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NO. 50573-8

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL CANTY,

Appellant.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

Michael Canty has a history of sexually assaulting female strangers and after a lengthy trial was found by a unanimous jury to be a sexually violent predator (SVP). Sufficient evidence supports the commitment, and this Court should reject Canty's attempts to turn routine evidentiary rulings into constitutional violations.

Canty's argument that the trial court erred by admitting the former testimony of victim Z.B. lacks merit. Despite substantial efforts, the State was unable to locate Z.B. for trial and sought to admit her sworn testimony from a preliminary hearing in the criminal case. The trial court properly exercised its discretion in admitting the testimony after finding that Z.B. was unavailable and that Canty had a similar motive and opportunity to cross-examine her at the prior hearing to challenge her credibility and testimony regarding the crimes.

Canty's challenges to several jury instructions—despite their conformity with the WPIs and this Court's previous rulings—also fail. First, the trial court properly exercised its discretion in refusing to issue an instruction that the State may file a new SVP petition if Canty commits a recent overt act (ROA). There was no evidence that Canty knew that committing an ROA could subject him to a new SVP petition or that this would deter him from reoffending; thus, his proposed instruction was not

supported by the record. Next, the trial court properly denied Canty's request to substitute the phrase "criteria for commitment" for "sexually violent predator" in the jury instructions because there is no basis to exclude the statutory language. Finally, the trial court properly instructed the jury that indecent liberties by forcible compulsion and burglary in the first degree with sexual motivation are crimes of sexual violence. This instruction accurately states the law and did not amount to an improper comment on the evidence or relieve the State of its burden of proving that Canty had in fact been convicted of a crime of sexual violence.

Lastly, Canty argues that the State failed to provide sufficient evidence that he is likely to engage in predatory acts of sexual violence because neither expert opined that he would likely commit each of the enumerated crimes in the instruction defining crimes of sexual violence. The trial court properly rejected this argument, noting that the State's expert testified about the types of crimes and conduct that Canty is likely to commit in the future and that this testimony provided a basis for the instruction. Viewing the evidence in the light most favorable to the State, there was substantial evidence for a rational trier of fact to find that Canty is likely to engage in predatory acts of sexual violence.

This Court should affirm Canty's commitment as an SVP.

## **II. RESTATEMENT OF THE ISSUES**

- 1. Did the trial court abuse its discretion by admitting the former sworn testimony from a victim under ER 804(b)(1) where the victim was unavailable and Canty had the opportunity and similar motive to develop the victim's testimony when he cross-examined her at the preliminary hearing in the criminal case?**
- 2. Did the trial court abuse its discretion by declining to instruct the jury that the State could file a new SVP petition if Canty committed a recent overt act where there was no evidence presented at trial that Canty knew about the recent overt act law and that this would deter him from reoffending?**
- 3. Did the trial court abuse its discretion by using the phrase "sexually violent predator" in the jury instructions where the phrase is used extensively throughout the statute and pattern instructions and where the jury must determine whether Canty is a "sexually violent predator" and whether he has been convicted of a crime of "sexual violence" and is likely to commit an act of "sexual violence?"**
- 4. Where the statute expressly states the crimes that are sexually violent offenses as a matter of law, did the trial court improperly comment on the evidence and relieve the State of its burden of proof by accurately instructing the jury that certain crimes constitute crimes of sexual violence?**
- 5. Viewing the evidence in the light most favorable to the State, was there sufficient evidence that Canty is likely to commit predatory acts of sexual violence where the State's expert testified that Canty's future offenses would likely be both predatory and sexually violent in nature based on his history of sexual offending?**

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History**

In August 2016, the State filed a petition alleging that Canty is an SVP. CP 1-2. In 2017, a unanimous jury found beyond a reasonable doubt that Canty is an SVP. RP 1031-32; CP 371. The court committed Canty to the custody of the Department of Social and Health Services for control, care, and treatment until such time as his personality disorder has so changed that he should be released. CP 372. Canty timely appealed. CP 377.

#### **B. Canty's History of Sexual Offending and Deviant Behavior**

In June 1996, Canty was arrested for attempted murder after he stabbed a man in the neck who declined his sexual advances. *See* RP 297-99. No charges were filed because the victim did not want to pursue the matter. *Id.* One month later, in July 1996, Canty approached Z.B. in her yard, grabbed her by the hair, and threw her to the ground. RP 300, 620-23; CP 336; Exhibit (Ex.) 33. He got on top of Z.B., pressed his penis against her back, and started rubbing his penis while gesturing at her house. *See* RP 300-01, 623-25. Fearing a sexual assault, Z.B. distracted Canty and escaped. RP 300-02, 624-27.<sup>1</sup> Canty admitted committing this offense.

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<sup>1</sup> Canty still had an erection when the police apprehended him shortly after the attack. RP 746.

RP 302; CP 334-38; Ex. 33.<sup>2</sup> A jury convicted Canty of sexual battery, attempted kidnapping, and false imprisonment for this offense. *See* RP 299-301, 620-27, 726; CP 334-38; Ex. 3; Ex. 33. The court sentenced Canty to eighteen months in prison and then released him on parole. RP 302-03. In 1998, while on parole, Canty exposed his penis to a woman while helping her in her home. RP 303. Canty threatened to kill her after she told him to leave. *Id.* Canty was returned to prison for one year for violating parole. *Id.*

In July 1999, three months after his release from prison, Canty followed two seventeen-year-old girls around the library and grabbed their buttocks. RP 304-06. One of the girls testified at trial that Canty touched her vaginal area while touching his groin area. RP 231-39. Canty was returned to prison for another year for violating parole. RP 304-05. In 2001, within two weeks of his release from prison, Canty committed two sexually violent offenses. *See* RP 307-10; Ex. 13. Canty pushed his way into a stranger's apartment, grabbed her by the throat, threw her to the ground, and threatened to break her neck if she refused to cooperate. RP 308-09; CP 350; Ex. 33. He held her down while trying to force his penis into her mouth and ejaculated

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<sup>2</sup> The State played Canty's video deposition at trial. Ex. 33; RP 250-51; 257-58, 321-22, 510; CP 328-51. Canty did not testify in person at the trial.

on her face. RP 309, 746.<sup>3</sup> Canty admitted committing this offense. RP 310; CP 347-51; Ex. 33. He was convicted of indecent liberties by forcible compulsion and burglary in the first degree with sexual motivation for this offense. *See* RP 307-10; Ex. 13. Canty's expert, Dr. Amy Phenix, testified that she believed Canty committed all of the offenses listed in the records, including uncharged offenses. RP 682-84; *see* RP 716-18.

While in prison, Canty received multiple infractions for sexual and aggressive misconduct. RP 311, 346-47. Canty's expert testified that Canty had "a striking number" of rule violations in prison. RP 675-77. He exposed himself to staff and engaged in frequent masturbation, claiming, "I can't help myself." RP 311-13, 323, 346, 482. When discussing civil commitment with prison staff, Canty admitted that he is "a danger to society." RP 325.

### **C. Expert Testimony**

The State's expert, Dr. Christopher North, diagnosed Canty with a personality disorder with antisocial and narcissistic traits. RP 340-60, 518. Canty's expert, Dr. Phenix, agreed with this diagnosis. RP 666-67, 728. Dr. North conducted a comprehensive risk assessment and concluded that Canty's personality disorder causes him serious difficulty controlling his behavior and makes him likely to engage in predatory acts of sexual

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<sup>3</sup> The victim had Muscular Dystrophy and was described as small, weak, and frail. RP 310.

violence if not confined in a secure facility. RP 358-78, 382-88, 392-96, 407-20, 435, 460, 518-21.<sup>4</sup>

**D. Former Testimony of Victim Z.B.**

The State's investigator attempted to locate victim Z.B. for trial by sending correspondence to her last known address, contacting a potential relative, and searching both social media and law enforcement databases. CP 91-92. The investigator declared that despite the numerous efforts and means employed, he exhausted all available resources and was unable to locate Z.B. *Id.* Based on Z.B.'s unavailability for trial, the State sought to admit her testimony given under oath at the 1996 preliminary hearing in Canty's criminal case. CP 69-70, 91-133; RP 93-101. The trial court found that the State's "significant effort" to locate Z.B. was sufficient to establish her unavailability under ER 804. RP 99-101, 606-07; CP 362. The trial court considered the types of proceedings involved, the nature of the testimony, and the fact that the prior testimony was given under oath and subject to cross-examination and ruled that the former testimony was admissible under ER 804(b)(1). *See* RP 99-101; CP 362. Z.B.'s sworn testimony was read to jury at trial. RP 619-27. This testimony was undisputed. Canty admitted committing the offense as described by Z.B. and testified about

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<sup>4</sup> Although Dr. Phenix diagnosed Canty with a personality disorder, she did not believe it caused him serious difficulty controlling his behavior. RP 666-67, 693, 708-09.

the offense in detail. *See* CP 334-38; Ex. 33; RP 299-302. In addition, both experts testified about the details of the offense, which were consistent with Z.B.'s testimony. *See* RP 299-302, 682-84, 721, 725-27, 746, 761, 770.

## **E. Jury Instructions**

### **1. Recent Overt Act Jury Instruction**

Canty proposed a jury instruction informing jurors that the State could file a new SVP petition if he committed a recent overt act (ROA). CP 218; RP 115-18. Canty argued that his knowledge of the ROA law would act as a deterrence and reduce his risk. RP 116. Canty's counsel conceded that Canty must have knowledge of the meaning of an ROA in order to testify about its deterrent effect. RP 115-17. The State agreed this information would be relevant *if* Canty testified accordingly. *Id.* However, Canty decided not to testify at trial. *See* RP 783-84, 813-14.<sup>5</sup> Canty sought to elicit testimony of the ROA issue from his expert, Dr. Phenix, arguing that she knows Canty was advised about an ROA. RP 778-85. However, the voir dire of Dr. Phenix revealed that she did not discuss the ROA issue with Canty and had no information regarding his knowledge of an ROA. RP 785-87. The trial court ruled that this was an insufficient basis to allow Dr. Phenix to testify about the deterrent effect of an ROA for Canty. RP 789-96. There was no evidence

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<sup>5</sup> The State's videotaped deposition did not include any testimony about the ROA issue. *See* CP 328-51; Ex. 33.

presented to the jury that Canty was familiar with the ROA law or that it would serve as a deterrent in terms of risk. The trial court did not submit Canty's proposed ROA instruction to the jury.

## **2. Use of the Phrase "Sexually Violent Predator"**

Canty proposed jury instructions to substitute the phrase "criteria for commitment" for "sexually violent predator" throughout the instructions. *See* CP 200-20. He argued that the phrase "sexually violent predator" was prejudicial. RP 118-22. The trial court found that there was no basis to exclude the phrase, which serves as the basis for the petition and is used extensively in the statute and pattern instructions. RP 123-24; CP 365.

## **3. Crimes of Sexual Violence**

The State proposed a jury instruction indicating that in order for the jury to find that Canty is an SVP, it must find that the State proved beyond a reasonable doubt that he has been convicted of a crime of sexual violence, namely indecent liberties by forcible compulsion and/or burglary in the first degree with sexual motivation. CP 399. Although Canty initially proposed an instruction indicating that the State must prove he had been convicted of a crime of sexual violence that did not include a list of specific qualifying crimes,<sup>6</sup> Canty did not object to the State's proposed instruction at trial.

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<sup>6</sup> *See* CP 219.

RP 849-52. The court gave the State's proposed instruction. *See* CP 467. The State also proposed an instruction including approximately eleven crimes that qualify as crimes of sexual violence under the statute, which reflected the crimes Canty either committed or would be likely to commit in the future. *See* CP 403; RP 830-32, 861-87. Canty argued that the instruction should only include Canty's sexually violent offense convictions. RP 872, 876-80, 895. After a lengthy discussion, the trial court narrowed the instruction to include four sexually violent offenses, including Canty's two prior convictions. *See* CP 471; RP 861-916, 946-47. The trial court determine that Dr. North's testimony about the types of crimes and conduct that Canty is likely to commit in the future provided a basis for this instruction. *See* RP 897-98.

#### IV. ARGUMENT

##### A. **The Trial Court Did Not Abuse its Discretion by Admitting Z.B.'s Former Sworn Testimony at Trial**

Canty argues that the trial court erred by admitting the former testimony of victim Z.B. at trial. Canty's argument lacks merit. The trial court properly exercised its discretion in admitting Z.B.'s testimony under ER 804(b)(1) after finding that she was unavailable. Even assuming the trial court erred, any error was harmless because the jury heard the same testimony from Canty and both experts about the offense against Z.B.

**1. The Admission of Testimony is Reviewed for an Abuse of Discretion**

Canty argues that the trial court violated his right to due process by admitting the testimony and that this is a constitutional issue subject to de novo review. App. Brief at 8-12. Canty attempts to improperly constitutionalize a trial court's discretionary decision. It is well established that the "admission and exclusion of relevant evidence is within the sound discretion of the trial court" and that this decision will not be reversed absent a manifest abuse of discretion. *See State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007) (admission of hearsay is reviewed for abuse of discretion); *State v. DeSantiago*, 149 Wn.2d 402, 411, 415, 68 P.3d 1065 (2003) (decision to admit former testimony of an unavailable witness is reviewed for abuse of discretion); *Acord v. Pettit*, 174 Wn. App. 95, 104, 302 P.3d 1265 (2013) (admission of testimony under ER 804(b)(1) is a discretionary decision); *State v. Benn*, 161 Wn.2d 256, 265, 165 P.3d 1232 (2007) (admission of former testimony under ER 804 is reviewed for abuse of discretion). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *In re Det. of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). Thus, it is well established that

the trial court's decision to admit Z.B.'s former testimony is reviewed for an abuse of discretion.

Canty claims that the Supreme Court has been inconsistent in its application of the appropriate standard of review and that this "inconsistency" justifies de novo review. *See* App. Brief at 9-12. Canty misconstrues the cases, all of which are consistent and support an abuse of discretion standard. If there is a constitutional issue involved, such as the right to present a defense in *Jones*, or the right to a speedy trial in *Iniguez*, review is de novo. *See State v. Jones*, 168 Wn.2d 713, 719-21, 230 P.3d 576 (2010); *see State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009).<sup>7</sup> If the issue involves the admission of evidence, such as the evidentiary rulings in *Clark*, or the trial management decision in *Dye*, review is for abuse of discretion. *See State v. Clark*, 187 Wn.2d 641, 648, 389 P.3d 462 (2017); *see State v. Dye*, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013). Neither *Clark* nor *Dye* are inconsistent with the *Iniguez* or *Jones* decisions.

*Aguirre* is also not inconsistent with *Jones* as Canty asserts. *See* App. Brief at 10 (citing *State v. Aguirre*, 168 Wn.2d 350, 229 P.3d 669

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<sup>7</sup> Contrary to Canty's assertion, *Iniguez* did not apply de novo review to the trial court's discretionary decision to deny a severance motion and grant a continuance. *See* App. Brief at 9. *Iniguez* stated that abuse of discretion applied to these issues. *Iniguez*, 167 Wn.2d at 280-81. However, the actual issue was a violation of the right to a speedy trial, which was a constitutional issue subject to de novo review. *Id.*

(2010)). *Aguirre* applied an abuse of discretion standard because issues of “relevancy and the admissibility of testimonial evidence are within the discretion of the trial court[.]” *Aguirre*, 168 Wn.2d at 361. The Court explained that there is no constitutional right to introduce inadmissible evidence and that the admissibility of evidence under the rape shield statute is within the trial court’s discretion. *Id.* at 362-63.

Canty suggests that merely alleging a due process violation triggers de novo review. *See* App. Brief at 10-11. But alleging a constitutional violation does not alter the standard of review where the Court is in fact reviewing the trial court’s rulings on admissibility of evidence. *See Dye*, 178 Wn.2d at 548 (“[a]lleging that a ruling violated the defendant’s right to a fair trial does not change the standard of review”); *State v. Blair*, No. 50037-0-II, 2018 WL 1918475, at \*3 (Wash. Ct. App. Apr. 24, 2018) (“Although the dispositive issue before us concerns the confrontation clause, ultimately we are asked to review the trial court’s ruling on the admissibility of [evidence], which is reviewed for abuse of discretion.”) (quoting *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002)). Here, the trial court did not abuse its discretion by admitting Z.B.’s former testimony.

## 2. Canty Does Not Have a Due Process Right to Confront Witnesses at an SVP Trial

It is well settled that the Sixth Amendment right to confrontation applies only to criminal defendants and not to individuals challenging an SVP commitment. *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). Canty argues that he has a due process right to cross-examination because of the significant liberty interest at stake. App. Brief at 14-15. Due process is a flexible concept. *Stout*, 159 Wn.2d at 370. “At its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context.” *Id.* To determine whether a particular procedural protection is required in a given context, courts apply the *Mathews*<sup>8</sup> test, which balances: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Stout*, 159 Wn.2d at 370.

In *Stout*, the SVP detainee wanted to confront and cross-examine a victim who gave prior deposition testimony in the case. *Id.* at 368. The Supreme Court applied the *Mathews* balancing test and concluded that Stout had no due process right to confront a live witness at an SVP trial. *Id.*

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<sup>8</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

at 370-74. *Stout* is dispositive. Under the *Mathews* balancing test, Canty did not have a due process right to cross-examine Z.B. at trial.

The first *Mathews* factor weighs in Canty's favor because of his significant liberty interest. *See Stout*, 159 Wn.2d at 370. However, the remaining factors weigh in favor of the State. *See id.* at 370-72. The second factor favors the State because there are significant procedural safeguards in place to protect against an erroneous deprivation of liberty. *See id.*; *see also In re Det. of Morgan*, 180 Wn.2d 312, 321-22, 330 P.3d 774 (2014) (discussing "robust statutory guaranties" in SVP statute). The statute provides a "comprehensive set of rights" for SVP detainees, including the initial right to cross-examine the State's expert at the probable cause hearing, and robust rights throughout the proceedings, including the right to counsel and the right to present evidence. *Stout*, 159 Wn.2d at 370-71. They have the right to a jury trial, the right to a unanimous verdict from twelve jurors, and the State is required to prove each element beyond a reasonable doubt. *Id.* "Given these significant protections, it is unlikely an SVP detainee will be erroneously committed if he is not also able to confront a live witness at commitment[.]" *Id.* at 371. The third factor also favors the State, which has a substantial interest in protecting the community from sexual predators. *See id.* The State also has an interest in "streamlining commitment procedures and avoiding the heavy financial burden that would be attendant with requiring live testimony of

out-of-state witnesses[.]” *Id.* Our Supreme Court noted that it is “unduly burdensome to require the State to build its case around a right to confrontation that adds only marginal protection for an SVP against liberty deprivation.” *Id.* at 372. Thus, the admission of Z.B’s former testimony was not a due process violation.

The *Coe* Court relied on *Stout* to hold that there is no due process right to confront victims at an SVP trial. *In re Det. of Coe*, 175 Wn.2d 482, 509-12, 286 P.3d 29 (2012).<sup>9</sup> In *Coe*, the State’s expert relied on five victim sexual assault reports, which were admitted only as a basis for her opinion. *Id.* at 509-11. *Coe* was unable to confront or cross-examine these victims because they were unavailable for a deposition or trial. *Id.* at 509. Applying *Mathews*, the Court held that *Coe*’s inability to cross-examine the victims did not reduce the effectiveness of procedural safeguards. *Id.* at 510-11. In *Allen*, a witness testified at *Allen*’s SVP trial that she pulled a crying

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<sup>9</sup> Washington courts have recognized that SVP cases are civil proceedings and have repeatedly refused to confer many criminal protections upon SVP respondents, including the Sixth Amendment right to confront witnesses, the Fifth Amendment right against compulsory self-incrimination, the ex post facto and double jeopardy clauses, the rule of lenity, and the presumption of innocence. *See, e.g., Stout*, 159 Wn.2d at 369 (“SVP commitment proceedings are *not* criminal proceedings” and it is “well-settled that the Sixth Amendment right to confrontation is available only to criminal defendants”) (emphasis in original); *In re Young*, 122 Wn.2d 1, 24-25, 50-52, 857 P.2d 989 (1993), *superseded by statute on other grounds* (the ex post facto and double jeopardy clauses do not apply to SVP civil proceedings and SVPs do not have a Fifth Amendment right to remain silent); *In re Det. of Coppin*, 157 Wn. App. 537, 238 P.3d 1192 (2010) (pursuant to CR 38, SVPs waive the right to a jury trial by failing to make a timely jury demand); *In re Det. of Aqui*, 84 Wn. App. 88, 98, 101, 929 P.2d 436 (1996) (refusing to apply the rule of lenity and presumption of innocence in SVP cases), *abrogated on other grounds by Det. of Henrickson v. State*, 140 Wn.2d 686, 2 P.3d 473 (2000).

child from Allen's arms who said Allen had touched her. *In re Det. of Allen*, 142 Wn. App. 1, 2-3, 174 P.3d 103 (2007).<sup>10</sup> Allen argued that he had a due process right to confront the child and cross-examine her at trial. *Id.* at 4. Relying on *Stout*, the Court disagreed. *Allen*, 142 Wn. App. at 4-5. *Stout* and *Coe* both defeat Canty's claim of a due process right to confrontation, and this Court should affirm the commitment.

**3. Z.B. Was Unavailable and Her Former Testimony Was Admissible as a Hearsay Exception**

ER 804(b)(1) provides that a witness's former testimony is an exception to the hearsay rule if the witness is unavailable and there was a prior opportunity and similar motive to develop the testimony:

Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

ER 804(b)(1). A witness is unavailable if she is absent from trial and the State has been unable to procure her attendance "by process or other reasonable means." ER 804(a)(5). "By process or other reasonable means" requires that, where the witness cannot be reached by subpoena, the party

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<sup>10</sup> The testimony was admissible under the excited utterance hearsay exception. *Id.* at 4.

offering the testimony “should at least be required to represent to the court that it made an effort to secure the voluntary attendance of the witness at trial.” *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987).

Z.B. testified under oath at a 1996 preliminary hearing in Canty’s criminal case and was cross-examined by Canty’s attorney. CP 94-133; RP 100. Canty was subsequently convicted of sexual battery, attempted kidnapping, and false imprisonment for the offense against Z.B. RP 299-302, 725-26; Ex. 3. Prior to Canty’s SVP trial, the State made substantial efforts to locate Z.B. *See* CP 91-92. The State’s investigator sent correspondence to Z.B.’s last known address and attempted to locate her through a potential relative and by using social media and law enforcement databases. CP 91-92. The investigator submitted a declaration indicating that despite the “numerous efforts and means employed,” he “exhausted all available resources” and was unable to locate Z.B. CP 92.<sup>11</sup>

In *DeSantiago*, the Court held that the witnesses were sufficiently unavailable where the State mailed subpoenas to their last known address and a family member reported that they moved out of the country and repeatedly refused to reveal their location. *DeSantiago*, 149 Wn.2d 409-13. Similar to

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<sup>11</sup> Canty references four different alleged spellings for the victim’s name and appears to suggest that the investigator’s search was somehow deficient. *See* App. Brief at 20. The record indicates that the victim goes by the name Zenaida “Banuelos” and “de la Torre” and there is no indication that this affected the State’s ability to locate the victim. *See* CP 91-97, 242-44.

*DeSantiago*, the State used reasonable means to locate Z.B. in order to secure her voluntary attendance. *See id.*; *see also Rice*, 109 Wn.2d at 57.<sup>12</sup> Canty cites no authority for requiring the use of the methods he asserts the State “should have” used to locate the victim. *See App. Brief* at 20-22. Relying on *State v. Aaron*, 49 Wn. App. 735, 741, 745 P.2d 1316 (1987), Canty argues that the State’s efforts to locate Z.B. were inadequate and that her testimony should have been excluded. *See App. Brief* at 22. *Aaron* is inapposite. In *Aaron*, the Court held that the witness was not unavailable under ER 804 because the State made “no effort” to obtain the witness’s presence at trial. *Aaron*, 49 Wn. App. at 741-45. In Canty’s case, the trial court found that the State took “reasonable steps” to locate Z.B. and that its “significant effort” was sufficient to establish Z.B.’s unavailability. RP 99, 606-07. The State’s attempts to locate Z.B. were reasonable and sufficient under the law, and the trial court did not abuse its discretion in finding Z.B. unavailable and admitting her former testimony.

#### **4. Canty Had an Opportunity and Similar Motive to Develop Z.B.’s Testimony at the Prior Proceeding**

Testimony is not excluded as hearsay if given “as a witness at another hearing of the same or a different proceeding” and the party had “an opportunity and similar motive to develop the testimony” by cross-

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<sup>12</sup>Z.B., as an out-of-state witness, could not be compelled to testify in Canty’s civil trial. *See Stout*, 159 Wn.2d at 376; *see also Young v. Key Pharmaceuticals, Inc.*, 63 Wn. App. 427, 432, 819 P.2d 814 (1991) (no statute or rule authorizes the service of a subpoena on a non-party witness who resides out of state).

examination. *See* ER 804(b)(1). Canty argues that he did not have a similar motive to cross-examine Z.B. at the 1996 preliminary hearing on the criminal case, which he claims had “no issues in common” with his SVP trial. App. Brief at 22-24. Canty’s arguments lack merit.

Canty claims that an opportunity to cross-examine, by itself, is insufficient. *Id.* at 22. This contradicts the plain language of the evidence rule and case law. In *Benn*, the trial court admitted the former testimony of a witness who died following the defendant’s first trial, despite the fact that the defendant did not cross-examine the witness in the first trial. *Benn*, 161 Wn.2d at 265. The Court held that the trial court did not abuse its discretion in admitting the testimony because the defendant had “the *opportunity* and similar motive to cross-examine” the witness in his first trial and was not prevented from doing so. *Id.* at 265-66 (emphasis added).

Further, “similar motive” does not mean “identical motive.” *DeSantiago*, 149 Wn.2d at 414. ER 804(b)(1) does not require that the issues at the prior proceeding be identical. *Acord*, 174 Wn. App. at 104. Rather, it requires that the party against whom the former testimony is offered had “an adequate motive for testing the credibility of the testimony” in the prior proceeding. *State v. Israel*, 113 Wn. App. 243, 292, 54 P.3d 1218 (2002). In *Israel*, the defendant argued that the trial court erred by admitting the videotaped trial testimony of a witness who died

before the defendant's second trial because he was unable to cross-examine the witness about the new conspiracy charge. *Id.* at 291-92. The Court disagreed, noting that the prior testimony was under oath and subject to cross-examination, and "although conspiracy was not at issue in the previous trial, ER 804(b)(1) does not require that the issues at the prior proceeding be identical." *Id.* at 292. The evidence rules are satisfied as long as the party was able to challenge the truth of the witness's statements by cross-examination. *Id.* at 292 n.20. Canty cross-examined Z.B. at the 1996 preliminary hearing in the criminal case and had a similar motive to test Z.B.'s credibility regarding the sexual assault. *See* CP 115-33.

Pretrial hearings qualify as former testimony under ER 804(b)(1) as long as there was an adequate opportunity for cross-examination. *See State v. Mohamed*, 132 Wn. App. 58, 64-69, 130 P.3d 401 (2006). Canty relies on several cases discussing the different motives of the government at a grand jury proceeding versus trial. App. Brief at 23. However, prosecutors often use the grand jury proceeding to investigate crimes and identify criminals as opposed to trying to prove any side of an issue. *See U.S. v. DiNapoli*, 8 F.3d 909, 913 (2nd Cir. 1993); *see also U.S. v. Carson*, 455 F.3d 336, 379 (D.C. Cir. 2006) (the government often "neither aims to discredit the witness nor vouch for him" in grand jury proceedings). The *Bartelho* case cited by Canty is also inapposite.

In *Bartelho*, the government had no interest in developing the witness' credibility at the suppression hearing because the sole issue was whether his admissions were involuntary, whereas the government had a significant interest in developing credibility during the guilt phase of trial. *U.S. v. Bartelho*, 129 F.3d 663, 672 (1st Cir. 1997).

The purpose of Canty's preliminary hearing in California was to determine whether there was probable cause to believe he committed the charged offenses. *See People v. Esmaili*, 153 Cal.Rptr.3d 625, 633 (Cal. Ct. App. 2013); *see also Jones v. Superior Court*, 483 P.2d 1241, 1245-46 (Cal. 1971) (defendants have a right to cross-examine witnesses and present their own evidence to weed out unsupported charges). Without any explanation or further argument, Canty argues that his motivation at the preliminary hearing of "obtaining discovery" and "avoiding a trial" differ substantially from his motivation in developing Z.B.'s testimony at the SVP trial. *See App. Brief at 24*. To the contrary, Canty had similar motivations at each proceeding, which was to challenge Z.B.'s credibility and challenge whether Canty sexually assaulted and falsely imprisoned her. And Canty did, in fact, challenge Z.B.'s credibility on these issues during cross-examination at the prior proceeding. *See CP 115-33*.<sup>13</sup>

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<sup>13</sup> Although the State proposed presenting both the direct and cross-examination of Z.B. at the SVP trial, the cross-examination was not read to the jury at Canty's request. *See RP 552-54; see also RP 93-101; CP 69-70, 94-133*.

Canty fails to explain how his motivation to cross-examine Z.B. at the SVP trial would have differed from the criminal proceeding. As a lay witness and victim, Z.B. would not have been qualified to testify to issues related to Canty's personality disorder. Furthermore, the only victim who testified in person at Canty's trial was R.M. *See* RP 231-44. Canty's brief cross-examination of this victim involved questioning her memory and credibility as opposed to anything unique to the SVP trial. *See* RP 244-49. Canty claims that Z.B.'s former testimony was "the only evidence offered describing an offense that might qualify as a predatory act of sexual violence." App. Brief at 25. This is inaccurate. The State did not allege that the offense against Z.B. was a sexually violent offense. CP 467, 471; *see* Ex. 3.<sup>14</sup> Moreover, Canty has not shown a different motivation for cross-examining Z.B. where neither Canty nor his expert disputed the facts as related by Z.B. *See* CP 334-38; RP 302, 682-84, 721, 725-27, 761, 770; Ex. 33. Canty testified in detail about sexually assaulting Z.B., which was consistent with Z.B.'s testimony. *See* CP 334-38; Ex. 33.

### **5. Any Error Was Harmless**

An error in admitting evidence warrants reversal only if it results in prejudice such that there is a reasonable probability that the error materially

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<sup>14</sup> The State alleged that the 2001 incident involved sexually violent offenses. *See* RP 307-10; CP 467; Ex. 13. Canty was convicted of indecent liberties by forcible compulsion and burglary in the first degree for this offense. Ex. 13; RP 307-10.

affected the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).<sup>15</sup> “The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Id.* at 403.

Z.B.’s former testimony provided details about Canty sexually assaulting her in 1996. RP 619-27. Canty argues that the State’s expert, Dr. North, relied on Z.B.’s statements in reaching his opinion and that the jury “could not meaningfully evaluate his testimony without determining the truth of her prior statements.” App. Brief at 17. First, Canty’s argument ignores the fact that his sexual assault of Z.B. was undisputed at trial. *Both* experts testified about the details of this offense. *See* RP 299-302, 682-84, 721, 725-27, 746, 761, 770. Furthermore, Canty admitted that he committed the offense and testified about it in detail; his testimony was consistent with Z.B.’s testimony. CP 334-38; RP 302; Ex. 33.<sup>16</sup> Second, if Canty believed the facts as related by the State’s expert were untrue, “nothing prevented him from offering rebuttal testimony about those facts or cross-examining” the State’s expert. *See Coe*,

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<sup>15</sup> Canty asks this Court to apply the wrong standard. *See* App. Brief at 24-25. When the error involves a “violation of an evidentiary rule, not a constitutional mandate, we do not apply the more stringent ‘harmless error beyond a reasonable doubt’ standard.” *Bourgeois*, 133 Wn.2d at 403.

<sup>16</sup> Canty testified he saw the victim in her yard and decided to sexually assault her to meet his “immediate need of arousal.” CP 334-36. He testified that he “grabbed her by the hair, threw her to the ground, and then got behind her and got on her back and rode her on her [*sic*] – straddled her back.” CP 336. She “broke loose” and escaped before anything else happened. CP 336-37.

175 Wn.2d at 511. In light of the other evidence at trial, any error admitting the testimony was harmless. *See State v. Scott*, 48 Wn. App. 561, 566, 739 P.2d 742 (1987) (*Scott I*) (admission of victim’s deposition was harmless error where another witness’s testimony established all aspects of the victim’s testimony).

**B. The Trial Court Did Not Abuse its Discretion By Declining to Instruct the Jury That the State Could File a New SVP Petition if Canty Committed a “Recent Overt Act”**

**1. The Standard of Review is Abuse of Discretion**

Jury instructions are sufficient when they permit each party to argue its theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law. *Rekhter v. State, Dept. of Soc. & Health Servs.*, 180 Wn.2d 102, 117, 323 P.3d 1036 (2014). In reviewing jury instructions, appellate courts look to the jury instructions as a whole, with the primary purpose of allowing both parties to fairly state their case. *Id.* at 120. Contrary to Canty’s assertion, appellate courts do not automatically review all jury instructions de novo. “The standard of review applicable to jury instructions depends on the trial court decision under review.” *State v. Condon*, 182 Wn.2d 307, 315, 343 P.3d 357 (2015). If the decision was based on a legal conclusion, it is reviewed de novo. *Id.* at 316. If it was based on a factual determination, it is reviewed for abuse of discretion. *Id.* at 315-16. The specific language of jury instructions is within

the discretion of the trial court. *Petersen v. State*, 100 Wn.2d 421, 440-41, 671 P.2d 230 (1983). Here, the trial court’s decision not to issue a jury instruction about ROAs is reviewed for abuse of discretion. *See Rekhter*, 180 Wn.2d at 120. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Post*, 170 Wn.2d at 309.

**2. There is No Basis to Apply the “Manifestly Apparent” Standard from Self-Defense Criminal Cases**

Canty claims that in “criminal cases” instructions must make the relevant legal standard “manifestly apparent” to the average juror and urges this Court to apply this standard to SVP proceedings. App. Brief at 26. First, Canty mischaracterizes the manifestly apparent standard, which our Supreme Court has only applied to *self-defense* cases. *See State v. Rodriguez*, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004) (“our Supreme Court subjects self-defense instructions to more rigorous scrutiny”).<sup>17</sup> Second, this Court has refused to apply the manifestly apparent

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<sup>17</sup> In self-defense cases, jury instructions must do more than adequately convey the law; they must make the relevant legal standard manifestly apparent to the average juror. *Id.*; *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). In such cases, once a defendant provides evidence of self-defense, the jury must be instructed in an “unambiguous way” that the State must prove the absence of self-defense beyond a reasonable doubt. *State v. Redwine*, 72 Wn. App. 625, 630-31, 865 P.2d 552 (1994). This shifting burden of proof, along with the subjective and objective elements incorporated in the self-defense standard, likely explains why courts apply heightened appellate scrutiny in such cases. *See State v. Woods*, 138 Wn. App. 191, 196-99, 156 P.3d 309 (2007) (explaining self-defense standard and shifting burdens of proof).

standard to jury instructions in SVP proceedings. *See In re Det. of Taylor-Rose*, 199 Wn. App. 866, 880 n.2, 401 P.3d 357 (2017).<sup>18</sup>

Canty appears to argue that substantive due process requires applying the manifestly apparent standard to jury instructions in civil commitment cases. *See* App. Brief at 28-29. Parties raising constitutional issues must present considered arguments to the Court of Appeals; “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *see also State v. Hoisington*, 123 Wn. App. 138, 145-47, 94 P.3d 318 (2004) (appellate courts do not consider fleeting constitutional claims). Canty’s argument rests on the false premise that the jury “misread” the court’s instructions and allowed an “erroneous detention” of a person who was not mentally ill and dangerous. The instructions were a proper statement of the law. *See* CP 467, 469. Appellate courts “should presume the jury followed the court’s instructions absent evidence to the contrary.” *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). Canty’s reliance on *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct 2450, 61 L.Ed.2d 39 (1979) is inapposite.

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<sup>18</sup> This Court noted that the self-defense case relied on by Taylor-Rose, *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009), is distinguishable. In *Kylo*, the Court was tasked with determining whether one correct instruction and one incorrect instruction read together made the correct standard apparent to the jury. *Taylor-Rose*, 199 Wn. App. at 880 n.2. Neither Taylor-Rose’s nor Canty’s case involve contradictory instructions.

See App. Brief at 28. In *Sandstrom*, the jury instruction allowed jurors to interpret it in a manner that relieved the State of its burden to prove an element of the crime. *Sandstrom*, 442 U.S. at 512-17. Canty’s instructions in no way relieved the State of its burden to prove each element.

Furthermore, not all instructional errors are of constitutional magnitude. *State v. Lord*, 117 Wn.2d 829, 880, 822 P.2d 177 (1991). The requirements of due process are usually met when the jury is informed of all the elements and instructed that the State must prove each element beyond a reasonable doubt. *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988) (*Scott II*).<sup>19</sup> Due process was satisfied in Canty’s case when the trial court accurately instructed the jurors on the elements the State was required to prove beyond a reasonable doubt.

Canty also argues that procedural due process supports application of the “manifestly apparent” standard and urges this Court to apply the *Mathews* test to evaluate language used in jury instructions. App. Brief at 27-28 (citing *Mathews*, 424 U.S. 319). This Court should reject Canty’s attempt to improperly constitutionalize a trial court’s discretionary decision. See *State v. Turnipseed*, 162 Wn. App. 60, 72-73, 255 P.3d 843 (2011)

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<sup>19</sup> Examples of manifest constitutional errors in jury instructions are: directing a verdict; shifting the burden of proof to the defendant; failing to define the “beyond a reasonable doubt” standard; failing to require a unanimous verdict; and omitting an element of the crime charged. *Scott II*, 110 Wn.2d at 688 n.5.

(Sweeney, J., concurring) (“a trend that is troublesome” is the “constitutionalization” of most assignments of error in criminal cases). Jury instructions are not a “procedure” and Canty cites no authority for applying a *Mathews* balancing test to the language used in jury instructions. *See Hoisington*, 123 Wn. App. at 145 (appellate courts “will not consider fleeting and unsupported assertions of constitutional claims”).

**3. The Trial Court Did Not Abuse its Discretion by Refusing to Give an Instruction That Was Not Supported by the Evidence**

Canty argues that the trial court erred by refusing to instruct the jury that the State could file a new SVP petition if he committed a recent overt act (ROA) following release. He claims that without his proposed instruction, he was unable to argue his theory of the case that he was less likely to reoffend because certain acts could subject him to a new SVP petition. App. Brief at 31-32. This Court has rejected Canty’s argument. *See Taylor-Rose*, 199 Wn. App. at 885-86.

In *Taylor-Rose*, this Court held that the trial court did not abuse its discretion by refusing to give an instruction regarding the State’s ability to file a new SVP petition following commission of an ROA. *Id.* The jury was properly instructed that it could consider all evidence bearing on risk, which allowed Taylor-Rose to argue his theory of the case without the need for more specific language. *Id.* Further, “[a] trial court does not abuse its

discretion when it refuses to give an instruction that is not supported by the evidence” and there was no evidence that Taylor-Rose would be less likely to reoffend due to the potential for a new SVP petition. *Id.* at 886.

Canty’s reliance on *Post* is misplaced. “*Post* did not require that a trial court give a proposed jury instruction regarding the possibility of a new SVP petition and in fact did not address jury instructions at all.” *Id.* at 885-86. And *Post* does not hold that evidence of an ROA is relevant and admissible in every case. *See Post*, 170 Wn.2d at 316-17. Rather, it is the person’s *knowledge* of the consequences of committing an ROA that makes the evidence relevant:

Post’s knowledge of the consequences for engaging in such conduct may well serve as a deterrent to such conduct and, therefore, has some tendency to diminish the likelihood of his committing another predatory act of sexual violence.

*Id.* Thus, the evidence is only relevant because the person’s knowledge of the threat of a new SVP petition could reduce his risk. *See Taylor-Rose*, 199 Wn. App. at 885 (citing *Post*, 170 Wn.2d at 317). Here, there was no evidence that Canty knew that committing an ROA could subject him to a new SVP petition or that this would deter him from reoffending. Thus, his proposed instruction was not supported by the record.

Canty’s counsel conceded that Canty must have knowledge of the meaning of an ROA in order to testify that it was a deterrent for him.

RP 115-17. But Canty never established such knowledge, and did not testify at trial. *See* RP 783-84, 813-14. Canty argued that Dr. Phenix knew that he was advised about an ROA. RP 778-85. However, the voir dire of Dr. Phenix revealed that she did not discuss the ROA issue with Canty and had no information regarding his knowledge of an ROA. RP 785-87. Rather, the night before Dr. Phenix testified, Canty’s *attorney* told Dr. Phenix that Canty “knows about recent overt act.” RP 786-87. The trial court properly ruled that this was insufficient to allow Dr. Phenix to testify about an ROA as a deterrent for Canty. *See* RP 789-96.<sup>20</sup> Because there was no evidence before the jury about Canty’s knowledge regarding ROAs, it would have been error to give Canty’s proposed instruction. *See State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986) (“it is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it”). The trial court did not abuse its discretion by refusing to give an instruction that was not supported by the evidence.

**C. Use of the Phrase “Sexually Violent Predator” in Jury Instructions is Consistent with the Law and Pattern Instructions**

Canty argues that the trial court erred by using the phrase “sexually violent predator” in the jury instructions and that this phrase “encouraged jurors to decide the case on impermissible factors rather than on the

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<sup>20</sup> After its ruling, the trial court pointed out that nothing prevented Canty from testifying about the ROA issue. RP 796. Despite this, Canty did not testify.

evidence.” App. Brief at 34. He argues that the court should have substituted the phrase “criteria for commitment” in place of “sexually violent predator.” *Id.* Canty cites no legal authority for his argument, as none exists.<sup>21</sup> His argument is absurd and should be rejected.

The phrase “sexually violent predator” has been used in jury instructions since the statute was enacted. *See Young*, 122 Wn.2d at 16 (jury concluded that Young was a “sexually violent predator”). The title of the statute is “Sexually Violent Predators” and the State is required to prove that Canty is a “sexually violent predator” beyond a reasonable doubt. *See RCW 71.09.060(1); WPI 365.10.* In any criminal or civil trial, the title of the cause of action relates to what is alleged. Although a defendant charged with murder or rape may prefer these words not be used at trial or in jury instructions, they are used because they reflect precisely what the State must prove at trial. The central issue at trial is whether Canty is a sexually violent predator. *See WPI 365.21.* There is no reasonable way to avoid use of this phrase at trial or in the jury instructions. As the trial court properly noted, the pattern instructions recommend use of the phrase “sexually violent predator” throughout the jury instructions. *See RP 124; see also WPI 365.01, 365.10, 365.11, 365.21.*

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<sup>21</sup> The State is not aware of any court that has granted such a motion.

“Sexually violent predator” is defined by statute and requires the State to prove that Canty has been convicted of a crime of “sexual violence.” *See* RCW 71.09.020(18). The State must also prove that Canty has a personality disorder that makes him likely to engage in predatory acts of “sexual violence” if not confined in a secure facility. *See id.*; CP 467; WPI 365.10. It defies logic to say that it is too inflammatory to use the phrase “sexually violent predator” when the jury is required to determine if Canty was convicted of a crime of “sexual violence” and if he is likely to commit a future act of “sexual violence.” Furthermore, use of the phrase “criteria for civil commitment” is misleading and would confuse the jury as there are various forms of civil commitment in Washington. *See e.g.* RCW 71.05 (commitment for mental illness). The jury should not be kept in the dark about what form of civil commitment the State is seeking.

It is well established that the “manner in which the previous crimes were committed has some bearing on the motivations and mental states” of individuals alleged to be SVPs and “is pertinent to the ultimate question” at trial. *Young*, 122 Wn.2d at 53; *In re Det. of Turay*, 139 Wn.2d 379, 401, 986 P.2d 790 (1999) (prior sexual history is highly probative of propensity for future violence and likelihood to reoffend). The jury heard the following evidence about Canty’s crimes at trial: that he was arrested for attempted murder after stabbing a man in the neck with a knife; that he attempted to

sexually assault a woman in her yard by throwing her on the ground and straddling her; that he exposed his penis to a woman and threatened to kill her; that he approached a teenager in a library and touched her vaginal area; and that he sexually assaulted a woman with Muscular Dystrophy in her home and ejaculated on her face while holding her down and trying to force his penis into her mouth. RP 231-39; 297-310; CP 334-37, 350; Ex. 33. Canty did not object to the admission of this testimony. It is absurd to argue that the phrase “sexually violent predator” was too prejudicial and inflammatory where the jury heard this relevant trial testimony and was tasked with applying these facts to the law.

Furthermore, there are safeguards in place to ensure Canty receives a fair trial. The court instructed the jury that the State has the burden to prove each element beyond a reasonable doubt and that Canty has no burden. CP 466-67. The court also instructed jurors that they should not let emotions overcome their rational thought processes and that they must reach a decision “based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference.” CP 462-64. Jurors are presumed to have followed the court’s instructions. *Montgomery*, 163 Wn.2d at 596. Thus, although there may be some negative connotation with the phrase “sexually violent predator,” there was no basis to exclude the phrase where it serves as the basis for the petition and is used extensively

throughout the statute and pattern instructions. RP 123-24. The trial court did not abuse its discretion by using this phrase in the instructions.

**D. The Jury Instructions Regarding Crimes of Sexual Violence Were an Accurate Statement of the Law and Not an Improper Comment on the Evidence**

Canty argues that the trial court violated Article IV, § 16 of the Washington Constitution and his right to due process under the 14th Amendment by instructing the jury that indecent liberties by forcible compulsion and burglary in the first degree with sexual motivation were crimes of sexual violence. Canty's argument lacks merit and is contrary to established law. The trial court's instructions accurately stated the law, were consistent with pattern jury instructions, and did not relieve the State of its burden to prove Canty had been convicted of a sexually violent offense.

**1. Standard of Review**

Although Canty did not raise this issue below,<sup>22</sup> whether an instruction is a judicial comment on the evidence is a constitutional issue that may be raised for the first time on appeal. *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). Appellate courts review instructions de novo to determine if the trial court improperly commented on the evidence. *Taylor-Rose*, 199 Wn. App. at 874. Jury instructions are proper when they

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<sup>22</sup> See RP 824-28, 843-52, 872-80.

permit each party to argue its theory of the case, are not misleading, and properly inform the jury of the applicable law. *Rekhter* 180 Wn.2d at 117.

**2. Crimes Listed in the Statutory Definition of a “Sexually Violent Offense” Are Also “Crimes of Sexual Violence”**

Canty concedes that Division I found that the phrases “crime of sexual violence” and “sexually violent offense” mean the same thing; however, he argues that this Court “is not bound by *Coppin*, and should not follow Division I’s reasoning.” App. Brief at 48 (citing *In re Det. of Coppin*, 157 Wn. App. 537, 238 P.3d 1192 (2010)). In a footnote, Canty then references the *Taylor-Rose* opinion, which agreed with the *Coppin* analysis and held that a crime listed in the definition of “sexually violent offense” also qualifies as a “crime of sexual violence.” App. Brief at 48 n.44; *see Taylor-Rose*, 199 Wn. App. at 875-76. However, Canty fails to inform this Court that *Taylor-Rose* is a Division II case. Thus, this Court has explicitly rejected the arguments made by Canty. *See Taylor-Rose*, 199 Wn. App. at 875-76.

Issues of statutory interpretation are reviewed de novo, and the goal is to carry out the Legislature’s intent. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Whatcom County v. City of Bellingham*,

128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Courts should avoid unlikely, absurd, or strained results. *Morris v. Blaker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992). Courts first look to the plain language of the statute and if it is unambiguous, the court's inquiry is at an end and the statute must be enforced in accordance with its plain meaning. *Armendariz*, 160 Wn.2d at 110. A statute is ambiguous if it is subject to more than one reasonable interpretation, but it is not ambiguous simply because different interpretations are conceivable. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). "The spirit and intent of the statute should prevail over the literal letter of the law." *Morris*, 118 Wn.2d at 143.

The State was required to prove that Canty is an SVP. *See* RCW 71.09.060(1). An SVP is a person "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(18) (emphasis added). Although the definitional section of the SVP act does not define "crime of sexual violence," it does define what constitutes a "sexually violent offense." *See* RCW 71.09.020(17). The SVP definition must be read in relation to the other statutory provisions. *Coppin*, 157 Wn. App. at 553.

*Coppin* applied principles of statutory interpretation and found that it would be absurd to conclude that a crime expressly listed as a “sexually violent offense” is not also a “crime of sexual violence.” *Coppin*, 157 Wn. App. at 552-53. In *Coppin*, the State relied on *Coppin*’s two convictions for first degree statutory rape to establish that he had been convicted of a “crime of sexual violence.” *Id.* In finding that a “sexually violent offense” has the same meaning as a “crime of sexual violence,” the Court noted:

The legislature expressly defined “sexually violent offense” to include statutory rape in the first degree. Given this definition, it would be absurd to conclude that first degree statutory rape, a “sexually violent offense” is not also a “crime of sexual violence.” Accordingly, *Coppin*’s two 1988 convictions for statutory rape necessarily were for crimes “of sexual violence,” as the SVP definition requires.

*Id.* at 553 (footnote omitted). This Court agreed with this analysis. *Taylor-Rose*, 199 Wn. App. at 875-76. This Court has rejected the argument that the Legislature intended different meanings by using different terms in RCW 71.09.020(17) and RCW 71.09.020(18). *Taylor-Rose*, 199 Wn. App. at 875-76 (citing *Coppin*, 157 Wn. App. at 553) (“there is no material difference between the term ‘violent’ used in subsection 17 and the term ‘violence’ used in subsection 18”).

RCW 71.09.020(17) provides a list of offenses that qualify as sexually violent offenses, which includes *Canty*’s convictions for indecent

liberties by forcible compulsion and burglary in the first degree with sexual motivation. Given this definition, it would be absurd to conclude that these “sexually violent offenses” are not also “crimes of sexual violence.” *See Taylor-Rose*, 199 Wn. App. at 875. Any other interpretation would render RCW 71.09.020(17) meaningless and superfluous.

Canty urges this Court to apply the dictionary definition of “violence” and find that a “crime of sexual violence” requires the jury to determine that the offense was violent “in fact” and accomplished by “swift and intense force” or “rough or injurious physical force.” App. Brief at 42-44. First, *Coppin* rejected this argument, finding that “the legislature has expressly declared his convictions to fall within those that are defined as ‘sexually *violent* offenses.’” *See Coppin*, 157 Wn. App. at 553-54 (emphasis in original). Second, Canty’s interpretation would lead to absurd results that would render RCW 71.09.020(17) meaningless. The statute provides that first and second degree child molestation are “sexually *violent* offenses” regardless of the amount of physical force used. *See* RCW 71.09.020(17) (emphasis added). Thus, what constitutes a sexually violent offense is defined by statute and not by how “rough” the sexual assault was.

*Coppin* also rejected Canty’s strict construction argument. *See Coppin*, 157 Wn. App. at 554. “To strictly construe a statute simply means

that given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.” *Id.* The Court explained that the Legislature has expressly defined what constitutes a sexually violent offense, and in light of this statutory definition, “there simply is no need to consider choices between ‘strict’ or ‘liberal’ interpretations of the statute.” *Id.*

### **3. The Instruction Was Not a Comment on the Evidence**

Article IV, § 16 of the Washington Constitution prohibits a trial court from commenting on the evidence. This provision prohibits judges from conveying their personal attitudes about the merits of the case or instructing the jury that matters of fact have been established as a matter of law. *Levy*, 156 Wn.2d at 721. A jury instruction that accurately states the law is not a comment on the evidence. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015); *Taylor-Rose*, 199 Wn. App. at 874 (instruction that does no more than accurately state the law is proper because it is the court’s duty to declare the law).

In *Taylor-Rose*, this Court held that instructing the jury that a particular crime is a crime of sexual violence is not an improper comment on the evidence, but rather an accurate statement of the law that does not relieve the State of its burden of proof. *Taylor-Rose*, 199 Wn. App. at 874-76. Contrary to Canty’s argument, the trial court did not inform the jury

that he had been convicted of a crime of sexual violence, thereby relieving the State of its burden to prove this element. Rather, the trial court properly informed the jury that in order to find Canty is an SVP, it must find beyond a reasonable doubt that Canty had been convicted of indecent liberties by forcible compulsion and/or burglary in the first degree with sexual motivation. *See* CP 467. The court also provided a list of crimes that constitute crimes of sexual violence as a matter of law. CP 471. These instructions were an accurate statement of the law and not a comment on the evidence. An instruction that removes a contested *factual* matter from the jury constitutes an improper comment on the evidence. *Brush*, 183 Wn.2d at 559. The court's instructions merely recited the law and did not remove a factual matter from the jury's consideration. The rationale in *McMahan*, an unpublished Division III decision, is persuasive:

[T]here was no comment on the factual component of the first element. The jury was told that the State had to establish in fact that Mr. McMahan had committed a crime of sexual violence and further specified which of the crimes presented in evidence needed to be established to the jury's satisfaction. This element did not say that the State had proved that defendant had committed an act of sexual violence. It instead told the jury that the State needed to prove a specific prior act of sexual violence. The factual question of whether or not the State had proved that point was not implicated by the language of the jury instruction, nor did that language in any way reflect the trial judge's thoughts on the matter. Instead, the instruction limited which of the defendant's past sexual offenses could properly be included in assessing the first element.

*In re Det. of McMahan*, No. 31252-6-III, 2014 WL 1494022, at \*2 (Wash. Ct. App. 2014).<sup>23</sup>

The instructions did not relieve the State of its burden to prove that Canty had been convicted of a crime of sexual violence. The State admitted a certified copy of these convictions in order to prove this element beyond a reasonable doubt, and Canty never disputed the fact of these convictions. *See* Ex. 13; *see also* RP 627, 682-85, 977-78, 985-89, 1002-04. Furthermore, the instruction was consistent with the note on use in the pattern instruction, which advises parties to “[f]ill in the name of the particular crime of sexual violence where indicated.” WPI 365.10.<sup>24</sup> Although pattern jury instructions are not mandatory, they are “intended to be accurate, concise, unbiased statements of the law.” *In re Domingo*, 155 Wn.2d 356, 369, 119 P.3d 816 (2005).

Canty’s reliance on *State v. Jackman*, 156 Wn.2d 736, 132 P.3d 136 (2007) is misplaced. *See* App. Brief at 46-47. In *Jackman*, the “to convict” jury instruction referenced the minor victims’ birth dates even though the

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<sup>23</sup> A party may cite an unpublished opinion filed after March 1, 2013 if identified as nonbinding authority and the opinion “may be accorded such persuasive value as the court deems appropriate.” GR 14.1(a).

<sup>24</sup> WPIC 365.10 reads in relevant part: “To establish that (respondent’s name) is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt: (1) That (respondent’s name) has been convicted of a crime of sexual violence, namely (identify crime of sexual violence);...”

State was required to prove the fact that the victims were minors. *Jackman*, 156 Wn.2d at 738-39, 744. The Court held that including the birth dates in the instruction was a comment on the evidence because it allowed the jury to infer that the State had proven those birth dates and removed this fact from the jury's consideration. *Id.* at 744-45. In Canty's case, the jury was not required to determine whether indecent liberties by forcible compulsion or burglary in the first degree with sexual motivation were, in fact, sexually violent offenses. They are as a matter of law. RCW 71.09.020(17). The instructions accurately stated the law and did not constitute an improper comment on the evidence or relieve the State of its burden to prove Canty had been convicted of a crime of sexual violence.

Even assuming arguendo that the trial court erred, there was no prejudice. *See Levy*, 156 Wn.2d at 723 (burden is on the State to show no prejudice). Canty never disputed the fact that he was convicted of a crime of sexual violence. *See* RP 682-85, 977-78, 985-89, 1002-04.

**E. The State Presented Sufficient Evidence That Canty Is Likely to Engage in Predatory Acts of Sexual Violence**

Referencing Instruction No. 8, Canty argues that the State failed to provide sufficient evidence that he is likely to engage in predatory acts of sexual violence. App. Brief at 35-37. Canty's entire argument rests on his assertion that neither expert explicitly opined that Canty would likely

commit each of the enumerated crimes in the instruction. *See id.* First, Canty cites no authority for this argument. There is none. Appellate courts do not consider arguments unsupported by citation to authority, and such “passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Joy v. Dept of Labor & Industries*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012). Second, Canty’s argument lacks merit and is based on a misunderstanding of the State’s burden.

The State must prove beyond a reasonable doubt that Canty’s personality disorder makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. CP 467; *see In re Det. of Audett*, 158 Wn.2d 712, 727, 147 P.3d 982 (2006). In an SVP case, “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.” *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). A claim of insufficiency admits the truth of all of the State’s evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State and interpreted strongly against the defendant. *Audett*, 158 Wn.2d at 727. The commitment will be upheld if any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Id.* at 727-28.

Here, Canty argues that the evidence was insufficient under the instruction given because it only enumerated four sexually violent offenses and “it may well be impossible for any expert to predict with certainty the specific acts he might commit.” App. Brief at 36-37. He suggests that “the State should have proposed an instruction defining the phrase ‘sexual violence’ in general terms.” *Id.* at 37.<sup>25</sup> However, there was sufficient evidence to prove that Canty was likely to engage in predatory acts of sexual violence.

“Predatory” is defined in the SVP statute as “acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.” RCW 71.09.020(10). The court instructed the jury consistent with this definition and the pattern instructions with no objection from Canty. *See* CP 470; WPI 365.13; RP 829-30, 922, 946. “Sexually violent offense” is also defined in the statute and includes a detailed list of crimes that qualify as sexually violent offenses. RCW 71.09.020(17). Based on this statutory definition and consistent with the pattern instructions, the State proposed an

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<sup>25</sup> Canty raises the issue about an instruction defining sexual violence “in general terms” for the first time on appeal. It is unclear what Canty means by such a “general” instruction, and he cites no authority for his claim. Further, Canty never proposed such an instruction. *See* CP 208-28.

instruction including approximately eleven of these offenses in order to narrow the crimes to reflect those that Canty previously committed or was likely to commit in the future. CP 403; *see* RP 830-32, 863-70; *see also* WPI 365.16. During oral argument, Canty requested that the court instruct the jury that sexual violence means indecent liberties by forcible compulsion and burglary in the first degree with sexual motivation – Canty’s two prior convictions for sexually violent offenses. RP 872, 876-80, 895.<sup>26</sup>

After a lengthy discussion on the record, the trial court narrowed the instruction to include four sexually violent offenses, including Canty’s two prior sexually violent offenses. *See* CP 471; RP 830-32, 861-916, 946-47. The instruction was consistent with the note on use in the pattern instruction, which recommends identifying specific crimes relevant to the particular offender:

Based on the evidence in the case, fill in the blank with the following crimes of sexual violence: (1) those with which the respondent has allegedly been charged or convicted; (2) those that the respondent is likely to commit in the future; (3) those that constituted “recent overt acts” (when proof of such an act is necessary).

*See* WPI 365.16. Pattern jury instructions are intended to be an accurate and unbiased statement of the law. *Domingo*, 155 Wn.2d at 369. According to

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<sup>26</sup> Canty initially argued that the trial court should instruct the jury that sexual violence means all of the sexual offenses listed in RCW 71.09.020(17) or, in the alternative, that it means only Canty’s predicate offenses. RP 861-63.

the pattern instruction, these types of crimes are relevant because the State must prove that the person has been convicted of a crime of sexual violence in the past and is likely to engage in predatory acts of sexual violence in the future. WPI 365.16.

Viewing the evidence in the light most favorable to the State, there was substantial evidence for a rational trier of fact to find that the State proved beyond a reasonable doubt that Canty was likely to engage in predatory acts of sexual violence. Dr. North testified that he is familiar with the definition of “sexual violence” and aware that any future offenses must fit within this definition. RP 460-63. He testified that Canty is likely to commit “predatory” acts of sexual violence in the future because “every single one of his offense victims has been a stranger.” RP 418, 520-21. He also testified that Canty’s personality disorder makes him likely to commit predatory acts of sexual violence in the future. RP 419, 435, 460, 518-20.

Dr. North testified that he considered Canty’s history of sexual offending in determining the offenses Canty is likely to commit in the future. RP 465. This included testimony about Canty’s 1996 sexual assault of a stranger, Z.B. *See* RP 299-302, 620-27, 726; CP 334-38; Ex. 33. Canty grabbed Z.B., threw her on the ground, got on top of her, and pressed his penis against her back. RP 300-02, 620-25; CP 334-338; Ex. 33. Z.B. managed to distract

Canty and escape. RP 300-02, 624-27. Dr. North also considered testimony that Canty was convicted of indecent liberties with forcible compulsion and burglary in the first degree with sexual motivation for an incident involving another stranger in 2001. *See* RP 307-10; Ex. 13. Canty pushed his way into a woman's apartment, grabbed her by the throat, threw her to the ground, and threatened to break her neck if she refused to cooperate. RP 308-09; CP 350; Ex. 33. He tried to force his penis into her mouth and ejaculated on her face. RP 309; *see* CP 350.

Dr. North testified that this history of sexual offending determines the types of sexual assaults Canty is likely to commit in the future. *See* RP 465. He testified that most of Canty's crimes have been "hands-on sex offenses" and that this last offense "clearly was a sexually violent offense" where he completed the sexual assault and did "what he wanted to do." RP 520; *see also* RP 307-10. Dr. North opined that if Canty is released and "allowed to do and get away with what he'd like to do it would clearly be a sexually violent offense." RP 520. Even Canty's expert, Dr. Phenix, testified that she reviewed all of the records regarding Canty's sexual assaults, including uncharged offenses, and believes he committed all of them. RP 682-85, 716-22.

Together, there was sufficient evidence that Canty is likely to engage in predatory acts of sexual violence, including those offenses

enumerated in Instruction No. 8. *See* CP 471. It is undisputed that Canty already committed two of the four sexually violent offenses listed in the instruction and ample evidence that he had a history of committing predatory sexual offenses as described in the statute and the instruction. Thus, there was abundant testimony to show the types of crimes Canty is likely to commit. There is no requirement in the statute or elsewhere that an expert specifically opine as to each specific crime in the instruction or statute. Indeed, the trial court properly questioned the appropriateness of such testimony. *See* RP 897-98 (suggesting that the expert should testify more generally “about the types of crimes and the conduct that could be involved”).<sup>27</sup> Psychologists are not experts in the law and it is the court’s duty to instruct the jury as to the law. *See State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (experts may not offer opinions of law in the guise of expert testimony); *see also Ball v. Smith*, 87 Wn.2d 717, 723, 556 P.2d 936 (1976) (“all matters of law are to be determined and declared by the court”).

In sum, the trial court properly found that Dr. North testified about the types of crimes and conduct that Canty is likely to commit in the future and that this testimony provided a basis for instructing the jury about

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<sup>27</sup> The trial court stated, “And frankly, I don’t know that it would have been appropriate for...him to even go into the specific elements of each of those crimes, but instead testifying about the types of crimes and the conduct that could be involved.” *Id.*

potential crimes that fit into the “likely to commit” category. RP 897-98. The trial court noted the importance of defining sexual violence for the jury and indicated that it would not be helpful to either party to leave jurors without an instruction as to what constitutes crimes of sexual violence. RP 869. Canty’s counsel agreed. RP 869. The trial court properly found that narrowing the instruction to include crimes that Canty either committed or is likely to commit in the future is consistent with the pattern instructions. *See* RP 863-65, 869-70. Viewing the evidence in the light most favorable to the State, there was sufficient evidence for a rational jury to find that Canty was likely to engage in predatory acts of sexual violence.

#### V. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm Canty’s commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of May, 2018.

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\_\_\_\_\_  
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NO. 50573-8

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

In re the Detention of:

MICHAEL CANTY,

Appellant.

DECLARATION OF  
SERVICE

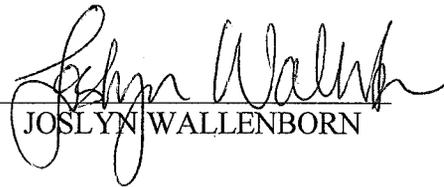
I, Joslyn Wallenborn, declare as follows:

On May 14, 2018, I sent via electronic mail, per service agreement, a true and correct copy of Respondent's Brief and Declaration of Service, addressed as follows:

Backlund & Mistry  
[backlundmistry@gmail.com](mailto:backlundmistry@gmail.com)  
[manek.manek.manek@gmail.com](mailto:manek.manek.manek@gmail.com)

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

DATED this 14<sup>th</sup> day of May, 2018, at Seattle, Washington.

  
JOSLYN WALLENBORN

**WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION**

**May 14, 2018 - 2:48 PM**

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- Manek R. Mistry (Undisclosed Email Address)
- Jodi R. Backlund (Undisclosed Email Address)

**Comments:**

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