

FILED
Court of Appeals
Division II
State of Washington
7/13/2020 10:56 AM

No. 54505-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of

Randy Smith,

Appellant,

vs.

State of Washington,
Respondent

Thurston County Superior Court Cause No. 18-2-02803-2

The Honorable Judge Christopher Lanese

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 5

ARGUMENT..... 7

I. The trial court violated Mr. Smith’s Fourteenth Amendment right to due process by commenting on the evidence and relieving the State of its burden to prove a prior conviction for a “crime of sexual violence.” 7

A. The state constitution bars courts from instructing jurors that a fact has been established by the evidence..... 7

B. RCW 71.09 differentiates between “sexually violent offenses” and “crimes of sexual violence.” 8

C. The court’s instructions improperly directed jurors to find that Mr. Smith’s prior conviction qualified as a “crime of sexual violence.”..... 15

D. Reversal is required because the record does not affirmatively show an absence of prejudice..... 16

E. This court should decline to follow Division I’s decision in *Coppin*, which ignored established Supreme Court precedent..... 18

II.	The court’s instructions did not make clear to jurors that Mr. Smith could face commitment in the future even if he did not commit a crime.....	20
	A. The court’s instructions should have made the relevant legal standards manifestly apparent to the average juror..	20
	B. The trial court failed to instruct jurors on the availability of a “recent overt act” petition, which reduced Mr. Smith’s risk of committing predatory acts of sexual violence.	25
	C. The Court of Appeals should address the due process arguments left undecided in <i>Taylor-Rose</i>	29
III.	The inflammatory phrase “sexually violent predator” created incurable prejudice in the minds of jurors and infringed Mr. Smith’s constitutional right to due process.....	30
IV.	The trial court should have excluded highly prejudicial evidence that had little or no probative value.	34
	CONCLUSION	37

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Addington v. Texas</i> , 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)	31, 34
<i>Foucha v. Louisiana</i> , 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).....	23, 24, 25, 26, 31, 34
<i>Kansas v. Crane</i> , 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)	31
<i>Kansas v. Hendricks</i> , 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).....	31
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)	21, 23
<i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)	23

WASHINGTON STATE CASES

<i>Blomstrom v. Tripp</i> , 189 Wn.2d 379, 402 P.3d 831 (2017).....	8
<i>Bunch v. King Cty. Dep't of Youth Servs.</i> , 155 Wn.2d 165, 116 P.3d 381 (2005).....	32
<i>Durland v. San Juan Cty.</i> , 182 Wn.2d 55, 340 P.3d 191 (2014)	19
<i>In re Det. of Coppin</i> , 157 Wn.App. 537, 238 P.3d 1192 (2010)..	18, 19, 20, 35
<i>In re Det. of Fair</i> , 167 Wn.2d 357, 219 P.3d 89 (2009)	19
<i>In re Det. of Hawkins</i> , 169 Wn.2d 796, 238 P.3d 1175 (2010)	21
<i>In re Det. of Moore</i> , 167 Wn.2d 113, 216 P.3d 1015 (2009).....	23, 25
<i>In re Det. of Morgan</i> , 180 Wn.2d 312, 330 P.3d 774 (2014)	22

<i>In re Det. of Post</i> , 170 Wn.2d 302, 241 P.3d 1234 (2010)	20, 26, 27, 28
<i>In re Det. of Strand</i> , 167 Wn.2d 180, 217 P.3d 1159 (2009)	9, 11, 13
<i>In re Det. of Taylor-Rose</i> , 199 Wn.App. 866, 401 P.3d 357 (2017), <i>review denied</i> , 189 Wash.2d 1039 (2018)	18, 24, 29, 30, 35
<i>In re Det. of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003)	31
<i>In re Detention of Anderson</i> , 166 Wn.2d 543, 211 P.3d 994 (2009)	8
<i>In re Detention of Martin</i> , 163 Wn.2d 501, 182 P.3d 951 (2008) ..	8, 18, 19
<i>In re Schreiber</i> , 189 Wn.App. 110, 357 P.3d 668 (2015)	24
<i>Matter of Det. of M.W. v. Dep't of Soc. & Health Servs.</i> , 185 Wn.2d 633, 374 P.3d 1123 (2016)	21
<i>Matter of Det. of Monroe</i> , 198 Wn.App. 196, 392 P.3d 1088 (2017)	29
<i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006)	12
<i>Peralta v. State</i> , 187 Wn.2d 888, 389 P.3d 596 (2017)	26
<i>State v. Allery</i> , 101 Wn.2d 591, 682 P.2d 312 (1984)	22
<i>State v. Armstrong</i> , 188 Wn.2d 333, 394 P.3d 373 (2017)	26
<i>State v. Baldwin</i> , 109 Wn.App. 516, 37 P.3d 1220 (2001)	35
<i>State v. Becker</i> , 132 Wn.2d 54, 935 P.2d 1321 (1997)	7, 15, 16
<i>State v. Borsheim</i> , 140 Wn.App. 357, 165 P.3d 417 (2007)	22
<i>State v. Brush</i> , 183 Wn.2d 550, 353 P.3d 213 (2015)	15, 18, 20
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004)	9, 19
<i>State v. DeLeon</i> , 185 Wn.2d 478, 374 P.3d 95 (2016)	8
<i>State v. Fischer</i> , 23 Wn.App. 756, 598 P.2d 742 (1979)	22, 33
<i>State v. Jackman</i> , 156 Wn.2d 736, 132 P.3d 136 (2006), <i>as corrected</i> (Feb. 14, 2007)	8, 16, 17

<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	21, 22, 24, 28
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	16
<i>State v. McCuiston</i> , 174 Wn.2d 369, 275 P.3d 1092 (2012)	21, 23, 24
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	35
<i>State v. Smith</i> , 174 Wn.App. 359, 298 P.3d 785 (2013).....	24
<i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999), <i>as amended</i> (July 2, 1999).....	24
<i>State v. Walden</i> , 131 Wn.2d 469, 932 P.2d 1237 (1997).....	24
<i>State v. Watkins</i> , 136 Wn.App. 240, 148 P.3d 1112 (2006)	24, 33, 34
<i>W.H. v. Olympia Sch. Dist.</i> , No. 97630-9 Slip Op. (Wash. June 18, 2020)	18, 24, 30

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV	1, 7, 9, 18, 20, 25, 26
Wash. Const. art. IV, §16.....	1, 7

WASHINGTON STATE STATUTES

RCW 71.05.320	21
RCW 71.09.010	14
RCW 71.09.020 .. 7, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 25, 26, 27, 28, 33	
RCW 71.09.025	10, 13
RCW 71.09.030	10, 11, 13, 28
RCW 71.09.060	7, 10, 11, 13, 26, 28
RCW 71.09.090	21

RCW 71.09.140 10, 11

OTHER AUTHORITIES

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 365.15 (6th ed.) 26

Deirdre M. Smith, *Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of "Sexually Violent Predator" Commitment*, 67 Okla. L. Rev. 619 (2015) 31

Dictionary.com, Random House, Inc. (2018) 12, 13, 14, 15, 16, 19, 35

ER 403 2, 4, 35, 36, 37

ER 404 35

RAP 2.5 8

Scurich, Gongola, & Krauss, *The Biasing Effect of the "Sexually Violent Predator" Label on Legal Decisions*, 47 International Journal of Law and Psychiatry, 109 (2016) 32, 33, 34

ISSUES AND ASSIGNMENTS OF ERROR

1. The trial judge improperly commented on the evidence in violation of Wash. Const. art. IV, §16.
2. Mr. Smith's civil commitment infringed his Fourteenth Amendment right to due process because the court's instructions relieved the State of its burden to prove an element required for commitment.
3. The trial court improperly directed jurors to find that Mr. Smith had previously been convicted of a "crime of sexual violence."
4. The trial court erred by instructing jurors that Mr. Smith's prior conviction was *per se* a "crime of sexual violence."
5. The trial court erred by giving Instruction No. 4.
6. The court's instructions failed to make the relevant standard manifestly clear to the average juror.

ISSUE 1: A judge may not comment on the evidence. Did the trial judge comment on the evidence and relieve the State of its burden of proof by telling jurors that Mr. Smith's prior offense was *per se* a "crime of sexual violence"?

7. Mr. Smith's commitment order violated his right to due process.
8. The court's instructions relieved the State of its burden to show current dangerousness under conditions as they would exist following Mr. Smith's release.
9. The trial court failed to instruct jurors on the availability of a Recent Overt Act ("ROA") Petition.

ISSUE 2: The possibility of civil commitment based on a "recent overt act" following release is relevant to a sexually violent predator determination. Should the trial judge have told jurors that Mr. Smith could be committed following release even if he did not commit a new crime?

10. The court's instructions encouraged commitment even if the evidence failed to show current dangerousness, in violation of Mr. Smith's right to due process.
11. The court's instructions infringed Mr. Smith's due process right to a decision based on the evidence rather than passion and prejudice.

12. The trial court erred by instructing jurors using language calculated to inflame the jury's passions and prejudices.
13. The trial court erred by denying Mr. Smith's motion to substitute neutral language for the phrase "sexually violent predator."

ISSUE 3: The phrase "sexually violent predator" has been shown to create bias unrelated to evidence that a person is dangerous. Did the trial court violate Mr. Smith's right to due process by refusing to substitute neutral language for the phrase "sexually violent predator" in the instructions?

14. The trial court violated ER 403 by admitting graphic details of injuries suffered by the victim of Mr. Smith's 1990 offense.
15. The court erred by failing to balance the probative value of the graphic evidence against the danger of unfair prejudice.
16. The probative value of graphic details of injuries inflicted during the 1990 offense was substantially outweighed by the danger of unfair prejudice.

ISSUE 4: ER 403 requires the court to balance the probative value of the evidence against the danger of unfair prejudice. Must the commitment order be vacated because the trial court failed to balance the probative value of certain graphic evidence against the danger of unfair prejudice?

INTRODUCTION AND SUMMARY OF ARGUMENT

Randy Smith's civil commitment order must be reversed for four reasons. First, at his civil commitment trial, the court instructed jurors that his prior conviction qualified as a "crime of sexual violence" as a matter of law. This amounted to a comment on the evidence.

Second, the court failed to instruct jurors that Mr. Smith could face commitment in the future even if he did not commit a new crime. This possibility reduced his likelihood of committing predatory acts of sexual violence in the future. Without this knowledge about conditions that would exist upon his release from custody, jurors were unable to assess the likelihood that he would engage in such acts. This relieved the State of its burden and violated Mr. Smith's right to due process.

Third, the court instructed jurors using the phrase "sexually violent predator" rather than the more neutral language—"criteria for commitment"—proposed by Mr. Smith's attorneys. Research shows that the phrase "sexually violent predator" creates bias unrelated to a person's dangerousness. It increases the probability of commitment based on passion and prejudice rather than the evidence. This violates due process, which requires proof of mental illness and current dangerousness.

And fourth, over objection, the trial court admitted graphic details of injuries suffered by the victim of Mr. Smith's 1990 offense. These

graphic details were unrelated to any element required for commitment. Nor did the graphic details provide support for the opinions of the State's expert. The court did not weigh the minimal probative value of the evidence against the danger of unfair prejudice. The introduction of graphic details violated ER 403.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 2018, the state filed a petition for involuntary commitment under RCW 71.09, alleging that Randy Smith is a sexually violent predator. CP 1-2. Randy Smith is a sex offender, and he knows that to succeed safely in the community, he needs structure and accountability. RP (1/15/20) 796. In response to the state's petition, Mr. Smith found a treatment provider and signed a treatment contract, and also secured supported housing with structure and accountability. RP (1/15/20) 806-843; RP (8/16/20) 871-964. In fact, the state's own expert called Mr. Smith's plan for treatment and housing "excellent." RP (1/15/20) 748.

The case went to trial. One of the elements that the state had to prove was that he had committed a "crime of sexual violence." CP 1-2. Over defense objection, the court instructed the jury that Mr. Smith had been convicted of such an offense. RP (1/16/20) 782; CP 784, 789.

At trial, the state sought to admit graphic details about Mr. Smith's 1990 rape of a child conviction. The defense objected, noting that the evidence as presented would be hearsay, not admissible under ER 703 or ER 705, and that in any event its prejudicial impact would outweigh its probity. CP 110-113. The court did not weigh the probity versus the prejudice and admitted the evidence. RP (12/27/19) 38. The jury heard not only that the scene of the crime was very bloody, but also that the three-

year old victim had to have surgery because the tissue between her vagina and anus was ripped. RP (1/8/20) 165-170; RP (1/18/20) 514-520.

The defense objected to the use of the term “sexually violent predator”, and instead asked that the court and parties refer to criteria for commitment. CP 115-118, 312, 335. Mr. Smith’s counsel noted the emotional charge the phrase “sexually violent predator” carried, and cited research proving the prejudicial impact such a term has on jurors. CP 115-118. The trial judge denied the motion, and the term was used in the court’s instructions. RP (12/27/19) 43; CP 785.

As part of the court’s instruction regarding finding whether or not Mr. Smith was likely to reoffend, the defense sought to define “likely” as “exceeds 50%”. CP 312, 339. The court declined to so instruct. RP (1/16/20) 973. The court also did not instruct the jury that one of the conditions that would exist were Mr. Smith released is the possibility that the State would file a new petition based on a recent overt act that did not amount to a new crime. CP 110.

The jury’s verdict was that the elements had been met, and Mr. Smith was committed to the Special Commitment Center. CP 801. He timely appealed. CP 804.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. SMITH’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY COMMENTING ON THE EVIDENCE AND RELIEVING THE STATE OF ITS BURDEN TO PROVE A PRIOR CONVICTION FOR A “CRIME OF SEXUAL VIOLENCE.”

Mr. Smith could only be committed if the jury found that he had previously been convicted of a “crime of sexual violence.” RCW 71.09.020(18); RCW 71.09.060(1); *see also* CP 785. The court explicitly directed jurors to find that Mr. Smith’s prior conviction qualified as a “crime of sexual violence” as a matter of law. CP 785. This amounted to a comment on the evidence in violation of Wash. Const. art. IV, §16. It also relieved the State of its burden to prove that Mr. Smith’s prior convictions qualified him for commitment, in violation of his Fourteenth Amendment right to due process.

A. The state constitution bars courts from instructing jurors that a fact has been established by the evidence.

Under the state constitution, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. art. IV, §16. A court may not “instruct the jury that matters of fact have been established as a matter of law.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

Judicial comments are presumed prejudicial.¹ *Jackman*, 156 Wn.2d at 743. A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Id.*, at 743, 745. This is a higher standard than normally applied to constitutional errors. *Cf. State v. DeLeon*, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (outlining constitutional standard for harmless error).

B. RCW 71.09 differentiates between “sexually violent offenses” and “crimes of sexual violence.”

The civil commitment scheme differentiates between “sexually violent offenses” and “crimes of sexual violence.” Here, the court’s instructions conflated the two concepts, resulting in a comment on the evidence.

Involuntary civil commitment involves a “massive curtailment of liberty.” *In re Detention of Anderson*, 166 Wn.2d 543, 556, 211 P.3d 994 (2009) (citations and internal quotation marks omitted). Because of this, a civil commitment statute such as RCW 71.09 must be strictly construed to its terms. *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008).

¹ Judicial comments invade a fundamental right, and thus can always be raised for the first time on review. *Id.*; *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136, 140 (2006), *as corrected* (Feb. 14, 2007); RAP 2.5(a)(3). Alleged constitutional errors are reviewed *de novo*. *Blomstrom v. Tripp*, 189 Wn.2d 379, 389, 402 P.3d 831 (2017). The Court of Appeals should review this issue *de novo*.

A court construing RCW 71.09 must choose a “narrow, restrictive construction” over a “broad, more liberal interpretation.” *Id.* at 510. Civil incarceration achieved by means other than strict compliance with RCW 71.09 deprives a person of liberty without due process. *Id.* at 511; U.S. Const. Amend. XIV.

Where the legislature uses different language in the same statute, different meanings are intended.² *State v. Costich*, 152 Wn.2d 463, 475-476, 98 P.3d 795 (2004). Principles of statutory interpretation require a “comprehensive reading” of RCW 71.09, deriving legislative intent from “ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Strand*, 167 Wn.2d at 186 (internal quotation marks and citations omitted).

A person’s prior offenses play a significant role in commitment proceedings under RCW 71.09. The statute uses two different phrases to describe predicate offenses: “sexually violent offense” and “crime of sexual violence.” *See* RCW 71.09.020(17) and RCW 71.09.020(18). Since the legislature used different language, it necessarily intended different meanings. *Costich*, 152 Wn.2d at 475-476.

² Statutory construction is a question of law reviewed *de novo*. *In re Det. of Strand*, 167 Wn.2d 180, 188, 217 P.3d 1159 (2009). The primary objective of statutory construction is to ascertain and carry out the intent of the legislature. *Id.* at 188.

The phrase “sexually violent offense” is used repeatedly throughout the statute; however, the phrase “crime of sexual violence” occurs only once: in the definition of sexually violent predator. RCW 71.09.020(18); *see also* RCW 71.09.020(17), RCW 71.09.025; RCW 71.09.030; RCW 71.09.060; RCW 71.09.140.

“Sexually violent offense” has a specific and concrete meaning assigned by the legislature. RCW 71.09.020(17). It is defined with reference to a limited list of qualifying offenses.³ RCW 71.09.020(17). A person who has been convicted of a “sexually violent offense” and who appears to meet criteria for commitment will be referred to the Office of the Attorney General and relevant prosecuting attorney(s) three months prior to release. RCW 71.09.025(1)(a).

These officials may file a petition for civil commitment when it appears that such a person—one who has been convicted of a “sexually

³ Under the statutory definition,

“Sexually violent offense” means ... rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; [an equivalent offense under a prior statute, federal law, or from another jurisdiction]; an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act [was done with sexual motivation]; or... an attempt, criminal solicitation, or criminal conspiracy to commit [one of the listed offenses].” RCW 71.09.020(17).

violent offense”—is about to be released from total confinement or has previously been released and has since committed a recent overt act. RCW 71.09.030(1). Jurisdiction for filing such a petition is based on where the “sexually violent offense” (or a subsequent overt act) occurred. RCW 71.09.030(2). Notice must be provided to certain people upon the discharge (or escape) of a person who has committed a “sexually violent offense.” RCW 71.09.140.⁴

This phrase appears only in the definition of sexually violent predator. RCW 71.09.020(17). The trier of fact in a civil commitment trial must determine whether a person qualifies as a sexually violent predator, which requires it to determine if the detainee has been convicted of a “crime of sexual violence.” RCW 71.09.020(18); RCW 71.09.060(1). This is one element of the criteria for commitment. RCW 71.09.020(18); RCW 71.09.060(1).

A “comprehensive reading” of Chapter 71.09 RCW establishes that the legislature used the two different phrases to serve two different purposes. *Strand*, 167 Wn.2d at 186. Thus, “the context of the statute in which [each] provision is found, related provisions, and the statutory scheme as a whole” reaffirms that the two phrases were intended by the

⁴ RCW 71.09.060’s two references to “sexually violent offenses” impose additional requirements where the offense was a crime that was sexually motivated or where the person charged with a sexually violent offense has been found incompetent.

legislature to have different meanings. *Id.* (internal quotation marks and citations omitted).

In contrast to the phrase “sexually violent offense,” the statute does not define the phrase “crime of sexual violence.” *See* RCW 71.09.020.

Where a statute fails to define a term, rules of statutory construction require that the term be given its plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006).

Applying this rule and the requirement that RCW 71.09 be strictly construed, the phrase “crime of sexual violence” must be given the most restrictive definition derived from the ordinary meaning of each word. Assuming a detainee’s predicate offenses qualify as sexual crimes, only the meaning of the word “violence” must be examined. The dictionary definitions of violence include “swift and intense force,” or “rough or injurious physical force.” *Dictionary.com*, Random House, Inc. (2018).⁵ In other words, a “crime of sexual violence” is a sex offense accomplished through the application of “swift and intense force” or “rough and injurious physical force.”

If a person is to be civilly committed, he (or she) must have a prior conviction that meets two separate tests. First, the conviction must be for

⁵ Available at <http://www.dictionary.com/browse/violence> (last accessed 7/2/20).

one of the enumerated offenses in RCW 71.09.020(17) (defining “sexually violent offense”). Such an offense will trigger a 3-month notice to the prosecuting agency (and the attorney general’s office), establish the proper jurisdiction for a civil commitment petition, and allow the appropriate agency to file a petition. RCW 71.09.025(1)(a); RCW 71.09.030.

Second, the trier of fact must find that the offense was a “crime of sexual violence.” Such a finding must be based on evidence that the crime was accomplished through “swift and intense force” or “rough and injurious physical force.” RCW 71.09.020(18); *Dictionary.com*.

The reason for the two separate definitions is apparent when the phrases are examined in context, as required. *Strand*, 167 Wn.2d at 188. Questions involving screening, jurisdiction, and notice rest on the defined list of crimes that qualify as “sexually violent offenses.” No factfinding is required to perform these functions. Instead, decisions can be made simply by referring to the list of offenses. RCW 71.09.020(17).

By contrast, indefinite civil commitment following trial requires a factual determination that the predicate offense qualifies as a “crime of sexual violence.” RCW 71.09.020(18); RCW 71.09.060(1). The factfinder must decide whether the predicate offense was in fact accomplished by “swift and intense force,” or “rough or injurious physical force.” RCW 71.09.020(18); *Dictionary.com*. When the State seeks to confine someone

indefinitely, the jury may not rely on a list of offenses but must examine the underlying facts and determine whether the offense involved actual violence.

This reading is consistent with the statute's purpose: to address the risks posed by the "small but extremely dangerous group of sexually violent predators"—those who are likely to engage in "repeat acts of predatory sexual violence"—and not the larger pool of sexual predators who are not violent. *See* RCW 71.09.010. The State screens potential candidates for civil commitment; the jury (or other factfinder) makes the final determination, including assessment of the predicate offense.

In this case, the State alleged that Mr. Smith had been convicted of first-degree rape of a child. CP 1. The question for the jury was whether the facts of the offense established that it was a "crime[s] of sexual violence." RCW 71.09.020(18). This, in turn, required jurors to determine if this offense was violent "in fact"—that is, accomplished by physical force that was rough, injurious, swift, and/or intense. RCW 71.09.020(18); *Dictionary.com*.

The court's instructions removed this question from the jury.

C. The court's instructions improperly directed jurors to find that Mr. Smith's prior conviction qualified as a "crime of sexual violence."

The court instructed jurors that the State was required to prove that Mr. Smith "has been convicted of one crime of sexual violence, namely Rape of a Child in the First Degree." CP 785.

As given, the instruction amounted to an unconstitutional judicial comment on the evidence. It erroneously told jurors that the State's obligation to prove a "crime of sexual violence" had been met as a matter of law. CP 785.

The court's instruction took the issue from the jury. Jurors should have determined whether the predicate offense was accomplished by "swift and intense force" or by "rough or injurious physical force." *Dictionary.com*.

The trial court commented on the evidence by taking this determination from the jury. *Becker*, 132 Wn.2d at 64; *see also State v. Brush*, 183 Wn.2d 550, 556-560, 353 P.3d 213 (2015). Although first-degree child rape is a "sexually violent offense," the jury was required to determine if either crime also qualified as a "crime of sexual violence." RCW 71.09.020 (17) and (18).

The jury question required a factual determination regarding the physical force used to accomplish the prior offenses. RCW

71.09.020(18); *Dictionary.com*. Under the court’s instructions, the jury was directed to return a “yes” verdict. CP 785. The instruction was “tantamount to a directed verdict.” *Becker*, 132 Wn.2d at 65.

D. Reversal is required because the record does not affirmatively show an absence of prejudice.

Judicial comments are presumed prejudicial. *Jackman*, 156 Wn.2d at 743; *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006)**Error! Bookmark not defined.** A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Levy*, 156 Wn.2d at 725.

This is a higher standard than normally applied to constitutional errors. *Id.* The State does not meet its burden merely because the comment addressed an undisputed element supported by testimony and corroborating evidence. *Jackman*, 156 Wn.2d at 745.

For example, in *Jackman* the defendant was charged with crimes against four minor boys. *Id.*, at 740. The children provided their birth dates in testimony, the State introduced corroborating evidence for three of the four boys, and the defendant did not contest the children’s ages at trial. *Id.*, at 740, 743, 745. To link each count with a specific child, each “to-convict” instruction included the minor victim’s initials and date of

birth.⁶ *Id.*, at 740-741. The defendant did not object to these instructions. *Id.*, at 741.

Despite the undisputed evidence and the absence of any objection, the Supreme Court reversed. The court found the date-of-birth references improperly commented on the evidence:

[T]he court conveyed the impression that those dates had been proved to be true. Absent the instructions, the jury would have had to consider whether it believed the evidence presented at trial with respect to the victims' birth dates.

Id., at 744.

The Supreme Court also noted that the defendant had not “challenged the *fact* of [the boys’] minority.” *Id.*, at 745 (emphasis in original). Even so, the court found that the State had failed to meet its burden of affirmatively showing that no prejudice could have resulted from the error:

Nevertheless, it is still conceivable that the jury could have determined that the boys were *not* minors at the time of the events, if the court had not specified the birth dates in the jury instructions.

Id., at 745.

Likewise, in this case the record does not affirmatively show an absence of prejudice. *Id.* As in *Jackman*, “it is still conceivable that the

⁶ The operative language for each instruction told jurors that conviction required proof (for example) that the defendant “(1) ...aided, invited, employed, authorized, or caused B.L.E., DOB 04/21/1985 to engage in sexually explicit conduct; [and] (2) That B.L.E., DOB 04/21/1985, was a minor.” *Id.*, at 741 n. 3.

jury could have determined that” Mr. Smith’s prior offense did not qualify as a “crime of sexual violence.” *Id.*

The court improperly commented on the evidence. The instructions relieved the State of its burden to prove the elements required for commitment and violated Mr. Smith’s Fourteenth Amendment right to due process. *Martin*, 163 Wn.2d at 509. Accordingly, the commitment order must be vacated, and the case remanded for a new trial with proper instructions. *See Brush*, 183 Wn.2d at 561.

E. This court should decline to follow Division I’s decision in *Coppin*, which ignored established Supreme Court precedent.

The Court of Appeals has previously found the phrase “crime of sexual violence” to mean the same thing as the phrase “sexually violent offense.”⁷ *In re Det. of Coppin*, 157 Wn.App. 537, 553, 238 P.3d 1192 (2010). This decision should not be allowed to stand, because it is incorrect and harmful. *See W.H. v. Olympia Sch. Dist.*, No. 97630-9 Slip Op. at *3 (Wash. June 18, 2020).

⁷ *See also In re Det. of Taylor-Rose*, 199 Wn.App. 866, 876, 401 P.3d 357 (2017), *review denied*, 189 Wash.2d 1039 (2018) (“[W]e agree with the analysis in *Coppin*. A crime that is expressly listed in the definition of ‘sexually violent offense’ in RCW 71.09.020(17) necessarily also qualifies as a ‘crime of sexual violence.’”)

Coppin is incorrect because the Court of Appeals ignored Supreme Court precedent. It is harmful because it results in the indefinite detention of people who do not qualify for commitment under Chapter 71.09 RCW.

The *Coppin* court ignored well-settled rules of statutory interpretation: “[i]t is firmly established... that where the legislature uses different language in the same statute, differing meanings are intended.” *Costich*, 152 Wn.2d at 475–76. This is a “basic rule” of statutory construction. *Durland v. San Juan Cty.*, 182 Wn.2d 55, 79, 340 P.3d 191 (2014) (internal quotation marks and citation omitted).

In addition, the *Coppin* court ignored constitutional principles applicable to RCW 71.09. Because it involves a deprivation of liberty, the statute must be strictly construed against the State. *Martin*, 163 Wn.2d at 508; *see also In re Det. of Fair*, 167 Wn.2d 357, 376, 219 P.3d 89 (2009); *Hawkins*, 169 Wn.2d at 801.

For all these reasons, the phrase “crime of sexual violence” cannot mean the same thing as the phrase “sexually violent offense.” A “sexually violent offense” is one enumerated by the statute. RCW 71.09.020(17). A “crime of sexual violence” is a sexual offense accomplished by “swift and intense force” or by “rough or injurious physical force.” *Dictionary.com*. The state may petition for civil commitment based on an offense that qualifies under RCW 71.09.020(17); however, to prevail at trial, it must

prove to a jury that the offense qualifies as a “crime of sexual violence.”
RCW 71.09.020(18).

Coppin was wrongly decided and should not be followed by this court. *See W.H.*, Slip Op. at *3.

Because the trial judge commented on the evidence, Mr. Smith’s commitment order must be reversed, and the case remanded for a new trial. *See Brush*, 183 Wn.2d at 561.

II. THE COURT’S INSTRUCTIONS DID NOT MAKE CLEAR TO JURORS THAT MR. SMITH COULD FACE COMMITMENT IN THE FUTURE EVEN IF HE DID NOT COMMIT A CRIME.

At a civil commitment trial, due process requires the State to persuade jurors the patient is currently dangerous under placement conditions that will exist upon release. A “recent overt act” (ROA) falling short of a new crime may trigger commitment following release; this fact “is relevant and is a condition that would exist upon placement in the community.” *In re Det. of Post*, 170 Wn.2d 302, 316, 241 P.3d 1234 (2010). The court’s failure to instruct on this issue violated Mr. Smith’s Fourteenth Amendment right to due process.

A. The court’s instructions should have made the relevant legal standards manifestly apparent to the average juror.

In criminal cases, jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166

Wn.2d 856, 864, 215 P.3d 177 (2009). This standard should apply to civil commitment cases as well

Because civil commitment involves a “massive”⁸ deprivation of liberty, procedural and substantive due process require application of the “manifestly apparent” standard in civil commitment cases. *See Matter of Det. of M.W. v. Dep't of Soc. & Health Servs.*, 185 Wn.2d 633, 654, 374 P.3d 1123 (2016) (analyzing substantive and procedural due process challenges to RCW 71.05.320(3)(c)(ii)); *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012) (analyzing substantive and procedural due process challenges to RCW 71.09.090(4)).

Procedural due process. Courts resolve procedural due process claims by balancing the individual interest at stake, the risk of error posed by the available procedures, and the State’s interest in a particular procedure. *M.W.*, 185 Wn.2d at 653-54 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). Because civil commitment involves a massive curtailment of liberty, the first factor weighs in favor of more rigorous procedural protections. *Id.*, at 654.

The second factor supports the “manifestly apparent” standard as well. Instructions may be clear “to the trained legal mind” without

⁸ *See, e.g., In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) (“massive” deprivation of liberty requires narrow construction of statute).

adequately communicating an important legal standard to the average juror. *State v. Fischer*, 23 Wn.App. 756, 759, 598 P.2d 742 (1979) (cited with approval by *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)). Any miscommunication regarding the correct legal standard has the potential to result in an erroneous finding. This potential for error supports the “manifestly apparent” standard in the criminal context. *Id.*; see *Kyllo*, 166 Wn.2d at 864; see also *State v. Borsheim*, 140 Wn.App. 357, 366, 165 P.3d 417 (2007). No lesser standard should apply in the civil commitment context, where the massive curtailment of liberty is based on predictions of the future rather than proof of past criminal conduct.

Finally, the third factor also weighs heavily in favor of applying the “manifestly apparent” standard here. The State’s compelling interest (in treating patients and protecting society)⁹ is furthered by jury instructions that are manifestly clear. Jurors who misinterpret their instructions may well release a predator who should be confined.¹⁰ There are no additional costs associated with ensuring that jury instructions are manifestly clear.

⁹ *In re Det. of Morgan*, 180 Wn.2d 312, 322, 330 P.3d 774 (2014).

¹⁰ Furthermore, jurors who misunderstand their instructions may erroneously commit someone who should be released, resulting in unnecessary costs for detention and treatment of someone who should be at liberty.

Under *Mathews*, procedural due process requires application of the “manifestly apparent” standard for jury instructions in civil commitment cases. All three *Mathews* factors favor application of this standard.

Substantive due process. Civil commitment is constitutional if it is narrowly drawn to serve compelling state interests. *McCustion*, 174 Wn.2d at 387. Our civil commitment statute is constitutional because it requires proof that the detainee is “mentally ill and currently dangerous.” *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009) (citing, *inter alia*, *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)). Where jury instructions are not manifestly clear, jurors might erroneously find that a detainee qualifies for civil commitment, even in the absence of sufficient evidence. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (due process violated where reasonable juror “could have interpreted” instruction as mandatory presumption relieving state of its burden to prove intent).

Civil commitment violates substantive due process if the jury misreads the court’s instructions to allow commitment of someone who is not mentally ill and currently dangerous. *Moore*, 167 Wn.2d at 124; *Foucha*, 504 U.S. at 77. A procedure allowing erroneous detention is not narrowly tailored to the State’s compelling interest in confining those who are mentally ill and currently dangerous. The “manifestly apparent”

standard should apply in civil commitment cases to ensure that the statute is implemented in a manner that complies with substantive due process.

Foucha, 504 U.S. at 77; *McCuiston*, 174 Wn.2d at 387.

The Court of Appeals has erroneously rejected the “manifestly apparent” standard in civil commitment cases. *Taylor-Rose*, 199 Wn.App. at 880 n. 2. However, in *Taylor-Rose*, the court did not address any due process arguments. *Id.*

Instead, citing *Kyllo*, the court incorrectly asserted that the “manifestly apparent” standard applies only where instructions are conflicting. *Id.* This mischaracterizes *Kyllo*. The instructions in that case did not conflict, and the court made no mention of any inconsistency in its analysis. *Kyllo*, 166 Wn.2d at 859-60; 863-65. Furthermore, as numerous other cases show, the “manifestly apparent” standard is not limited to situations involving conflicting instructions.¹¹

A prior decision should be overruled if it is incorrect and harmful. *W.H.* Slip Op. at *3. The *Taylor-Rose* court’s rejection of the “manifestly apparent” standard is incorrect and harmful. It is incorrect because it rested on a misreading of *Kyllo* and the court’s failure to acknowledge the

¹¹ See *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049, 1055 (1999), as amended (July 2, 1999); *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *In re Schreiber*, 189 Wn.App. 110, 116, 357 P.3d 668 (2015); *State v. Smith*, 174 Wn.App. 359, 369, 298 P.3d 785 (2013); *State v. Watkins*, 136 Wn.App. 240, 243, 148 P.3d 1112 (2006).

many other cases applying the “manifestly apparent” standard in criminal cases. It is harmful because it allows civil commitment based on instructions that lack clarity, increasing the probability of wrongful commitment.

This court should apply the “manifestly apparent” standard to Mr. Smith’s instructional issues.

- B. The trial court failed to instruct jurors on the availability of a “recent overt act” petition, which reduced Mr. Smith’s risk of committing predatory acts of sexual violence.

One critical issue at Mr. Smith’s trial was his level of risk—whether he was “likely to engage in predatory acts of sexual violence” if released from detention. CP 785; *see* RCW 71.09.020(7) and (18). This element ensures that the statute complies with due process, which requires proof of current dangerousness. U.S. Const. Amend. XIV; *Moore*, 167 Wn.2d a 124; *Foucha*, 504 U.S. at 77.

Here, the court’s instructions did not inform jurors that Mr. Smith could be committed in future even absent a new offense. This relieved the State of its burden to prove dangerousness, in violation of Mr. Smith’s

constitutional right to due process.¹² U.S. Const. Amend. XIV; *Foucha*, 504 U.S. at 77.

When determining if a person is likely to engage in predatory sexual violence, jurors may consider “placement conditions... that would exist for the person if unconditionally released.” RCW 71.09.060(1). The fact that an offender released from prison may face commitment even absent commission of a new crime is relevant to this issue. *Post*, 170 Wn.2d at 316–17.

In *Post*, the Supreme Court reversed a commitment order based on the erroneous exclusion of evidence relating to the availability of a “recent overt act” (ROA) petition. *Id.* The *Post* court reasoned that “[e]vidence that a respondent in an SVP proceeding who is subsequently released could be subject to another SVP proceeding if he commits a recent overt act^[13] is relevant and is a condition that would exist upon placement in the community.” *Id.*, at 316. The court’s decision was based (in part) on the fact that “[t]he possibility of a recent overt act petition... is, in a literal

¹² Courts review constitutional errors and jury instructions *de novo*. *Peralta v. State*, 187 Wn.2d 888, 894, 389 P.3d 596 (2017); *State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373 (2017).

¹³ The phrase “recent overt act” is defined to include, *inter alia*, “any act, threat, or combination thereof that... creates a reasonable apprehension” of “harm of a sexually violent nature” RCW 71.09.020(12); *see also* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 365.15 (6th ed.) (“Sexually Violent Predators—Recent Overt Act—Definition”).

sense, a condition to which [the patient] would be subject if released.” *Id.*, at 317.¹⁴

In this case, the trial judge did not instruct jurors on the possibility of a recent overt act petition. CP 780-800. This was error. As in *Post*, the availability such a petition is (as a matter of law) “a condition to which [Mr. Smith] would be subject if released.” *Id.* The error requires reversal. *Id.*

Jurors should have been informed that Mr. Smith could be committed in future for acts or threats that did not amount to a new crime. RCW 71.09.020(12). The possibility of future commitment based on a qualifying act reduces the possibility of reoffense. A person who is committed following a “recent overt act” will be removed from the community, and thus will not have the opportunity for future acts of predatory sexual violence.¹⁵

Although *Post* addressed the admissibility of evidence, its reasoning applies to the instructional issue raised here. Jury instructions

¹⁴ The *Post* court also based its decision on the deterrent effect that applies to offenders who are familiar with the statutory scheme. *Id.* The availability of an ROA petition serves another important function as well. Juries are understandably reluctant to release detainees who are potentially dangerous, even if they do not qualify for commitment. Jurors should be informed that a new petition can be filed following release even absent a new criminal offense. Allowing jurors to know this would ameliorate their reluctance to release a potentially dangerous person.

¹⁵ This is so regardless of whether the person is deterred by the possibility of such commitment.

must make the applicable legal standard manifestly clear to the average juror. *Kyllo*, 166 Wn.2d at 864. The court’s instructions included no reference to the “recent overt act” standard.

As a matter of law, Mr. Smith would be subject to a new petition based on any “recent overt act” committed after release. RCW 71.09.020(7) and (12); RCW 71.09.030(1)(e); RCW 71.09.060(1). Without proper instruction on this point, jurors were unable to make an accurate assessment of his dangerousness, and thus could not determine if he was “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(7).

This relieved the State of its burden to prove Mr. Smith’s dangerousness under conditions as they would exist following his release. The court’s failure to instruct on this point violated Mr. Smith’s right to due process.

Mr. Smith’s commitment order must be reversed, and the case remanded for a new trial. Upon retrial, the court must instruct jurors on the possibility that the State may file a new petition based on a “recent overt act” that falls short of a new criminal offense. *Id.*; *Post*, 170 Wn.2d 316–17.

C. The Court of Appeals should address the due process arguments left undecided in *Taylor-Rose*.

The Court of Appeals has previously held that a court need not instruct on the availability of a recent overt act petition. *Taylor-Rose*, 199 Wn.App. at 885. In *Taylor-Rose*, the trial court declined the patient's request for instruction on the availability of an ROA petition. *Taylor-Rose*, 199 Wn.App. at 885-886. The Court of Appeals affirmed. *Id.*

The *Taylor-Rose* court did not address the due process argument raised in this brief. *Id.* Its decision makes no mention of the State's constitutional burden to prove current dangerousness. *Id.* Instead, the court addressed only the appellant's ability to argue his theory of the case under the instructions as given, without any reference to the instructions' due process implications.¹⁶ *Id.* (citing *Matter of Det. of Monroe*, 198 Wn.App. 196, 202, 392 P.3d 1088 (2017)).

Mr. Smith's argument is based on due process; it does not relate to his ability to argue his theory of the case.¹⁷ Instead of following *Taylor-*

¹⁶ The court also asserted that "there was no evidence presented at trial that Taylor-Rose would be less likely to reoffend because of the potential for new SVP petitions." *Id.*, at 886. This statement ignores the incapacitating effect of future commitment based on a recent overt act that does not amount to predatory sexual violence. Such an effect plays a role in every case.

¹⁷ Furthermore, the argument involves a pure legal question regarding the State's burden and the statutory landscape. The issue is independent of the evidence introduced at trial.

Rose, the Court of Appeals should directly address the due process arguments raised here.¹⁸

In addition, the Court of Appeals should overturn *Taylor-Rose* because it is incorrect and harmful. *W.H.*, Slip Op. at *3. The *Taylor-Rose* court erroneously rejected the “manifestly apparent” standard based on a misreading of *Kyllo*, as outlined above. *See Taylor-Rose*, 199 Wn.App. 880 n. 2. The opinion is also harmful: it permits commitment in the absence of proof of the offender’s likelihood of reoffense under conditions that will exist following release. This court should overrule *Taylor-Rose*.

Analysis of Mr. Smith’s due process argument under the proper standards requires reversal. The case must be remanded for a new trial with proper instructions informing jurors of the State’s burden to prove current dangerousness under conditions as they would exist upon Mr. Smith’s release from custody.

III. THE INFLAMMATORY PHRASE “SEXUALLY VIOLENT PREDATOR” CREATED INCURABLE PREJUDICE IN THE MINDS OF JURORS AND INFRINGED MR. SMITH’S CONSTITUTIONAL RIGHT TO DUE PROCESS.

Research has shown that the phrase “sexually violent predator” creates bias unrelated to evidence of a person’s dangerousness. The

¹⁸ The *Taylor-Rose* court did not apply the *de novo* standard applicable to constitutional errors and legal questions. *Id.*

court's refusal to use an accurate but neutral phrase to describe criteria for commitment inflamed the jury's passions and prejudices, resulting in a verdict based on improper factors. This violated Mr. Smith's right to due process.

Substantive due process prohibits indefinite civil commitment except in the narrowest of circumstances. U.S. Const. Amend. XIV; *see Kansas v. Hendricks*, 521 U.S. 346, 364, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). The State must prove that the person is both mentally ill and currently dangerous. *Addington v. Texas*, 441 U.S. 418, 426-433, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *Foucha*, 504 U.S. at 75-86. In civil commitment cases such as this one, the State must submit "proof 'sufficient to distinguish [patients subject to commitment] from the dangerous but typical recidivist convicted in an ordinary criminal case.'" *In re Det. of Thorell*, 149 Wn.2d 724, 732, 72 P.3d 708 (2003) (quoting *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)).

The phrase "Sexually Violent Predator" is neither a medical classification nor a phrase with inherent legal significance. *See, e.g.* Deirdre M. Smith, *Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of "Sexually Violent Predator" Commitment*, 67 Okla. L. Rev. 619, 623 (2015). It is, however, calculated to strike terror into the

heart of the average person, an effect which is undoubtedly magnified for those who have children. While such language has political benefits for legislators and other policy makers, it has little to do with the jury's "constitutional role" of determining the facts without passion or prejudice. *See Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

Research has shown that the language itself is unfairly prejudicial. Using the phrase "sexually violent predator" in legal proceedings affects juror decisions. *See Scurich, Gongola, & Krauss, The Biasing Effect of the "Sexually Violent Predator" Label on Legal Decisions*, 47 International Journal of Law and Psychiatry, 109 (2016) ("Scurich"). In the Scurich study,

[Jurors] were asked to decide whether an individual who had been incarcerated for 16 years should be released on parole. The individual was either labeled as a) a sexually violent predator or b) a convicted felon, and all other information was identical between the conditions. Jurors were over twice as likely to deny parole to the SVP compared to the felon, even though they did not consider him any more dangerous or any more likely to reoffend.

Scurich, p. 109 (Abstract).

The trial court judge refused Mr. Smith's request to substitute the phrase "criteria for civil commitment" in place of "sexually violent predator." RP (12/27/19) 43; CP 115-118. This was error, because it

encouraged jurors to decide the case on impermissible factors rather than on the evidence.

Instructions that are clear “to the trained legal mind” may not adequately communicate an important legal standard to the average juror. *Fischer*, 23 Wn.App. at 759. Furthermore, statutory language is not always adequate to convey the jury’s task. *See Watkins*, 136 Wn.App. at 243.

Such is the case here. The inflammatory language used by the court diverted jurors from their task – determining, without passion or prejudice, whether Mr. Smith met criteria for commitment.

The prejudicial, inflammatory language appeared in the court’s instructions at the end of the case, and in the verdict. RP (1/16/20) 1039; CP 784-785. As research shows, this language created a probability that jurors would ignore the evidence and vote in favor of commitment based on passion and prejudice. Scurich, p. 109.

The phrase “sexually violent predator” is legally devoid of content. The proper standard is provided by the criteria required for civil commitment, as outlined in RCW 71.09.020. The court should have granted Mr. Smith’s motion and substituted the “criteria for commitment” language in place of the inherently prejudicial language chosen by the Legislature.

The inflammatory language may serve a political purpose, but it has been shown to create distortions in the minds of average people. Scurich, p. 109. It has no place in jury deliberations.

A court's refusal to use neutral language in its instructions encourages jurors to prefer commitment even if the person is not mentally ill and currently dangerous. Scurich, p. 109. This violates due process. *Addington*, 441 U.S. at 426-433; *Foucha*, 504 U.S. at 75-86.

Mr. Smith's commitment order must be reversed, and the case remanded for a new trial. Upon retrial, the court should use the phrase "criteria for commitment" rather than the inflammatory term "sexually violent predator." *See Watkins*, 136 Wn.App. at 243.

IV. THE TRIAL COURT SHOULD HAVE EXCLUDED HIGHLY PREJUDICIAL EVIDENCE THAT HAD LITTLE OR NO PROBATIVE VALUE.

Defense counsel objected to evidence of injuries suffered by the victim of Mr. Smith's 1990 offense, arguing that "the evidence... is not particularly relevant and, as a result, the prejudice outweighs the probative value." CP 111. The trial court did not balance the prejudicial effect of the evidence against its probative value. Because the evidence was highly prejudicial and had (at most) minimal probative value, it should have been excluded.

Under ER 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. When faced with a challenge under ER 403, the trial court must “determine *on the record* whether the danger of undue prejudice substantially outweighs the probative value of such evidence.” *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995) (emphasis added). Here, the trial court did not engage in any balancing on the record.¹⁹

Where the evidence “is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” *Id.* Such a danger existed in this case because the victim was an infant, and her injuries were severe. RP (1/14/20) 516. Jurors likely experienced an extreme emotional reaction to the graphic evidence introduced by the State.

Any probative value was slight. The State was required to show only the fact of Mr. Smith’s predicate conviction.²⁰ *See Coppin* 157 Wn.App. at 553. Under *Coppin*, it is irrelevant that the offense may have involved “rough or injurious physical force.”²¹ *Id.*; *see also Taylor-Rose*,

¹⁹ Without citation to authority, Division III has concluded that the court need not perform the balance on the record, unless ER 404(b) is implicated. *State v. Baldwin*, 109 Wn.App. 516, 528, 37 P.3d 1220 (2001). The *Powell* court did not articulate such a distinction. *Powell*, 126 Wn.2d at 264.

²⁰ Mr. Smith challenges *Coppin*’s interpretation of the statute elsewhere in this brief.

²¹ *Dictionary.com*.

199 Wn.App. at 876. The court’s instructions made clear to jurors that the predicate conviction qualified as a “crime of sexual violence” as a matter of law, regardless of any injuries inflicted. CP 785. Because of this, the injuries were unnecessary to establish the elements required for commitment.

Dr. Arnold did not tie the graphic evidence to any opinion he gave. RP (1/14/20) 516. Even if Dr. Arnold relied on the fact of the child’s injury to explain his opinion, there was no need to place graphic details before the jury.²² If necessary, Dr. Arnold could have outlined conclusions he drew from the fact of the child’s injuries without the need for graphic details about the nature and extent of those injuries.²³

The trial court allowed the State to introduce a highly prejudicial and graphic description of an infant’s injuries from a sex offense. RP (12/27/19) 38; RP (1/14/20) 516. The court did not balance the evidence’s (minimal) probative value against the substantial danger of unfair prejudice. RP (12/27/19) 38. Instead, the court denied Mr. Smith’s ER 403

²² As Dr. Arnold explained to the jury, Mr. Smith is not aroused by inflicting pain or causing injuries. RP (1/14/20) 611.

²³ According to the State, Dr. Arnold believed “that the injuries were relevant to [Mr. Smith’s] emotional and volitional impairments,” and were “a factor in assessing [his] ‘callousness.’” CP 421. At trial, Dr. Arnold did not provide any testimony on these points. RP (1/13/20) 452-482; RP (1/14/20) 492-578; RP (1/15/20) 715-784. As noted, Dr. Arnold told the jury that Mr. Smith has no interest in violent sex. RP (1/14/20) 611.

objection “for the reasons articulated by the State in their response” to Mr. Smith’s motion *in limine*. RP (12/27/19) 38; *see* CP 111-112.

But the State’s response did not weigh the probative value of the evidence against the danger of unfair prejudice. CP 421-422. The court’s reference to the State’s argument did not satisfy the requirements of ER 403.

Mr. Smith’s commitment order must be reversed. The case must be remanded for a new trial with instructions to exclude evidence of the victim’s injuries.

CONCLUSION

The trial court improperly commented on the evidence by instructing jurors that Mr. Smith’s prior conviction qualified as a crime of sexual violence. In addition, the court’s instructions failed to make manifestly clear that Mr. Smith could face commitment in future even if he did not commit a new crime. The instructions also included inflammatory language that created prejudice in the minds of jurors. Finally, the court erroneously admitted graphic details of the victim’s injuries suffered during Mr. Smith’s 1990 offense.

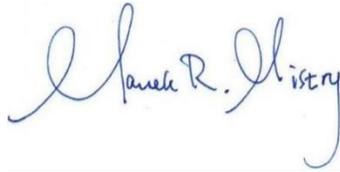
For all these reasons, the commitment order must be reversed, and the case remanded for a new trial.

Respectfully submitted on July 13, 2020,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in blue ink.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Handwritten signature of Manek R. Mistry in blue ink.

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Randy Smith
McNeil Island Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Office of the Attorney General
crjstvpef@atg.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 13, 2020.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

July 13, 2020 - 10:56 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54505-5
Appellate Court Case Title: In Re: The Detention of Randy R. Smith, Appellant
Superior Court Case Number: 18-2-02803-2

The following documents have been uploaded:

- 545055_Briefs_20200713105620D2312169_6233.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 54505-5 In Re Detention of Randy Smith Opening Brief.pdf

A copy of the uploaded files will be sent to:

- crjsvpef@ATG.WA.GOV
- mark.ferraz@atg.wa.gov
- sharon.dear@atg.wa.gov

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com
Address:
PO BOX 6490
OLYMPIA, WA, 98507-6490
Phone: 360-339-4870

Note: The Filing Id is 20200713105620D2312169