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I. ISSUE PRESENTED

- A. **Whether there was sufficient evidence at trial that Elmore was currently dangerous and continued to meet the definition of a sexually violent predator.**

II. STATEMENT OF THE CASE

A. Procedural History

In 1999, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of Keith Elmore pursuant to RCW 71.09. CP 123-24. On October 8, 2001, Elmore stipulated to civil commitment as an SVP.¹ Ex. 4. The parties submitted a report by a psychologist at the Special Commitment Center (SCC) as part of the stipulation. *Id.* The Clark County Superior Court ruled that Elmore was an SVP and committed him to the custody of the Department of Social and Health Services for placement in a secure facility for control, care, and treatment. *Id.* at 7. Pursuant to the SVP statute, Elmore must be held at this secure facility until such time as (a) his condition has so changed that he no longer meets the definition of an SVP; or (b) conditional release to a less restrictive alternative (LRA) is in his best interest and conditions can be imposed that would adequately protect the community. RCW 71.09.060(1).

¹ At some point after he stipulated to civil commitment, Keith Elmore changed his first name to Rebecca. RP II-A, 228; Ex. 4. Consequently, he is occasionally referred to as Rebecca in the record.

In October 2007, the Washington Supreme Court held that Elmore was entitled to a full evidentiary hearing where the State must establish, beyond a reasonable doubt, that Elmore remains an SVP. *In re Detention of Elmore*, 162 Wn.2d 27, 38, 168 P.3d 1285 (2007).² On January 12, 2009, a bench trial commenced in Clark County Superior Court pursuant to RCW 71.09.090(3)(b) on the issue of whether Elmore should be unconditionally released. RP I, 3-6³; CP 66. The State was required to prove beyond a reasonable doubt that Elmore's condition remains such that he continues to meet the definition of an SVP. RCW 71.09.090(3)(b). Evidence of the prior commitment trial and disposition was admissible in the unconditional release trial. RCW 71.09.090(3)(b); Ex. 4; RP III-B, 577-80, 594-96. The trial court found that Elmore's condition had not so changed that he no longer met the definition of an SVP. CP 113, 117-18. The court found that the State proved beyond a reasonable doubt that Elmore continues to be an SVP. CP 113, 117. The court issued a written ruling and entered written Findings of Fact and Conclusions of Law. CP 91-119.

² In *Elmore*, the Court held that the 2005 amendments to the SVP statute do not apply retroactively to Elmore. *Elmore*, 162 Wn.2d at 39.

³ For the Court's convenience, the State will use the Verbatim Report of Proceedings citation system utilized by Appellant.

B. Unconditional Release Trial

1. Sexually Violent Offense

Elmore was born on June 12, 1956. CP 114. On October 25, 1994, Elmore was convicted of assault in the second degree with sexual motivation and kidnapping in the second degree with sexual motivation.⁴ Ex. 2, 3; RP II-B, 360. On February 7, 1995, the court sentenced Elmore to an exceptional sentence of 60 months in prison. Ex. 3. Elmore has been either incarcerated or in a secure facility since he committed these crimes. RP III-B, 583-84.

These convictions involved an incident in July 1994 where Elmore lured a female acquaintance, Lolene C., to his apartment and attempted to strangle her with the intent to cut her up and eat her body parts. RP II-B, 328; RP I, 48. Elmore had devised an elaborate plan to kill and cannibalize Lolene and used a ruse in order to lure her to his apartment. RP II-B, 328.

Elmore discussed this crime in detail in both his deposition and

⁴ Both of these offenses are sexually violent offenses within the meaning of RCW 71.09.020(15). Note: This is the citation to the statute that was in effect at the time of Elmore's trial. The SVP statute was amended on May 7, 2009; however, none of the changes are relevant to any issue raised by Appellant. The only changes applicable here have to do with a renumbering of some of the statutory provisions. For example, the definition of sexually violent offenses is currently located at RCW 71.09.020(17). Where applicable, the State will use the numbering in effect at the time of Elmore's trial, with an explanatory footnote.

with Dr. Robert Wheeler.⁵ Ex. 8 at 65-79, 92-94; RP I, 48-54. Dr. Wheeler testified that Elmore told him he planned to carry out a fantasy he had been having since his early to mid teenage years. RP I, 48. The fantasy involved an elaborate abduction of a woman whom he intended to strangle to death after tying her up, forcing her to consume alcohol, dismembering her body with a knife, and then frying up and eating her body parts. RP I, 48-49. Elmore targeted Lolene because she was an easy victim who was submissive and vulnerable. RP I, 49.

Elmore told Dr. Wheeler that he concocted a story where he told Lolene that he had some tools for her husband and to meet him at his apartment. RP I, 51. He told her not to tell anyone and asked her to meet him at a mini-mart so it would be more difficult for the police to trace her vehicle to him. *Id.* He placed a chair in the middle of the room so he could easily approach her from behind. *Id.*; RP II-B, 328. He had purchased some rope and cut it into three pieces in order to tie her up and then strangle her. RP I, 51-52; RP II-B, 328. He planned to force her to strip, strangle her to death, and then cut up her body and eat the parts. RP I, 52. Elmore described in elaborate detail how he would dismember her and butcher her body. RP I, 52-54; RP II-B, 338.

⁵ The deposition of Elmore taken by the State in 2001 was admitted into evidence at the unconditional release trial. *See* Ex. 8. Dr. Wheeler was the State's expert for Elmore's initial civil commitment trial. RP I, 36-42.

After Elmore lured Lolene to his apartment, he placed the rope around her neck and ordered her to strip. RP I, 130; RP III-A, 448-49. When she refused to comply, Elmore ran to get a sledgehammer and Lolene escaped. RP I, 130; RP III-A, 496.

2. Twin Rivers Sex Offender Treatment Program

After his conviction, Elmore participated in the Twin Rivers Sex Offender Treatment Program while in prison. RP I, 84-85; RP II-B, 405. He participated in the treatment program from April 1996 until July 1997, when his treatment team terminated him from the program. RP II-B, 405. He never completed the program. *Id.* Elmore made minimal progress in treatment, his participation was superficial, he failed to control his deviant masturbation, and failed to disclose his deviant fantasies. RP I, 84-85; RP II-B, 406. Despite the fact that his treatment team stressed the importance of keeping a journal of his fantasies, Elmore refused to do it. RP I, 86-87, 90.

3. Testimony from Dr. Wheeler

Dr. Robert Wheeler is a licensed psychologist who was retained by the State for Elmore's initial commitment trial. RP I, 29, 36-42. He interviewed Elmore for a total of 18 hours on three separate occasions in 1999. RP I, 38-39. Dr. Wheeler testified at the unconditional release trial about numerous statements Elmore made to him about his prior conduct

and sexually deviant fantasies over the years.

During the weeks prior to his attack on Lolene, Elmore was preoccupied with the fantasy of strangling, dismembering, and consuming a woman.⁶ RP I, 54-55. He masturbated to this fantasy on a regular basis. RP I, 54. Dr. Wheeler characterized these as sadistic fantasies. RP I, 46. Elmore was significantly aroused by the fear and terror the victim would experience when she realized he planned to kill her. RP I, 55. The arousal intensified with the victim's anticipated fear and terror and with his feelings of power and control over her. *Id.* Elmore reported that the anticipation of terrorizing the victim intensified his arousal until he reached ejaculation. RP I, 56.⁷

Elmore described three deviant fantasies he had been having since puberty. RP I, 59-60; Ex. 8 at 50-54. The first fantasy involved him masturbating to skinning a woman and wearing her skin. RP I, 59. The

⁶ Elmore referred to his cannibalistic fantasies as "consuming fantasies," meaning consuming the body parts of women he dismembered in order to feminize himself. RP I, 46-47, 121. Consuming fantasies, dismemberment fantasies, and cannibalistic fantasies all refer to the same thing. RP I, 121-22.

⁷ Elmore has reported ejaculating at different times during these fantasies, either at the point of consuming the body parts or at the victim's fear and terror. He also reported ejaculating at the point he imagined himself becoming a woman (after consuming her body parts). RP I, 55-56, 64. When Dr. Wheeler asked Elmore if he assumed he was going to have to keep killing women to get enough estrogen, Elmore replied, "I had the basic idea that just one would not be enough." RP I, 65. While one component of his fantasy was to transform into a woman, the other component was his arousal to the victim's terror and fear and his sense of power and control. RP I, 122-23, 159. Having someone completely under his control was a component of his sexual arousal. RP I, 123.

second fantasy involved him masturbating to being shrunk down into a hypodermic needle, injected into a woman, and circulating through her body until he reached her crotch where he would expand and inhabit her body. *Id.* The third fantasy involved killing and butchering a woman, chopping up her body parts into frying pan size pieces and eating them. RP I, 59-60; Ex. 8 at 55.

Elmore said that he masturbated to the cannibalistic fantasy for approximately 20 years. Ex. 8 at 54-55. This fantasy predominated his teenage years and he continued to have it for sustained periods of time throughout his adulthood. RP I, 60. Elmore claimed that this fantasy stopped approximately eight to twelve months before meeting with Dr. Wheeler; however, he was still having intrusions. RP I, 60, 134.

Elmore described his fantasy of butchering a woman in detail to Dr. Wheeler. Elmore said that he intended to restrain her with a rope around her neck, tight enough to cause her fear. RP I, 63. He would force her to strip, tie her arms and legs together, and pour alcohol down her throat to make her drowsy and drunk. *Id.* He would then strangle her with a rope or his hands and cut her up into cookable pieces. *Id.* Elmore used this entire fantasy while masturbating. RP I, 63-64. When asked why he went through this ritual instead of just killing the woman, Elmore said that part of his arousal pattern was instilling fear and terror in the woman and

the sense of power and control he gained from her knowing that she was completely under his control. RP I, 64.

Not only did Elmore express no remorse for his behavior, but Dr. Wheeler indicated that Elmore was devoid of affect in describing his cannibalistic fantasies. RP I, 65, 158. Elmore said that he simply found the fantasy of killing, butchering, and consuming a female arousing. RP I, 66.

Elmore was married to Judy D. from approximately 1988 to 1994. RP I, 73. During their marriage, Elmore had these cannibalistic fantasies on a fairly ongoing basis, which intensified during stressful times. RP I, 73-74. Dr. Wheeler spoke with Judy D. who confirmed these cannibalistic fantasies and that Elmore wanted to literally eat her body parts. RP I, 138-40. He masturbated to these fantasies and vocalized them to his wife, despite her objections and discomfort. RP I, 74, 84. Elmore verbalized these cannibalistic fantasies to his wife during sexual intercourse and reported that he took pleasure in her fearful response and was aroused by her fear and discomfort. RP I, 74-75, 140; Ex. 8 at 86-89, 97-100.

From approximately 1990 to 1993, Elmore saw a therapist, at his wife's insistence, regarding his verbalization of these deviant fantasies. RP I, 83-84. However, Elmore continued to engage in this behavior

despite his wife's objections throughout their marriage. RP I, 84. Elmore told Dr. Wheeler that he would ask her to select a body part for him to consume and if she had selected one, he would have interpreted that as permission to act out his fantasy. RP I, 75-76. As Elmore's fantasies intensified and as his verbalizations became increasingly graphic, Elmore's wife divorced him. RP I, 75, 141.

Toward the end of their marriage, Elmore put a 16-inch knife in a dresser drawer to use in case he was able to act out his fantasy of killing his wife. RP I, 78. Elmore reported that he didn't go through with the killing because he couldn't figure out how to explain her disappearance to her children. RP I, 79; Ex. 8 at 100. Elmore reported that killing her would not have bothered him in the short term. RP I, 79, 158. Dr. Wheeler also described an incident where Elmore's wife reported waking up to Elmore strangling her. RP I, 79-80. Elmore reported that it probably occurred, but claimed to be sleeping. RP I, 80.

Elmore told Dr. Wheeler that for the five years preceding his attack on Lolene, he was unable to ejaculate during sexual intercourse unless he engaged in a cannibalistic fantasy. RP I, 78. The fantasy was obligatory to having sexual intercourse with his wife. RP I, 76. Elmore said that he couldn't get sexually aroused without engaging in this deviant fantasy. Ex. 8 at 90.

While in prison, Elmore had cannibalistic fantasies about his female supervisor. RP I, 88. Elmore told Dr. Wheeler that he continued to have cannibalistic fantasies throughout most of his prison sentence. RP I, 88, 91. He masturbated during these cannibalistic fantasies, and his most intense sexual arousal was to the victim's fear. RP I, 91.

In 1999, Elmore told Dr. Wheeler that stress was a major risk factor for him and that he knew he needed help and needed more work. RP I, 92. Elmore also reported still having intrusive deviant, cannibalistic fantasies while masturbating, but that he would try to stop them. RP I, 92-93. Elmore admitted that he was not sure if these controls would work in a more stressful situation. RP I, 93, 134. Dr Wheeler diagnosed Elmore with Sexual Sadism in 1999. RP I, 138. Dr. Wheeler testified that at that time, there was no evidence that treatment had ameliorated his Sexual Sadism. RP I, 165.

4. Testimony from Dr. Phenix

At trial, the State offered the expert opinion testimony of clinical psychologist Dr. Amy Phenix, Ph.D. Dr. Phenix has been a licensed psychologist since 1992 and is currently licensed in both Washington and California. RP II-B, 295-96. She has extensive experience in the

evaluation, diagnosis, treatment, and risk assessment of sex offenders.⁸ RP II-B, 296-301. She is familiar with the SVP law and has evaluated approximately 350 individuals in various states to determine if they meet the statutory criteria as an SVP.⁹

As part of her evaluation of Elmore, Dr. Phenix reviewed extensive records, including court records, police reports, prison records, mental health and treatment records, SCC records, depositions, and trial transcripts. RP II-B, 302-04. Dr. Phenix testified that the records she reviewed were the type that she and other mental health professionals reasonably rely on in evaluating sex offenders. RP II-B, 303-04. She also personally interviewed Elmore for more than four hours on December 1, 2008. RP II-B, 305.

Dr. Phenix testified that, in her professional opinion, Elmore suffers from two mental abnormalities: a paraphilia known as Sexual Sadism and Personality Disorder Not Otherwise Specified (NOS) with borderline and dependent traits. RP II-B, 311, 319-22. In making this diagnosis, Dr. Phenix relied on a classification system universally used by

⁸ Dr. Phenix's Curriculum Vitae outlines her extensive education and experience. Ex. 23.

⁹ Dr. Phenix has evaluated individuals in eight different states and collectively finds that individuals do not meet criteria about 55 percent of the time. The reason most of the Washington evaluations result in her finding that the person meets criteria is due to Washington's comprehensive screening process that refers only the more high-risk sex offenders. RP II-B, 298-300.

mental health professionals known as the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV, TR). RP II-B, 306-07.

Dr. Phenix testified in detail about the "overwhelming evidence" supporting Elmore's diagnosis of Sexual Sadism.¹⁰ RP II-B, 321-33. Dr. Phenix testified that Elmore is sexually aroused to causing pain, fear, and terror in a victim, and that the primary motivation behind his cannibalistic fantasies and behaviors is sexual arousal. RP III-A, 449. Records indicate that Elmore disclosed in treatment that he gets more excitement and thrill out of hurting a person than he does from the actual sexual act and that the more frightened a person is, the more sexually excited he becomes. RP II-B, 347-48. Elmore also disclosed that he frequently daydreamed about how pleasurable it would be to hurt someone during sex. RP II-B, 348. Furthermore, Elmore's penile plethysmograph (PPG) testing revealed some sexual arousal to the sadistic rape of a female and to an assault against a female. RP III-B, 583.

Key to Dr. Phenix's Sexual Sadism diagnosis was how entrenched Elmore's sadistic fantasies were and the fact that he had been reinforcing these sexual fantasies for decades by repeatedly masturbating to thoughts

¹⁰ Sexual Sadism is essentially deviant sexual arousal to causing pain, torture, or harm, either physically or psychologically, to another person. RP II-B, 321.

of strangling, killing, dismembering, and eating the body parts of a female.

RP II-B, 323-26. Dr. Phenix explained that killing a woman and eating her flesh is a sadistic act:

[Elmore] reported these originally emerging in his mid teens, just about when he would be developing his sexuality. At about age thirteen or fourteen he started to experience these sexual fantasies. These fantasies became very, very persistent, repetitive and -- and had lasted from about his mid teens to about -- the last evidence we have that he experienced these fantasies was as recently as 2000. ... The fantasies were very elaborate and detailed fantasies. This is a person who became aroused to the restraint and bondage of a woman, which is a very typical sadistic behavior, very classic for sexual sadism. So binding the woman's hands and feet, strangling the woman, and then, of course, dismembering the person. He has reported that his most -- his -- his peak arousal or his most aroused and this is typical of sadism -- to the fear that the individual experiences knowing that they are being completely controlled by him, dominated by him, and that they know that they'll be killed. And that fear is something that's sexually arousing to Mr. Elmore.

RP II-B, 323-24, 354.

The entrenched nature of the fantasy, and Elmore's report of masturbating to it on a daily basis, is very significant because a paraphilia is a lifelong, enduring, pervasive disorder, and the longer the sexual deviancy exists and the more it is reinforced, the more certain one can be that the disorder is still present. RP II-B, 324-26. Dr. Phenix testified in detail about Elmore acting out these fantasies against his wife and subsequently against Lolene. RP II-B, 326-39. The strangulation incident

involving his wife left physical marks on her neck, and she thought Elmore was going to kill her. RP II-B, 327; RP III-A, 494. Furthermore, Elmore admitted to his own expert, Dr. Wollert, that he intended to murder his wife when he strangled her. RP V, 986. Elmore also said that he was sexually aroused and got an erection while strangling his wife. RP II-B, 369; RP V, 987. Elmore then masturbated afterwards to his longstanding fantasy of cannibalism. RP II-B, 369; RP V, 1004.

Elmore continued to have sexual fantasies of cannibalism after he was incarcerated, including toward a female supervisor whom he viewed as controlling. RP III-A, 420-21. Dr. Phenix testified that this shows the pervasive nature of the fantasy and that it can easily be transferred to any female. *Id.* Furthermore, Elmore's detailed plans of restraining, binding, strangling, and dismembering a victim was highly rehearsed and arousing to him. RP II-B, 338. Dr. Phenix testified that his sexual arousal to violence and the victim's fear defines Sexual Sadism. RP II-B, 339. His arousal to the control aspect is also a sadistic trait. RP III-A, 556. Dr. Phenix testified that Elmore is still currently suffering from Sexual Sadism, which is a very deviant disorder that is chronic, lifelong, and pervasive. RP II-B, 339-40; RP III-A, 546-47.

Dr. Phenix testified that Sexual Sadism is the most deviant of all sexual disorders. RP II-B, 343. Although the expression of the fantasies

may ebb and flow, it does not disappear on its own and may become more apparent during times of stress. RP II-B, 340; RP III-A, 546. Elmore has acknowledged that stress is a high risk for him and a precursor to offending. RP II-B, 342. Moreover, there were periods of time in Elmore's life when his deviant fantasies either decreased or stopped, only to return again years later. RP II-B, 340-42.

Dr. Phenix testified that evidence of Sexual Sadism has been present since Elmore was approximately age 13 and that it has continued throughout his adult life. RP II-B, 332. She testified that Elmore has never been disturbed by his sadistic fantasies, which is a trait of sexual sadists. RP II-B, 332-33. She testified that Elmore's Sexual Sadism affects his emotional and volitional capacity. RP II-B, 332-35. She explained not only the "striking deficits" in his emotional capacity, but also his "very, very poor volitional controls." RP II-B, 333-35. She explained that when Elmore was in treatment after strangling his wife, and trying to gain some behavioral controls, he escalated out of control to the point of luring a victim to his apartment with the intent to kill her.¹¹ RP II-B, 335. Dr. Phenix emphasized that nothing has changed for Elmore in terms of gaining any volitional control over his deviance. *Id.*

¹¹ She also testified about the "overwhelming evidence" in the record that Elmore was actively searching for a victim and had tried to lure multiple women to his apartment in order to carry out his plan. RP II-B, 336-37; RP III-B, 584-86.

Dr. Phenix testified in detail about Elmore's personality disorder and how it continues to currently lead to a pattern of unstable relationships that are fraught with difficulty. RP II-B, 354-59. Elmore's borderline and dependent personality traits can be seen in his current relationship with H.P., which Elmore continues to pursue despite all the dysfunction and problems it causes him. RP II-B, 356-58, 401-02; RP III-A, 425. Elmore focuses only on H.P., isolating himself from other people. RP III-A, 425. Dr. Phenix testified that this is a risk factor for him and a precursor to offending. *Id.* Moreover, Elmore's offense cycle involves him being dependent on other people, leading to a buildup of tension and passive-aggressive behavior, which is similar to his behavior prior to his sexually violent offenses. *See* Ex. 8 at 82-84. Elmore was currently displaying this same offense cycle in his relationship with H.P. at the SCC. *See* RP II-A, 211-12, 225-27; RP II-B, 352-59; RP III-A, 425.

Dr. Phenix testified that Elmore's recent limb amputation fantasies were the ultimate expression of his dependent personality. RP II-B, 359. She explained that his personality disorder contributes significantly to his negative mood states, causes him constant, ongoing distress with people, and contributes to his inability to cope with the world. *Id.* She testified that his personality disorder acts as a precursor to his offending and to the fact that he acts out on his sadistic fantasies. *Id.* Dr. Phenix also testified

that his mental abnormality and personality disorder cause him to have serious difficulty controlling his sexually violent behavior. RP II-B, 365-66.

Dr. Phenix testified that when she met with Elmore the month before trial, he denied significant aspects of his crime that he had previously admitted to in detail. RP II-B, 361-64.¹² Elmore now denied that he planned the offense, denied having any fantasies about it, claimed that he did not intend to strangle Lolene or cut her up and cannibalize her, and that he only planned to put the rope around her neck and let her go. RP II-B, 362-64; RP III-A, 428-29. Elmore did not believe he had a sexual deviancy problem. RP III-A, 445. Dr. Phenix testified that this denial and his failure to recognize important aspects of his offense cycle indicate Elmore has a lot of work to do in treatment. RP II-B, 364-65.

Dr. Phenix testified in detail about the risk assessment she did to determine whether Elmore was likely to commit future predatory acts of sexual violence. RP II-B, 372-407; RP III-A, 419-35, 443-50; RP III-B, 581-85. Although she generally relies on actuarial risk assessment to assess a person's risk, she explained the limitations of actuarial instruments and how they cannot accurately be applied to someone like

¹² Elmore described his detailed planning of the crime during his deposition. Ex. 8 at 68-77, 91-94. He also described it in detail to Dr. Wheeler. RP I, 51-54.

Elmore whose paraphilia is so "very rare."¹³ RP II-B, 380-83; RP III-B, 576-77. Dr. Phenix did not use an actuarial instrument to assess Elmore's risk because it would lead to misleading and inaccurate results. RP II-B, 380-83; RP III-A, 501-02, 517, 526, 533-36.¹⁴

In assessing Elmore's risk, Dr. Phenix looked at research-based factors related to future sexual reoffense. RP II-B, 384; RP III-B, 582. She also considered Elmore's history of sexual deviance, the type of fantasies he has experienced, and his ability to control them. RP III-B, 582. She testified that research shows the strongest predictor of future sexual reoffense is sexual deviance. RP II-B, 384; RP III-B, 582.

Dr. Phenix used an instrument called the Stable 2007, which is commonly relied on by experts in the field. RP II-B, 384-86. This instrument assesses dynamic or changeable risk factors that are the target of treatment. RP II-B, 385. If these factors are present, they increase the risk of future sexual reoffense. *Id.* "So for someone who has been in

¹³ Dr. Phenix was not the only psychologist who evaluated Elmore and opined that actuarial instruments were inapplicable to Elmore. Both Dr. Wheeler and Dr. Richards testified that they should not be applied to Elmore. *See* RP I, 163-64; RP II-A, 197.

¹⁴ Actuarial instruments involve group data based on the development sample studied. If the sample doesn't include a significant number of offenders with paraphilic conditions like Elmore, then the resulting statistics and risk assessment will be misleading. Sexual sadists only make up 2 to 5 percent of all sex offenders. Elmore has not only Sexual Sadism, but also a paraphilia for cannibalism and a diagnosed Gender Identity Disorder. Because of all of these disorders, Dr. Phenix testified that "we keep moving farther and farther away from any sample that we would see in the development of these actuarial instruments." RP II-B, 373-83.

treatment, it's essential that you look at the presence of those risk factors in assessing risk and to see if treatment has reduced their risk on those factors." RP II-B, 386. Dr. Phenix testified in detail about this instrument and the risk factors that increase Elmore's risk, including significant social influences, intimacy deficits, sexual self-regulation, cooperation with supervision, and general self-regulation. RP II-B, 392-403.

Dr. Phenix testified that Elmore has not made significant progress in treatment since he was committed as an SVP. RP III-A, 421-22. Elmore has remained in the same treatment phase for seven years.¹⁵ RP II-B, 405. Elmore had recently been manipulative and dishonest in treatment, particularly as it relates to his relationship with H.P. RP III-A, 425-26. Dr. Phenix testified that Elmore has a low motivation for treatment, his interest waxes and wanes, he refuses to journal his thoughts and fantasies, and he quit treatment on two separate occasions. RP III-A, 423-27. Elmore returned to treatment after quitting the second time only because he was told that as a non-participant he would be moved to a different unit and separated from H.P. RP III-A, 423-24.

Dr. Phenix testified that Elmore does not have a current understanding of his offense cycle and has not developed a relapse

¹⁵ At the unconditional release trial, Elmore was in Phase 3 of the SCC treatment program, which was the same treatment phase he was in when he stipulated to civil commitment as an SVP in 2001. RP II-B, 405.

prevention plan in order to manage his deviancy if released. RP II-B, 404; RP III-A, 427-28. Dr. Phenix testified that these are important factors in terms of his risk to the community. RP II-B, 404.

Dr. Phenix testified that Elmore has not so changed since his initial commitment trial in 2001 such that he no longer meets criteria as an SVP. RP III-A, 429, 444. She testified that Elmore has not progressed in treatment and has a severe paraphilic condition that requires intensive treatment. RP III-A, 444. Dr. Phenix testified that in her expert opinion, to a reasonable degree of psychological certainty, Elmore's mental abnormality and personality disorder cause him to have serious difficulty controlling his behavior and make him likely to commit predatory acts of sexual violence if not confined in a secure facility. RP II-B, 365, 369-71; RP III-A, 449-50.

5. Testimony from Dr. Richards

At the time of trial, Dr. Henry Richards was the Superintendent of the SCC where Elmore resides.¹⁶ RP II-A, 183. In that capacity, he was responsible for all the activities at the SCC, including administrative functions, clinical programming, and the care and control of the residents. RP II-A, 183-84. The Superintendent makes the determination whether a

¹⁶ The Curriculum Vitae of Dr. Richards outlines his extensive education and experience. Ex. 21.

resident has sufficiently changed through treatment to be unconditionally released or released to an LRA. RP II-A, 186. Dr. Richards was involved in Elmore's case due to Elmore's unusual diagnosis.¹⁷ RP II-A, 186-89.

Dr. Richards was familiar with Elmore's file and evaluated him in late 2003 to assist with diagnosis and formulating a treatment plan.¹⁸ RP II-A, 195-98. His evaluation included a great deal of psychological testing. RP II-A, 197-99. Testing revealed that even in a controlled environment like the SCC, Elmore was overwhelmed, had very difficult coping problems, and was socially isolated and withdrawn. RP II-A, 207, 212. Testing also indicated that he was likely to deny anger, despite actually harboring a great deal of anger, and to have difficulty dealing with it effectively. RP II-A, 207. Dr. Richards testified that this testing was consistent with previous testing and other reports regarding Elmore at the SCC. RP II-A, 208.

Testing also revealed that Elmore was very goal persistent in the face of frustration. RP II-A, 209. Elmore directly displayed this behavior at the SCC by his persistence in pursuing relationships with other residents that were counterproductive to his treatment progress. RP II-A, 210.

¹⁷ Dr. Richards indicated that Elmore was the only case he has encountered of someone having an ongoing paraphilic arousal to consuming flesh. RP II-A, 189.

¹⁸ Although Dr. Richard's evaluation of Elmore was done in 2003, he was familiar with Elmore's current functioning at the SCC and had monitored Elmore's case since his involvement. *See* RP II-A, 186-90, 196, 242.

Dr. Richards noted that Elmore showed this same persistence in the community when he persisted in pursuing his goal of attacking and cannibalizing a woman despite knowing it was wrong. *Id.*

Dr. Richards testified that Elmore's lengthy relationship with another resident at the SCC is consistent with the diagnosis of Sexual Sadism. RP II-A, 211-12. Dr. Richards described the sadomasochistic elements present in Elmore and in his merger fantasies.¹⁹ RP II-A, 219-22. He explained the sadistic and masochistic aspects of Elmore's fantasy, which was to destroy the person, take her essence, and discard the rest. RP II-A, 220.

Dr. Richards also testified that Elmore has a severe and profound disturbance in self. RP II-A, 212-13. Part of that impairment involves him discounting reality whenever it is inconsistent with his goals. RP II-A, 216. This interferes with his treatment progress. *Id.* Dr. Richards testified that Elmore has been repeatedly told that in order to progress in treatment he must keep a detailed journal of his sexual

¹⁹ By "merger fantasies," Dr. Richards was referring to Elmore's ongoing fantasies over the years of merging himself with a female, who would give her body to him and he could discard her head and become female. *See* RP II-A, 210-211, 219-21. Elmore explained these fantasies in explicit detail and sent them to Dr. Wheeler. Ex. 45; RP I, 69-70. In "I become you" Elmore wanted a female to give her body to him so he could discard her brain and insert his own brain into her skull, thereby becoming female. Ex. 45. In "Neck and Head Sendoff" Elmore wanted his entire head transplanted onto the female's body. Elmore had various ideas of what to do with her head, including displaying it on a shelf in his home, turning it into an alarm clock, or plugging her head into a speaker phone. Ex. 45. These writings were admitted at trial. *See* Ex. 45; RP III-B, 598-99.

fantasies and behaviors and discuss it in therapy. RP II-A, 216-17. Elmore refuses to comply. RP II-A, 217, 241. This is a critical component of treatment. RP II-A, 241.

Although Elmore claims that he wants to comply and be cooperative with treatment, his actions do not correspond with that. RP II-A, 216-18. Dr. Richards explained that one of the hallmarks of working with severe offenders is to be very concerned if the person appears to have made progress, but his behaviors are inconsistent with that. RP II-A, 218. This is the case with Elmore. RP II-A, 218-19, 224-25. Dr. Richards believes that Elmore's lack of participation in treatment is because Elmore has some plans he would rather not share involving his current sexual interests. RP II-A, 219.

Dr. Richards testified that Elmore has remained in phase three of the treatment program for a number of years and has not progressed through treatment. RP II-A, 216-17, 222. Elmore has "pretty much been self-defeating in regard to his treatment" and "has undermined his own treatment." RP II-A, 222. A goal in treatment is to have open communication about a person's thoughts, fantasies, and behaviors, in order to provide feedback to the person. RP II-A, 224. However, Elmore has not done that. *Id.* In fact, Elmore has actually regressed in treatment. RP II-A, 234. Dr. Richards testified that Elmore was currently denying

even the most basic aspects of his offense cycle, despite having previously acknowledged and written about them in detail. *Id.*

Dr. Richards described Elmore's relationship with SCC resident H.P. over the years and how problematic it is to Elmore's progress. RP II-A, 226-40. Elmore was still enmeshed in a relationship with H.P. at the time of trial. RP II-A, 226, 237. Dr. Richards testified that Elmore spent a lot of time in therapy discussing how the roots of his problem stem from his relationship with his mother, who was controlling and dependent. RP II-A, 224-25. Yet, Elmore continues to establish relationships that are exactly like that at the SCC, including his relationship with H.P. RP II-A, 211, 225. When confronted about it, Elmore refuses to change his behavior and persists in the relationship. RP II-A, 225.

Dr. Richards testified that Elmore refused to comply with his treatment team's directive that he not have contact with H.P. because it was interfering with and undermining his treatment. RP II-A, 236-39. Elmore has received infractions due to his relationship with H.P., and many staff members believe their relationship is sexual in nature, which is against the rules at the SCC. RP II-A, 235-36; RP II-B, 398-400. Elmore also exhibited an ongoing pattern of deception about this relationship, including lying about being threatened in order to move closer to H.P. RP II-A, 225, 239-40. Dr. Richards testified that this is particularly

problematic because as residents progress through treatment, they are expected to be transparent and honest. RP II-A, 240.

Elmore was currently involved in several relationships that were not only counterproductive to his treatment progress, but also were drawing him back into his pathology. RP II-A, 225-26. Dr. Richards testified that Elmore's relationship with H.P. and H.P.'s wife is a counterproductive relationship that helps Elmore reproduce the fantasy of becoming a woman. RP II-A, 226. If Elmore were unconditionally released, he wanted to live with H.P.'s wife. RP II-A, 227, 239. In fact, Elmore was making her a wedding dress, and Dr. Richards believed Elmore was imagining himself as the bride. RP II-A, 227. This led to a concern that H.P.'s wife could become a potential victim. RP II-A, 239.

Dr. Richards explained:

And this seems like a duplication of wanting to take a woman's place. It's -- it's a form of -- of masked envy of the woman. And I think that that pattern of envy is directly related to his craving of eating a woman to become a woman. So I see his current relationship, the triangle with H.P. and H.P.'s wife, as a recapitulation of his offense dynamics of finding a way through a man to become a woman. In fact, in his -- his offense he used a man to find a woman to try to become that woman.

RP II-A, 227.

Dr. Richards also testified that Elmore's symptom pattern hasn't

even stabilized over the years.²⁰ RP II-A, 231-33. Dr. Richards testified that Elmore's symptoms fit a pattern that "classically has been referred to as polymorphous perversity[,]" which is a sexualized symptom that when addressed or frustrated changes into something else:

And my feeling is that at this point we haven't seen the end of the kinds of symptoms that Mr. Elmore will present. I believe his current sexualized relationship with Mr. H.P. is a new form of symptom and that it may have sort of in a way substituted for the conscious craving of eating a woman in that he now has the ability to substitute the identification with Mr. H.P.'s wife and with his own submission to Mr. H.P. for that symptom.

RP II-A, 232.

Dr. Richards reviewed recent records involving Elmore, including his most recent annual review, and testified that there was no indication that Elmore's condition had so changed that he no longer met the definition of an SVP. RP II-A, 242. Dr. Richards testified that as the Superintendent of the SCC, he did not support Elmore's unconditional release. RP II-A, 243.

²⁰ In 2003, while at the SCC, Elmore revealed additional sexual masturbatory fantasies he was having regarding having his own legs and arms amputated. RP II-A, 204, 232; RP II-B, 350. This is another paraphilia known as apotemnophilia, which is a person who is sexually aroused to having his limbs amputated. RP II-B, 349. Elmore worked on this deviancy for several years in treatment. RP II-B, 350. Dr. Phenix testified that this arousal to having his limbs amputated and being completely dependent on another person was an expression of his dependent personality disorder. RP II-B, 352-53.

III. ARGUMENT

Elmore argues on appeal that the State failed to prove beyond a reasonable doubt that Elmore was currently dangerous and continued to meet criteria as an SVP. Elmore also assigns error to several Findings of Fact and Conclusions of Law entered by the trial court. Elmore's argument is without merit, as there was substantial evidence presented at trial to find that Elmore was currently dangerous and continued to meet criteria as an SVP. Because of the overwhelming evidence at trial regarding Elmore's mental abnormality and personality disorder and his likelihood to reoffend, this Court should affirm his commitment.

A. Standard of Review

The criminal standard of review applies to sufficiency of the evidence challenges under the SVP statute. *In re the Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). "Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 744.

In reviewing the sufficiency of the evidence, the reviewing court does not determine whether *it* believes the evidence at trial was proven beyond a reasonable doubt. *State v. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005), *overruled on other grounds by Washington v.*

Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). This court must look at the evidence in the light most favorable to the State and the commitment must be upheld if any rationale trier of fact could have found the essential elements beyond a reasonable doubt. *In re Detention of Audett*, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006).

In this sufficiency challenge, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the Appellant. *See Audett*, 158 Wn.2d at 727. An appellate court should not second guess the credibility determinations of the fact-finder. *In re the Detention of Halgren*, 156 Wn.2d 795, 811, 132 P.3d 714 (2006); *see also In re Personal Restraint Petition of Davis*, 152 Wn.2d 647, 680, 101 P.3d 1 (2004) ("A trial court's credibility determinations cannot be reviewed on appeal, even to the extent there may be other reasonable interpretations of the evidence.") Appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Detention of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005). "Determinations of credibility are for the fact finder and are not reviewable on appeal." *Hughes*, 154 Wn.2d at 152.

B. Current dangerousness is established by the fact-finder properly finding that the person meets the statutory criteria as a sexually violent predator.

The issue at trial was whether Elmore's mental condition had "so changed" since his 2001 commitment trial such that he no longer meets the criteria as an SVP. RP I, 3-6; RCW 71.09.090(4). An SVP is an individual "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(16).²¹ "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 unconditionally released. RCW 71.09.020(7). A mental abnormality is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

The SVP statute is premised on a finding of present dangerousness. *In re Detention of Henrickson*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000). The definition of mental abnormality is tied directly to present

²¹ The current statutory provision is located at RCW 71.09.020(18).

dangerousness. *Id.* This tie to current dangerousness is required because due process requires that an individual be both mentally ill and presently dangerousness before he may be civilly committed. *See In re Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993). Due process concerns are satisfied because the SVP statute requires dangerousness as a condition for civil commitment. *Id.* at 31; *See* RCW 71.09.020(16).²²

The SVP statute inherently applies only to dangerous offenders. *Young*, 122 Wn.2d at 32. When a person is incarcerated prior to the civil commitment trial, the State may rely on the offender's offense history, mental condition, expert testimony, and other relevant, probative evidence to establish the offender's current dangerousness. *See Froats v. State*, 134 Wn. App. 420, 438-39, 140 P.3d 622 (2006). "The point of *Young* is that an individual's conduct during incarceration is not necessarily probative of current dangerousness given the relative difficulty, if not impossibility, of committing an offense during incarceration." *Froats*, 134 Wn. App. at 439. The Washington Supreme Court has held that by properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact-finder impliedly finds that the person is currently dangerous. *In re Detention of Moore*, 167 Wn.2d 113, 124-25, 216 P.3d 1015 (2009). In Elmore's case, the trial court entered specific

²² The current statutory provision is located at RCW 71.09.020(18).

findings as to each and every required statutory element. CP 114-19.

C. The State presented sufficient evidence that Elmore was currently dangerous and continued to meet the definition of a sexually violent predator.

In this case, a review of the record indicates that there was sufficient evidence for the trial court to find, beyond a reasonable doubt, that Elmore continued to meet criteria as an SVP. Taken in the light most favorable to the State, the evidence overwhelmingly supported both a finding that Elmore was currently dangerous and that his mental abnormality and personality disorder cause him serious difficulty controlling his behavior and make him likely to engage in sexually violent acts if unconditionally released.

Elmore assigns error to several Findings of Fact and Conclusions of Law entered by the trial court and argues that there was insufficient evidence to support these findings. Because there was substantial evidence supporting the court's findings and conclusions, this Court should affirm Elmore's commitment.

Unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *In re Detention of Anderson*, 166 Wn.2d 543, 549, 211 P.3d 994 (2009). An appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence.

Jones, 152 Wn.2d at 8. "Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the findings." *Id.* The party challenging a factual finding bears the burden of proving that it is not supported by substantial evidence in the record. *Davis*, 152 Wn.2d at 680.

In order to uphold Elmore's commitment, this Court must find that the fact-finder had sufficient evidence to find the following elements:

1. That the Respondent has been convicted of or charged with a crime of sexual violence; and
2. That the Respondent suffers from a mental abnormality or personality disorder; and
3. That such mental abnormality or personality disorder makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

Audett, 158 Wn.2d at 727; RCW 71.09.020(16).²³ Although a separate finding is not required, the third element must be supported by proof beyond a reasonable doubt of serious difficulty controlling one's behavior. *Audett*, 158 Wn.2d at 728.

1. **Findings of Fact 8 and 13 are supported by sufficient evidence and the court did not err in entering Conclusions of Law 4, 6, and 7.**

Findings of Fact 8 and 13 read as follows:

8. Having compared the testimony of Dr.'s Phenix and Wollert, the Court concludes that Respondent suffers from

²³ The current statutory provision is located at RCW 71.09.020(18).

Sexual Sadism, a condition that is chronic and long term, as well as Personality Disorder, Not Otherwise Specified (NOS), with Borderline and Dependent features.

13. The Court, in weighing the evidence provided by the experts, finds the State's evidence more persuasive than [sic] that evidence presented by the Respondent on the issues of diagnosis, loss of volitional control, and the likelihood of recidivism, the effect of advancing age and as to whether Respondent's condition has "so changed" since the original commitment.

Conclusion of Law 4, 6, and 7 read as follows:

4. The Respondent suffers from a mental abnormality as that term is defined in RCW 71.09.020(8), namely Sexual Sadism.

6. The Respondent's Sexual Sadism and Personality Disorder NOS with Borderline and Dependent features cause him serious difficulty controlling his sexually violent behavior.

7. The combination of the following is sufficient to conclude that the Respondent's mental disorders cause him serious difficulty controlling his sexually violent behavior: Respondent's Sexual Sadism, Personality Disorder NOS with Borderline and Dependent features, the Respondent's prior sexually violent behavior, and the testimony of Dr. Phenix linking the Respondent's mental disorders to a serious difficulty controlling his behavior.

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences must be drawn in favor of the State. *Audett*, 158 Wn.2d at 727. Dr. Phenix testified that Elmore currently suffers from Sexual Sadism, which is a chronic and lifelong mental condition, and from Personality Disorder NOS with borderline and

dependent features. RP II-B, 311, 339-40. Dr. Phenix testified in detail about these mental abnormalities. RP II-B, 319-33, 338-43, 347-48, 353-59; RP III-A, 425, 449, 546-47, 556; RP III-B, 583.

Dr. Phenix explained the "overwhelming evidence" that supports Elmore's current diagnosis of Sexual Sadism. RP II-B, 321-33, 339-40. She testified that Elmore is sexually aroused to causing pain, fear, and terror in a victim, and that the primary motivation behind his cannibalistic fantasies and behaviors is sexual arousal. RP III-A, 449. She testified about how entrenched Elmore's sadistic sexual fantasies were and that he had been reinforcing them for decades by repeatedly masturbating to thoughts of strangling, killing, dismembering, and eating the body parts of a female. RP II-B, 323-26. She explained that the longer such a sexual deviancy exists and the more it is reinforced, the more certain one can be that the disorder still exists. RP II-B, 324-26. Dr. Phenix testified that Elmore's sexual arousal to violence and the victim's fear defines Sexual Sadism. RP II-B, 339.

Dr. Phenix also testified in detail about Elmore's personality disorder and how it continues to currently lead to a pattern of unstable relationships that are fraught with difficulty. RP II-B, 354-59. She testified that his borderline and dependent personality traits are seen in his current relationship with H.P., which Elmore continues to pursue despite

all the dysfunction. RP II-B, 356-58, 401-02; RP III-A, 425. Evidence also indicated that Elmore was currently in his offense cycle in his relationship with H.P. See RP II-A, 211-12, 225-27; RP II-B, 352-59; RP II-A, 425; Ex. 8, at 82-84. Dr. Phenix testified that Elmore's personality disorder acts as a precursor to his offending and to the fact that he acts out his sadistic fantasies. RP II-B, 359.

Dr. Phenix explained how these mental disorders affect Elmore's emotional and volitional capacity. RP II-B, 332-35. She also testified about how these disorders cause him serious difficulty controlling his sexually violent behavior. RP II-B, 365-66.

Appellant argues in his brief that Dr. Wheeler testified that Elmore "has volitional control"²⁴ and that Dr. Phenix testified about Elmore's "lack" of emotional and volitional control and what she believed made him "incapable of volitional control." See Brief of Appellant at 15-16. Dr. Phenix's testimony was that Elmore's mental disorders affect his emotional and volitional capacity, which is what the SVP statute requires. See RP II-B, 333-35; RCW 71.09.020(8), (16).²⁵ The law does not require

²⁴ Dr. Wheeler did not testify that Elmore "has volitional control." In response to questioning about if Elmore stopping the assault and not killing Lolene demonstrated "some volitional control" on Elmore's part, Dr Wheeler responded that "it reflects some degree of volitional control, recognizing that volitional control exists along a continuum." RP I, 126-27.

²⁵ RCW 71.09.020(16) is currently located at RCW 71.09.020(18).

that the person lack all control or be incapable of volitional control, but rather that his mental disorder *affects* his volitional control and causes him seriously difficulty controlling his behavior. *Thorell*, 149 Wn.2d at 731-36; RCW 71.09.020(8).

Elmore's volitional control was clearly affected when he couldn't stop himself from strangling his wife and when he couldn't stop himself from luring, kidnapping, and assaulting Lolene with sexual motivation. Although Elmore arguably exercised *some* volitional control in not *killing* either female, he did not exercise volitional control in assaulting and strangling them. RP III-A, 493-95, 557; *see also*, CP 104. Clearly Elmore's volitional capacity was affected during the incident involving Lolene because he committed two sexually violent offenses against her before she escaped.²⁶

Dr. Phenix testified in detail about how she assessed Elmore's risk, and she testified that he was likely to commit future acts of sexual violence if not confined in a secure facility. RP II-B, 372-403; RP III-A, 449-50. She looked at research-based factors related to future sexual

²⁶ Appellant states in his brief that Dr. Richards testified that Elmore was in the low maintenance unit for residents who had "good control over their behavior..." *See* Brief of Appellant at 3. However, Dr. Richards clarified that he was only referring to "behaviors like keeping your room clean and going to the dining room without hitting someone over the head." RP II-A, 287-89. Dr. Richards was not referring to control over his sexually violent behavior. RP II-A, 287. Moreover, regardless of the unit where the person resides, the SCC is a secure facility. *See* RP III-B, 583-84.

reoffense. RP II-B, 384; RP III-B, 582. She also considered Elmore's history of sexual deviance, the types of fantasies he has experienced, and his ability to control them. RP III-B, 582. She testified that sexual deviance is the strongest predictor of future sexual reoffense. RP II-B, 384; RP III-B, 582.

Dr. Phenix also assessed Elmore's risk using an instrument called the Stable 2007, which assesses dynamic risk factors that are the target of treatment. RP II-B, 384-87. She testified that for someone in treatment, it is essential to look at the presence of these risk factors in assessing risk in order to ascertain whether treatment has reduced their overall risk. RP II-B, 386. If the factors are present, they increase the risk of future sexual reoffense. RP II-B, 385. Dr. Phenix testified in detail about the risk factors that increase Elmore's risk, including significant social influences, intimacy deficits, sexual self-regulation, cooperation with supervision, and general self-regulation. RP II-B, 392-403. She also testified that she did not believe it was appropriate to reduce Elmore's risk based on his age. RP III-A, 430-34.

Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the required elements beyond a reasonable doubt. Because there was substantial evidence in the record to support the court's findings, the trial court did not err in entering

Conclusions of Law 4, 6, and 7. Appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *Brotten*, 130 Wn. App. at 335. The trial court clearly found the State's evidence more persuasive, including finding the testimony of Dr. Phenix more credible and persuasive than Dr. Wollert. CP 95-113.

In its written ruling, the trial court made the following statements regarding the credibility of Dr. Wollert: "One danger in his approach is the injection of a high degree of subjectivity." CP 96. "One weakness of Dr. Wollert's testimony is the clear and obvious bias that he brings to the inquiry and to the courtroom." CP 98. The court discussed how Dr. Wollert minimized Elmore's behaviors and how Dr. Wollert opined that Elmore fabricated his sadistic fantasies despite the fact that there was "not one shred of evidence in this case" that anyone planted the violent fantasies in Elmore's mind. CP 101. The court concluded that:

The persuasive evidence in this case convinces me that Dr. Wollert has simply chosen to disregard the strongest aspect of the State's case – that Respondent was afflicted by recurrent, pervasive, violent fantasies, supporting the diagnosis of Sexual Sadism.

CP 102. The court noted that while it was impressed with the education and experience of both experts, it was more persuaded by the testimony of Dr. Phenix "because she actually applies all that education, training,

experience, skill, and judgment, in her analysis of Respondent.²⁷ CP 111.

2. Finding of Fact 14 is supported by sufficient evidence.

Finding of Fact 14 reads as follows:

14. Specifically, on the issue of predictability of future re-offenses, while the Court recognizes that the actuarial method of prediction is admissible in Washington courts, this Court, upon review of the evidence in this case, gives little or no insight to the actuarial data, for the reasons set forth in this Court's ruling on January 27, 2009.

In its written ruling, the court explained in detail the basis for its decision to not rely on actuarial data to assess Elmore's risk. CP 105-11. There was substantial testimony at trial to support this finding. Dr. Phenix testified that actuarial instruments cannot accurately be applied to someone like Elmore and that using them would lead to misleading and inaccurate results. RP II-B, 380-83; RP III-A, 501-02, 517, 526, 533-36; RP III-B, 576-77. In addition, both Dr. Wheeler and Dr. Richards testified that actuarial instruments should not be used to assess Elmore's risk. *See* RP I, 163-64; RP II-A, 197. Prior psychologists who evaluated Elmore also agreed with this. RP III-B, 581. Even Dr. Donaldson, one of Elmore's retained experts, stated that Elmore was "so far outside the

²⁷ The trial court's entire written ruling is located at CP 91-113.

actuarial framework I don't think it means much."²⁸ Ex. 52 at 30; CP 153-54.

Dr. Wollert was the only psychologist evaluating Elmore who used an actuarial approach to assess his risk. The trial court was not persuaded by Dr. Wollert's testimony and indicated that using an actuarial approach in a vacuum would "ignore substantial and compelling evidence" in Elmore's case. CP 105-07. "If the court were engaged in selling life insurance, I would be more persuaded than I am. Dr. Wollert conceded that the actuarial approach is not very accurate in individual cases." CP 105.

Moreover, Dr. Wollert's actuarial assessment of Elmore in 2000 was the same as it was during the 2009 trial and reflected a low risk to reoffend. RP IV-B, 832, 918; RP V, 1008. However, in 2001, Elmore stipulated and admitted that he was likely to reoffend, in effect admitting that the actuarial method used by Dr. Wollert was erroneous. CP 109-10; Ex. 4. The court noted that "[t]he effect of Respondent's stipulation in October, 2001 cannot be ignored, although it appears that Dr. Wollert chooses to ignore it."²⁹ CP 110.

²⁸ In the middle of trial, Elmore decided not to have Dr. Donaldson testify at trial. However, Dr. Donaldson's deposition was admitted at trial as part of the record. Ex. 52; RP I, 14-15; RP III-B, 599-607.

²⁹ Dr. Wollert also testified that he never believed Elmore met criteria as an SVP, even dating back to his initial involvement in 2000. RP IV-B, 914.

3. The court did not err in entering Conclusions of Law 8 and 9.

Conclusions of Law 8 and 9 read as follows:

8. The Respondent's mental abnormality and personality disorder make him likely to engage in predatory acts of sexual violence unless he remains confined to a secure facility.

9. The evidence presented at the Respondent's trial proves beyond a reasonable doubt that the Respondent continues to be a sexually violent predator, as that term is defined by RCW 71.09.020(16), and that his condition has not so changed that he is no longer a sexually violent predator.

There was substantial evidence at trial in support of these conclusions of law. Dr. Phenix testified that Elmore's mental abnormality and personality disorder make him likely to engage in future predatory acts of sexual violence. RP II-B, 369-71; RP III-A, 449-50. She also testified in detail about how Elmore has not so changed since his initial commitment trial such that he no longer meets criteria as an SVP. RP III-A, 429, 444. She testified in detail about his lack of progress in treatment and the numerous current risk factors present in Elmore that make him likely to reoffend. RP II-B, 392-404; RP III-A, 421-28, 444.

Appellant appears to argue in his brief that Elmore's progress in treatment was irrelevant and should not have been at issue in the trial. *See* Brief of Appellant at 16-17. He is simply incorrect. Elmore's lack of

progress in treatment speaks directly to Elmore's risk and whether he has "so changed" such that he is no longer an SVP. Dr. Phenix specifically looked at the dynamic risk factors present in Elmore that are the target of treatment. RP II-B, 384-87. She testified that when a person is in treatment, it is essential to look at those risk factors to ascertain whether treatment has reduced the person's risk. RP II-B, 385-86.

The fact that Elmore has not progressed in treatment since he was committed as an SVP speaks volumes about his risk. The evidence indicated that Elmore is manipulative and dishonest in treatment, refuses to participate in key aspects of treatment, does not understand his offense cycle, and does not have a relapse prevention plan in place. RP II-B, 404; RP III-A, 423-27. In fact, Elmore has actually regressed in treatment, as he was currently denying significant aspects of his crime that he had previously admitted to in detail. *See* RP II-B, 361-64; RP III-A, 428-29. All of these factors are highly relevant to Elmore's risk. They also indicate, quite clearly, that Elmore's condition has not so changed such that he longer meets the definition of an SVP. As the trial court explained in its ruling, "If anything, it appears that any change he has experienced in his condition has been in the opposite direction." CP 113.

Dr. Phenix testified that in her expert opinion, to a reasonable degree of psychological certainty, Elmore's mental abnormality and

personality disorder cause him to have serious difficulty controlling his behavior and make him likely to commit predatory acts of sexual violence if not confined in a secure facility. RP II-B, 365-66, 369-71; RP III-A, 449-50. Viewing the evidence in the light most favorable to the State, with all reasonable inferences from the evidence drawn in favor of the State, a rationale trier of fact would have found the State proved beyond a reasonable doubt that Elmore continues to meet criteria as an SVP.

IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 13th day of April, 2010.



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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

DEPUTY

In re the Detention of:

KEITH ELMORE

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION OF
SERVICE

I, Kelly Hadsell, declare as follows:

On this 13th day of April, 2010, I deposited in the United States
mail true and correct cop(ies) of Brief Of Respondent and Declaration of
Service, postage affixed, addressed as follows:

Anne Cruser
PO Box 1670
Kalama, WA 98625

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

DATED this 13th day of April, 2010, at Seattle, Washington.


KELLY HADSELL