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NO. 49881-2

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

In re the Detention of Joel Reimer:

STATE OF WASHINGTON,

Respondent,

v.

JOEL REIMER,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

After a fair trial, a unanimous jury found, beyond a reasonable doubt, that Appellant Joe Reimer continues to be a sexually violent predator. Reimer raises three issues, none of which has merit. First, he claims that his constitutional right to testify at trial was violated; however, Reimer was present in court and testified during the State's case, never unequivocally asserted he wanted to testify a second time, and cannot prove that his attorneys actually prevented him from testifying a second time, in his case-in-chief. Second, Reimer claims that the State's cross-examination of defense expert Dr. Henry Richards was improper because it violated a motion in limine and used inadmissible evidence. However, the State's impeachment of Dr. Richards was proper under the Evidence Rules and there was no final order in limine restricting the parties from impeaching experts based on non-hearsay evidence. Nevertheless, the trial court ultimately reversed its initial decision to allow this impeachment evidence, and provided an oral curative instruction and a limiting jury instruction as requested by Reimer. Finally, despite the Washington State Supreme Court rejecting this exact argument in *In re Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001), Reimer asks this court to "reexamine" the constitutionality of the statute's requirement that the State prove, beyond a reasonable doubt, that the offender is "likely" to reoffend.

II. RESTATEMENT OF THE ISSUES

- A. **Was the right to testify properly afforded when Reimer testified at length, did not unequivocally ask the court for an opportunity to testify a second time, and has not shown that his attorney actually prevented him from testifying a second time?**
- B. **Where the prosecutor attempted to impeach Reimer's expert, but the trial court sustained Reimer's objections and instructed the jury to disregard, has Reimer shown that either the trial court abused its discretion or that he was prejudiced?**
- C. **Where the Supreme Court has determined that standard for civil commitment pursuant to RCW 71.09 is constitutional, should this Court reexamine this issue?**

III. STATEMENT OF THE CASE

A. Procedural History

On December 16, 1992, Reimer was committed as a sexually violent predator (SVP) by a unanimous jury after a fair trial in the Cowlitz County Superior Court. CP 617. Since his commitment, Reimer has remained in the custody of the Department of Social and Health Services (DSHS) as a sexually violent predator pursuant to RCW 71.09.060(1). CP 617.

In 2014, the Cowlitz County Superior Court entered an order granting Reimer a full unconditional discharge trial. CP 617. In October 2016, a Cowlitz County jury unanimously found beyond a reasonable doubt that Reimer continues to be a sexually violent predator after a fair trial. RP 1396; CP 1268. The trial court entered an Order recommitting Reimer

to the custody of the DSHS at the Special Commitment Center (SCC).
CP 1269.

Reimer filed a timely Notice of Appeal. CP 1288.

B. Relevant Facts

Joel Reimer's history of sex offenses began when he was twelve years old when Reimer forced a seven-year-old boy to perform oral sex on him. RP 511. He pleaded guilty to indecent liberties against a child under age fourteen in 1982. CP 618. A sexually violent offense as defined in RCW 71.09.020(17).

Four years later, at the age of sixteen, Reimer raped a thirteen-year-old boy. As the boy was riding his bike, Reimer grabbed him and threatened to kill him with a knife. RP 512. Reimer told the boy he would cut his throat unless he went behind a nearby shed. RP 513. Once at the shed, Reimer forced the boy to perform oral sex. *Id.* He then shoved the boy against the shed, anally raped him, and urinated on the boy's back. *Id.* Reimer pleaded guilty to Rape in the First Degree and Assault in the Second Degree. CP 618. As a result, he was convicted in 1985 of his second sexually violent offense. RCW 71.09.020(17); CP 618.

Reimer's sexual crimes against children did not stop when he reached adulthood. In 1990, at the age of twenty-one, Reimer forced a twelve-year-old girl into a bedroom, pinned her arms above her head, and

raped her. RP 520. Reimer pleaded guilty to Child Molestation in the Third Degree. RP 511.

In addition to a persistent history of sex offenses, Reimer has a long history of other criminal convictions. RP 520. In 1982, he was convicted of second degree burglary, malicious mischief, and theft of a motor vehicle. In 1983, his convictions included first-degree escape, theft of a motor vehicle, and a hit and run. The next year, he again stole a motor vehicle. In 1985, he was convicted of first-degree escape. In 1986, he was convicted of assault and then received another escape conviction. In 1988, his crimes included third degree assault and attempted escape.

As a result of his behavior, Reimer has spent most of his life in rehabilitative or correctional institutions. RP 520. However, even in institutional settings, Reimer's troubling behavior did not stop. Reimer sexually exploited younger children and was reported to have been sexually inappropriate with persons with intellectual disabilities. RP 525-26.

Reimer was scheduled to be released from custody in 1991. Prior to his release, Dr. Irwin Drieblatt evaluated Reimer to determine whether he met the statutory criteria as a SVP. CP 619. During the evaluation, Reimer stated that if he was released he had no idea how he would cope with his sexual aggression in the community, and that he was nearly certain that he would reoffend. RP 528. Reimer told Dr. Drieblatt that he wanted to be

committed because otherwise he would reoffend. RP 528. Reimer also told Dr. Dreiblatt that there were many other times that he had engaged in sexually violent conduct and that he fantasized about such behavior. RP 529.

Dr. Drieblatt diagnosed Reimer with paraphilia (sexual sadism), a severe personality disorder, and antisocial personality. CP 619. He concluded that Reimer met the criteria as a SVP. *Id.* Following this determination, Reimer was civilly committed in 1992 to the Special Commitment Center (SCC). RP 509.

Since Reimer's initial commitment in 1992, he has never participated in sex offender specific treatment. RP 530. He refused to participate in anything other than Native American spiritual practices. RP 782, 807, 808, 886-889, 893, 895, 907-908, 911. During his time at the SCC, Reimer behavior was described as assaultive, harassing, angry, hostile, and verbally abusive to staff and residents. RP 542. At one point, Reimer nearly incited a riot and spent fourteen days in the Intensive Management Unit as a result. RP 542. Reimer has remained in the custody of DSHS as a sexually violent predator since his initial commitment in 1992.

In 2014, the Cowlitz County Superior Court entered an order granting Reimer a full unconditional discharge trial. CP 617. During pre-trial proceedings for his unconditional release trial, Reimer made it clear

that he wanted to be transported back to the SCC immediately after his testimony and he waived his right to be present at every phase of trial, including "The Defense Case". CP 1229. In his Motion to Allow Waiver of Presence at Trial, he stated that, he "fears that the State's case...will likely attempt to portray Mr. Reimer as a sexual monster...[and] will upset him..." CP 1145. Reimer attended the trial only when the State called him as a witness. RP 772. Reimer provided lengthy testimony, which included examination and questioning by the State, his attorney, and the jury. RP 772-919. While present in court, Reimer expressly reiterated that he wanted to be transported back to the SCC immediately after he finished testifying. RP 904.

Dr. Harry Hoberman testified at trial as the State's expert forensic psychologist. RP 418. Dr. Hoberman reviewed extensive records, interviewed Reimer, and conducted a comprehensive psychological evaluation. RP 418. Dr. Hoberman diagnosed Reimer with sexual sadism disorder and antisocial personality disorder with severe psychopathy. CP 620. Dr. Hoberman testified that Reimer scored in the upper one-percentile of persons with psychopathy. RP 610. Dr. Hoberman testified that in his expert opinion, Reimer continued to meet the statutory criteria as a sexually violent predator. RP 622-54.

Dr. Henry Richards testified as Reimer's expert forensic psychologist. RP 920. Dr. Richards reviewed the extensive records in this case, interviewed Reimer, and performed a psychological evaluation. RP 920. Dr. Richards testified that Reimer did not meet the statutory criteria as a sexually violent predator. RP 1115. Dr. Richards testified that in his opinion, Reimer did not suffer from sexual sadism, and in fact, Reimer has never suffered from any paraphilia. RP 1129. Despite this conclusion, Dr. Richards testified that Reimer "continues to present a significant risk for sexual recidivism." RP 1183-84.

Dr. Richards further testified that he first encountered Reimer in 2002, when Dr. Richards was working as a part-time consultant to the SCC. RP 1097. He also testified about his previous employment at the SCC. RP 1176. Dr. Richards subsequently became the superintendent at the SCC, a position he held from 2004 to 2007. RP 1176. Dr. Richards testified that as superintendent, he oversaw the psychologists who wrote the annual evaluations of the SVPs pursuant to RCW 71.09.070. RP 1177. He explained that the evaluators are required to determine whether the individuals continue to be sexually violent predators, which includes making recommendations and diagnostic assessments. RP 1177. Dr. Richards testified that reviewed these reports, and if he disagreed with

the clinical evidence in the report, he wrote the evaluator and copied his supervisor. RP 1177.

Dr. Richards acknowledged that while he was superintendent at the SCC, Reimer was committed and there were several evaluations completed that found Reimer continued to be a sexually violent predator. RP 1179-80. The State asked Dr. Richards whether he wrote any letters disagreeing with these evaluators' diagnosis that Reimer suffers from sexual sadism. RP 1179. Dr. Richards admitted that he never wrote a letter stating he disagreed with those evaluations and diagnoses, despite his current testimony that Reimer never suffered from sexual sadism or any paraphilia. RP 1180. During this testimony, Reimer's counsel objected based on "pretrial motions." RP 1179-80. The trial court overruled the objection, stating, "I'll allow it." *Id.*

Reimer's objection was based on an issue discussed during pre-trial motions in limine. RP 129. Specifically, in addressing Reimer's third and fourth motions, the parties and the court addressed the issue of "vouching" or "bolstering" a testifying expert's opinion with the opinions of non-testifying experts under ER 704 and ER 705. RP 129. The court did not issue a final ruling on this issue and indicated it would rule "depending on the questions asked." RP 129.

When the State finished its examination of Dr. Richards, Reimer raised the issue again outside the presence of the jury. After reconsideration, the trial court reversed its decision and instructed the jury to disregard the evidence. RP 1190-91. At the conclusion of trial, the court gave a written curative instruction at the request of Reimer's attorneys:

You have heard testimony about the diagnostic opinions of forensic evaluators at the Special Commitment Center who have offered their opinions in prior reports. This evidence is not admissible. You must not consider it for any reason in your deliberations.
CP 1249 (instruction 4).

Ultimately, the jury found, beyond a reasonable doubt, that Reimer continued to be a sexually violent predator. RP 1396; CP 1268.

IV. ARGUMENT

A. Reimer Was Not Denied His Constitutional Right to Testify at Trial

Reimer alleges he was denied his constitutional right to testify at trial. RP 772-919. In general, constitutional rights can be waived by a knowing, voluntary, and intelligent act. *Matter of Detention of Black, En Banc.*, 187 Wn.2d 148, 153, 385 P.3d 765 (2016) citing *State v. Stegall*, 124 Wn.2d 719, 724–25, 881 P.2d 979 (1994). A defendant has the burden to prove by a preponderance of the evidence “that his attorney *actually prevented* him from testifying in his own behalf.” *In re Lord*, 123 Wn.2d 296, 317, 868 P.2d 835 (1994) (citing *State v. King*, 24 Wn. App. 495, 499,

601 P.2d 982 (1979)) (emphasis added). If Reimer can prove that his attorney actually prevented him from testifying, then the court must address this claim as an ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Robinson*, 138 Wn.2d 753, 765-766, 982 P.2d 590 (1999). Under *Strickland*, the defendant must prove both that the attorney's performance "fell below the objective standard of reasonableness" and that he was prejudiced by the attorney's deficient performance. *Id.* at 688, 694. The second prong of this test is met by showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In this case, Reimer cannot prove that his attorneys actually prevented him from testifying, and thus, his claim fails.

1. Reimer's attorneys did not actually prevent him from testifying at trial.

First, Reimer does not address the proper legal standard. An evidentiary hearing would be required only if the defendant alleges that his attorneys "*actually prevented* him from testifying in his own behalf." *State v. Thomas*, 128 Wn.2d 553, 557, 910 P.2d 475 (1996) (citing *In re Lord* at 317). Reimer merely asserts that he "did not waive his right to testify; he preserved this right." App. Br. at 11. Contrary to Washington State

precedent, Reimer incorrectly states, “waiver cannot be presumed from Mr. Reimer’s conduct.” App. Br. at 11. However, the Washington Supreme Court has specifically held in a criminal case, waiver of the right to testify need not be made on the record, and it can be presumed from an accused’s conduct if the accused is present at trial.¹ *Robinson*, 138 Wn.2d at 763. Here, Reimer was present at trial, he testified, and he did not express an unequivocal demand to testify again in his case-in-chief. RP 904. To the contrary, Reimer expressed that he did not want to be present for the remainder of the trial and wanted to be transported back to the SCC as soon as possible. RP 904. Because Reimer was present, and cannot prove by a preponderance that his attorneys “actually prevented him from testifying”, this court can presume that he waived his right to testify. *Thomas*, 128 Wn.2d at 557.

In order to prove that his attorney actually prevented him from testifying, Reimer must prove that the attorney refused to allow him to testify in the face of his unequivocal demands that he be allowed to do so. *Robinson*, 138 Wn.2d at 764-65. In the absence of such demands by the defendant, courts presume that the defendant elected not to take the stand. *Id.* Mere allegations by a defendant that his attorney prevented him from

¹ Although proceedings pursuant to RCW 71.09 are civil, the criminal standard is appropriate in this context. See *Matter of Detention of Black, En Banc.*, 187 Wn.2d 148, 153, 385 P.3d 765 (2016).

testifying are insufficient to justify reconsideration of a waiver of the right to testify. *Id.* at 760.

To establish that an unequivocal demand was made, Reimer must show some “particularity” to give their claims sufficient credibility to warrant further investigation. *Id.* (citing *Underwood v. Clark*, 939 F.2d 473, 476 (1991)). The defendant must “allege specific facts” and must be able to “demonstrate, from the record, that those ‘specific factual allegations would be credible.’” *Id.* (citing *Passos-Paternina v. U.S.*, 12 F. Supp. 2d 231, 239 (1998) quoting *Siciliano v. Vose*, 834 F.2d 29, 31 (1987)).

For example, in *Thomas*, a defendant challenged his conviction in post-trial motions, asserting, without any factual support, that his attorney had prevented him from testifying. *Thomas*, 128 Wn.2d at 561. The Washington Supreme Court held that no evidentiary hearing was required. “The defendant must...produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action.” *Id.* Once a defendant meets this burden, he is entitled to an evidentiary hearing on the issue of whether he voluntarily waived the right to testify. *Id.* at 557.

In contrast, the Washington State Supreme Court in *Robinson* found that the defendant had provided substantial evidence to support his claim. *Id.* at 760-61. Robinson submitted affidavits from several different people

indicating that he unequivocally demanded to testify before closing arguments began. *Id.* A courtroom guard saw his attorney storm out of the courtroom after telling Robinson to find another attorney because he would not continue the case. *Id.* The guard also heard Robinson complaining about not being able to take the stand. *Id.* Another attorney, who accompanied Robinson's attorney back to court, claimed that Robinson told her that he wanted to take the stand to give his own version of the events. *Id.* In addition, his attorney conceded that Robinson "pleaded" with him to be allowed to testify.² *Id.*

In this case, aside from Reimer's own post-verdict assertions, there is no other corroborating evidence or factual support in the record for his allegation. Reimer does not provide any substantiated evidence that his attorneys "actually prevented him from testifying." *Thomas*, 128 Wn.2d at 557. The only support for his argument is that he "sent a message from the jail through the court that he wanted to talk to his attorneys. But his attorneys apparently did not contact him...." App. Br. at 11. The record is ambiguous at best. Reimer could have been asking to speak with his attorneys for a number of reasons. This ambiguous statement falls far short

² Federal cases have held that affidavits from lawyers who allegedly interfered with the defendant's right to testify may give the defendant's claims enough credibility to warrant an investigation into whether the attorneys prevented the defendants from testifying. *Underwood*, 939 F.2d at 476; *Passos-Paternina*, 12 F.Supp.2d at 239.

of the evidence provided in *Robinson* in order for the defendant to meet his burden for an evidentiary hearing on the issue.

Furthermore, Reimer in fact, unequivocally waived his right to be present at every phase of trial in a written waiver, including his right to be present for “The Defense Case”. CP 1229. When Reimer was present at trial (for his testimony), at no point did he unequivocally demand to testify again. To the contrary, Reimer’s pretrial motions stated that he wanted to be transported back to the SCC immediately after his testimony.³ This was reinforced during a break in Reimer’s testimony. While Reimer was present, his attorney relayed to the court that “Mr. Reimer is very concerned about being transported back to the SCC.” RP 904.

In addition to his inability to substantiate, from the record, specific factual allegations that his attorneys actually prevented him from testifying, Reimer must prove that his assertions are *credible*. *Robinson*, 138 Wn.2d at 760. As his own expert testified, he has a history of pathologically lying. RP 1099. Dr. Richards stated that he did not base his conclusion on whether one of Reimer’s rapes occurred “on what Mr. Reimer says because I was aware that Mr. Reimer lies...” RP 1122. Mr. Reimer himself testified that

³ Respondent’s Motion for Daily Transport. CP 1141; Respondent’s Motion to Allow Waiver of Presence at Trial. CP 1141. At the October 5, 2016 hearing, the trial court agreed to accommodate Reimer’s request to be transported on the day before he testified and returned him to the SCC as close to the end of his testimony as possible. RP 68.

he lied to the initial evaluator, Dr. Drieblatt, about his sexual offending in order to manipulate the system and get into the SCC. RP 878-79.

Thus, Reimer fails to meet his burden to prove his attorneys “actually prevented him from testifying.” *Thomas*, 128 Wn.2d at 557. He has not alleged specific facts, and cannot demonstrate from the record, that those specific factual allegations would be credible.

2. Reimer was not prejudiced because he testified at trial.

Even assuming arguendo that Reimer could prove his attorneys actually prevented him from testifying, he would then have to meet his burden to prove that prejudice occurred as a result. *Robinson*, 138 Wn.2d at 767 (citing *Strickland*, 466 U.S. 668). Prejudice is not assumed. *Robinson*, 138 Wn.2d at 767. Under *Strickland*, the defendant must prove both that the attorney's performance “fell below the objective standard of reasonableness” and that he was prejudiced by the attorney's deficient performance. *Strickland*, 466 U.S. at 688, 694. Reimer fails meet the second prong as well because he cannot show that there is “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

The Washington State Supreme Court has emphasized the importance of reaching the “justice of the result” when considering whether “the alleged error actually affected the defendant's rights.” *State v. Williams*,

137 Wn.2d 746, 751, 975 P.2d 963 (1999) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). In *Williams*, the defendant alleged that his constitutional right to testify was violated during the CrR 3.5 hearing. *Id.* The Court held that even if Williams had been denied the right to testify in the hearing, he could not show prejudice because he testified at trial. *Id.*

Similarly, in this case, Reimer actually testified at trial. The State was able to call Reimer to testify because unlike criminal cases, the Fifth Amendment right against self-incrimination does not apply to SVP civil proceedings. *In re Young*, 122 Wn.2d 1, 50, 857 P.2d 989 (1993); RP 772. Reimer provided lengthy testimony, which included examination and questioning by defense counsel as well as questions from the jury. RP 772-919. At no point was defense counsel limited as to the scope of their examination. The record demonstrates that they were able to elicit favorable and mitigating testimony from Reimer. *Id.*

Reimer testified at length, and his attorney was able to ask numerous questions regarding his behavior, his mitigated risk factors, and his release plan. RP 865-919. In response to his attorney's leading questions, Reimer was given an opportunity to provide justifications for his criminal behavior. RP 866-87. For example, Reimer testified that the reason he committed so many crimes from an early age was due to his parents' abuse. RP 866. In

addition, he blamed “a schoolkid that was making fun of my homelife” for an assault, being put in isolation for his unruly behavior at a youth institution, and being released early from an institution and dropped off at a gas station for his subsequent sex offense. RP 870-77. He testified that he lied to Dr. Drieblatt about his sexual deviancy because his “goal was to get into the SCC” in order to transition back into society and not have to live with his family after his release from prison. RP 877. Reimer’s attorney gave him an opportunity to explain why he was continually “raising hell at the SCC.” RP 888. He testified that the records of his behavior at the SCC are bad because they “live in a forensic fishbowl, so that's all they (SCC staff) do at the desk is sit there and stare at people and write things.” RP 889. Reimer said that his behavior was a result of “multiple people trying to bait me after I won the ruling that I was going to get a new trial.” RP 890. He was also given an opportunity to explain why he refused to participate in sex offender specific treatment for the last 24 years while he has been at the SCC. RP 881-85. Reimer testified at length about his Native American heritage and spirituality. RP 886-89, 893-895. He testified that he became an advocate for Americans with Disability Act people because he wanted “to be a compassionate person”, stating, “I knew that I could never redeem myself for what I did, and so I wanted to redeem my soul.” RP 891. Finally, Reimer testified about his release plans, including a room waiting for him

at a traditional housing facility, his immediate employment and educational opportunities, and various reasons why he will not reoffend if released, including the threat of “automatically doing life in prison” for a “recent overt act.” RP 896-99.

As noted above, Reimer provides almost no evidence to support a conclusion that the result of the trial would have been different if he were able to testify a second time. Reimer simply points to his “declaration in support of his pro se motion for a new trial, declaring his strategy was to testify about his Native American spirituality during his case-in-chief.” App. Br. at 11-12. However, Reimer had testified at length about his Native American spirituality during both the State’s examination and his own attorney’s questioning. RP 782, 807, 808, 886-889, 893, 895, 907-908, 911. Thus, Reimer also fails to meet his burden to prove any prejudice resulted from his inability to testify a second time.

B. The State’s Cross-Examination of Dr. Richards Complied with the Rules of Evidence and Was Proper Impeachment.

Reimer alleges that the State’s cross-examination of Dr. Richards violated ER 401, 402, 703, 705, and 801(c). App. Br. at 13. Reimer argues that the State’s impeachment of Dr. Richards violated a motion in limine, violated the rules of evidence, constituted prosecutorial misconduct, and prejudiced Reimer. However, there was never a final ruling or order in

limine and Reimer mischaracterizes the purpose and relevancy of the evidence offered. The State properly impeached Dr. Richards based on his acts as superintendent of the SCC, which were inconsistent with his opinion and diagnosis at the unconditional release trial. RP 1176-80. Because the impeachment evidence was not offered for its truth, the State properly questioned Dr. Richards about his own contradictory testimony, and thus, did not violate the rules of evidence or commit misconduct. Furthermore, the trial court ultimately reversed its decision to admit the evidence, immediately instructed the jury to disregard this evidence, and gave a limiting instruction to the jury at the conclusion of trial at the request of Reimer's attorneys. Thus, Reimer's claim must fail.

An expert may be impeached by methods showing bias, prior inconsistent statements, reputation for untruthfulness, contradiction, or any of the other methods available to impeach a lay witness. ER 705. In *Young v. Group Health Coop.*, 85 Wn.2d 332, 534 P.2d 1349 (1975), the Washington Supreme Court held that the rules of evidence do not preclude impeachment of an expert witness, who gives opinion evidence at trial, by introduction of his previously expressed inconsistent opinion.

It is improper to impeach an expert witness' testimony by contrasting it with "unrelied on opinions" of other non-testifying experts. *State v. Hamilton*, 196 Wn. App. 461, 464, 383 P.3d 1062 (2016). If the

“unrelied on opinions” possess the potential to impeach due to their truthful qualities, thus for the purpose of discrediting the expert’s opinion, such “unrelied on opinions” are inadmissible hearsay. *Id.* at 484.

However, confrontation problems arise only when an out-of-court statement is offered for the truth of its content. *State v. Parris*, 98 Wn.2d 140, 654 P.2d 77 (1982). Evidence is not hearsay if it does not depend upon the credibility of the out-of-court asserter for its value. *State v. Fullen*, 7 Wn. App. 369, 380, 499 P.2d 893, *review denied*, 81 Wn.2d 1006 (1972), *cert. denied*, 411 U.S. 985, 93 S. Ct. 2282, 36 L. Ed. 2d 962 (1973).

In this case, the prosecutor properly confronted Dr. Richards with the contradictions between his own testimonies and opinions. RP 1179-80. Dr. Richards testified that it was his job as superintendent at the SCC to review the yearly evaluations and if he disagreed with the clinical evidence in the report, he would write the evaluator and copy his supervisor. RP 1177. His testimony at trial was that Reimer never suffered from a paraphilia. RP 1129. However, Dr. Richards then conceded that he never disagreed with the evaluations that consistently diagnosed Reimer with a paraphilia while he was superintendent at the SCC. RP 1180. Therefore, the evidence offered demonstrated that, (1) Dr. Richards’ current diagnosis was inconsistent with the diagnoses he previously approved of; and/or (2) his credibility as an expert was undermined by his inability to properly perform

his duties as the superintendent. Thus, the evidence of diagnoses from prior evaluators was not used for the truth of the matter asserted as a means to “vouch” or “bolster” the opinion of the State’s expert, and thus, was proper under ER 801(c), ER 70, and ER 705.

1. Dr. Richards opened the door to impeachment evidence by offering contradictory testimony about his actions when he reviewed every annual review as superintendent of the SCC.

Reimer claims that a question by the State during the cross-examination of Dr. Henry Richards was improper and prejudicial. App. Br. at 13. However, Dr. Richards’ opinion at trial that Reimer never suffered from a paraphilia is inconsistent with his acts as superintendent of the SCC.

A unique aspect of this trial was that Reimer’s retained expert witness formerly presided over the institution in which Reimer was indefinitely detained as a sexually violent predator. Dr. Richards first began working at the SCC, on a weekly basis, as a consultant from 2002 to 2004. RP 1176. He testified that he first encountered Reimer in 2002 when, as a consultant, he was reviewing cases at Senior Clinical. RP 1097. He then became the superintendent at the SCC from 2004 to 2007. RP 1176.

At Reimer’s original commitment trial in 1992, the State relied on the opinion testimony of forensic psychologist Dr. Irwin Dreiblatt as the legal basis for his commitment. CP 619. Dr. Dreiblatt opined that

Mr. Reimer met criteria and diagnosed him with a Paraphilia, Sexual Sadism.⁴ CP 619. RCW 71.09.070(1) provides, upon commitment, SVPs shall have a current examination (evaluation) of his mental condition at least once every year. This evaluator must prepare a report that includes consideration whether the committed person currently meets the definition of a sexually violent predator. RCW 71.09.070(2)(a).

At the trial, Dr. Richards testified about his duties and practice as head of the SCC. Dr. Richards stated that he oversaw the psychologists who wrote the evaluations of the SVPs. RP 1177.⁵ Dr. Richards further described the evaluation process and his management responsibilities over the evaluators. RP 176-77. He explained that evaluators are asked to write an evaluation of a SVP including diagnostic assessments. RP 1177. Dr. Richards testified he would review these reports, and if he disagreed with the clinical evidence in the report, he would write the evaluator and copy the evaluator's supervisor. RP 1177. Dr. Richards gave an example of this process and how he would address the evaluations he disagreed with:

For example. Did you consider this aspect of the diagnosis of sexual sadism, for example. And then I would wait for an answer, and I would sit down with the forensic services manager and review the answer...If the psychologist still disagreed with my

⁴ Dr. Dreiblatt also opined that the Respondent suffers from a severe personality disorder, Antisocial Personality Disorder.

⁵ In fact, he supervised the forensics services managers as well, who are the psychologists who supervise these evaluators. RP 1178.

– for example, let’s say the psychologist said the person should be released, they’re not an SVP, and I didn’t agree after meeting with the forensic services manager, I would let him or her submit the report, and then I would write a letter saying to the court I disagreed. RP 1178.

Dr. Richards also acknowledged that Reimer was committed at the SCC and there were several evaluations done while he was superintendent. RP 1179-80.

Dr. Richards also testified that he did not diagnose Reimer with sexual sadism, stating that in his expert opinion, Reimer has never suffered from a paraphilia. RP 1129. Based on the foundation laid by Dr. Richards’ testimony, the State properly confronted him about this contradiction:

And so, Dr. Richards, while you were there for several years there was several evaluations at that time on Mr. Reimer, and, in fact, each of those evaluations diagnosed him with several paraphilias.... RP 1179.

At that point, Reimer’s counsel objected based on “pretrial motions.” RP 1179-80. The trial court overruled the objection, stating, “I’ll allow it.” *Id.* Reimer’s counsel responded, “Your Honor...”, and the court again stated, “I’ll allow it.” RP 1180. The State finished the question:

He was diagnosed with multiple paraphilias, including sexual sadism. He was diagnosed with antisocial personality and high psychopathy by all of them. So you never wrote a letter to them in regards to

Mr. Reimer in terms of those cases; is that right? RP 1180.

Dr. Richards' conceded that he never wrote a letter to these evaluators indicating that he disagreed, stating, "That's correct." *Id.*

After Reimer raised the issue again outside the presence of the jury, the trial court reversed its decision overruling the objection and immediately instructed the jury to disregard the evidence. RP 1189-90. At the request of Reimer's counsel, the trial court also gave a limiting instruction at the end of trial. CP 1249.

2. The trial court reserved ruling on the issue until specific questions were asked.

First, Reimer incorrectly alleges that the State violated a motion in limine to prevent the state from "bootstrapping" or bolstering its expert's opinion, even though the court only made a tentative ruling subject to the evidence at trial. App. Br. at 14. During pretrial proceedings, the trial court addressed both the State's and Reimer's motions in limine, however, it did not issue a final, unequivocal ruling. RP 127-131.

"[T]he purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial." *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). The party losing the motion in limine has a standing objection if the trial court makes a "final ruling" on the motion, "[u]nless the trial court indicates that further

objections at trial are required when making its ruling.” *Powell*, 126 Wn.2d at 256 (quoting *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *superseded by*, 113 Wn.2d 520, 782 P.2d 1013 (1989)). The Washington State Supreme Court has explained:

If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. *When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.*

Koloske, 100 Wn.2d at 896 (emphasis added).

Here, although the court discussed Reimer’s motions 3 and 4, the trial court made no definitive oral or written ruling on that evidentiary issue. RP 129. When addressing these motions, Reimer’s trial counsel summarized their position, stating, “We’re just really...very concerned about this bootstrapping of prior opinions.” The prosecutor agreed with Reimer’s “bootstrapping” concern, stating, “I’m not just going to bolster...Dr. Hoberman’s and undercut Dr. Richards by saying...20 people agree with you....” RP 129.

In its tentative oral ruling, the trial court addressed the issue in the context of “vouching” or “bolstering” a testifying expert’s opinion with the opinions of non-testifying experts under ER 704 and ER 705. However, the

court neither granted nor denied the Respondent's motions 3 and 4. RP 129.

Instead, the trial court stated:

The experts can testify to facts other people have. The experts can't testify to opinions other people have, *and that's going to be our starting point.*

Again, this is one where the field can really change as we're going along, depending on the questions that are asked. *So I guess I would just use that as my beginning point.*

RP 131. (emphasis added)

The trial court's ruling was tentative and addressed the use of non-testifying expert's opinions as a means to bolster a testifying expert's opinion. The court did not issue a final ruling on this issue and indicated it would rule "depending on the questions asked." The state did not violate any ruling, and was simply impeaching Dr. Richards on the statements he made about his oversight of the evaluators at the SCC when he was the superintendent. The court's initial ruling, overruling the objection, indicates that the trial court understood that the question was impeachment and not an attempt to bolster its expert's opinion. RP 1180.

3. Even though the State's impeachment of Dr. Richards was proper, the trial court instructed the jury to disregard this evidence, and therefore, Reimer cannot show prejudice.

Reimer alleges that the State's cross-examination was improper because the State "asked Dr. Richards about the diagnosis of sexual sadism

in prior evaluations.” App. Br. at 13. Reimer argues that the question posed on cross-examination violated the rules of evidence because the State offered “unrelied on opinions” of non-testifying experts for their truthfulness. App. Br. at 16. Additionally, Reimer claims that this evidentiary error prejudiced his case. App. Br. at 16. Reimer’s claim lacks merit.

- a. **The evidence used to impeach Dr. Richards was not offered for its truth but offered to show that Dr. Richards’ current diagnosis was inconsistent from his acts as superintendent at the SCC.**

First, Appellant is mistaken in the purpose of the testimony. The State was not seeking the admission of evidence pursuant to ER 703 and ER 705; instead, it was impeaching the witness. The purpose of the impeachment was to highlight the stark contrast between Dr. Richards’ opinion while he was superintendent at the SCC versus his current opinion at trial. Dr. Richards testified that in his expert opinion, Reimer has never suffered from a paraphilia. RP 1129. Dr. Richards testified that as superintendent of the SCC he oversaw the psychologists who wrote the evaluations of the SVPs and reviewed these evaluations. RP 1177. Dr. Richards testified that if he disagreed with the clinical evidence in the report, he would write the evaluator and copy the evaluator’s supervisor. RP 1177. He testified that if he “didn’t agree after meeting with the forensic

services manager, I would let him or her submit the report, and then I would write a letter saying to the court I disagreed.” RP 1178 Thus, based on this foundation, the State properly impeached Dr. Richards, forcing him to concede that although several evaluations were done of Reimer while Dr. Richards oversaw these evaluators, he never wrote a letter to them disagreeing with their diagnosis of sexual sadism. RP 1180.

Appellant mistakenly relies on *State v. Hamilton*, 196 Wn. App. 461, 383 P.3d 1062 (2016), but this case is clearly distinguishable. In *Hamilton*, the prosecutor repeatedly referenced medical records during cross-examination as a basis to impeach the expert’s testimony “with the facts that he reviewed, that he considered, or should have considered when making his statements and his opinions.” *Id.* at 1075. In *Hamilton*, the trial court erred by permitting the prosecutor to impeach the Defense expert with evidence of “unrelied on opinions” offered for the truth. *Id.* at 1072. The Court of Appeals has made clear that ER 703 and ER 705 should not be construed to “bootstrap” into evidence hearsay. *State v. Martinez*, 78 Wn. App. 870, 899 P.2d 1302 (1995), *review denied* 128 Wn.2d 1017, 911 P.2d 1342 (1996). Using “unrelied on opinions” in this manner to impeach an expert is inadmissible hearsay and violates the Confrontation Clause. However, evidence is not hearsay if it does not depend upon the credibility of the out-of-court asserter for its value. *State v. Fullen*, 7 Wn. App. at 380.

Unlike *Hamilton*, the primary concern here was not whether the State established that Dr. Richards actually relied on the diagnoses in these previous evaluations, but rather what Dr. Richards himself testified would have been his opinion when he reviewed Reimer's annual reviews. RP 1177-1180. The relevant issue is, if Dr. Richards believed Reimer never suffered from a paraphilia, then why did he not write a letter to these evaluators, or the court, notifying them that he had concerns about their diagnoses that Reimer's sexual sadism, which was the basis for his continued confinement as a SVP? RP 1179-80.

Clearly, this evidence was not hearsay because the truth and credibility of the prior evaluators' opinions were inconsequential to the purpose of the State's impeachment. ER 801. Dr. Richards' testimony that Reimer *never* suffered from a paraphilia was undermined by his decision not to contact these prior evaluators if he in fact disagreed with their diagnosis. RP 1129. Thus, there would be no value in confronting these evaluators at trial because whether the opinions from previous evaluators were incorrect or not, the effectiveness or purpose of the cross-examination was not diminished. The evidence was relevant to show that Dr. Richards' acts or omissions from 2004 to 2007 as superintendent of the SCC directly undermined his current opinion at trial. The prior evaluations were not offered for their truth in order to bolster the credibility of the State's expert.

Therefore, unlike *Hamilton*, the evidence used by the State on cross-examination was not hearsay and was a proper method of impeachment.

b. Reimer cannot show any prejudice because the trial court instructed the jury to disregard the testimony.

Even assuming *arguendo* that the evidence was inadmissible, Reimer cannot show that the trial court abused its discretion. The trial court reversed its initial decision to overrule Reimer's objection, sustained the objection, and instructed the jury to disregard the evidence. RP 1190-91. Additionally, at the conclusion of trial, the court gave another curative instruction at the request of Reimer's counsel. CP 1249. Thus, because the trial court ultimately sustained his objection, he cannot show either an abuse of discretion or prejudice.

Appellate courts review a trial court's decisions to admit evidence under an abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. *Powell*, 126 Wn.2d at 258. "[E]videntiary error will not be reversed absent a showing that the error prejudiced the defendant." *Aubin v. Barton*, 123 Wn. App. 592, 608, 98 P.3d 126 (2004) (citing *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 562, 815 P.2d 798

(1991)). Reimer cannot make either showing and the cases he cites are inapposite.

In *Hamilton*, the prosecutor repeatedly cross-examined the defense expert with inadmissible evidence. *Hamilton*, 196 Wn. App. at 471. The trial court allowed the prosecutor to continue to impeach despite the defense's repeated objects. *Id.* At one point, the judge allowed the prosecutor to continue but issued limiting instructions to the jury. *Id.* After *Hamilton's* sixth objection, the trial judge excused the jury to address the issue. *Id.* The Court of Appeals did not find the prosecutor's legal justification for the cross-examination persuasive, stating:

Notwithstanding that the prosecutor was wrong as to all three of these assertions, the trial court appeared to acquiesce in this view of the law and took no further remedial action in response to the objections raised by *Hamilton* and his counsel. *Id.*

In contrast, the trial court in this case reversed his initial decision and instructed the jury to disregard the evidence. RP 1190-91. Besides the single question at issue, the evidence was never referenced again in front of the jury. Additionally, upon request from counsel, the court provided another curative instruction to the jury:

You have heard testimony about the diagnostic opinions of forensic evaluations at the Special Commitment Center who have offered their opinions in prior reports. The

evidence is not admissible. You must not consider it for any reason in your deliberations. CP 1249 (Instruction 4).

Because jurors are presumed to follow the court's instruction, he cannot show that the testimony affected the jurors in any way. Because the court sustained his objection, he cannot show the trial court was manifestly unreasonable or ruled based upon untenable grounds or reasons. *State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001). To the contrary, the trial court gave Reimer the exact remedy he requested, utilizing its discretion to exclude the evidence and instruct the jurors to not consider it.

4. The State's proper impeachment of Dr. Richards was not misconduct.

Additionally, Reimer argues that the State committed prosecutorial misconduct in its cross-examination of Dr. Richards. App. Br. at 18. His arguments are without merit. Courts apply the prosecutorial misconduct standard used in criminal cases to SVP cases. *See In re Det. of Law*, 146 Wn. App. 28, 50-52, 204 P.3d 230 (2008); *In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009). Reimer "has a significant burden when arguing that prosecutorial misconduct requires reversal[.]" *See State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). He must prove that the prosecutor's comments were both improper and prejudicial. *See*

State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). As discussed previously, Reimer fails to meet his initial burden because the impeachment was proper. Second, even assuming the question was improper, he cannot meet his burden of showing the statements were so flagrant and ill-intentioned that the two curative instructions requested by his trial counsel failed to cure any prejudice.

a. Reimer fails to show that the prosecutor's question was improper.

In this case, Reimer argues that the prosecutor improperly vouched for the credibility of a witness by indicating that evidence not presented to the jury supports that witness's testimony. App. Br. at 18-19. The State did not violate the motions in limine and the State properly cross-examined Dr. Richards with evidence that was not offered for its truthfulness, but for purposed of impeachment based on Dr. Richards' inconsistencies. Additionally, the cases cited by Reimer do not support his conclusion.⁶ App. Br. at 19.

First, the trial court did not provide a blanket ruling in limine as Reimer suggests. RP 131. The parties addressed the admissibility of the

⁶ *Coleman* addressed "prosecutorial vouching" in the context of the admissibility of truthfulness provision in plea agreements, while *Jones* addressed "opening the door" to speculation about a CI's motives on re-direct examination. *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010); *State v. Jones*, 144 Wn. App. 284, 293-94, 183 P.3d 307 (2008).

opinions of nontestifying experts as a means to “bootstrap” or “bolster” the opinions of experts at trial. RP 128. Second, evidence of diagnoses from prior evaluators was not used for the truth of the matter asserted as a means to “vouch” or “bolster” the opinion of the State’s expert. ER 801(c); ER 70; ER 705.

The questions asked by the State tended to prove that either Dr. Richards’ prior opinion must have been that Reimer had a paraphilia, or he was not being consistent. The prosecutor confronted Dr. Richards with the contradictions between his own testimonies, opinions, and acts. RP 1179-80. Dr. Richards testified that it was his job as superintendent at the SCC to review the yearly evaluations and if he disagreed with the clinical evidence in the report, he would write the evaluator and copy his supervisor. RP 1177. His testimony at trial was that Reimer never suffered from a paraphilia. RP 1129. However, Dr. Richards then conceded that he never disagreed with the evaluations that consistently diagnosed Reimer with a paraphilia while he was superintendent at the SCC. RP 1180. Therefore, the evidence offered demonstrated that, (1) Dr. Richards’ current diagnosis was inconsistent with the diagnoses he previously approved of; and/or (2) if his opinion from 2004 to 2007 was that Reimer did not suffer from a paraphilia then he did not properly perform his superintendent duties as he described during his testimony. Thus, Reimer fails to meet his

significant burden of proving the prosecutor's question on cross-examination was improper.

b. Reimer cannot meet his burden to show any prejudice to his case.

Even assuming arguendo that the question asked by the prosecutor was improper, Reimer fails to show prejudice. Because Reimer objected at trial,⁷ he must establish "that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

Reimer cannot cite any authority where reversal was justified under similar circumstances. In this case, the alleged misconduct arose from a single question; it was not repetitive or cumulative. *See State v. Allen*, 182 Wn.2d 364, 372, 341 P.3d 268 (2015). It was proper impeachment on cross-examination; it was not a misstatement of the law or a shifting of the burden during closing argument. *See State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011); *see also State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); *see also State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010).

Furthermore, the trial court gave correct and thorough curative instructions immediately after the cross-examination and again in the jury

⁷ Although Reimer did object at the start of the prosecutor's question, the court overruled the objection and allowed the prosecutor to finish the question and for Dr. Richards to answer. RP 1180.

instructions. RP 1190-91; CP 1249. The Washington Supreme Court has found that an appropriate instruction can even cure “such a remarkable misstatement of the law by a prosecutor” or improper prosecutorial remarks that touch upon constitutional rights. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); *State v. Stenson*, 132 Wn.2d 668, 730, 940 P.2d 1239 (1997). Reimer cannot show misconduct, much less, that there was prejudice that had a substantial likelihood of affecting the jury's verdict. Thus, Reimer’s claim must fail.

C. Washington’s Statute Requires Proof Beyond A Reasonable Doubt

Contrary to clear Washington Supreme Court precedent, Reimer argues that the statute’s requirement that the State prove, beyond a reasonable doubt, that the offender is "likely" to reoffend cannot pass constitutional muster. App. Br. at 21; *See In re Det. of Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001). Although he acknowledges that the Washington State Supreme Court rejected this argument in *In re Brooks* (reversed on other grounds by *Thorell*), he argues that this argument should be “reexamined” in light of *Crane* and *Thorell's* requirement that the offender have "serious difficulty" controlling his dangerous sexual behavior. *In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003); *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

Our Supreme Court rejected this same argument, pointing out that it confuses the burden of proof, which is the degree of confidence the trier of fact should have in the correctness of its conclusions, with a fact to be proved—which, in the case of this element, is couched in terms of statistical probability. *Brooks*, 145 Wn.2d at 297. Furthermore, the jury here did determine each element beyond a reasonable doubt, including a finding that Reimer has serious difficulty controlling his behavior.⁸ CP 1251; CP 1268.

A decision by the Supreme Court is binding on all lower courts in the state. *State v. Pedro*, 148 Wn. App. 932, 950, 201 P.3d 398 (2009); *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (it is error for the Court of Appeals not to follow directly controlling authority by the Supreme Court). This argument is frivolous and must be rejected.

⁸ The *Thorell* Court specifically rejected the notion that “serious difficulty controlling sexually violent behavior” is an element that the State is required to prove. Instead, the Court noted that *Crane* requires a nexus between the mental disorder and the likelihood of offending, but having the jury make an explicit finding ensures a better record on appeal. *In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003).

V. CONCLUSION

For the reasons set forth above, this Court should affirm Reimer's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 13th day of November, 2017.

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DECLARATION OF SERVICE

On the 13th day of November, 2017, pursuant to the Electronic Service Agreement between the parties, I sent via electronic transmission a true and correct copy of the State's Brief of Respondent addressed as follows:

WASHINGTON APPELLATE PROJECT
WAPOFFICEMAIL@WASHAPP.ORG

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 November, 2017, at Seattle, Washington.



NERISSA TIGNER
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

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