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NO. 54505-5

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

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In re the Detention of Randy Smith

STATE OF WASHINGTON,

Respondent,

v.

RANDY SMITH,

Appellant.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Randy Smith seeks review of an order committing him as a sexually violent predator following a unanimous jury verdict. Smith's appeal raises several arguments that this Court has repeatedly rejected. This Court should again reject them.

For the first time on appeal, Smith raises two new challenges to the jury instructions. Both claims fail. Smith first challenges the jury instruction identifying his predicate offense—rape of a child in the first degree—as a “crime of sexual violence.” But this claim fails because this instruction is an accurate statement of the law, not an improper comment on the evidence. Smith also challenges the jury instructions on the basis that they failed to include language about the possibility of a future petition following a “recent overt act.” But Smith failed to preserve this challenge because he never proposed an instruction with that language, and he failed to take exception to the omission of such language in the court's proposed instructions. Moreover, the omission of such language was proper because the law does not require it, there was no evidence to support it, and Smith could argue his theory of the case without it.

Smith also challenges the trial court's denial of his motion to “exclude” the phrase “sexually violent predator” from the proceedings and from the jury instructions. This claim is meritless. The jury in this case was

required to determine whether Smith is a “sexually violent predator” as that term is defined by statute. The trial court’s use of the statutorily defined term most accurately reflected the jury’s inquiry, was consistent with the statute, and was consistent with the pattern jury instructions.

Finally, Smith argues that the trial court abused its discretion by admitting evidence of his victim’s physical injuries. This claim is equally meritless. The evidence of the victim’s injuries was not admitted substantively; it was admitted only as the basis for the expert’s opinion and was subject to a limiting instruction. The evidence was relevant to the expert’s assessment of whether Smith has a mental abnormality and is more likely than not to reoffend. Further, the prejudicial effect of this evidence was slight, as it was only briefly mentioned during trial. In addition, the trial court instructed the jury not to decide the case based on emotions but to decide it based upon the evidence.

For all of these reasons, this Court should affirm.

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

1. Where the sexually violent predator statute defines certain offenses as sexually violent offenses as a matter of law, did the trial court properly identify one of those offenses in the jury instructions as a “crime of sexual violence”?
2. Where Smith failed to propose a jury instruction about the possibility of a future petition following a “recent overt act,” and he failed to take exception to the omission of such language in the court’s proposed instructions, is he

precluded from challenging the omission of this language for the first time on appeal?

3. Where Smith never requested language in the jury instructions about future petitions, and such language was not required by the law, was unsupported by the evidence, and did not preclude Smith from arguing his theory of the case, did the trial court properly omit it?
4. Where the jury was required to determine whether Smith is a “sexually violent predator”—a legal term defined by statute—and the statute and pattern jury instructions consistently use that term, did the trial court properly use that term in the jury instructions?
5. Where evidence of Smith’s victim’s injuries was relevant to the expert’s opinion of whether he has a mental abnormality and is more likely than not to reoffend, and this evidence was just briefly referenced at trial and was subject to a limiting instruction, did the trial court properly exercise its discretion when it admitted this evidence?

### **III. RESTATEMENT OF THE FACTS**

#### **A. Smith’s Sexual Offense History**

In 1990, Smith went to a party with strangers where he drank alcohol and took meth. CP<sup>1</sup> 509, 515-16; VRP (Vol. 1) 128-29; VRP (Vol. 3) 515. At some point, other partygoers separated him from a woman with whom he was having sexual relations. CP 509, 517-18; VRP (Vol. 3) 515-16. This made Smith angry. CP 509. He passed out, but upon waking up, he again

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<sup>1</sup> Smith testified by way of a videotaped deposition. The transcript of this testimony is contained in the clerk’s papers, not the report of proceedings. *See* VRP (Vol. I) 95.

started doing drugs and began “looking through the house for females” to have sexual contact with. CP 509-10; VRP (Vol. 3) 516.

Smith ultimately came across two young girls—ages two and three—in the downstairs bedroom. CP 509-11; VRP (Vol. 3) 516. Smith found the three-year-old attractive, particularly her “cute face, blonde hair, and . . . butt.” CP 512. He removed her clothing and touched her vaginal area. CP 512-13. He then crawled on top of her, covered her mouth, and vaginally raped her until he ejaculated inside of her. CP 510-14, 518; VRP (Vol. 3) 516.

Smith admits committing this offense. CP 510-11, 518-19, 585. He denied that the alcohol and drugs were the reason for the offense and instead blamed his anger at the other partygoers. CP 523. He also said that voices in his head told him to hurt somebody and “make them pay” for what they did. CP 574. Smith was arrested, and the case proceeded to a trial. CP 519. A jury ultimately convicted Smith of rape of a child in the first degree. CP 520; VRP (Vol. 1) 128, VRP (Vol. 3) 509. He was given an exceptional sentence of 175 months. VRP (Vol. 3) 520. After this offense, Smith began masturbating to thoughts of children. CP 583.

While in prison, Smith received several infractions, including one for sexual harassment towards staff. CP 523-24. He explained that he was “trying to compromise staff for sexual reasons,” by giving a female staff

member gifts to get her close to him. CP 524. He was drawn to this woman because she was small, petite, and looked younger than her age. CP 524.

Following his release from prison, Smith began manufacturing, using, and selling drugs. CP 539. He testified that he used drugs every day until he passed out. CP 539.

Beginning in 2012, Smith began a pattern of surreptitiously taking pictures of young girls in stores and using the photos to masturbate. CP 543-46. Smith fantasized about having sex with the girls. CP 550. He estimated that the girls ranged in age from six-years-old to teenagers. CP 546. He testified that he engaged in this behavior about twice a week for about a year. CP 546. Ultimately, in June 2013, Smith was arrested after he was caught trying to take a photo of a young girl underneath the dressing room door in a Fred Meyer. CP 543, 546, 556-57, 561-62; VRP (Vol. 2) 337-39; VRP (Vol. 3) 521. Smith selected this young girl because she “had a nice butt.” CP 561. Smith was charged with voyeurism and ultimately entered an Alford plea. CP 543, 567; VRP (Vol. 3) 509. Smith served five years in prison for this offense. CP 605.

#### **B. Smith’s Civil Commitment Trial**

In 2018, the State petitioned to commit Smith as a “sexually violent predator.” CP 1-2. A “sexually violent predator” is defined by statute as “any 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).

Prior to trial, Smith moved in limine to exclude evidence of the physical injuries that Smith’s three-year-old victim sustained as a result of the rape. CP 110-13. He argued that the evidence was hearsay, should not have been relied on by the expert, and that its prejudice outweighed any probative value. CP 111-12. The State opposed this motion based on the fact that Smith admitted raping the victim and that the State’s expert testified in a deposition that the victim’s injuries were relevant to show Smith’s emotional and volitional impairments as well as his callousness. CP 420-21. The trial court denied Smith’s motion for the reasons articulated by the State. VRP (12/27/19) 38.

Smith also moved in limine to “exclude” use of the term “sexually violent predator” throughout the proceedings and to replace it with the term “criteria for civil commitment.” CP 115-18. The State opposed this motion, pointing out that that the ultimate issue at trial is whether Smith is, in fact, a “sexually violent predator” and that using a less precise terms would be misleading and confusing to the jury. CP 423-25. The trial court denied Smith’s motion on the basis that “sexually violent predator” is the term that the law uses. VRP (12/27/19) 43-44.

The case proceeded to trial in December 2019. At trial, the State presented testimony from several witnesses including Dr. Dale Arnold, a forensic psychologist. Dr. Arnold diagnosed Smith with five mental disorders: pedophilic disorder, alcohol use disorder, “other specified schizophrenia spectrum and psychotic disorder,” stimulant use disorder, and antisocial personality disorder. VRP (Vol. 3) 534-50. Dr. Arnold testified that Smith has a mental abnormality as that term is defined by statute. VRP (Vol. 3) at 528, 573-77.

Dr. Arnold also conducted a comprehensive risk assessment. *See* VRP (Vol. 3) 579. He first administered the Hare Psychopathy Checklist Revised, PCL-R. VRP (Vol. 3) 564-66. Smith’s score was 29, which is considered to be at the border of high and severe psychopathy. VRP (Vol. 3) 566. He next utilized two actuarial instruments, the Static-99R and the Static-2002R. VRP (Vol. 3) 582. Smith’s score on the Static-99R was four, which placed him in the “above average” risk category. VRP (Vol. 3) 591. Smith’s score on the Static-2002R was six, which also placed him in the “above average” risk category. VRP (Vol. 3) 603-04. In addition, Dr. Arnold scored Smith on two instruments that measure dynamic risk factors—the Structured Risk Assessment - Forensic Version (SRA-FV) and the Stable 2007. VRP (Vol. 3) 608, 621-22. Smith’s score on the SRA-FV instrument was a 4.02, which indicated that Smith’s risk is higher than

the actuarial estimates. VRP (Vol. 3) 620-21. Smith's score on the Stable 2007 was sixteen, which indicated that he was in the "high risk" category. VRP (Vol. 3) 622-23. Finally, Dr. Arnold used structured clinical judgment. VRP (Vol. 3) 644-45. Ultimately, he concluded that Smith was likely to engage in predatory acts of sexual violence if not confined to a secure facility. VRP (Vol. 3) 648-49.

The State also presented testimony from Smith. He testified that he does not feel ready to be released with no supervision. CP 606. He explained, "I feel I do better on supervision, and I need a platform to build a new social network." CP 606.

Smith also presented testimony from several witnesses, most of whom testified about Smith's plan if he were to be unconditionally released. *See generally* VRP (Vols. 4, 5).

At the conclusion of the evidence, the trial court proposed jury instructions. VRP (Vol. 5) 970. The trial court's instructions omitted language about the possibility of a future petition based on a "recent overt act." CP 780-800. Smith did not take exception to this omission. VRP (Vol. 5) 970-73. Smith's proposed instructions had also omitted such language. *See* CP 333-48. The trial court's elements instruction identified Smith's predicate offense as a "crime of sexual violence." CP 785. Smith also did

not take exception to this instruction. VRP (Vol. 5) at 970-73. Nor did Smith propose an alternative instruction containing the elements. *See* CP 333-48.

The jury unanimously found beyond a reasonable doubt that Smith is a sexually violent predator. The trial court subsequently entered an order of commitment. CP 801; VRP (Vol. 5) 1038-42.

Smith appeals.

#### IV. ANALYSIS

##### A. **The Jury Instruction Identifying Rape of a Child in the First Degree as a “Crime of Sexual Violence” Accurately Stated the Law and Did Not Improperly Comment on the Evidence**

For the first time on appeal, Smith claims that the jury instruction providing the elements violated his rights to due process because it improperly commented on the evidence and relieved the State of its burden to prove that he has been convicted of a “crime of sexual violence.” Appellant’s Opening Br. at 7-20. Smith asserts that this was “tantamount to a directed verdict.” *Id.* at 16. This claim fails because the jury instruction was an accurate statement of the law—not an improper comment on the evidence. Moreover, it was consistent with well settled decisions from this Court as well as the Washington pattern jury instructions.

A jury instruction “that does no more than accurately state the law pertaining to an issue . . . does not constitute an impermissible comment on the evidence by the trial judge.” *State v. Woods*, 143 Wn.2d 561, 591, 23

P.3d 1046 (2001). An appellate court reviews jury instructions de novo to determine if the trial court has improperly commented on the evidence. *See State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

In an initial commitment trial, the State must prove that the individual meets the definition of a “sexually violent predator,” which requires proof that the person has been convicted of or charged with a “crime of sexual violence.” *See* RCW 71.09.020(18). For purposes of satisfying that definition, this Court has repeatedly determined that crimes expressly identified by the legislature in the sexually violent predator statute as “sexually violent offenses” necessarily also qualify as “crimes of sexual violence,” and the Supreme Court has consistently denied review of those decisions.

Division One first reached this conclusion in *In re Detention of Coppin*, 157 Wn. App. 537, 551-54, 238 P.3d 1192 (2010), *review denied*, 170 Wn.2d 1025, 249 P.3d 181 (2011). In doing so, it looked to the statute’s plain language, related provisions, and construed the statute as a whole. *Id.* It noted that the legislature expressly defined “sexually violent offense” in RCW 71.09.020(17) to include certain enumerated crimes. *Id.* at 553. And it reasoned that given that definition, it would be “absurd” to conclude that those enumerated crimes are not also “crimes of sexual violence” for purposes of satisfying the definition of a “sexually violent predator” in

RCW 71.09.020(18). *Id. Coppin* expressly rejected the argument that because the legislature used different terms in RCW 71.09.020(17) and (18), the terms must have different meanings. *Id.* It stated, “there is no material difference between the term ‘violent’ used in subsection 17 and the term ‘violence’ used in subsection 18.” *Id.*

More recently, this Court reached the exact same conclusion in *In re Detention of Taylor-Rose*, 199 Wn. App. 866, 875-76, 401 P.3d 357 (2017), *review denied*, 189 Wn.2d 1039, 409 P.3d 1070 (2018). In doing so, it expressly agreed with the analysis in *Coppin* and rejected Taylor-Rose’s arguments to reject the reasoning in that decision. *Taylor-Rose*, 199 Wn. App. at 876. This Court later reaffirmed this holding in the unpublished decision *In re Detention of Canty*, 7 Wn. App. 2d 1044, 2019 WL 624737 at \*10-11 (Wash. Ct. App. Feb. 13, 2019) (unpublished)<sup>2</sup>, where it stated that *Taylor-Rose* “is dispositive.”

The trial court’s instruction in this case was entirely consistent with these decisions. It identified Smith’s predicate offense—rape of a child in the first degree—as a “crime of sexual violence.” CP 785. This was proper because rape of a child in the first degree is a crime that the legislature expressly identified as a “sexually violent offense” in RCW 71.09.020(17).

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<sup>2</sup> This case is cited in accordance with GR 14.1.

It thus necessarily qualifies as a “crime of sexual violence.” *Coppin*, 157 Wn. App. at 553-54; *Taylor-Rose*, 199 Wn. App. at 875-76. Consequently, the trial court’s instruction did not amount to an improper comment on the evidence. *Woods*, 143 Wn.2d at 591. Nor did it improperly relieve the State of proving this element, as the State was still required to prove the fact of the conviction.

Further, the trial court’s instruction was consistent with the Washington pattern jury instruction setting out the elements in a sexually violent predator initial commitment trial. 6A *Washington Practice: Washington Pattern Jury Instructions: Civil* (WPI) 365.10 (2019) (stating that the first element is “That (respondent’s name) has been convicted of a crime of sexual violence, namely (identify crime of sexual violence)”). In short, the trial court’s instruction was correct, and Smith fails to show any error.

Smith urges this Court to depart from *Coppin*, *Taylor-Rose*, and *Canty* and upend settled law on this issue. *See* Appellant’s Opening Br. at 18-20. This Court should decline. Contrary to Smith’s assertions, this Court’s prior decisions are well reasoned and consistent principles of statutory construction, which require courts to take into account the context of the entire act, harmonize related statutes, and avoid absurd results. *State v. Gray*, 189 Wn.2d 334, 340, 402 P.3d 254 (2017); *US West Commc’ns*,

*Inc. v. Wash. Util. & Transp. Comm'n*, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997); *Morris v. Blaker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992). To conclude that crimes that the legislature expressly identified as “sexually violent offenses” do not also qualify as “crimes of sexual violence” would be a hyper-technical interpretation of the statute that is inconsistent with these principles of interpretation.

Smith also claims that chapter 71.09 RCW differentiates between “sexually violent offense” and “crime of sexual violence” and that the trial court improperly conflated the two. Appellant’s Opening Br. at 8-14. He claims that “sexually violent offense” is utilized for determining eligibility for civil commitment, jurisdiction, and notice. *Id.* at 10-11, 13. And he claims that “crime of sexual violence” should be given its plain and ordinary meaning and requires the jury to find that the predicate offense was committed with “swift and intense force” or “rough and injurious physical force.” *Id.* at 13-24.

But this Court has repeatedly rejected this argument, explaining that there is no material difference between the terms “violent” and “violence” in chapter 71.09 RCW and that principles of statutory construction require courts to harmonize statutes and avoid absurd results. *See Coppin*, 157 Wn. App. at 553; *Taylor-Rose*, 199 Wn. App. at 875-76. Further, there is no support for the proposition that the State must prove at trial that Smith’s

predicate offense—rape of a child in the first degree—was accomplished with “swift and intense force” or was sufficiently “rough and injurious” in order to qualify as a “crime of sexual violence.” The legislature has expressly declared that rape of a child in the first degree is a “sexually *violent* offense” as a matter of law. *See* RCW 71.09.090(17) (emphasis added). The State must prove only the fact of that conviction.

Finally, contrary to Smith’s assertion otherwise, even if the instruction amounted to a comment on the evidence, the record affirmatively shows that no prejudice could have resulted. Appellant’s Opening Br. at 16; *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d (2006). Smith did not dispute this element. Moreover, Smith admitted at trial that he used physical force when raping the three-year-old victim. CP 510-11. In light of this evidence, it is inconceivable that the jury could have concluded that the conviction for rape of a child in the first degree was not a “crime of sexual violence.”

**B. The Trial Court Properly Omitted Language in the Jury Instructions About the Possibility of a Future Petition Following a “Recent Overt Act”**

**1. Smith failed to preserve this challenge for appellate review, so this Court should decline to consider it**

For the first time on appeal, Smith argues that the trial court erred by failing to instruct jurors that Smith could be subject to a future petition

if he committed a “recent overt act”<sup>3</sup> after release. Appellant’s Opening Br. at 25-30. But Smith failed to preserve this challenge for appellate review, so this Court should decline to consider it.

“If a party is dissatisfied with an instruction, it is that party’s duty to propose an appropriate instruction and, if the court fails to give the instruction, take exception to that failure.” *Goodman v. Boeing Co.*, 75 Wn. App. 60, 75, 877 P.2d 703 (1994); *accord State v. Jacobson*, 74 Wn. App. 715, 724, 876 P.2d 916 (1994). “If a party does not propose an appropriate instruction, it cannot complain about the court’s failure to give it.” *Id.* “[A] party is generally required to take exception to a jury instruction at trial in order to preserve the issue for appellate review.” *Jacobson*, 74 Wn. App. at 724 (quoting *State v. Noel*, 51 Wn. App. 436, 438, 753 P.2d 1017 (1988)).

In addition, “Under the doctrine of invited error, even where constitutional rights are involved, [courts] are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording.” *State v. Winnings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005); *accord In re Det. of Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998).

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<sup>3</sup> A “recent overt act” means “any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows the history and mental condition of the person engaging in the act or behaviors.” RCW 71.09.020(12).

Here, Smith never asked the trial court to issue a jury instruction about the possibility of a future petition following a recent overt act. Smith's proposed jury instructions did not include any language referencing such petitions. CP 334-47. Likewise, Smith's Memorandum in Support of Jury Instructions did not contain any reference to future petitions or argue for the inclusion of such language. CP 312-14. Further, Smith did not take exception to the omission of language about future petitions in the trial court's proposed instructions. VRP (Vol. 5) at 970-73. Smith thus agreed to the omission. Accordingly, this issue is unpreserved for appellate review. *Goodman*, 75 Wn. App. at 75; *Jacobson*, 74 Wn. App. at 724. It also constitutes invited error. *Winnings*, 126 Wn. App. at 89; *Gaff*, 90 Wn. App. at 845. Finally, Smith fails to make any argument that this claim fits within the narrow scope of RAP 2.5(a), and this Court should reject Smith's attempt to elevate this challenge into the constitutional realm because the constitution did not require the jury instructions to be further defined. *See, State v. Scott*, 110 Wn.2d 682, 686-91, 757 P.2d 492 (1988). For these reasons, this Court should decline to consider this belated challenge to the jury instructions.

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**2. This Court has repeatedly held that there is no basis to apply the heightened “manifestly apparent” standard in the civil commitment context**

As just discussed, this Court should decline to consider Smith’s belated challenge to the omission of language in the jury instructions about the possibility of a future recent overt act petition. But if this Court chooses to consider the claim, it should reject Smith’s claims to apply the heightened “manifestly apparent” standard when reviewing the jury instructions. *See* Appellant’s Opening Br. at 20-25. This Court has repeatedly rejected the argument that the “manifestly apparent” standard applies in the civil commitment context, and it should reach the same conclusion here.

In general, the heightened “manifestly apparent” standard applies only to jury instructions in criminal self-defense cases. *See State v. Woods*, 138 Wn. App. 191, 196, 156 P.3d 309 (2007); *State v. Rodriguez*, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004)<sup>4</sup>. And it is well-established that sexually violent predator proceedings are civil, not criminal, in nature. *See*,

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<sup>4</sup> In *Rodriguez*, Division Three of this Court explained that the reasons for singling out self-defense jury instructions for increased appellate scrutiny are “a bit murky” but, “that said, it is the announced standard.” *Rodriguez*, 121 Wn. App. at 185. If 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 Woods*, 138 Wn. App. at 198-99 (explaining self-defense standard and shifting burdens of proof).

*e.g.*, *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007); *In re Det. of Petersen*, 138 Wn.2d 70, 91, 980 P.2d 1204 (1999).

Moreover, this Court has repeatedly rejected application of the heightened criminal self-defense standard in civil commitment cases. *See, e.g.*, *Taylor-Rose*, 199 Wn. App. at 880 n. 2; *In re Detention of Urlacher*, 6 Wn. App. 2d 725, 738-40, 427 P.3d 662 (2018), *review denied*, 192 Wn.2d 1024, 435 P.3d 276 (2019); *Canty*, 2019 WL 624737 at \*8 (unpublished).

Notably, in *In re Detention of Urlacher*, 6 Wn. App. 2d 725, 738-40, 427 P.3d 662 (2018), *review denied*, 192 Wn.2d 1024, 435 P.3d 276 (2019), this Court expressly rejected the same constitutional arguments that Smith advances here. Specifically, it concluded that neither procedural nor substantive due process required application of the “manifestly apparent” standard to jury instructions in the civil commitment context. *Urlacher*, 6 Wn. App. 2d at 739-40. It noted that *Urlacher* failed to provide any persuasive authority or argument that the standard for reviewing the sufficiency of a jury instruction is a procedure that deprives a person of life, liberty, or property, and is subject to the *Mathews*<sup>5</sup> test. *Id.* It also noted that *Urlacher* failed to provide persuasive legal authority that the standard to

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<sup>5</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The *Mathews* test 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.

review the sufficiency of jury instructions is a government action or statutory scheme subject to a substantive due process analysis. *Id.* at 740.

Smith does not cite *Urlacher* anywhere in his brief. And he again fails to provide persuasive legal authority to establish that the standard for reviewing the sufficiency of jury instructions is subject to a procedural or substantive due process analysis.

In support of his procedural due process claim, Smith cites *Matter of Det. of M.W. v. Dep't of Soc. & Health Servs.*, 185 Wn.2d 633, 654, 374 P.3d 1123 (2016) and *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012). Appellant's Opening Br. at 21. But those cases involved procedural due process challenges to a *statute*. They are thus inapposite and do not establish that the standard for reviewing jury instructions is subject to a *Mathews* test.

In spite of this failure, Smith cites several criminal cases to argue that the *Mathews* test supports application of the “manifestly apparent” standard in this context. Appellant's Opening Br. at 22 (citing *State v. Fischer*, 23 Wn. App. 756, 759, 598 P.2d 742 (1979); *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007)). But those cases fail to support his claim because they make no mention of procedural due process. Further, even if the *Mathews* test applied, the factors weigh in favor of the State. Although

Smith has a significant liberty interest, there are substantial statutory protections against an erroneous deprivation of that liberty and neither the jury instructions nor the regular standards for reviewing such instructions risks an erroneous deprivation of that interest. Additionally, the State has a substantial and compelling interest in protecting the community from sexually violent predators. *In re Det. of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

In support of his substantive due process claim, Smith first relies on *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). Appellant's Opening Br. at 23. But *Sandstrom* is distinguishable because it involved a question of whether a jury instruction improperly shifted the burden of proof. Smith next cites two civil commitment cases to argue that "civil commitment violates due process if the jury misread's the court's instructions to allow commitment of someone who is not mentally ill and dangerous." *Id.* (citing *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009); *Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). But those cases do not support this proposition because they did not involve substantive due process challenges to jury instructions. Moreover, the jury instructions in this case in no way permitted the jury to commit Smith without finding that he is both mentally ill and dangerous. *See* CP 785.

**3. Language about the possibility of a future petition was not required by the law, not supported by the evidence, and not necessary for Smith to argue his theory of the case**

The trial court did not abuse its discretion when it omitted language about the possibility of a future petition following a “recent overt act.” The trial court was not required to include such language because it was not proposed by either party, not required by the law, not supported by the evidence, and not necessary for Smith to argue his theory of the case.

“Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law.” *Taylor-Rose*, 199 Wn. App. at 879 (quoting *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015)). Courts consider all the trial court’s instructions as a whole to ensure that both parties are allowed to fairly state their case. *Id.* at 879-80.

Absent a legal error, courts review a trial court’s decision regarding the specific language of an instruction for abuse of discretion. *Taylor-Rose*, 199 Wn. App. at 880. A trial court has broad discretion in determining the wording of jury instructions. *Id.* A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

In *In re Detention of Taylor-Rose*, 199 Wn. App. 866, 885, 401 P.3d 357 (2017), *review denied*, 189 Wn.2d 1039, 409 P.3d 1070 (2018), this Court rejected an argument that the trial court abused its discretion when it declined to add language to the jury instructions stating that the State could bring a new petition if Taylor-Rose committed a recent overt act following his release. Taylor-Rose claimed that without such language, he was unable to argue that that he was less likely to reoffend because certain acts could subject him to future commitment. *Taylor-Rose*, 199 Wn. App. at 885. But this Court noted that the jury instructions allowed Taylor-Rose to argue his theory of the case without the need for more specific language because they stated that the jury could consider all evidence that bears on the issue of whether Taylor-Rose was likely to engage in predatory acts of sexual violence. *Id.* 885-86. It also noted that there was no evidence at trial that Taylor-Rose would be less likely to reoffend because of the potential for a new petition, so the proposed language was unsupported by the evidence. *Id.* at 886.

Here, Smith does not claim that he was unable to argue his theory of the case in the absence of language about the possibility of a future petition. And nor could he. As in *Taylor-Rose*, the jury instructions in this case stated that the jury could consider “all evidence that bears on the issue” of whether Smith is likely to engage in predatory acts of sexual violence if

not confined in a secure facility. CP 787. This would include any evidence about the deterrent effects of a future petition. Moreover, the facts did not support inclusion of this language. No evidence was presented at trial—by Smith or any other witness—that the potential for a new petition made him less likely to reoffend. Thus, it would have been error for the trial court to include language about a possible future petition. *Taylor-Rose*, 199 Wn. App. at 886; *see also 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”).

Smith relies on *In re Detention of Post*, 170 Wn.2d 302, 241 P.3d 1234 (2010) to argue that the trial court’s failure to instruct the jury about the possibility of a future petition was error. Appellant’s Opening Br. at 26-28. But *Post* does not support his claim. As this Court correctly recognized in *Taylor-Rose*, *Post* does not require that a trial court give a proposed jury instruction regarding the possibility of a new recent overt act petition. 199 Wn. App. at 885. In fact, *Post* did not address jury instructions at all; it only recognized the potential relevance and admissibility of *evidence* of a new petition if tied to the individual's knowledge and the impact on his offending. *Post*, 170 Wn.2d at 316-17. In short, nothing in *Post* compels the inclusion of language about the possibility of a future petition.

Smith also claims that the trial court's failure to include language about the availability of a future petition relieved the State of its burden to prove dangerousness and violated his right to due process. Appellant's Opening Br. at 25-26, 28. He claims that this argument was "left undecided" by *Taylor-Rose. Id.* at 29-30. This claim is meritless. Due process was satisfied when the trial court accurately instructed the jurors on all of the elements the State was required to prove beyond a reasonable doubt. *See Scott*, 110 Wn.2d at 690; CP 785.

**C. The Trial Court Properly Used the Statutorily Defined Term "Sexually Violent Predator" in the Jury Instructions**

The trial court properly exercised its discretion when it denied Smith's motion in limine to "exclude" use of the term "sexually violent predator" throughout the proceedings and replace it with the term "criteria for civil commitment." CP 115-18. The term "sexually violent predator" is a statutorily defined term that has specific legal significance at trial. The trial court's use of the term was consistent with the jury's inquiry, the statutory language, and the pattern jury instructions. Further, the court's jury instructions protected against any potential prejudice and ensured that the jury based its decision only on the evidence presented at trial.

Appellate courts review a trial court's ruling on a motion in limine for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615

(1995). Likewise, a decision about the specific language of jury instructions is a matter of discretion. *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991). Indeed, “A trial court has considerable discretion as to how instructions will be worded.” *Peterson v. State*, 100 Wn.2d 421, 441, 671 P.2d 230 (1983). An abuse of discretion occurs only when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Powell*, 126 Wn.2d at 258

Here, the trial court did not abuse its discretion when it denied Smith’s motion to replace the legal term “sexually violent predator” with the phrase “criteria for civil commitment.” As the trial court correctly recognized, the term “sexually violent predator” is “the term that the law uses.” VRP (12/29/19) at 43-44.

The term “sexually violent predator” is defined by statute and has specific legal significance at trial. *See* RCW 71.09.020(18); RCW 71.09.060(1). At an initial commitment trial, the court or jury “shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.” RCW 71.09.060(1). Given that the central issue in this trial was whether Smith is a “sexually violent predator” under the statute, the trial court properly used that term in the jury instructions. Using the precise legal term was consistent with the State’s allegations and most accurately reflected the State’s burden of proof and the jury’s inquiry.

The trial court's instructions also mirrored the statutory language and were consistent with the pattern jury instructions. The term "sexually violent predator" is used throughout chapter 71.09 RCW. *See generally* ch. 71.09 RCW. It is also used throughout the pattern jury instructions for initial commitment trials. For example, the pattern verdict form asks whether the State "proved beyond a reasonable doubt that (name of respondent) is a sexually violent predator[.]" *6A Washington Practice: Washington Pattern Jury Instructions: Civil* WPI 365.21 (7th ed.) (WPI). In addition, the pattern instruction providing the elements for commitment and the pattern instruction providing the reasonable doubt definition also use the term "sexually violent predator." *See* WPI 365.10, WPI 365.11.

Further, the phrase "criteria for civil commitment" is vague and potentially misleading. There are various forms of civil commitment in Washington, and it is important for the jury to understand what form of civil commitment is at issue in a particular proceeding. *See, e.g.,* ch. 71.05 RCW. Using vague and imprecise terminology heightens the possibility that the jury may not fully comprehend the State's allegation or the nature of its determination. Thus, the trial court properly declined to substitute a less precise phrase for the statutorily defined term.

Relying on law review articles, Smith argues that the term "sexually violent predator" produces an emotional response that "encouraged jurors

to decide the case on impermissible factors rather than on the evidence.” Appellant's Opening Br. at 33. He further argues that this violated his right to due process. *Id.* at 31, 34.

But many legal terms have the potential to provoke an emotional response. For example, a defendant charged with murder or rape may claim that those terms are emotionally charged and wish that the court did not use such terms at trial. Nevertheless, use of precise legal terminology is critical to ensuring that the factfinder fully understands the State’s allegations, its role, and can properly apply the law to the facts in a particular case. Further, Smith fails to support his due process claim with any relevant argument or authority. Rather, he merely cites various civil commitment cases for the proposition that substantive due process requires State to prove that a person is both mentally ill and currently dangerous. *See* Appellant’s Opening Br. at 32. This is insufficient to command judicial consideration. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

Moreover, in this case, the court's final instructions to the jury protected against any potential prejudice and prevented the jury from relying on improper factors during deliberations. The court expressly instructed the jury “to decide the facts in this case based upon the evidence presented to you during this trial.” CP 781. It also instructed the jury as follows:

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 782. Similarly, it instructed the jury: “You are all officers of the court and must evaluate the evidence with an open mind free of bias or prejudice.”

CP 799. Courts presume that juries follow all instructions given. *State v Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Finally, even if the court's ruling was error, it was harmless. An “error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). In this case, there was ample evidence supporting the jury verdict in the State's favor, including Smith's testimony that he does not feel ready to be released without supervision. CP 606. In addition, there was ample evidence that Smith had committed a violent rape of a child. In light of this evidence, it is not reasonable to assume that sanitizing this statutorily defined term would have materially affected the outcome of this trial.

**D. The Trial Court Properly Exercised Its Discretion When It Admitted Testimony about the Physical Injuries Sustained by Smith's Victim**

The trial court properly exercised its discretion when it denied Smith's motion in limine to exclude evidence of the physical injuries sustained by his victim. Dr. Arnold relied on this evidence when evaluating whether Smith has a mental abnormality and whether he is likely to engage in predatory acts of sexual violence. The trial court admitted testimony about the injuries for the jury to be able to assess the credibility of Dr. Arnold's opinion, and the testimony was subject to a limiting instruction.

Appellate courts will not disturb a trial court's ruling on a motion in limine or the admissibility of evidence absent an abuse of discretion. *Powell*, 126 Wn.2d at 258. An abuse of discretion occurs only when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.*

Evidence is relevant and admissible if it has any tendency to make the existence of a fact of consequence to the determination of an action more or less probable. ER 401. Experts are permitted to base their opinion on factors or data that are not otherwise admissible so long as they are reasonably relied on by experts in the particular field. ER 703. Relevant

evidence may be excluded if “its probative value is *substantially* outweighed by the danger of unfair prejudice.” ER 403 (emphasis added).

Here, the trial court admitted evidence of the victim’s physical injuries for the limited purpose of assessing the credibility of Dr. Arnold’s opinion. This evidence was relevant to Dr. Arnold’s assessment of whether Smith has a mental abnormality and is likely to engage in predatory acts of sexual violence. Dr. Arnold testified in a deposition prior to trial that this evidence was relevant to assessing Smith’s emotional and volitional control as well as his callousness. CP 420-21, 428-29. Moreover, at trial, Dr. Arnold’s testimony established that he relied on Smith’s criminal history, including his 1990 offense, when conducting his evaluation and rendering an opinion about whether Smith has a mental abnormality and whether he is more likely than not to reoffend. *See* VRP (Vol. 3) 493, 500, 507-09. Dr. Arnold cited the 1990 offense when discussing antisocial personality disorder diagnosis and Smith’s reckless disregard for the safety of others as well as Smith’s lack of remorse. VRP (Vol. 3) 555, 558-59. He also testified that, based on the facts he reviewed, Smith demonstrated callousness. VRP (Vol. 3) at 615-16. Dr. Arnold factored Smith’s callousness into his risk assessment. *See id.*

Moreover, the danger of unfair prejudice of this testimony was low when considering the other evidence presented at trial. The other evidence

included Smith's own account of the offense at issue, which included testimony that "put [his] penis in [the three-year-old girl]" and raped her for ten to fifteen minutes to the point of ejaculation. CP 510, 513. For these reasons, the trial court's decision to admit this evidence was not manifestly unreasonable or based on untenable grounds or reasons.

Smith contends that any probative value of this evidence was slight because the State was required to show "only the fact of Mr. Smith's predicate conviction." Appellant's Opening Br. at 35. But this argument overlooks the fact that the State also had to prove that Smith suffers from a mental abnormality that causes serious difficulty controlling his behavior and that he is likely to engage in predatory acts of sexual violence if not confined to a secure facility. CP 785. And as Dr. Arnold's testimony established, evidence of his victim's physical injuries was relevant to his opinion on those two elements.

Smith also appears to suggest that the trial court erred because it did not balance the probative value of this evidence against its prejudicial effects on the record. Appellant's Opening Br. at 34-35. In support of this claim, he relies on *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995). But *Powell* was focused on ER 404(b) evidence, and it cited a comment to ER 404(b) and a case about ER 404(b) when stating that this balancing must be on the record. *Powell*, 26 Wn.2d at 264. *Powell* should not be read to

require trial courts to conduct a balancing on the record for every evidentiary objection under ER 403. Indeed, appellate courts have repeatedly rejected the argument that trial courts are required to conduct on-the-record balancing for ER 403 claims. *See, e.g., State v. Baldwin*, 109 Wn. App. 516, 528, 37 P.3d 1220 (2001); *State v. Gould*, 58 Wn. App. 175, 184, 791 P.2d 569 (1990); *State v. Flowers*, 191 Wn. App. 1003, 2015 WL 6686738 at \*4 n. 5 (Wash. Ct. App. Nov. 3, 2015) (unpublished). In doing so, they reasoned that requiring on-the-record balancing for ER 403 claims “would unnecessarily and unreasonably intrude upon the trial court’s management of the trial process.” *Gould*, 58 Wn. App. at 184.

In any event, a trial court’s failure to articulate its balancing process may be harmless if the record as a whole permits appellate review. *State v. Acosta*, 123 Wn. App. 424, 433, 98 P.3d 503 (2004). Such is the case here, and for the reasons already discussed, the record demonstrates that the admission of this evidence was proper.

Finally, even if admission of this evidence was error, it was harmless. Evidentiary error is grounds for reversal only if it results in prejudice. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An error is prejudicial if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Id.* (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

The outcome of this trial would not have been materially affected if this evidence had been excluded. Dr. Arnold's testimony about the child's injuries was very brief, was not a focus by either party during the trial, and was not mentioned at all in closing arguments. Further, this evidence was not admitted substantively, but rather, it was admitted for the purpose of assessing the expert's opinion and was subject to a limiting instruction. *See* CP 783. In addition, there was ample evidence to support the jury's verdict in favor of the State, including testimony from Smith about the details of the rape and that he did not feel ready to be released without supervision. CP 510-15, 606. Lastly, the trial court instructed the jurors that they must not let their emotions overcome their rational thought process, and they must reach their decision based on the facts and the law. CP 782. Courts presume that juries follow all instructions given. *Stein*, 144 Wn.2d at 247.

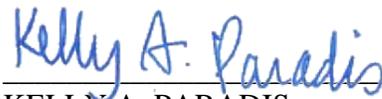
## V. CONCLUSION

The trial court properly exercised its discretion when it identified rape of a child in the first degree as a "crime of sexual violence" in the jury instructions. It also properly exercised its discretion when it omitted language about a possible future petition and when it declined to substitute a less precise phrase for the statutorily defined term "sexually violent predator." Finally, the trial court properly exercised its discretion when it

admitted a few details about Smith's victim's physical injuries. For the foregoing reasons, this Court should affirm.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of October, 2020.

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NO. 54505-5

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

In re the Detention of:

RANDY SMITH,

Appellant.

DECLARATION OF  
SERVICE

I, Malia Anfinson, declare as follows:

On October 9, 2020, I sent via electronic mail, per service agreement, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

Jodi Backlund  
Backlund & Mistry  
[backlundmistry@gmail.com](mailto:backlundmistry@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 9<sup>th</sup> day of October, 2020, at Seattle, Washington.



MALIA ANFINSON

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

**October 09, 2020 - 4:32 PM**

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