

NO. 38764-6-II

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

JOHNNY DAVIS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

COURT OF APPEALS
DIVISION II

OPENING BRIEF OF RESPONDENT

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I. FACTS

Johnny Davis has a history of sexual assaults against young female children. He has been convicted of three sexually violent offenses as defined by RCW 71.090.020(15). Davis' first sexually violent offense occurred on October 22, 1996, when Davis was thirteen years old.¹ In that case, Davis orally raped two six-year-old girls, A. and J., in a house that was under construction in his neighborhood. Davis approached the girls and told them he wanted to play a game with them. He lured the girls into the house, and told J. to pull down her underpants. RP at 62. Davis then licked her vagina. *Id.* After he was finished, Davis did the same to A. RP at 63. The girls then ran out of the house to get away from Davis. RP at 63. Davis was subsequently convicted of Rape of a Child in the First Degree on December 30, 1996. RP at 68, Ex. 2-4.

On January 25, 1999, slightly more than two months before his 16th birthday, Davis kidnapped, molested, and raped a four-year-old girl in a field near his neighborhood. The child, M., testified at trial. M. testified that Davis, a friend of her older brother's, came into her house and told her they were going to build a fort. They walked together to the fields behind her house. RP at 89. After Davis lifted M. over a fence on the way to the fields, he told her to take off her clothes. *Id.*

¹ Davis was born on April 7, 1983. Suppl. CP at ___ (Hoberman's report at 3).

When she refused, he took them off for her. RP at 90. He dragged her to a spot behind the fence where they could not be seen by other houses in the neighborhood. *Id.* He then told her "that his penis was his stomach and his stomach was his penis and that he wanted me to suck his stomach." *Id.* When M. resisted, he held her down, removed her pants, and began to lick her vagina. *Id.* As he did this, M. cried, saying "no!" RP at 91. Davis then got on top of her and appears to have attempted to penetrate her with his penis. *Id.* M. testified that "All of a sudden, I had felt the pain [in her vaginal area], a really bad pain and I didn't know what it was but I started crying because I had never felt pain like that."

Id. M. continued:

After maybe a few minutes, he had started to get on top of me, and I didn't—again, I could tell I didn't like this, and so I started crying even harder, and I didn't think I was screaming though, and I had—then when he got on top of me, he—I didn't understand still what was going on. I knew that my parents wouldn't approve of it, though. And then I felt another pain, but it wasn't as bad as the first one.

RP at 92. Davis was interrupted by the appearance of a neighbor, Mrs. Lecaros. RP at 284. When Mrs. Lecaros came upon the two, his pants were down and his penis was erect. *Id.* M. told Mrs. Lecaros that "Johnny was hurting" her, and that she didn't know why. *Id.* The neighbor told Davis to put his pants on, helped M. with her own clothes, and took her home. RP at 93. M. later told police that Davis took "his

wiener out of his pants," and engaged in a "humping motion." RP at 284-85. She told police that "he did it for a long, long time." RP at 285. Blood was found both in M.'s underwear and on Davis' pants. *Id.* Davis was subsequently convicted of Rape of a Child in the First Degree, Child Molestation in the First Degree, and Kidnapping in the First Degree with Sexual Motivation on October 21, 1999. Ex. 7, 8; RP at 68.

In addition to the sex offenses that resulted in convictions, Davis admitted to other offenses against young children. When interviewed by Richard Peregrin for the Department of Juvenile Rehabilitation Administration (JRA) in September, 1999 (RP at 71), Davis indicated that, at age 14, he had sexual intercourse with a ten-year-old girl in a trailer at her father's home. RP at 73-74. He told Peregrin that the child had consented to the sexual contact. RP at 74. He also told Peregrin that, at age 15, he had rubbed the breasts of his best friend's four-year-old sister. *Id.*

Peregrin asked Davis about his masturbatory fantasies. Davis told him that, beginning at around age 15, he had begun to have sexual fantasies about having sexual intercourse with four-year-old girls. RP at 76. He also admitted to a fantasy regarding having sexual intercourse with a cow. RP at 76. He reported having had sexual

thoughts about all of his victims both before and after the assaults, and continued to have sexual thoughts about his victims roughly three times a week at the time of the interview. RP at 77.

While at the SCC, Davis' case manager on the non-treatment unit where he resided was Gianna Leoncavallo-Fleming. At their introductory meeting, he told Ms. Fleming that he continued to have urges towards minors, but that he could control them through smoking and meditation. RP at 105. Ms. Fleming indicated that she discussed his past offending with Davis. She testified that he never expressed any remorse for his actions or empathy for his victims, that he was not able to discuss the chain of events -- referred to as an "offense cycle" -- that led up to his offending, and that, beyond attributing his offending to feelings of anger over victimization, he was unable to identify any "triggers" to offending. RP at 107-09. Ms. Fleming indicated that Davis had little insight into his offending or ways to prevent it. For example, he told her that, as long as he had adequate support in the community, it would be alright for him to babysit, indicating that, if he got an "urge," "I'll just call mom." RP at 109. Likewise, he had no concept of relapse prevention, that is, what steps he needed to take to ensure that he did not expose himself to high-risk situations or, if he did, what he needed to do to remove himself from those situations. RP at 110-11.

The State called Davis in its case in chief. Davis explained that, after having been convicted in 1996, he was released on a Special Sex Offender Disposition Alternative (SSODA), and received sex offender treatment in the community. RP at 124-25. He received one to two hours of treatment a week for two years. RP at 125. While in treatment, in 1999, he assaulted four-year-old M. RP at 126-27, 142. His SSODA was revoked, and he was committed to JRA, where he received sex offender treatment for five more years. RP at 126-28.

Upon being questioned about various admissions he had made to evaluators over the years, Davis testified that he had no memory of having made most of the admissions, or having committed most of the offenses to which he admitted. RP at 132-37. He also denied that he had told various evaluators and treatment providers that, since his last offense, he had continued to have sexual fantasies about minors. RP at 140-41. He testified that he had had no sex-offender specific treatment in roughly five years. RP at 142. He explained that this was because treatment at the SCC was "inadequate." RP at 144. Although he testified that he had previously participated in Alcoholics Anonymous, when asked about the "steps" of this 12-step program, he was not able to identify the first or the twelfth step, nor was he able to recite any portion

of the Serenity Prayer.² RP at 145. He denied that he had recently tested positive for ethanol on a urinalysis test at the SCC, and stated that he did not believe that alcohol would be a problem for him if released. RP at 145-46. He indicated that, beyond planning to live with his mother and step-father in California, he had not made any arrangements regarding release. He stated he had not lived with his biological mother since he was very young, and had "reconnected" with her only in 2000. RP at 150. He did not know if he would have a parole officer (RP at 147), did not have a sex offender treatment provider (although he stated that he wanted to find one) and did not know how much it would cost to obtain the services of such a provider. RP at 149. He testified that he had talked with his younger sister about taking their four-year-old niece to Disneyland. RP at 151. He testified that he planned to get sex offender treatment, but did not believe that he needed it, and did not believe that he was at risk to reoffend. RP at 151. Finally, he conceded that each of the members of his current support group had been available to him both in 1996 and in 1999 when he had offended. RP at 154-55. Davis testified that he believed his risk of reoffending if released was "absolutely zero." RP at 166.

² "God grant me the serenity to accept the things I cannot change; courage to change the things I can; and wisdom to know the difference." The "Serenity Prayer" is typically recited at the end of every AA meeting.

Dr. Harry Hoberman testified on behalf of the State. Dr. Hoberman, an expert with extensive experience in the diagnosis and evaluation of sex offenders and, more specifically, sexually violent predators, testified that he had met with Davis for roughly 14 hours over the course of three days. RP at 249. Davis told Dr. Hoberman that he had had "multiple" sexual contacts with J., the 1996 victim. He told Dr. Hoberman that he had "tried" to have vaginal intercourse with her, "but she never let me." RP at 283.³ He told Dr. Hoberman that, at age 14, he had had vaginal intercourse with a ten-year-old, T., whom he identified as his youngest sister's girlfriend, saying that he had had vaginal intercourse with her in a trailer the first time. RP at 284. He also told Dr. Hoberman that he had had sexual contact with M. ten or more times prior to being detected. RP at 285. He described these contacts as "his rubbing her vaginal area." *Id.* Dr. Hoberman noted that, in interviews in both June and September of 1999, Davis had admitted to both digital penetration of M. and attempted penile penetration. *Id.* These other sexual contacts did not result in criminal charges or convictions, and Dr. Hoberman noted that Davis had admitted to several evaluators, himself included, that most of his sexual activity involving

³ Dr. Hoberman noted that Davis had made similar admissions in an interview in 1999. RP at 283.

prepubescent children did not come to public attention. RP at 286. Dr. Hoberman indicated that the detected criminal offenses all appear to involve "planful attempts" to isolate the girls in order to have sexual contact with them, as opposed to simply "opportunistic" behavior. RP at 286-87.

The defense presented the testimony of Dr. Theodore Donaldson. Dr. Donaldson admitted that Davis "certainly has had some urges and fantasies about prepubescent children," but said that he could not know whether they were paraphilic, that is, whether they pertained to a sexual disorder. RP at 688. Asked if Davis had difficulty controlling his behavior, Dr. Donaldson responded that he did not find that he ever tried to control his behavior. RP at 689. "If he doesn't try to control it I don't know how I could ever conclude he had difficulty." *Id.* When asked whether he found it "troubling" that Davis had reoffended even though he was on parole in violating his conditions by being around children more than two years younger than he, he responded "[w]ell, I find all of his behavior troubling." RP at 692.

The jury returned a verdict on January 15, 2009 (RP at 833) and the trial court entered an order civilly committing Davis as an SVP on the same day. CP at 20, 48-49. Davis appeals from that order.

II. ARGUMENT

A. Davis Has Waived Any Challenge To The Jury Instructions

Davis argues that a number of the jury instructions issued by the Court violate his rights to due process. Appellant's Brief (hereinafter "App. Br.") at 16-41. Because he did not raise these claims at the time of trial, he has waived these arguments, and this Court should decline to consider them.

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); RAP 2.5(a). That rule, as the *Salas* Court noted it had explained "clearly and often," "is not a mere technicality." 127 Wn.2d at 181.

CR 51(f) requires that, when objecting to the giving or refusing of an instruction, "[t]he objector shall state distinctly the matter to which he objects and the grounds of his objection." The purpose of this rule is to clarify, at the time when the trial court has before it all the evidence and legal arguments, the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction.

Therefore, 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., 127 Wn.2d at 181, citing *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990) (internal citations omitted). 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).

Prior to trial, the State submitted a packet of proposed jury instructions based on the Washington Pattern Instructions then in use. Suppl.CP at _____. It does not appear that Davis submitted any jury instructions of his own, nor did he take exception to any of those proposed by the State. RP at 755. As such, all of these arguments raised in Sections I-V of his brief have been waived.

B. Even If Permitted To Contest The Court's Instructions, Davis Has Not Shown Error

An exception to the general rule that errors cannot be raised for the first time on appeal exists where appellant is able to show a "manifest error affecting a constitutional right." RAP 2.5 (a)(3). *Salas*, 127 Wn.2d at 183; *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1955). Although Davis claims that the various errors alleged violate his rights to due process under the Fourteenth Amendment, he has provided little beyond that bare assertion, and has not demonstrated that any constitutional rights are implicated.

Jury instructions are sufficient when they allow parties to argue their case theories, do not mislead the jury, and, when taken as a whole,

properly inform the jury of the law to be applied. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). An instruction which follows the words of a statute is proper unless the statutory language is not reasonably clear or is misleading. *Borromeo v. Shea*, 138 Wn. App. 290, 294, 156 P.3d 946 (2007). Whether an instruction which accurately states the law should not be given to avoid confusion is a matter within the trial court's discretion, not to be disturbed absent abuse. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001) citing *Douglas v. Freeman*, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991). Even if an instruction is misleading, the party asserting error still bears the burden to establish consequential prejudice. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995).

1. "Crime of Sexual Violence" Instruction

Davis argues that the court commented on the evidence by issuing an instruction that "allowed the jury to return a 'yes' verdict if it found that Mr. Davis had been convicted of a crime of sexual violence, namely Rape of a Child in the First Degree, Child Molestation in the First Degree or Kidnapping in the First Degree with Sexual Motivation" (App. Br. at 22), an instruction which, he argues, was "tantamount to directing a verdict." App. Br at 23. Although Davis concedes that the term "sexually violent

offense" is specifically defined by statute to include these crimes, Davis argues that this list is designed merely as a preliminary "screening" tool (App. Br. at 19), intended only to provide a framework for referral to the prosecuting agency, which then determines whether a petition should be filed. App. Br. at 20. It is then up to the jury, he argues, to decide whether the crime was actually violent, that is, "whether the predicate offense was in fact accomplished by 'swift and intense force,' or 'rough or injurious physical force.'" App. Br. at 20.

Davis did not raise this issue below, and as such has waived it. Beyond simply waiving this issue, however, he appears to have actually conceded at trial that the crimes of which Davis had been committed constituted crimes of sexual violence. At trial, the defense characterized Davis' offenses as "terrible crimes." RP at 797. Later, in closing, he argued:

This case begins and ends with one notion and that is Mr. Davis committed rapes of children. This case begins and ends with that. I'm saying that to you because what we hear from the State over and over again is about those rapes where **we've already agreed he's done them. He's done those things. That's only one element of the three elements the State has to prove,**⁴ but we hear about them

⁴ As set forth in Instruction 3, the State "must prove each of the following elements beyond a reasonable doubt: 1) That Johnny Davis has been convicted of a crime of sexual violence, namely, Rape of a Child in the First Degree, Child Molestation in the First Degree or Kidnapping in the First Degree with Sexual Motivation; (2) That Johnny David suffers from a mental abnormality and/or personality disorder which causes him serious difficulty in controlling his sexually violent behavior; and (3) That his mental

over and over again.

RP 802-03 (emphasis added). Later, as he was concluding his closing remarks, defense counsel noted,

We feel that we have given you enough information to show that the State has not met its burden of proving beyond a reasonable doubt element two, which is Johnny is a pedophile, and element three, which is because of that mental abnormality he's likely to reoffend because of his age...

RP at 815-16. Thus, far from arguing that the jury should not find that he had been convicted of at least one "crime of sexual violence," he repeatedly conceded that this element had been met, and that the real focus of the trial is on the remaining issues of mental condition and likelihood to reoffend.⁵

2. Failure To Include An Instruction Defining Personality Disorder

Davis next argues that the trial court committed "manifest error" affecting his right to due process by failing to define the term "personality disorder." He appears to concede that this argument was not raised below, noting that "such errors may be reviewed for the first time on appeal. RAP 2.5(a)." App. Br. at 27, FN 5. He seeks to distinguish controlling

abnormality and/or personality disorder makes Johnny Davis likely to engage in predatory acts of sexual violence if not confined to a secure facility." CP at 26.

⁵ Although Davis appears to have conceded this point as a legal matter, his trial counsel did point out during cross examination of witnesses that, for example, no weapons had been used in any of the offenses. RP at 79-80.

law (*In re Twining*, 77 Wn. App. 882, 894 P.2d 1331 (1995) and *In re Pouncy*, 144 Wn. App. 609, 184 P.3d 651(2008)) by suggesting that, because the legislature has now amended RCW 71.09 to include a definition of personality disorder, "it is this statutory definition that must be used at trial." App. Br. at 28.

Davis failed to propose a jury instruction defining personality disorder at trial, and as such he has waived this issue. Even if he had not, his argument fails. Davis neglects to note that trial in this matter was finished in January of 2009, while the legislature's addition of the definition of "personality disorder" to the statute did not take effect until May 7, 2009. At the time this case went to trial, then, the statute did not include a definition of the term. As such, there is no basis upon which to distinguish this case from prior appellate decisions on this subject.⁶

3. Alternative Means

Davis next argues that his due process rights were violated because the Court submitted an instruction that permitted the jury to commit him based on the presence of a "mental abnormality or personality disorder," although the state, in its petition, alleged only that he suffered from a

⁶ Nor is it true that the jury was given no guidance as to the meaning of the term "personality disorder." Dr. Hoberman discussed the term in detail .RP at 299. He also offered extensive testimony on both the definition of an Antisocial Personality Disorder and how it manifested in Davis. RP at 301-04; 313-20.

mental abnormality. App. Br. at 32-32.

Like the other issues raised in his brief, Davis failed to raise this argument at the time of trial. This is in all likelihood because it was not, in fact, an issue at all: despite the fact that the State's Petition did not mention Davis' personality disorder, Davis had ample notice that the State would be presenting evidence of the presence of a personality disorder at trial. The State's case was filed on April 6, 2004. CP at 4. Dr. Hoberman's report was completed on April 1, 2004. CP at 59; Suppl. CP at ____ (Hoberman's Report at 46). It was provided to the defense no later than June 1, 2006, as indicated by the June 26, 2006 report submitted by Dr. Donaldson, attached to Davis' May, 2008, Motion for Summary Judgment. CP at 53-54.⁷ Dr. Hoberman's report contained an extensive discussion of Davis' personality disorder. Suppl. CP at _____. (Hoberman report at 9-10; 30-32). Thus the record demonstrates that, at the very latest, Davis had notice of this diagnosis—and hence this basis for commitment—no later than 2 ½ years before trial. Had Davis in fact been surprised by this diagnosis—which he clearly was not—his counsel could have moved objected to the State's submission of evidence on this

⁷ Dr. Donaldson makes reference only to Dr. Hoberman's diagnosis of Pedophiila. CP at 59. Dr. Hoberman's report, however, contained an extensive discussion of Davis' personality disorder. Suppl. CP at _____. (Hoberman report at 9-10; 30-32).

issue and requested a continuance in order to respond. CR 15(b). The State could then have submitted amended pleadings pursuant to CR 15(a) (leave to amend to be "given freely when justice so requires").

Nor has Davis demonstrated any prejudice from the court's alleged error. Davis did not seem to dispute Dr. Hoberman's diagnosis of an Antisocial Personality Disorder. RP at 651.⁸ Rather, the dispute focused more on whether this condition, standing alone, was a sufficient basis upon which to commit someone as an SVP. This is illustrated by defense counsel's closing, in which he argued that "an antisocial personality disorder by itself is not gonna cause you—you're not gonna have serious difficulty controlling your sexually violent behavior." RP at 807.

Davis has waived this issue, and neither alleges nor demonstrates why his failure to raise this issue below should be excused at this juncture. As such, it must be rejected.

4. "Currently Dangerous"

Davis next argues that his rights to due process were violated because the trial court's instructions did not require the jury to find that Davis was "currently dangerous." App. Br. at 32. Davis did not submit a jury instruction to this effect and as such has waived this issue.

⁸ Dr. Donaldson refers to Davis as "hardly socialized," and states "he's got a history of antisocial behavior." RP at 693.

Even if this Court permits Davis to raise this issue now, his argument is without merit. As noted recently by the Washington State Supreme Court "[b]y properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact finder impliedly finds that the SVP is currently dangerous." *In re Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009). In what appears to be an attempt to distinguish his situation from that considered by the court in *Moore*, Davis argues first that Moore was committed following a bench trial. This is a distinction without a difference; there is nothing in the *Moore* opinion that suggests that this fact is of any consequence for purposes of this argument.

Davis also argues that the jury in his case could have voted to commit him "even if it believed that Mr. Davis is not currently dangerous." App. Br. at 34. In support of this argument, he postulates a situation in which there might be "expert testimony establishing that an individual has a 1% likelihood of reoffending over the course of a single year and that the overall likelihood or recidivism increases to 51% over the course of 51 years..." App. Br. at 34, FN 6. Davis does not, however, suggest that any such testimony or argument was offered in his trial, nor would the record support this contention. In fact, that actuarial testimony offered by the State's expert indicated that, on every actuarial tool, he was at high risk of reoffending: Dr. Hoberman testified that Davis' score on

the MnSOST-R, or Minnesota Sex Offender Screening Tool-Revised, put him in the group, 57% of whose members were rearrested for a new sex offense within 6 years of release from custody. RP at 375, 383. On the SORAG, or Sex Offender Risk Appraisal Guide, he had a raw score of 29. RP at 381. Of others in the sample with this score, 75% were arrested for a new violent offense in 7 years, and 89% were rearrested for a new sex offense in 10 years. RP at 381, 383. Davis' argument must be rejected.

5. "Undue Emphasis" On Likelihood to Commit Predatory Acts of Sexual Violence

Davis argues that, by defining the various crimes which David might be likely to commit if not confined, the instructions "placed undue emphasis upon one factor—the predatory acts of sexual violence that a person might commit if not confined." App. Br. at 36. Specifically, he takes exception to the trial court's instructions setting forth each of the sexually violent offense Davis was "likely" to commit, and defining each in turn. Davis did not take exception to these instructions at the time of trial. RP at 755.

Davis' argument is frivolous. The instruction used mirrors WPI 365.16, which reads, in pertinent part,⁹ "'Sexual violence' means:

⁹ WPI 365.16 also contains language that would be included if the case involved an allegation of a "recent overt act." Because no recent overt act was alleged in this case, any reference to such has been omitted in discussing this instruction.

_____". The Note on Use that follows WPI 365.16 instructs the court in pertinent part as follows:

Based on the evidence in the case, fill in the blank with the following crimes of sexual violence: (1) those with which the respondent has allegedly been charged or convicted; (2) those that the respondent is likely to commit in the future... For predicted future offenses... the court should also give instructions defining the elements of those crimes, as well as any instructions necessary to define terms used in those instructions. See the Comment below.

The entire trial—indeed, the entire Sexually Violent Predator Act—is concerned with the identification, incapacitation and treatment of those persons likely to commit "predatory acts of sexual violence." As such, it is critical that the jury know whether the person they are considering for commitment is in fact likely to commit the sorts of crimes the law seeks to prevent. Indeed, the only crimes enumerated (Inst. 8; CP at 31) or defined (Inst. 9-20; CP at 32-43) are those that Davis would be likely, in view of his past offenses, to commit. Davis' argument that his constitutional rights are violated simply because the trial court used a pattern instruction enumerating those offenses clearly included among those offenses the law seeks to prevent must be rejected.

C. Pedophilia Diagnosis/*Frye* hearing

Davis argues that that State's expert's diagnosis of Pedophilia should have been excluded under *Frye v. United States*, 293 F. 1013

(D.C. Cir 1923). Dr. Hoberman's diagnosis, he argues, was improper because Davis, who committed his last offense roughly two months before his 16th birthday, could not have met the diagnostic criteria for Pedophilia¹⁰ under the DSM IV-R (Diagnostic and Statistical Manual IV-R). App. Br. at 38. This, he argues, constitutes a "novel application" of the diagnosis, and, because the State did not affirmatively establish that this "novel application" was generally accepted in the scientific community, the evidence should have been excluded under *Frye*. App. Br. at 37-41.

This argument fails. First, Davis did not suggest at trial that a *Frye* hearing should have been conducted and as such has waived this argument on appeal. Even if this Court were to consider the merits of the argument, it should be rejected. The *Frye* test allows a court to admit "novel scientific evidence" only if the evidence is generally accepted in the relevant scientific community. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996). However, the *Frye* test is unnecessary if the

¹⁰ The diagnostic criteria for Pedophilia are: Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).

- A) The person has acted on these sexual urges or the sexual urges or fantasies cause marked distress or interpersonal difficulty.
- B) The person is at least 16 years of age and at least five years older than the child or children.

Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders* (4th rev. ed. 2000) (DSM-IV-TR) at 572 (emphasis added).

evidence does not involve new methods of proof or new scientific principles. *State v. Baity*, 140 Wn.2d 1, 10-11, 991 P.2d 1151 (2000). Here, no "novel method of proof" or "new scientific evidence" was implicated. As noted by the *Young* court 16 years ago, "The sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable cause and effect relation petitioners seek, the level of acceptance is sufficient to merit consideration at trial." *In re Young*, 122 Wn.2d 1, 57, 857 P.2d 989 (1993). As generally occurs at trial, there was a disagreement between experts on opposing sides as to whether a particular diagnosis was properly applied to a particular person. Such differences of opinion are properly resolved through cross examination, not through a *Frye* hearing.

A similar argument was considered and rejected by Division in *In re Detention of Post*, 145 Wn. App. 728, 187 P.3d 803 (2008). There, a committed sex predator attempted on appeal to argue that his constitutional rights had been violated by the trial court's consideration of the State's expert's diagnosis of Paraphilia Not Otherwise Specified: Rape. 145 Wn. App. at 754. Because this diagnosis was not based on "sound scientific principles," he argued, admission of evidence relating to this

diagnosis violated his rights to due process. Rejecting his attempt to raise this for the first time on appeal, the court noted that Post "improperly attempts to transform that which should have been raised as an evidentiary challenge in the trial court into a question of constitutional significance on appeal. In point of fact, Post attempts to sidestep the fact that he did not seek a *Frye* hearing in the trial court, and, thus, has not preserved an evidentiary challenge for review." *Id.*, at 755-56.

Davis seeks to avoid this result by arguing that the performance of his trial attorney was deficient. App. Br. at 39. The deficiency alleged appears to be that trial counsel, having lost his motion for summary judgment¹¹ challenging Dr. Hoberman's diagnosis of Pedophilia (CP at 53-191) did not then bring a *Frye* motion.

Davis has not demonstrated, however, that this constitutes deficient performance on the part of trial counsel. In order to prevail on an ineffective assistance of counsel claim, the claimant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant, "i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *In re Stout*,

¹¹ No written order on the trial court's order denying the motion for summary judgment appears to have been entered.

159 Wn.2d 357, 377, 150 P.3d 86 (2007). Davis points to nothing in the materials submitted in support of his summary judgment motion that would have supported a *Frye* motion, nor does he demonstrate that the result would have been different had he requested one.

While Davis argues that the pivotal fact for purposes of diagnosing Davis with Pedophilia was his age at the time of his criminal offenses, this is inaccurate. First, Davis' own experts both before¹² and at trial conceded that diagnosis of Pedophilia could be assigned to a person under the age of 16: Dr. Donaldson conceded that there could be a "pathological element to a 15-year-old having sex with a 4-year-old. RP at 650. When asked on cross examination whether he would apply the diagnosis to a person who was, at the time he molested a pre-pubescent girl, "15 years and 360 days old," Dr. Donaldson responded, "I might or I might not." RP at 683.

More importantly, the evidence of Davis' Pedophilia was not restricted to his criminal offenses committed before age 16. In addition to the actual offense committed, there was extensive evidence at trial of the persistence of Davis' "urges and fantasies" regarding sexual contact with children beyond the age of 16: *See e.g.* Exhibit 1 at 22-23 ("[I]n 9/99,

¹² Interestingly, the authors of one of the articles submitted in support of Davis' motion for summary judgment state only that "**Generally**, the individual must be at least 16 years of age and at least 5 years older the juvenile of interest to meet criteria for Pedophilia. In cases that involve adolescent offenders, **factors such as emotional and sexual maturity may be taken into account** before a diagnosis of Pedophilia is made." CP at 133.

Mr. Davis reported 'he realized he was having sexual thoughts of younger females around the age of 4 when he as 15-years-old. The sexual thoughts consisted of him putting his penis in the girls' vagina and having sexual intercourse with them ... [he] reports having sexual thoughts of all of his identified victims before and after the sexual contact with them. The client reports he continues to have sexual thoughts of his victims 3 times a month.'"); Exhibit 1 at 23 ("As noted in 4/00, [Mr. Davis] had acknowledged 'Deviant fantasies: Vulnerable small kids/sex.'"); Exhibit 1 at 12 ("In 10/00, Mr. Davis admitted, 'he has fantasized about very young girls & victim since [arriving] at [Maple Lane School]. Johnny minimized the fantasies & attempted to convince group that girls were older in my fantasies – not 4-6 but 9-10.'"). Dr. Hoberman also cited to a June, 1999 report by a psychologist hired by Davis' then-attorney in which the psychologist wrote that Davis had a "fixation on prepubescent girls for sexual gratification," (RP at 293) and emphasized that Davis had continued to report pedophilic sexual urges and fantasies up until 2004, when he was 20 years old. RP at 290.

This evidence placed Davis squarely within the explicit terms of the diagnostic criteria. As such, even if the trial court had taken seriously the argument that a dispute of this nature could conceivably lead to a *Frye* hearing, any attempt on Davis' part to cast the State's application of the

diagnosis as "novel" would have failed.¹³

D. Evidentiary Rulings

Davis argues that the trial court violated his rights to due process by "unfairly preventing" him from introducing relevant and admissible evidence (App. Br. at 41) while, on the other hand, permitting the prosecution to introduce various pieces of evidence that should not have been admitted. App. Br. at 44. Because Davis has not demonstrated that the trial court abused its discretion in making any of these rulings, all of these challenges fail.

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". ER 401. Even relevant evidence will be excluded "if its probative value is substantially

¹³ The real dispute at trial was not regarding Dr. Hoberman's application of the diagnosis, as set forth in the DSM-IV-TR, to the facts of Davis' case. Of more significance, from Dr. Donaldson's perspective, was the legitimacy of the diagnosis of Pedophilia at all. Dr. Donaldson appears not to have accepted the DSM at all as relates to the diagnosis (RP at 681), preferring a definition he attributed to "Fred Berlin, an international authority on Pedophilia," that a diagnosis of Pedophilia should not be made "unless the person was engaging in [the] behavior and didn't want to do it...they don't want to do it, and afterwards they feel terrible." RP at 681. This requirement, Dr. Donaldson conceded, was not a part of the DSM's diagnostic criteria. RP at 681. Dr. Donaldson also appeared to favor a requirement that the person being considered for the diagnosis of Pedophilia show a sexual preference for children, although he conceded, again, that the DSM-IV-TR does not require any such showing. RP at 682.

outweighed by the danger of unfair prejudice". ER 403. The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent manifest abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). Discretion is abused when based on untenable grounds or in a manifestly unreasonable manner. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93,107, 864 P.2d 937 (1994). "An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (internal citations omitted). Constitutional claims will not be reviewed in the absence of "considered argument;" "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *State v. Ladson*, 86 Wn. App. 822, 829, 939 P.2d 223 (1997), reversed on other grounds, 138 Wn.2d 343, 979 P.2d 833 (1999), citing *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir.1970)).

Because Davis fails to show that the trial court abused its discretion regarding any of his evidentiary objections, his arguments fail.

1. Admission of Testimony Relating To Treatment

Davis first argues that certain testimony which he sought to

introduce was improperly excluded. Although Davis was permitted to say that he believed that treatment at the SCC was inadequate, he was not permitted to testify regarding the federal injunction,¹⁴ lifted two to three months after he came to the SCC (and almost 4 years prior to trial), the success rate for treatment at the SCC, or his desire to find a therapist who could help him with treatment.¹⁵ App. Br. at 44. Beyond asserting that these subjects were "clearly of interest" to the jury (App. Br. at 44),¹⁶ Davis does not attempt to explain why these issues were relevant, the nature of the prejudice he suffered by being unable to discuss these matters, or how the outcome might have been different had he been able to "fully explain" his refusal to do treatment. App. Br. at 44.¹⁷ Nor, beyond

¹⁴ *Turay v. Seling*, Cause Number C91-664WD.

¹⁵ Although Davis lists this as one of the things he was not permitted to discuss at trial, none of the proffered citations to the record seem to refer to any such limitation.

¹⁶ Of the three jury questions cited by Davis in support of the contention that the topic of his refusal to do treatment at the SCC was "clearly of interest to the jury," only one would properly have elicited any testimony regarding Davis' views regarding the inadequate treatment at the SCC. ("You say treatment at S.C.C is inadequate, but you have never been in it. Why do you say treatment there is inadequate? You said 'I still want to get treatment.'" CP at 9. The other questions cited, while they have to do broadly with the issue treatment, would not properly have elicited any testimony regarding the program's inadequacies. ("To my knowledge the 12 step program is all about knowing the 12 steps. Why don't you remember anything about it? Is it possible that you were in another program thinking you were in the Alcohol 12 step program?" CP at 7. "You say you still have issues that need to be worked out. What are the issues?" CP at 8.)

¹⁷ Despite the fact that he was not permitted to testify to problems with the SCC's treatment program to the degree desired, Davis had many opportunities to discuss the inadequacies of the SCC. Asked about BMRs he had received, he explained that staff at the SCC could give you a BMR for "absolutely anything." RP at 167. He explained that he refused to take a TB test because the person at the SCC clinic insisted that his name was Dale, not Johnny, Davis. RP at 171. He explained that he had received many

a bare assertion, does he attempt to explain why this alleged failing rises to the level of a violation of his rights to due process.

The Washington State Supreme Court has twice rejected arguments that the trial court abuses its discretion when it refuses to permit testimony regarding treatment at the SCC. In *In re the Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999) the court affirmed the trial court's ruling excluding evidence relating to Turay's conditions of confinement, including treatment and the verdict in his federal litigation, as irrelevant, stating:

Turay's arguments in regard to this issue are meritless and demonstrate a fundamental misunderstanding of the purpose of an SVP commitment proceeding. The trier of fact's role in an SVP commitment proceeding, as the trial judge correctly noted, is to determine whether the defendant constitutes an SVP; it is not to evaluate the potential conditions of confinement. The particular DSHS facility to which a defendant will be committed should have no bearing on whether that person falls within RCW 71.09.020(1)'s definition of an SVP. Furthermore, **a person committed under RCW 71.09 may not challenge the actual conditions of their confinement, or the quality of the treatment at the DSHS facility until they have been found to be an SVP and committed under the provisions of RCW 71.09.**

Id. at 404 (citations omitted)(emphasis added). More recently, in

of the BMRs due to retaliation by friends of a staff member who had gotten fired. These friends, apparently, continued to "retaliate" against him on behalf of the terminated SCC staff. RP at 170-171; 196-97.

In re PRP of Duncan, 167 Wn.2d 398, 219 P.3d 666 (2009), an SVP respondent argued that he should have been permitted to cross examine one of the State's witnesses regarding the "success rate" of the SCC program. The court rejected his argument, stating that "it was within the judge's discretion to determine whether cross examination regarding the general success rate of the entire SCC program was appropriate for a case that dealt with the specific issue of whether Duncan was an SVP and not with whether the treatment offered was effective." 167 Wn.2d at 409. The court also rejected Duncan's argument that he should have been permitted to elicit testimony from his own expert regarding the quality of treatment at the SCC, agreeing with the Court of Appeals that such testimony was "'barely relevant' to the question of whether Duncan was likely to reoffend and that it 'in any event, is a side issue.'" 167 Wn.2d at 410, citing *In re Duncan*, 142 Wn. App. at 109-10, 174 P.3d 136

2. Admission of Irrelevant Information

Davis next argues that the trial court permitted the State to introduce various pieces of irrelevant evidence such that reversal is required. App. Br. at 44-48. First, he claims that the trial court should not have admitted evidence that Davis refused to participate in treatment while at the SCC. App. Br. at 45. Second, he claims that testimony to the effect that Davis was the subject of a sex offender notification campaign upon

his release from JRA was irrelevant and unfairly prejudicial. App. Br. at 46. Third, he argues that a statement to the effect that Davis had abused animals as a child was irrelevant, violated ER 404(b) and was highly prejudicial. App. Br. at 46. Fourth, he argues that the court's admission of evidence showing that Davis had received a manifest injustice disposition in 1999 was irrelevant and highly prejudicial. Finally, he argues that the prosecutor's question of Davis as to whether a statement by an earlier witness' testimony had been "incorrect" was improper, had the effect of eliciting irrelevant information, and had the potential for prejudice. App. Br. at 47. All of these arguments fail.

a. Refusal To Participate In Treatment At SCC

Davis argues that evidence of Davis' refusal to participate in treatment was both irrelevant and "highly prejudicial."¹⁸ App. Br. at 45-46. Contrary to Davis' urging, the fact that he refused to participate in treatment at the SCC was highly relevant to both his mental condition and his likelihood to reoffend, the critical issues at the trial. The State introduced an enormous amount of evidence showing that Davis was an untreated sex offender with no insight into his condition, no empathy for

¹⁸ Presumably, Davis intends to argue that such evidence violated ER 403, which provides in pertinent part as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...."

his victims, and no remorse for his actions. While there was extensive discussion of his participation in treatment in the past (RP at 317-19, 337, 387, 409, 410, 411), the evidence also demonstrated that, despite this past treatment, Davis did not understand the central principals of sex offender treatment and was unable to use basic concepts of treatment to reduce his risk. RP at 410. Dr. Hoberman explained that, in order to be successful in the community, the individual must "embrace..and enact" what has been taught in treatment. RP at 411-12. As such, this evidence was clearly relevant to the questions before the jury. To the extent that the information "suggested...that Mr. Davis was unwilling to take actions that might reduce his chances of recidivism," such an inference would be both entirely correct and highly relevant to the questions before the jury. Davis has not demonstrated that the trial court abused its discretion.

b. Sex Offender Notification

Davis argues that the trial court's admission of testimony relating to a sex offender notification was "unfairly prejudicial."¹⁹ This argument is not persuasive, and the trial court did not abuse its discretion in permitting the State to introduce such testimony.

Davis appears to object to the following exchange between the state's attorney and Ray Bourgeois, a police officer for the City of Liberty

¹⁹ Again, Davis appears to intend to argue that such evidence violated ER 403.

Lake. Officer Bourgeois had just explained that he had been involved in the investigation of Davis' 1996 assault of two young girls.

Q: After that day, were you aware of when Mr. Davis returned to the community?

A: He was out of the community for a couple of years. I had no contact with him or the family at that point. I'm assuming that he was incarcerated then at that time for juvenile—

[Defense counsel]: Objection, Your Honor, relevance.

The Court: Sustained.

Prosecutor: Thank you. I'm going to rephrase, Your Honor.

Court: Okay.

Q: What is sex offender notification?

Mr. Woodrow: Objection, your Honor, relevance.

The Court: I'll allow it.

A: That's a notification that the police departments do when a person has been released from being in custody, that he is a sex offender and is living in a particular neighborhood.

Q: Were you involved in the sex offender notification regarding Mr. Davis?

A: I was.

RP at 50.

Davis's argument that this exchange was somehow improper is meritless. First, Davis' counsel's objection in the trial court did not preserve the issue he now raises. Secondly, he did not object to the substantive testimony regarding the notification.

In general, an objection must be specific rather than general to preserve an issue for appeal. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). While an appellate court may consider the propriety of a ruling on a general objection if the specific basis for the objection is "apparent from the context," (*State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992)) ER 103(a.)(1). Counsel's objection as to relevancy would not have alerted the trial court to the alleged errors Davis now asserts. At most, he preserved an objection on the basis of relevance, not on the ground that the evidence was unduly prejudicial under ER 403. *See* 5 Karl B. Tegland, *Washington Practice: Evidence* § 103.11, at 43 (4th ed.1999) (objection only that evidence is "irrelevant" is merely a general objection unless some indication of the reason for irrelevancy is stated). *Guloy*, 104 Wn.2d at 421 Error due to violation of ER 403 is not of constitutional magnitude, and cannot be raised for the first time on appeal. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Because he did not preserve an objection based on

ER 403, it has been waived.

Nor did Davis's trial counsel object to the substantive testimony regarding the notification. Rather, he simply objected to the State's question, "[w]hat is sex offender notification?" That objection was properly overruled. Defense counsel made no further objection, and as such has waived this issue. Even if he had not, it would be without merit. In light of the enormous amount of evidence showing Davis' danger to the community, the mere fact that there had been a sex offender notification cannot possibly have been prejudicial.

c. Abuse of Animals

Next, Davis argues that the trial court should not have permitted the State to introduce testimony regarding his abuse of animals as a child, arguing that such information was irrelevant and "highly prejudicial." App. Br. at 46. RP at 75.

The line of questioning to which Davis objects occurred during the State's direct examination of Richard Peregrin, who had interviewed Davis at the request of JRA. The testimony occurred as follows:

Q: Did you ask Mr. Davis any questions about his relationship with animals?

A: I did.

Q: And what—

Defense counsel: I'm going to object as to relevance.

Court: I'll allow it.

RP at 75.

First, Davis did not preserve an objection under ER 403 or ER 404(b). As was the case with (b), above, Davis at most preserved an objection on the basis of relevance, not on the ground that the evidence was unduly prejudicial under ER 403 or that its admission violated ER 404(b).

Even if the Court considers his argument, it fails. Davis' history of cruelty to animals was consistent with his history of antisocial behavior, and constituted a showing that there was early evidence of this condition. Moreover, even if the evidence should not have been admitted, it strains credulity to suggest that such evidence, consisting as it did of roughly eight lines of testimony,²⁰ had a prejudicial effect in light of the totality of the evidence, evidence which included numerous references to digital and penile penetration of four-to six-year-old children.

Finally, Davis' assertion, without elaboration, that this violated ER 404(b) is likewise without merit. The state did not offer such testimony "to prove the character of the defendant in order to show action

²⁰ Mr. Peregrin testified that Davis told him that he used to trap his dog in a corner and kick it, break bird eggs and throw rocks at birds at age five, and kill bugs he and his sister would collect. RP at 75-76.

in conformity therewith" (ER 404(b)), but to show that Davis is a sexually violent predator. *In re Turay*, 139 Wn. 2d 379, 401-02, 986 P.2d 790 (1999). As such, ER 404(b) does not apply in this context.

d. Admission Of Manifest Injustice Disposition

Next, Davis objects to the trial court's admission of evidence that Davis had received a manifest injustice disposition in 1999 as irrelevant and "highly prejudicial." App. Br. at 46. Davis does not elaborate, and includes no citation to the record with regard to this matter. Nor does he indicate that he objected to admission of this evidence.

RAP 10.3(a)(5) requires parties to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Arguments that are not supported by pertinent authority or meaningful analysis need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (insufficiently argued claims); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (arguments not supported by adequate argument and authority). This Court should decline to consider this argument.

e. Testimony of Gianna Fleming

Finally, Davis argues that the court committed error by allowing

the prosecutor to ask Davis if Gianna Fleming's testimony as it related to Davis' fantasies regarding young girls was "incorrect." RP at 141; App. Br. at 47. Although trial counsel objected to the State's question, the basis of his objection was "facts not in evidence." RP at 141. Such an objection did not preserve the objection Davis now seeks to make. *Guloy*, 104 Wn.2d at 422. While, as noted above, an appellate court may consider the propriety of a ruling on a general objection if the specific basis for the objection is "apparent from the context," (*Braham*, 67 Wn. App. at 935 ER 103(a)(1)), Counsel's objection would not have alerted the trial court to the alleged errors Davis now asserts.

Even if trial counsel had correctly identified the basis upon which the question might have been objectionable, any failure to sustain the objection would have been harmless in light of the abundant trial testimony regarding Davis' ongoing fantasies.

E. The Circumstances Discussed Above Do Not Amount To Cummulative Error Requiring Reversal

Davis contends that the cumulative error doctrine mandates reversal in this case. Under this doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a fundamentally unfair trial. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849

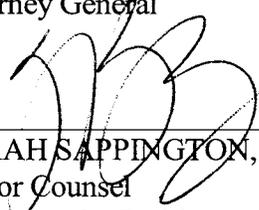
(1994). The cumulative error doctrine only applies when there are numerous prejudicial and egregious errors during trial. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). Where the claims of error are "largely meritless," reversal is not warranted. *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13, 33 (2006). Given these standards, and the above discussion of Davis' claimed errors, the cumulative error doctrine does not apply to this case. Therefore, reversal is not required.

III. CONCLUSION

For the foregoing reasons, the state respectfully requests that the court affirm the jury's verdict that Davis is a sexually violent predator and the trial court's order civilly committing him as such.

RESPECTFULLY SUBMITTED this 20th day of January, 2010.

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Attorneys for Petitioner State of Washington

NO. 38764-6-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of Johnny Davis

vs.

State of Washington

DECLARATION OF
SERVICE

10 JAN 22 PM 11:11
STATE OF WASHINGTON
BY
JENNIFER DUGAR
COURT OF APPEALS
DIVISION II

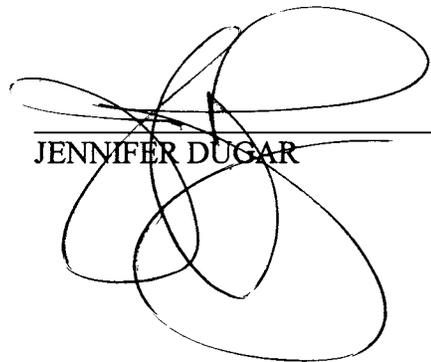
I, Jennifer Dugar, declare as follows:

On this 20th day of January, 2010, I deposited in the United States mail true and correct cop(ies) of Opening Brief of Respondent, Supplemental Designation of Clerk's Papers and Exhibits, and Declaration of Service, postage affixed, addressed as follows:

Manek Mistry
203 4th Ave E, Suite 404
Olympia, WA 98501

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

DATED this 20th day of January, 2010, at Seattle, Washington.


JENNIFER DUGAR