365.14, the limiting language used in RCW 71.09.060(1) was only meant to exclude evidence related to conditions of a less restrictive alternative. The statutory history of this provision and accompanying findings of

legislative intent makes this point abundantly clear.⁶

The Comment to WPIC 365.14 has been revised to explain the reasoning for this change in the pattern instruction:

[The previous] version of this instruction could be interpreted as permitting the jury to consider only placement conditions and voluntary treatment options when determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, even if other evidence relevant to the question has been admitted. This instruction has been revised to make it clear that the jury is not prohibited from considering such evidence when it has been admitted by the trial court.

Comment to WPIC 365.14 (as amended in 2006).

Instructions must accurately state the law without misleading the jury. State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). Proper jury instructions "must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror."

State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (quoting

⁶ Laws of 2001, ch. 286 § 1, provides "The legislature finds that presentation of evidence related to conditions of a less restrictive alternative that are beyond the authority of the court to order, and that would not exist in the absence of a court order, reduces the public respect for the rule of law and for the authority of the courts. Consequently, the legislature finds that the decision in In re the Detention of Casper Ross, 102 Wn. App 108 (2000), is contrary to the legislature's intent. The legislature hereby clarifies that it intends, and has always intended, in any proceeding under this chapter that the court and jury be presented only with conditions that would exist or that the court would have the authority to order in the absence of a finding that the person is a sexually violent predator."

LeFaber, 128 Wn.2d at 900 (internal quotation marks omitted)). The adequacy of challenged jury instructions is subject to de novo review. State v. Clausing, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002).

Instruction 6 states that in determining the issue of whether Park is likely to engage in predatory acts of sexual violence if not confined in a secure facility, "you may consider *only* placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention in this proceeding." CP 22 (emphasis added). Use of the adverb "only" expressly limited the universe of evidence the jury could consider in determining a contested element of the case.

"The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), reversed in part on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts rely on rules of grammar in coming to a conclusion. See, e.g., LeFaber, 128 Wn.2d at 902-03 (proper grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, resulting in court's determination that jury could have applied the erroneous standard); State v. Noel, 51 Wn. App.

436, 440-41, 753 P.2d 1017 (1988) (relying upon grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act).

The plain language of Instruction 6 unambiguously prohibited the jury, in determining Park's risk of future offense, from considering any evidence other than placement conditions and voluntary treatment options that would exist if Park were released. Instruction 6 categorically barred the jury from taking into account other evidence relevant to future risk.

A challenged jury instruction is reviewed within the context of the jury instructions as a whole. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Reading Instruction 6 in conjunction with other instructions creates intractable confusion. Instruction 1 provides "You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case." CP 15. Instruction 1 further states: "In deciding this case, you must consider all of the evidence that I have admitted. Each party is entitled to the benefit of all the evidence, whether or not that party introduced it." CP 15. Instruction 1, which tells the jury to consider all admitted evidence in reaching its verdict, cannot be reconciled with Instruction 6, which specifically prohibits the jury from considering evidence directly relevant to a particular element of the State's case.

When jury instructions read as a whole are ambiguous, the reviewing court cannot assume that the jury followed the legally valid interpretation. State v. McLoyd, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997). Instructions must be "manifestly clear" because an ambiguous instruction that permits an erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. "When instructions are inconsistent, it is the duty of the reviewing court to determine whether the jury was misled as to its function and responsibilities under the law by that inconsistency." State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977) (citation and internal quotation marks omitted), superseded on other grounds by statute, Lewis v. Dep't of Licensing, 157 Wn.2d 446, 464, 139 P.3d 1078 (2006).

"[W]here such an inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant." Id. While it may be possible to interpret Instruction 6 in a manner consistent with applicable law, the jury should not be required to engage in that interpretive exercise. The standard for clarity in a jury instruction is higher than for a statute. LeFaber, 128 Wn.2d at 902. Courts may resolve ambiguous wording in a statute by utilizing rules of construction, but jurors lack such interpretative tools. Id.

b. The Instructional Error Is Of Constitutional Magnitude And Prejudiced Park's Right To Present A Complete Defense And To Have A Verdict Based On Sufficient Evidence.

Park did not object to Instruction 6,⁷ but the error may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). In the absence of an objection at trial, "an appellate court will consider a claimed error in an instruction if giving such an instruction invades a fundamental right of the accused." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

The involuntary commitment of an alleged SVP is a significant deprivation of liberty triggering due process protection under the Fourteenth Amendment of the United States Constitution. In re Detention of Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003) (citing Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). Notions of fundamental fairness require an accused be given "a meaningful opportunity to present a complete defense." State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); see also In re Welfare of Hansen, 24 Wn. App. 27, 36, 599 P.2d 1304 (1979) (due

⁷ RP 699-700.

process principles require party be given a full and meaningful opportunity to present evidence). "[T]he right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies" is a fundamental element of due process as protected by the Fourteenth Amendment. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

The sweeping restrictions imposed by Instruction 6 unlawfully limited what facts the jury could consider as it decided whether the State had proven beyond a reasonable doubt that Park was likely to re-offend. In Wanrow, the court reversed conviction where an instruction setting forth the law of self-defense directed the jury to consider only those acts and circumstances occurring "at or immediately before the killing." Wanrow, 88 Wn.2d at 234-36. The instruction was a misstatement of the law because the justification of self-defense should be evaluated in light of all the facts and circumstances known to the defendant. Id. at 236. By improperly limiting the jury's consideration of the surrounding acts and circumstances to those occurring "at or immediately before the killing," the self-defense instruction was an erroneous statement of the applicable law on the critical focal point of the defendant's case. Id. at 236-37.

The same type of situation presents itself here. Like the defendant in Wanrow, Park was deprived of his right to have the jury consider all the

facts and circumstances relevant to a central issue in the case as it reached its verdict. Park recognized it was wrong to inappropriately touch women and maintained he would never inappropriately touch anyone in the future. This was evidence that the jury was entitled to consider in reaching its determination of whether Park was likely to reoffend. He had the right to have the jury consider his perspective on the issue of reoffense and his declaration that he would refrain from committing acts in the future. Dr. Tucker disagreed with Park on this point, but the constitution has made the jury the sole and exclusive judge of the evidence, the weight to be given to the evidence, and the credibility of the witnesses. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967).

Not only did Instruction 6 invade Park's due process right to present a complete defense, it also violated his due process right to not be committed unless the verdict rested on sufficient evidence.

In every criminal prosecution, due process requires the State to prove all elements of the charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). "Although the commitment proceedings are civil in nature, given the standard of proof, the sufficiency of evidence is examined under

the standard of beyond a reasonable doubt." Audett, 158 Wn.2d at 728 n.10.

To withstand constitutional scrutiny, the verdict against Park must be supported by substantial evidence that supports a finding of guilt beyond a reasonable doubt as measured by a rational trier of fact. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); State v. Jacobs, 121 Wn. App. 669, 680-81, 89 P.3d 232 (2004). A verdict cannot be founded on speculation or conjecture. Schmidt v. Pioneer United Dairies, 60 Wn.2d 271, 276, 373 P.2d 764 (1962); Prentice Packing & Storage Co. v. United Pac. Ins. Co., 5 Wn.2d 144, 164, 106 P.2d 314 (1940).

Park had the constitutional right to have the jury base its commitment verdict on sufficient evidence. Instruction 6 violated this right by restricting the evidence that the jury could consider in determining whether the State proved a critical element of its case beyond a reasonable doubt. Instruction 6, by prohibiting the jury from considering key expert testimony on the issue of Park's risk of reoffense, ensured the verdict rested on speculation and conjecture rather than substantial evidence from which a rational jury could conclude this element had been proven beyond a reasonable doubt. The verdict was based on insufficient evidence as measured by the type of evidence it could consider pursuant to Instruction 6.

Instructions that allow the jury to speculate as to the facts are improper. Harris v. Robert C. Groth, M.D., Inc., 99 Wn.2d 438, 447, 663 P.2d 113 (1983). "The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture." Gardner v. Seymour, 27 Wn.2d 802, 808, 180 P.2d 564 (1947) (citation omitted); accord State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

Dr. Tucker's expert testimony was necessary to support a jury finding that Park suffered from a mental abnormality that caused him to likely commit future acts of predatory sexual violence. "In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson." Berger v. Sonneland, 144 Wn.2d 91, 110, 26 P.3d 257 (2001) (citation omitted). "Medical facts must be proved by expert testimony unless they are observable by laypersons and describable without medical training." Id. Determining whether a particular person possesses a mental abnormality as defined by RCW 71.09.020(8) "is based upon the complicated science of human psychology and is beyond the ken of the average juror." In Re Detention of Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006). A diagnosis of a mental abnormality, "when coupled with evidence of prior sexually violent behavior and testimony *from mental health experts*, which links these to a serious lack of control, is sufficient for a jury to find that

the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP." Thorell, 149 Wn.2d at 761-62 (emphasis added).

Instruction 6 prohibited the jury from considering Dr. Tucker's expert opinion on Park's risk of reoffense apart from conditions and treatment that would exist if unconditionally released. Under Instruction 6, the jury could not consider Dr. Tucker's expert testimony regarding risk of reoffense as measured by actuarial instruments and Tucker's clinical judgment. But this testimony was necessary to provide sufficient evidence on this element of the State's case. A jury does not possess the specialized knowledge or medical training necessary to formulate a sound opinion on risk of reoffense. Expert testimony was necessary to enable a valid jury finding that Park was likely to commit predatory acts of sexual violence if not confined in a secure facility. Thorell, 149 Wn.2d at 761-62. Jurors were free to disregard Dr. Tucker's expert testimony, but at that point their verdict rests on speculation and conjecture rather than evidence in the case. See Schmidt, 60 Wn.2d at 276 (verdict cannot be founded on speculation).

"[T]he chief objects contemplated in the charge of the judge are to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relation of the particular

evidence adduced to the particular issues involved." State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). "Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case." State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). The test of whether an instruction allows a party to argue its theory of the case is an additional safeguard to be applied only where the instruction itself is an accurate statement of the law: "[I]t would be illogical to apply such a test to erroneous instructions -of what significance is it that counsel may or may not be able to argue his theory to the jury when the jury has been misinformed about the law to be applied?" Wanrow, 88 Wn.2d at 237.

As set forth above, Instruction 6 misinformed jurors about the law to be applied to the issue of Park's risk of reoffense. A defendant has the constitutional right "to have a jury base its decision on an accurate statement of the law applied to the facts in the case." State v. Miller, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). Jury instructions satisfy a defendant's right to a fair trial only if they accurately inform the jury of the applicable law and are not misleading. Tili, 139 Wn.2d at 126.

A jury is presumed to follow the court's instructions absent evidence to the contrary. State v. Montgomery, 163 Wn.2d 577, 596, 183

P.3d 267 (2008). Relying on that presumption, it inexorably follows the jury determined Park was likely to commit future acts of sexual violence without considering the heart of Tucker's expert testimony or Park's own testimony on risk of reoffense.

A constitutional error is "manifest" within the meaning of RAP 2.5(a)(3) if it had "practical and identifiable consequences in the trial of the case." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (citation omitted). Determining whether prejudice derived from an erroneous instruction "requires careful attention to the words actually used in the instruction because whether a defendant has been accorded full constitutional rights depends on the way a reasonable juror could have interpreted the instruction." Miller, 131 Wn.2d at 90. As set forth above, Instruction 6's command to consider "only" placement conditions and voluntary treatment options that would exist if Park were unconditionally released from detention prevented Park from presenting a complete defense and stopped the jury from finding this element based on something more than conjecture.

Instructional error infringing upon a defendant's constitutional rights is presumed to be prejudicial, and the State has the burden of proving the error was harmless. Id. The error cannot be declared harmless unless it was harmless beyond a reasonable doubt. Id. A

"harmless error" is one which is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Id.

Instruction 6 tainted the deliberation process. The error cannot be considered harmless because it precluded the jury from considering evidence in Park's defense and undermined Park's right to have the commitment verdict rest on a jury finding of proof beyond a reasonable doubt after considering all the evidence. Reversal is required.

D. CONCLUSION

For the reasons stated, this Court should reverse the verdict.

DATED this 21st day of December, 2008.

Respectfully Submitted,

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

STATE OF WASHINGTON/DSHS)

Respondent,)

v.)

MYOUNG PARK,)

Appellant.)

COA NO. 37617-2-II

2008 DEC 23 PM 4:19

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF DECEMBER, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF DECEMBER, 2008.

x Patrick Mayovsky

STATE OF WASHINGTON
BY Patrick Mayovsky
DEPUTY

03 DEC 2008 AM 11:06

COURT OF APPEALS
DIVISION II