

NO. 32193-2-III

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

In re Detention of Jonathan Parsons,

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN PARSONS,

Appellant.

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

The Honorable Robert Lawrence-Berrey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. A PERSONALITY DISORDER THAT DOES NOT MAKE ONE MORE LIKELY TO COMMIT SEXUALLY VIOLENT ACTS IS, AS A MATTER OF LAW, NOT RELEVANT TO WHETHER ONE SUFFERS FROM A MENTAL ABNORMALITY OR TO WHETHER ONE SHOULD BE COMMITTED

“Mental abnormality” is defined as “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). In contrast, a “[p]ersonality disorder” means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment.” RCW 71.09.020(9). In addition, evidence of a personality disorder “must be supported by testimony of a licensed forensic psychologist or psychiatrist.” Id.

Either of these definitions may qualify a person for commitment. RCW 71.09.020(18). However, the mental abnormality or the personality disorder must “make[] the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” Id. Because mental abnormalities predispose persons to “commi[t] . . . criminal sexual acts,”

they will likely almost always satisfy the commitment criteria. RCW 71.09.020(8). This is not true of personality disorders.

Some personality disorders may not make a person more likely to engage in predatory acts of sexual violence. That type of disorder cannot satisfy the commitment criteria as a matter of law.

The evidence established that Parsons's alleged personality disorder did not make him more likely to engage in predatory acts of sexual violence:

Q. Now, the same question that I've asked you about the others . . . as a standalone diagnosis, not as working interacting with the sadism diagnosis but as a standalone diagnosis, would your disassociation of Mr. Parsons' personality disorder with these different features be a . . . mental abnormality, that would cause him to commit sexually violent offenses in the future?

A. Okay. What I'll say is as a hypothetical question that I'm being asked, if I was to exclude the other things that I know about him and only look at that, then I would say that didn't qualify. But that's not the reality of the person I'm looking at, that it is related to other things. So, yeah, that disorder without the sexual violence would not predispose one to sexual violence.

2RP 376 (cross examination of Putnam) (emphasis added). The State and the trial court agreed and the trial court instructed the jury only on Parsons's alleged mental abnormality. CP 925; 2RP 628, 658.

The trial court nonetheless erred by allowing the jury to consider personality disorder evidence to determine whether Parsons suffered from a

mental abnormality and whether Parsons was likely to engage in predatory acts of sexual violence if not confined. This error requires reversal.

- a. The State ignores RCW 71.09.020's definitions in claiming that Parsons's alleged personality disorder is relevant to whether Parsons qualifies for commitment

The State claims Parsons's alleged personality disorder was relevant because it "interacts with and is related to his sexual sadism." Br. of Resp't at 13. The State also quotes Putnam: "Mr. Parsons is a person with a lot of characteristics that all come together in one person. They're not all distinct features. They are all part of who he is." Br. of Resp't at 13-14 (quoting 2RP 282). The State contends that Parsons's personality disorder is relevant because it provides a more holistic assessment of Parsons.

This argument is better addressed to a panel of psychologists than a panel of judges. Although Parsons's alleged "personality disorder plays into his mental abnormality" as a matter of psychiatric best practices, see Br. of Resp't at 14, this cannot change clear and unmistakable statutory definitions. United States v. Hoffman, 154 Wn.2d 730, 741, 116 P.3d 999 (2005) ("It is an axiom of statutory interpretation that where a term is defined [courts] will use that definition.").

To commit a person under chapter 71.09 RCW, he or she must suffer "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(18). A disorder that does not make a person more likely to engage in predatory sexual acts falls outside the statutory definition of “sexually violent predator.” Such a disorder is thus irrelevant because it does not meet this statutory definition.

Similarly, a “[m]ental abnormality . . . affect[s] the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts” RCW 71.09.020(8). A personality disorder that has no affect on emotional or volitional capacity that predisposes a person to commit criminal sexual acts is, by definition, excluded from the definition of mental abnormality. Such a disorder is also irrelevant because it does not meet this statutory definition.

The State does not discuss these statutory definitions. Instead, the State asserts that courts and juries need to look at Parsons as “one person” irrespective of the definitional statutes. Br. of Resp’t at 14 (quoting 2RP 282). But no court can evade controlling statutory language.

The State’s expert admitted that Parsons’s disorder did not qualify as a mental abnormality and did not qualify Parsons for commitment. 2RP 376. The trial court and the State agreed. CP 925; 2RP 628, 658. Because Parsons’s supposed disorder fell outside the RCW 71.09.020’s mental abnormality and sexually violent predator definitions, the alleged disorder was not relevant—as a matter of statutory interpretation and common

sense—to any issue the jury had to decide. It should have been excluded from the jury’s consideration.

b. Parsons did not waive or invite any error

The State claims Parsons waived or invited the trial court’s error in permitting the jury to consider irrelevant personality disorder evidence. The State is again mistaken.

After the close of the State’s case, Parsons moved to dismiss the evidence pertaining to the disorder: “The state has to prove each element of the petition beyond a reasonable doubt, and they can’t prove the personality disorder prong.” 2RP 417. The State now splits hairs, arguing that the motion to dismiss evidence regarding Parsons’s alleged personality disorder is not the same as moving to strike the personality disorder evidence on relevance grounds. Br. of Resp’t at 10-11.

When Parsons renewed his motion to dismiss in the context of jury instructions, he made clear: “Our position is either the state should choose, which they could do right now, and send the case to the jury only on the mental abnormality prong, or you need to instruct them so that we can parse out what they actually do when they make their decision.” 2RP 605. Parsons clearly argued for “pars[ing] out” the personality disorder evidence from the mental abnormality evidence. This adequately preserved the

argument that the jury should not have been allowed to consider the personality disorder evidence to find a mental abnormality.

In the same vein, Parsons did not invite the error. The State cites the first part of defense counsel's discussion but neglects the second. Br. of Resp't at 14 (citing 2RP 418). Although defense counsel initially did not move to strike, 2RP 418, counsel later did just that, moving the court to dismiss the disorder evidence altogether and to instruct the jury it could only consider evidence pertaining to the mental abnormality prong. 2RP 604-05 (arguing court should instruct the jury only on diagnoses conditions that fell under the mental abnormality prong, sadism and paraphilia NOS). Although the court ultimately declined "to instruct on the minute diagnoses . . . the specific diagnoses set forth in the petition," 2RP 637, counsel's request to parse the personality disorder evidence from the mental abnormality evidence overcomes the State's invited error claim.

Even if Parsons waived or invited this error, this court should still exercise its discretion to consider it. State v. Osborne, 140 Wn. App. 38, 41, 163 P.3d 799 (2007) (holding appellate courts have discretion to review legal argument raised for first time on appeal). RAP 1.2(a) provides, "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling

circumstances where justice demands” The State does not attempt to make any showing of compelling circumstances supporting the avoidance of this case’s merits. This court should review the merits and reverse.

2. IT IS UNCLEAR ON WHAT GROUNDS THE JURY
BASED ITS COMMITMENT VERDICT

The personality disorder prong and the mental abnormality prong are “alternative means for making the SVP determination.” In re Detention of Halgren, 156 Wn.2d 795, 810, 132 P.3d 714 (2006). The trial court allowed the jury to consider evidence of an alleged disorder in determining whether the alleged mental abnormality made Parsons likely to engage in sexually violent acts. 2RP 637. But, as discussed, the alleged disorder did not predispose Parsons to sexual violence and therefore could not support the verdict. 2RP 376.

The State argues, “Nothing in the record indicates any reliance on Parsons’[s] personality disorder as a means for his civil commitment.” Br. of Resp’t at 16. This is Parsons’s precise point. Because the State opposed an instruction and the trial court refused it, this court cannot know whether the jury impermissibly relied wholly or partially on the disorder evidence. Because the State cannot show the verdict was based solely on the mental abnormality evidence, it cannot show unanimity on the mental abnormality prong. This uncertainty regarding unanimity requires reversal.

3. PUTNAM'S CONJECTURE REGARDING LIKELIHOOD OF RECIDIVISM WAS UNRELIABLE AND INADMISSIBLE

The State claims Parsons's "criticism of Dr. Putnam's risk assessment . . . goes to the weight of the evidence and not its admissibility." Br. of Resp't at 24. Specifically, the State criticizes Parsons's reliance on Lakey v. Puget Sound Energy, 176 Wn.2d 909, 920, 296 P.3d 860 (2013), because there the expert "failed to follow the proper methodology which rendered his conclusions unreliable." Br. of Resp't at 24-25. But because Putnam admitted there was no methodology to follow, the trial court erred in admitting his testimony regarding his selection of Parsons into the high-risk, high-needs reference group.

While Putnam claimed to have been trained with "guidelines" to determine reference group placement, he admitted, "There is not an instrument for picking a norm group." 2RP 319-21. He also testified there was no "specific study showing how to match or relating to matching the groups." 2RP 366. Because Putnam himself conceded there was no scientifically validated means to select norm groups, Putnam's selection was not reliable. Unreliable methods are not helpful to the trier of fact and are not admissible. Lakey, 176 Wn.2d at 918. Putnam's norm group selection testimony amounted to nothing more than unfounded, unverified, and unreliable supposition. The trial court erred in admitting it.

The trial court at least should have held a Frye¹ hearing because Putnam's methodologies are not accepted in the scientific community.

As the State points out, under Frye, the ““core concern . . . is only whether the evidence being offered is based on established scientific methodology.”” Br. of Resp't at 17 (quoting In re Pers. Restraint of Young, 122, Wn.2d 1, 56, 857 P.2d 989 (1993) (quoting State v. Cauthron, 120 Wn.2d 879, 889, 846 P.2d 502 (1993))). As discussed, Putnam divulged that his “methodology” of placing Parsons into a high-risk, high-needs group was not scientifically tested and had never been verified. 2RP 321, 366. Parsons also provided significant scholarship that called into question the “methodology” Putnam claimed to employ. See Br. of Appellant at 24-25. Because Putnam's speculative methods were not actually accepted in the scientific community and had not been established by scientific methodology, the trial court erred in failing to hold a Frye hearing.

The State also asserts Parsons is disingenuous by arguing that Putnam's 2010 method, about which he testified, has been supplanted by the SRA-FV and is therefore no longer accepted in the scientific community. Br. of Resp't at 22 n.7. But the trial court allowed outdated methods that were no longer accepted in the scientific community to be presented to the jury in violation of Frye.

¹ Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

The SRA-FV, a novel risk assessment instrument, requires vetting under Frye. In re Detention of Ritter, 177 Wn. App. 519, 525, 312 P.3d 723 (2013). As a result, the trial court properly excluded testimony regarding Putnam's 2013 use of the SRA-FV. CP 910-13, 1RP 87-88, 102, 104-05. The trial court instead permitted Putnam to testify about his 2010 methods, which the SRA-FV was designed to replace. 1RP 123-24, 128-29, 3RP 5-7. But at the time of trial these 2010 methods were also outdated and no longer accepted in the scientific community. As a result, neither of Putnam's methods was accepted in the relevant scientific community. Had the court conducted a Frye hearing as required, the court would have realized that Putnam could not establish that any of his methods were accepted in the scientific community and would have excluded Putnam's testimony regarding assigning Parsons's the high risk reference group.

4. INVOLUNTARY COMMITMENT IS INCARCERATION

Involuntary commitment is incarceration. Application of Gault, 387 U.S. 1, 50, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); In re Detention of D.F.F., 172 Wn.2d 37, 40 n.2, 256 P.3d 237 (2011).

The State argues the trial court did not abuse its discretion even though it applied an incorrect understanding of the law. Br. of Resp't at 25-26. But, by restricting Parsons's use of the word "incarceration," the trial

court employed an incorrect legal standard. State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). The trial court thus abused its discretion.

B. CONCLUSION

Parsons did not receive a fair trial. The jury was permitted to consider wholly irrelevant personality disorder evidence to determine that Parsons suffered from a mental abnormality. Putnam's placement of Parsons into a "high risk" recidivism group was nothing more than guesswork—Putnam's methods were unreliable, unhelpful to the trier of fact, and should have been excluded. At the very least, the trial court erred by not conducting a Frye hearing on Putnam's rank conjecture. Parsons also remains incarcerated and thus should have been able to use the word "incarcerated" at trial. Parson's trial was unfair. This court must reverse and remand for retrial.

DATED this 20th day of October, 2014.

Respectfully submitted,

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v.)	
)	
JONATHAN PARSONS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 20TH DAY OF OCTOBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL PER AGREEMENT OF THE PARTIES PURSUANT TO GR30(b)(4) AND/OR BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF OCTOBER 2014.

X *Patrick Mayovsky*