

**FILED**

JUN 08 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 28889-7

---

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

---

In Re the Detention of Calvin Mines:

STATE OF WASHINGTON,

Respondent,

v.

CALVIN MINES,

Appellant.

---

**RESPONDENT'S BRIEF**

---

ROBERT M. MCKENNA  
Attorney General

Malcolm Ross  
Assistant Attorney General  
WSBA No. 22883  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-2011

2011 JUN -6 PM 4:47

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**ORIGINAL**

**FILED**

JUN 08 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

NO. 28889-7

---

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

---

In Re the Detention of Calvin Mines:

STATE OF WASHINGTON,

Respondent,

v.

CALVIN MINES,

Appellant.

---

**RESPONDENT'S BRIEF**

---

ROBERT M. MCKENNA  
Attorney General

Malcolm Ross  
Assistant Attorney General  
WSBA No. 22883  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-2011

2011 JUN -6 PM 4:47

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**ORIGINAL**

**TABLE OF CONTENTS**

- I. ISSUES PRESENTED .....1
  - A. Where the legislature’s intent in RCW 71.09 is to protect the public, and the plain language of the statute allows the petitioner to establish a predicate offense by proving at the SVP trial that a crime was sexually motivated, did the trial court err by following that plain language and denying Mines’ motion to dismiss? .....1
  - B. Where there are no provisions in RCW 71.09 for a separate trial on the recent overt act element, and where bifurcation would have led to two identical and lengthy trials, did the trial court err by denying Mines’ motion to bifurcate?.....1
  - C. Where original charging documents were relevant to the risk assessment and to determining sexual motivation, did the trial court abuse its discretion admitting them into evidence?.....1
  - D. Where Mines’ proposed limiting instruction was contrary to law, did the trial court abuse its discretion by rejecting it? .....1
- II. STATEMENT OF FACTS.....1
  - A. Procedural History .....1
  - B. Mines’ Criminal Sexual History .....2
    - 1. Jennifer K. ....2
    - 2. Christina S. ....5
    - 3. Angela C. ....5
    - 4. Bradley B. ....8
    - 5. Tammy H. ....8

6.	Matthew E. ....	10
7.	Jeromy B. (Recent Overt Act).....	11
C.	Expert Opinion Testimony.....	13
III.	ARGUMENT .....	14
A.	The Trial Court Correctly Denied Mines’ Motion to Dismiss Because RCW 71.09.020(17)(c) Defines “Sexually Violent Offense” as Including Assault First Degree Where Sexual Motivation is Proved at the SVP Trial.....	14
1.	Standard of Review .....	14
2.	The Statute’s Plain Language Demonstrates the Legislature’s Intent to Permit SVP Petitioners to Establish the Predicate Offense by Proving Sexual Motivation at the SVP Trial .....	15
3.	Statutory Construction is Unnecessary Because There is Only One Reasonable Interpretation .....	21
4.	RCW 71.09.020(17)(c) Does Not Violate Mines’ Equal Protection Rights.....	24
5.	RCW 71.09.020(17)(c) Does Not Violate Mines’ Right To Due Process.....	29
B.	The Trial Court Did Not Abuse Its Discretion When It Denied Mines’ Motion to Bifurcate the Proceedings .....	30
1.	Standard of Review .....	31
2.	Bifurcation Would Have Produced Two Nearly Identical, Lengthy Trials .....	31
3.	The Unitary Trial Did Not Violate Mines’ Equal Protection Rights .....	35

C.	The Trial Court Did Not Abuse It’s Discretion When It Admitted Evidence of Crimes With Which Mines had been Charged .....	38
1.	Standard of Review .....	38
2.	The Charging Information was Relevant to the Risk Assessment .....	38
3.	The Charging Information was Relevant to Mines’ Criminal Sexual History .....	40
4.	Any Error Was Harmless.....	43
D.	The Trial Court Did Not Abuse It’s Discretion When It Declined to Give Mines’ Erroneous Proposed Limiting Instruction .....	45
IV.	CONCLUSION .....	48

## TABLE OF AUTHORITIES

### Cases

<i>Brown v. General Motors Corp.</i> , 67 Wn.2d 278, 407 P.2d 461 (1965).....	34
<i>Burns v. City of Seattle</i> , 161 Wn.2d 129, 164 P.3d 475 (2007).....	19
<i>Christensen v. Ellsworth</i> , 162 Wn.2d 365, 173 P.3d 228 (2007).....	17
<i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 91 P.3d 875 (2004).....	30
<i>Dep't of Ecology v. Campbell &amp; Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	17
<i>Hanson Industries Inc. v. Kutschkau</i> , 158 Wn. App. 278, 239 P.3d 367 (2010).....	15
<i>In re Detention of Abolafya</i> , 114 Wn. App. 137, 56 P.2d 608 (2002).....	passim
<i>In re Detention of Albrecht</i> , 147 Wn.2d 1, 51 P.3d 73 (2002).....	31
<i>In re Detention of Boynton</i> , 152 Wn. App. 442, 216 P.3d 1089 (2009).....	20, 21
<i>In re Detention of Coe</i> , ___ Wn. App. ___, 250 P.3d 1056 (2011).....	38, 40
<i>In re Detention of Fair</i> , 139 Wn. App. 532, 161 P.3d 466 (2007).....	24
<i>In re Detention of Greenwood</i> , 130 Wn. App. 277, 122 P.3d 747 (2005).....	37

<i>In re Detention of Kistenmacher</i> , 163 Wn.2d 166, 178 P.3d 949 (2008).....	17
<i>In re Detention of Law</i> , 146 Wn. App. 28, 204 P.3d 230 (2008).....	41
<i>In re Detention of Stout</i> , 159 Wn.2d 357, 150 P.3d 86 (2007).....	36, 37
<i>In re Detention of West</i> , 2011 WL 1679393 at 5 .....	47
<i>In re Detention of Wright</i> , 138 Wn. App. 582, 155 P.3d 945 (2007).....	41
<i>In re Detention of Young</i> , 122 Wn.2d 1, 857 P.2d 989 (1993).....	46
<i>In re Field</i> , 412 A.2d 1032 (N.H., 1980).....	34, 35
<i>In re Miller</i> , 186 P.3d 201 (Kan.App. 2008) <i>review granted</i> (Sept. 24, 2008) ...	21, 40
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006).....	31
<i>Myers v. Boeing Co.</i> , 115 Wn.2d 123, 794 P.2d 1272 (1990).....	31
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 162 (1970).....	10, 18
<i>Schrom v. Board for Volunteer Fire Fighters</i> , 153 Wn.2d 19, 100 P.3d 814 (2004).....	23
<i>State v. Borboa</i> , 124 Wn. App. 779, 102 P.3d 183 (2004).....	21
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	43

<i>State v. Gallagher</i> , 112 Wn. App. 601, 51 P.3d 100 (2002).....	46
<i>State v. Gordon</i> , 153 Wn. App. 516, 223 P.3d 519 (2009).....	25
<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005).....	17
<i>State v. Keller</i> , 98 Wn.2d 725, 657 P.2d 1384 (1983).....	24
<i>State v. Krall</i> , 125 Wn.2d 146, 881 P.2d 1040 (1994).....	19
<i>State v. Manussier</i> , 129 Wn.2d 652, 921 P.2d 473 (1996).....	24, 25
<i>State v. Mines</i> , 2010 WL 2403374.....	2
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001).....	43
<i>State v. Ramirez</i> , 62 Wn. App. 301, 814 P.2d 227 (1991), <i>review denied</i> , 118 Wn.2d 1010, 824 P.2d 490 (1992).....	46
<i>State v. Russell</i> , 171 Wn.2d 118, 249 P.3d 604 (2011).....	47
<i>State v. Thomas</i> , 138 Wn.2d 630, 980 P.2d 1275 (1999).....	26
<i>State v. Tili</i> 139 Wn.2d 107, 985 P.2d 365 (1999).....	23
<i>State v. Turnipseed</i> , ___ Wn. App. ___, 2011 WL 1991752 at 9.....	38
<i>State v. Ward</i> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	25

<i>Western Telepage, Inc. v. City of Tacoma Dept. of Financing,</i> 140 Wn.2d 599, 998 P.2d 884 (2000).....	23
<i>Weyerhaeuser Co. v. State Dept. of Ecology,</i> 86 Wn.2d 310, 545 P.2d 5 (1976).....	23
<i>Wingert v. Yellow Freight Systems, Inc.,</i> 146 Wn.2d 841, 50 P.3d 256 (2002).....	22

**Statutes**

Former RCW 9.94A.127 (Supp. 1990-91).....	27
Laws of Washington, ch. 3 §§ 601, 602 .....	26
RCW 10.77 .....	22
RCW 10.77.020(3).....	15
RCW 10.77.086(4).....	15, 22
RCW 10.77.110 (1).....	15
RCW 10.77.150 .....	15
RCW 71.09 .....	1, 17, 25, 37
RCW 71.09.010 .....	17, 18
RCW 71.09.020 .....	15
RCW 71.09.020(12).....	passim
RCW 71.09.020(17).....	14, 16, 20
RCW 71.09.020(17)(c) .....	passim
RCW 71.09.020(18).....	34, 39
RCW 71.09.030 .....	15

RCW 71.09.030(1).....	16, 17, 19
RCW 71.09.030(1)(c) .....	36
RCW 71.09.030(1)(e) .....	19
RCW 71.09.040(4).....	1
RCW 71.09.060(2).....	21, 23, 36, 37
RCW 9.94A.030.....	16
RCW 9.94A.030(46).....	26
RCW 9.94A.535(3)(f).....	26
RCW 9.94A.835(1).....	26

**Rules**

CR 42(b).....	31, 32
ER 105 .....	45, 47
ER 401 .....	39
ER 801(d)(2).....	30, 44

## I. ISSUES PRESENTED

- A. **Where the legislature's intent in RCW 71.09 is to protect the public, and the plain language of the statute allows the petitioner to establish a predicate offense by proving at the SVP trial that a crime was sexually motivated, did the trial court err by following that plain language and denying Mines' motion to dismiss?**
- B. **Where there are no provisions in RCW 71.09 for a separate trial on the recent overt act element, and where bifurcation would have led to two identical and lengthy trials, did the trial court err by denying Mines' motion to bifurcate?**
- C. **Where original charging documents were relevant to the risk assessment and to determining sexual motivation, did the trial court abuse its discretion admitting them into evidence?**
- D. **Where Mines' proposed limiting instruction was contrary to law, did the trial court abuse its discretion by rejecting it?**

## II. STATEMENT OF FACTS

### A. Procedural History

On March 15, 2006, the State filed a petition alleging that Calvin Mines (Mines) is a sexually violent predator (SVP). CP at 1. Following a contested probable cause hearing on July 26, 2006, the trial court ordered that Mines be detained and evaluated pursuant to RCW 71.09.040(4), pending trial. CP at 65-66.

Pre-trial, Mines moved to dismiss the petition, alleging *inter alia* that he had never been convicted of a sexually violent offense. CP at 132-44. The Petitioner responded, and the trial court heard oral argument on August 31, 2009. CP at 145-49; 1RP at 5-27. The court denied the motion on October 29, 2009. CP at 281-84.

Mines also moved to bifurcate the proceedings and requested a separate hearing as to whether he had committed a recent overt act. CP at 75-78. The petitioner responded. CP at 150-83. On October 29, 2009, the trial court denied the motion. CP at 278-80.

A jury trial in the Walla Walla County Superior Court commenced on February 1, 2010 and, on February 9, 2010, the jury returned a verdict finding that Mines is a sexually violent predator. CP at 948. The court ordered that Mines be civilly committed as an SVP. CP at 31. Mines timely appealed. CP at 954-55.

Prior to the SVP trial, Mines collaterally attacked his 1970 predicate conviction for assault first degree through a CrR 7.8 motion in the trial court and, on June 17, 2010, in an unpublished opinion, this Court affirmed the trial court's denial of that motion. *State v. Mines*, 2010 WL 2403374.

## **B. Mines' Criminal Sexual History**

### **1. Jennifer K.**

In November, 1969, Jennifer K. was a 16 year old Walla Walla High School student who lived with her mother and siblings in College Place, Washington. 2RP at 54. On November 17, 1969, she was spending time with friends after school before her choir practice. 2RP at 54-55. She went downtown with them to a restaurant. 2RP at 55. Mines was there with his friend, Norman Banks (Banks). 2RP at 56. Jennifer did not know Mines. 2RP at 56.

At about 7:00 p.m. Jennifer left for choir practice. 2RP at 56. Mines and Banks left the restaurant at the same time and offered her a ride. 2RP at 57. She first declined but when they kept insisting she eventually accepted. 2RP at 57. Jennifer sat in the back of Banks' car while Banks drove and Mines rode in the front passenger seat. 2RP at 57. They had agreed to take her to Cordiner Hall on the Whitman College campus for her choir practice, but drove off in the wrong direction. 2RP at 57-58. They told Jennifer they needed to pick up something first. 2RP at 58. At some point Mines climbed into the back seat with Jennifer. 2RP at 59.

Banks parked the car at Washington Park. 2RP at 58. Mines became aggressive and insistent, touching Jennifer, holding on to her and trying to kiss her, though she told him to stop. 2RP at 59. When she pushed him away, he began hitting her hard in the face with a closed fist. 2RP at 59-60. He cursed her, called her a "bitch" and ordered her to take off her clothes. 2RP at 60. Jennifer was screaming and Mines told her to shut up or he would kill her. 2RP at 60. He ordered Banks to hand him the knife in the glove compartment. 2RP at 60. Mines held the knife up to Jennifer and threatened to cut her throat if she didn't shut up. 2RP at 60-61. She begged him to stop but he put his hand around her throat and choked her. 2RP at 61. When he again threatened to kill her, she took off her clothes. 2RP at 61.

Mines removed his pants and attempted to vaginally rape Jennifer. 2RP at 61. Though he had an erection, he was unable to penetrate her.

2RP at 61-62. He called her a “tight bitch;” Jennifer told him she was a virgin. 2RP at 62. Mines then called her a “lying bitch.” 2RP at 62. Pushing her head down onto his lap, he pushed his penis into her mouth. 2RP at 62. He kept pushing her head down onto his penis until he ejaculated into her mouth. 2RP at 62. When she spit his semen out he became very angry and cursed and pushed her. 2RP at 63. His face was “very hard, very angry looking.” 2RP at 63.

Mines got out of the car and Jennifer scrambled to put her clothes back on. 2RP at 63. Then Banks and Mines drove her to a house and took her to a bathroom to clean up. 2RP at 63. Her face was swollen as she washed blood off of it. 2RP at 64. They dropped her off at Cordiner Hall. 2RP at 64. Her choir director saw her, asked her what had happened and took her directly to the hospital. 2RP at 64-65.

Walla Walla County charged Mines with assault first degree and sodomy. Ex. 1. He pled guilty to assault and was convicted on February 5, 1970. Exs. 2, 3. The trial court concurrently entered the following finding of fact:

That the Defendant, CALVIN MINES, on the 17<sup>th</sup> day of November, 1969, with intent to rape, did assault a female child with use of a deadly weapon, to-wit: one hunting knife with 5-inch blade.

Ex. 4. The court sentenced Mines to a maximum of not more than 20 years. Ex. 3.

At the SVP commitment trial, Mines' expert witness, Dr. Louis Rosell, testified that Mines admitted to him that he forced his penis into Jennifer's mouth. 5RP at 61.

**2. Christina S.**

On or about December 7, 1989, Spokane County charged Mines with rape second degree by forcible compulsion against victim Christina S. Ex. 5. On January 4, 1990, Mines pled guilty to an amended charge of unlawful imprisonment and was convicted on January 19, 1990. Exs. 6, 7, 8. The court sentenced him to 11 months confinement. Ex. 8.

**3. Angela C.**

Angela C. was 15 years old in November, 1991, and lived with her mother in Oak Harbor, Washington, on Whidbey Island. 2RP at 95. Her friend lived in a townhouse next to Mines' apartment building. 2RP at 95-96. Angela lived about two blocks away and was casually acquainted with Mines. 2RP at 95-96.

On the evening of November 6, 1991, Angela visited her friend. 2RP at 98. Her friend was supposed to walk her half-way home because Angela had become concerned about Mines. 2RP at 98. He had recently given her a necklace and some lingerie, gifts that made her confused and uncomfortable. 2RP at 96-98. Though Angela was scared and nervous about the walk home, her friend had become upset about something and declined to accompany her. 2RP at 99.

Angela tried to sneak out of her friend's complex by a route that should have hidden her from Mines' view. 2RP at 99-100. She crossed a

street and was a half-block away when she heard Mines calling her. 2RP at 100. She called back, lying to him that she had to go to her cousin's home and would be late if she stopped. 2RP at 100. Mines became more insistent that she come talk to him and eventually Angela crossed the street and approached him. 2RP at 100. Mines kept insisting that she come up to his apartment because he wanted to show her something. 2RP at 100-101. Angela declined, but when Mines persisted she followed him. 2RP at 100-101. Once she was inside his apartment, Mines closed and locked the door. 2RP at 101.

Mines asked Angela if she would have sex with a black man. 2RP at 101. When she said "No," he became very angry; his eyes were glassy and bloodshot and he slapped the table. 2RP at 101-102. Angela nervously asked if she could call her friend and Mines said she could. 2RP at 101. But when she started to dial the number, Mines came from behind her and wrapped his arm around her neck, choking her so that she couldn't breathe. 2RP at 102. She tried to pull his arm down but he held on until her knees buckled. 2RP at 102. He then hung up the phone, told her to stay quiet and, keeping his arm around her neck so she couldn't scream, pulled her into a bedroom. 2RP at 103. Angela was too shocked to struggle further. 2RP at 103.

Mines ordered her to take off her clothes and took some of them off himself. 2RP at 104. He had already taken off his own clothes. 2RP at 104. He attempted to vaginally rape her but couldn't. 2RP at 104. He reached for a jar of Vaseline and told Angela to put it on his penis, and

she did. 2RP at 104. He was then able to penetrate her. 2RP at 104. Angela has no memory of pain or of how long the rape lasted; it seemed as though she was standing outside of her body and she assumed she had passed out from shock. 2RP at 104-105. The next thing she remembers is Mines lying next to her naked and elbowing her awake. 2RP at 105.

Mines told Angela he had to kill her because he couldn't go back to prison. 2RP at 103, 105. Angela thought she was going to die and others would find her body in the woods. 2RP at 105. She told Mines that she wouldn't tell anyone, that she didn't want to die and she asked him to let her go home. 2RP at 105. Mines just told her to get dressed. 2RP at 105. When they went out to the living room, Mines stood at the door deliberating whether to unlock it; he kept repeating that he "couldn't go back to prison." 2RP at 106. Then he told Angela to go to the bathroom because she had to "pee." 2RP at 106. Angela told him she didn't have to but he insisted and so she went into the bathroom, filled a cup with water and poured it into the toilet to simulate urination. 2RP at 106-107. She could hear Mines standing right outside the door. 2RP at 107.

Angela opened the bathroom door expecting to die. 2RP at 107. Mines walked her out of the apartment and away from the apartment house. 2RP at 107. When they neared her home, an unmarked police car approached and Angela tried to flag it down. 2RP at 107. The car passed, but then turned and drove back towards them. 2RP at 107-108. Angela

ran from Mines to a neighbor's house and told them what had happened. 2RP at 108. She reported the crime to police that night. 2RP at 108.

Island County charged Mines with rape of a child third degree. Ex. 9. Mines pled guilty to an amended charge of unlawful imprisonment and was convicted on December 20, 1991. Exs. 10, 11, 12. The court sentenced him to 22 months. Ex. 12.

#### **4. Bradley B.**

In March, 1992, Bradley B. was 20 years old and serving a nine- to thirteen-month sentence in Washington's Department of Corrections (DOC). 2RP at 162-63. At the Cedar Creek Corrections Center he became acquainted with Mines in the yard. 2RP at 163. Mines was bench-pressing about 400 pounds and Bradley was impressed. 2RP at 166. Mines offered him a pack of cigarettes because he was new. 2RP at 163-64.

On March 13, 1992, Mines came into Bradley's room, grabbed him and put something to his head. 2RP at 164-65. Bradley felt a sharp, hard, pointed object by his ear. 2RP at 178-79. Mines said it was a nail and told Bradley to orally copulate him. 2RP at 164-65. He threatened Bradley's unborn child. 2RP at 165. Bradley complied with Mines' demand. 2RP at 166-67. When it was over Mines left and Bradley ran to the guard shack and reported the assault. 2RP at 167.

#### **5. Tammy H.**

Tammy H. was 27 years old in November, 1993 and lived with her children in Coupeville, Washington, on Whidbey Island. 2RP at 134-35.

She worked at the Captain's Galley restaurant. 2RP at 134-35. Mines was a casual acquaintance. 2RP at 135.

On Thanksgiving night, 1993 (November 25<sup>th</sup>), Tammy went to work but wasn't needed because business was slow. 2RP at 135. She stayed to visit with people and ran into Mines. 2RP at 135-36. He asked to walk her home and she agreed; they left about 12:30 a.m. 2RP at 136. They talked casually as they walked towards her home. 2RP at 137.

Without warning, Mines suddenly grabbed her around her neck, put his hand over her mouth and threw her to the ground. 2RP at 137. He dragged her into the woods and told her, "Shut up, bitch" and "you're going to die here if you don't do what I said, or what I want you to do." 2RP at 137-38. He ordered her to suck his penis and, when she refused, he said, "You're going to do what I want [or] I'm going to bury you here, bitch." 2RP at 138. He pulled his pants down, tied her hands with shoe laces and tied her feet with her coat. 2RP at 138.

Mines again ordered Tammy to suck his penis; she refused and bit it when he tried to force it in her mouth. 2RP at 139. When he threatened again to kill and bury her, she told him she'd cooperate because she just wanted to "go home to my babies." 2RP at 139. After that, Mines pulled her pants down and tried to vaginally rape her. 2RP at 139.

Mines kept Tammy in the woods for approximately three hours. 2RP at 139. At one point she was face down with her hands tied behind her back. 2RP at 138. Mines repeatedly called her names and told her he was going to kill her and leave her in the woods. 2RP at 139. He choked

her and a couple of times she almost blacked out. 2RP at 142. Eventually he ejaculated in her mouth. 2RP at 139. As she continued to plead with him he let her walk home while he escorted her, though he said that she shouldn't be leaving the woods and he was going to regret it. 2RP at 140. He threatened to have her and her family hurt if she reported him. 2RP at 140.

Mines spent the night at Tammy's home. 2RP at 140-41. He forced her to write a note that she had consented to have sex with him. 2RP at 141. She didn't try to leave for fear he would choke her again. 2RP at 141-42. The next day she was able to go to work and reported the assault. 2RP at 142.

Island County charged Mines with rape third degree. Ex. 13. Mines entered an *Alford*<sup>1</sup> plea to that charge and was convicted on February 11, 1994. Exs. 14, 15. The court sentenced him to 60 months. Ex. 15.

#### **6. Matthew E.**

Matthew E. was 17 years old in 1994 when he spent 15 days in the Island County Jail in Coupeville, Washington. 6RP at 53-54. Mines was there, too, and Matthew met him his first day in the jail. 6RP at 54-56. They became friendly, talked with each other daily, and visited in each other's cell. 6RP at 65-66. They gave each other candy and cigarettes. 6RP at 66-67. Mines gave Matthew lotion and a bar of soap. 6RP at 67.

---

<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 162 (1970).

One day, things suddenly went bad. 6RP at 71. Mines came into Matthew's cell and "mobbed" him on his bed. 6RP at 80. He wrestled with Matthew, ripped his underwear off, put him in a choke hold and said he was going to "tune [him] up." 6RP at 79. Mines said, "Do you know what this means when you're in prison? You're about to get fucked." 6RP at 80. He put a hand over Matthew's mouth. 6RP at 80-81. Mines eventually stopped. 6RP at 80.

Approximately the next day, Mines assaulted Matthew again. 6RP at 75. Mines was "hovering" – his eyes were on Matthew constantly. 6RP at 75. When Matthew went into his cell, Mines followed him. 6RP at 75-76. Matthew asked, "What's going on now?" 6RP at 76. Mines wanted to "wrestle" again. 6RP at 76. He told Matthew to pull his pants down and he fondled him. 6RP at 76. He asked Matthew to orally copulate him and for Mines to orally copulate Matthew. 6RP at 76. Mines threatened to hurt Matthew if he made any noise. 6RP at 76. The assault lasted about five minutes. 6RP at 78.

#### **7. Jeromy B. (Recent Overt Act)**

Jeromy B. was 23 years old in 2003 and imprisoned in the DOC. 3RP at 23-25. From March to August that year he served time at DOC's Airway Heights Correctional Center (AHCC). 3RP at 25. He met Mines at AHCC and worked with him in the kitchen. 3RP at 25.

On approximately August 10, 2003, Jeromy entered a bathroom in his dorm and saw Mines and another man kneeling down in a shower stall. 3RP at 26-27. Jeromy turned around and left. 3RP at 27.

The next day, Mines told Jeromy to go out to the yard with him. 3RP at 27. He talked to Jeromy for a couple of hours. 3RP at 28. Mines said that, because of what Jeromy had seen the day before, Mines did not trust him and was worried that he would report the incident. 3RP at 28. Mines said that to “make it even,” Jeromy would have to perform a sex act with Mines, or Mines would kill him. 3RP at 28. Mines said he had nothing to lose, and repeated that he would severely hurt or kill Jeromy if he did not cooperate. 3RP at 28. He told Jeromy to follow him into the shower that night. 3RP at 29.

Jeromy was “scared to death.” 3RP at 28. He didn’t feel he could report Mines, who celled next to him, and out of intense fear Jeromy was willing to “go along with whatever was happening.” 3RP at 28-29. That night he went into the showers with Mines, masturbated him, and was orally copulated by Mines. 3RP at 29. Still later that same night, Mines came over to Jeromy’s cubicle and masturbated and orally copulated him. 3RP at 30. Afterward, scared and knowing he had to be near Mines for at least one more week before he left AHCC, Jeromy made no report. 3RP at 29.

The next day, a correctional officer pulled Jeromy aside and asked if he was okay. 3RP at 30. Mines was standing within earshot. 3RP at 31. Jeromy was scared for his life and said nothing was wrong. 3RP at 31. Mines became upset with the officer and told him he had no business telling people who could and could not be friends. 3RP at 31.

Afterwards, Mines told Jeromy to go to the recreation center. 3RP at 30. There, he told Jeromy he would again have to prove that he wouldn't tell on Mines and to follow him into the shower stall again. 3RP at 31. Jeromy complied and in the shower stall Mines put Vaseline on Jeromy's penis, masturbated him and then had Jeromy put his penis in Mines' anus. 3RP at 32. He told no one because he was terrified and didn't want to die or be beaten. 3RP at 33.

Three days later Jeromy left AHCC for work release. 3RP at 32-33. He immediately called the Spokane Police and reported the assaults to his counselor. 3RP at 33. Mines received an infraction and lost 362 days of "good time." 6RP at 106-9.

### **C. Expert Opinion Testimony**

At trial the state presented the expert opinion testimony of Dr. Harry Goldberg. 3RP at 77. Dr. Goldberg is a clinical psychologist who specializes in forensic psychology. 3RP at 77, 81. He diagnosed Mines with a rape disorder (paraphilia not otherwise specified) and antisocial personality disorder. 3RP at 96-97, 115-117. Additional diagnoses included alcohol and marijuana abuse. 3RP at 123. Dr. Goldberg also determined that Mines is a psychopath. 3RP at 148. He performed a risk assessment and concluded that Mines' mental disorders make him likely to engage in predatory acts of sexual violence if he is released from custody. 3RP at 132.

Mines presented the expert opinion testimony of Dr. Louis Rosell, who like Dr. Goldberg is a clinical and forensic psychologist. 4RP at 145.

Dr. Rosell did not diagnose Mines with a paraphilia but did diagnose antisocial personality disorder. 5RP at 11, 43. He did not believe that condition made Mines likely to reoffend. 5RP at 43.

### **III. ARGUMENT**

#### **A. The Trial Court Correctly Denied Mines' Motion to Dismiss Because RCW 71.09.020(17)(c) Defines "Sexually Violent Offense" as Including Assault First Degree Where Sexual Motivation is Proved at the SVP Trial**

Mines alleges his due process rights were violated because the predicate offense relied on by the state in this case – assault first degree, with sexual motivation proved at the SVP trial – is not defined in RCW 71.09.020(17). He further argues that, if the legislature intended to allow petitioners to establish the predicate offense by proving sexual motivation at the SVP trial, then the statute violates his right to equal protection.

The Court should reject Mines' arguments because RCW 71.09.020(17)(c) explicitly defines "sexually violent offense" as including assault first degree where sexual motivation is proved at the SVP trial. Furthermore, the legislature's decision to allow proof of sexual motivation at the SVP trial has a rational basis and does not violate the equal protection clause.

##### **1. Standard of Review**

Although Mines frames his argument under the due process clause, the focus of his appeal is on his April 14, 2009 motion to dismiss for failure to plead a sexually violent offense, and the trial court's denial of

that motion on October 29, 2009. CP at 132-44, 281-84. Properly framed, Mines is alleging that the trial court committed errors of law in its interpretation of RCW 71.09.020 and by denying his motion. Statutory interpretation and other questions of law are reviewed *de novo* by this Court. *Hanson Industries Inc. v. Kutschkau*, 158 Wn. App. 278, 287, 239 P.3d 367 (2010).

**2. The Statute's Plain Language Demonstrates the Legislature's Intent to Permit SVP Petitioners to Establish the Predicate Offense by Proving Sexual Motivation at the SVP Trial**

This issue should be resolved in favor of the State based on the plain language of the statute. By explicitly authorizing the State to prove at the SVP trial that the previous conviction was sexually motivated, the legislature sought to further its objective of protecting the public.

RCW 71.09.030<sup>2</sup> provides, in pertinent part, that:

A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that: . . . (e) a person who at any

---

<sup>2</sup> RCW 71.09.030(1) in its entirety provides:

(1) A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that: (a) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement; (b) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement; (c) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released, pursuant to RCW 10.77.086(4); (d) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released, pursuant to RCW 10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or (e) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.

time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.

RCW 71.09.030(1). The legislature defined the term “sexually violent offense” to include assault first degree where sexual motivation is later proved at the SVP trial:

"Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: . . . (c) an act of . . . assault in the first or second degree . . . which act, either at the time of sentencing for the offense *or subsequently during civil commitment proceedings pursuant to this chapter*, has been determined beyond a reasonable doubt to have been sexually motivated[.]

RCW 71.09.020(17) (emphasis added).<sup>3</sup> The plain language of the statute, therefore, permits the state to prove the predicate offense by proving at the SVP trial that an act of assault first degree was sexually motivated.

---

<sup>3</sup> RCW 71.09.020(17) in its entirety provides:

"Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as 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; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) 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, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

Mines argues that his 1969 conviction for assault first degree is not a sexually violent offense because it was not proven to be sexually motivated at the time of the conviction. His argument is contrary to the plain language of the statute.

The fundamental objective when reading a statute is to determine and fulfill legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). The legislature adopted RCW 71.09 primarily to protect the public. *In re Detention of Kistenmacher*, 163 Wn.2d 166, 173, 178 P.3d 949 (2008); RCW 71.09.010. This Court's interpretation of the statute begins with the goal of fulfilling that intent.

When a statute's meaning is plain on its face, this Court carries out legislative intent by giving effect to that language. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Plain meaning is determined "from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Jacobs*, 154 Wn.2d at 600. Only when a statute is ambiguous, *i.e.*, subject to more than one reasonable interpretation, will a court resort to statutory construction to determine the correct meaning. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). Here, there is no ambiguity and this issue can be disposed of by interpreting the statute's plain language.

Mines bases his argument on the word "previously." Because RCW 71.09.030(1) requires proof that a person "previously has been

convicted” of a sexually violent offense, he argues, the legislature must have intended that sexual motivation be proved at the time of conviction. Brief of Petitioner/Appellant at 19. Any other interpretation, he asserts, would render the word “previously” superfluous. His argument seeks a result utterly at odds with the legislature’s intent and violates fundamental rules of statutory interpretation.

As the facts herein demonstrate, Mines’ interpretation would thwart legislative intent by preventing the civil commitment of highly dangerous sexual predators merely because they pled guilty to crimes whose titles do not indicate their true sexual nature. Mines attempted to rape Jennifer K. and forced his penis into her mouth at knife point, but pled guilty to assault first degree. 2RP at 54-65. He was charged with raping Christina S. with forcible compulsion, but pled guilty to unlawful imprisonment. Exs. 5-8. He choked Angela C. into submission, raped and threatened to kill her, but pled guilty to unlawful imprisonment. 2RP at 95-108. He raped Tammy H. over a three-hour period in the woods, tied her up, choked her, threatened to kill her, and eventually ejaculated in her mouth, but entered an *Alford* plea to rape in the third degree. 2RP at 134-40; Exs. 13-15. While incarcerated, he committed unadjudicated sexual assaults against Bradley B., Matthew E. and Jeromy B. 2RP 167-79, 3RP at 23-33; 6RP at 53-81.

Despite overwhelming evidence that Mines is in the “small but extremely dangerous group” of sexual predators from whom the legislature intended to protect the public (RCW 71.09.010), he believes

the legislature intended to exclude him from the statute's reach. But he can only make that argument by ignoring the statute's purpose and some of its language.

Though Mines ostensibly bases his argument on the rule that all statutory language must be given effect, he himself violates that rule by ignoring plain language allowing proof of sexual motivation at the SVP trial. He sacrifices a significant part of the definition of "sexually violent offense" in order to defend his narrow interpretation of the single word "previously" in RCW 71.09.030(1). When this Court interprets a statute, however, it does not determine plain meaning by examining individual words in isolation. Instead, the

meaning of words in a statute is not gleaned from those words alone but from "all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another."

*Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (quoting *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994)).

Correctly reading RCW 71.09.030(1) in conjunction with RCW 71.09.020(17)(c) gives effect to the legislature's intent to protect the public from offenders like Mines. The legislature clearly intended to authorize the petition below if the State could prove Mines "previously has been convicted of" (RCW 71.09.030(1)(e)) "an act of . . . assault in the first or second degree . . . which act . . . subsequently during civil commitment proceedings pursuant to this chapter, has been determined

beyond a reasonable doubt to have been sexually motivated” (RCW 71.09.020(17)(c)). Properly read together, the two sections permit the state to rely on a past violent conviction if it can prove the additional fact of sexual motivation at the SVP trial.

The legislature clearly communicated this intent by defining “sexually violent offense” as “an act.” RCW 71.09.020(17); *In re Detention of Boynton*, 152 Wn. App. 442, 453, 216 P.3d 1089 (2009). In *Boynton*, the appellant – like Mines – moved to dismiss the SVP petition on the theory that the State could not prove the sexually violent offense, which in that case was “incest against a child under the age of 14.” 152 Wn. App. at 445; RCW 71.09.020(17)(a). Boynton argued that, because the age of the victim was not an element of the crime and not been proved at the criminal trial, the conviction did not meet the definition of “sexually violent offense.” 152 Wn. App. at 445. Like Mines, he asserted that the state could not establish the predicate offense by proving additional facts at the SVP trial:

The crux of Boynton's argument is that the State can only prove the fact of the 1999 conviction for purposes of a civil commitment proceeding and is not entitled to prove any additional facts.

*Id.* at 455.

The *Boynton* court rejected that argument. It first concluded that the legislature had specifically chosen to define “sexually violent offense” as an “act” and not a “crime.” *Id.* at 453. While some crimes facially qualify as a “sexually violent offense,” the court noted, others “only

qualify if committed in a certain manner or against certain victims.” *Id.* Consequently, where the legislature defined incest against a child under age 14 as a sexually violent offense, but the conviction did not indicate the victim’s age, age could be proved at the SVP trial. *Id.* at 456.

*Boynton* is on point. Assault first degree is an act that can qualify as a sexually violent offense. RCW 71.09.020(17)(c). A finding of sexual motivation would not be an element of that charge. *See State v. Borboa*, 124 Wn. App. 779, 791, 102 P.3d 183 (2004). Therefore, where the crime’s title does not indicate sexual motivation, such can be proved at the SVP trial. RCW 71.09.020(17)(c). Persuasive authority is in accord. *See, e.g. In re Miller*, 186 P.3d 201 (Kan.App. 2008) *review granted* (Sept. 24, 2008) (evidence that facially non-sexual crime was sexually motivated is admissible at SVP trial).

### **3. Statutory Construction is Unnecessary Because There is Only One Reasonable Interpretation**

Mines offers an alternative interpretation of the statute. He asserts that the legislature intended to allow proof of sexual motivation at the SVP trial only in cases where a person was charged with, but not tried for, an offense due to incompetency. Brief of Petitioner/Appellant at 18-19; RCW 71.09.060(2). In such cases, the SVP trial is bifurcated and the state must first prove that the person committed the crime charged, under the rules applicable to criminal trials. RCW 71.09.060(2).<sup>4</sup>

---

<sup>4</sup> RCW 71.09.060(2) provides:

If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be or has been released pursuant to

When there is more than one reasonable interpretation of a statute, it is ambiguous, and the court turns to rules of statutory construction to effectuate legislative intent. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002). Here, the alternative interpretation offered by Mines is not reasonable and there is no need for statutory construction.

Mines interpretation is insupportable and at odds with the goal of the statute. There is nothing in the legislative history, the statute, cases interpreting it, or anywhere else, suggesting the legislature intended to limit the definitional language in RCW 71.09.020(17)(c) to the rare occasions where: (1) a person who has committed a sexually motivated offense has been charged with a facially non-sexual crime; (2) the charges are dismissed pursuant to RCW 10.77 because the person is not competent; and (3) the person has no other convictions for a sexually

---

RCW 10.77.086(4), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.086(4) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

violent offense.<sup>5</sup> When the legislature defines a term, that definition controls. *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 27, 100 P.3d 814 (2004) (“Definitions provided by the legislature are given controlling effect.”). Had the legislature intended the language of RCW 71.09.020(17)(c) to apply only on the rare occasion described above, it surely would have placed it in RCW 71.09.060(2) and not in the general definition of “sexually violent offense.”

The statute is not susceptible to Mines’ alternative interpretation and is not ambiguous. Mines cannot make it so by proposing unreasonable alternative interpretations. *State v. Tili* 139 Wn.2d 107, 115, 985 P.2d 365 (1999) (statutes not ambiguous “merely because different interpretations are conceivable.”); *Western Telepage, Inc. v. City of Tacoma Dept. of Financing*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000) (court is “not obliged to discern an ambiguity by imagining a variety of alternative interpretations.”).

Assuming for the moment that the statute is open to more than one reasonable interpretation, Mines’ construction should be rejected. It is a rule of statutory construction that “the interpretation which better advances the overall legislative purpose should be adopted[.]” *Weyerhaeuser Co. v. State Dept. of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5 (1976). Therefore, the correct interpretation is the one that

---

<sup>5</sup> In the only reported case where the predicate offense was based on charges dismissed due to incompetency, the second degree rape charge did not require additional proof of “sexual motivation.” See *In re Detention of Greenwood*, 130 Wn. App. 277, 122 P.3d 747 (2005).

allows the state to protect the community from Mines. Mines' alternative interpretation would lead to the absurd result of preventing the state from confining him due only to the title of the offense of which he was convicted. This Court does not interpret statutes in a way that leads to absurd results. *State v. Keller*, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983); *In re Detention of Fair*, 139 Wn. App. 532, 541-542, 161 P.3d 466 (2007) (strained interpretation of RCW 71.09 would lead to absurd result of preventing state from filing SVP petition).

**4. RCW 71.09.020(17)(c) Does Not Violate Mines' Equal Protection Rights**

Mines alternatively argues that, if the legislature intended to let petitioners prove sexual motivation at trial, then his right to equal protection under the law was violated. He asks this Court to decide this issue differently than did Division I, which has rejected the same argument. *In re Detention of Abolafya*, 114 Wn. App. 137, 56 P.2d 608 (2002). Mines fails to show an equal protection violation and the reasoning in *Abolafya* is directly on point.

The equal protection clauses of both the federal and Washington State constitutions require that "persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); Washington Constitution article I, Section 12; Fourteenth Amendment, U.S. Constitution. The right is identical under both constitutions. *Manussier*, 129 Wn.2d at 672.

Of the three standards of review employed under equal protection analysis, the one applicable here is the most relaxed. The most stringent is “strict scrutiny,” applied when a legal classification affects a suspect class or affects a fundamental right. *Id.* at 672-73. “Intermediate” or “heightened scrutiny” applied when “important rights or semisuspect classifications are affected.” *Id.* at 673. Mines’ interest is in his physical liberty – “an important, but not a fundamental, right.” *Id.* at 673-74. His argument therefore implicates the deferential “rational basis” or “rational relationship” test – applicable when there is no suspect or semi-suspect class and no fundamental right is threatened. *Id.* at 673.

Under the rational basis test, “the challenged law must rest upon a legitimate state objective, and the law must not be wholly irrelevant to that objective.” *Id.* The means employed must be rationally related to the state’s goal, but do not have to be the “best way of achieving that goal.” *Id.*

The legislature has “broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” *Id.* (quoting *State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994)). Mines’ burden is to prove that the law is “purely arbitrary.” *Id.* The statute is presumed constitutional and Mines must meet his burden under the beyond a reasonable doubt standard. *State v. Gordon*, 153 Wn. App. 516, 525, 223 P.3d 519 (2009).

Mines argues that he is similarly situated to persons facing civil commitment under RCW 71.09 whose predicate offenses were found to be

sexually motivated following a criminal proceeding. Brief of Petitioner/Appellant at 24. Because such individuals had criminal protections that he did not enjoy in the civil SVP trial, he reasons, his right to equal protection was violated.

Mines' argument fails because anyone similarly situated to him would not have a conviction that was found beyond a reasonable doubt to have been sexually motivated. Sexual motivation is a statutory aggravating factor that, if proven at a criminal trial, can support an exceptional sentence. RCW 9.94A.030(46), 9.94A.535(3)(f); *State v. Thomas*, 138 Wn.2d 630, 632, 980 P.2d 1275 (1999). Criminal prosecutors are required to file a special allegation of sexual motivation where there is evidence such that a reasonable and objective fact-finder would be justified in making the finding. RCW 9.94A.835(1); *Thomas*, 138 Wn.2d at 632. Proving the allegation increases the severity of the punishment "where the sexual nature of the crime has not already been taken into account in determining the presumptive sentence." *Thomas*, 138 Wn.2d at 637.

The aggravator and the requirement that prosecutors allege it, however, were not adopted in Washington until 1990. See Laws of Washington, ch. 3 §§ 601, 602. Thus, when Mines committed his predicate offense in 1969, sexual motivation was not statutorily defined and prosecutors did not specially allege it.

When the Legislature adopted the Community Protection Act of 1990, which included the SVP law, they specifically provided that the new

aggravator would apply *retrospectively* for purposes of proving predicate offenses under RCW 71.09. *See* note following Former RCW 9.94A.127 (Supp. 1990-91). Consequently, anyone similarly situated to Mines would have a predicate conviction obtained prior to adoption of, and lacking, the sexual motivation aggravator. But because the legislature retrospectively provided for sexually motivated predicate offenses, that fact must be proven at the SVP trial for crimes committed prior to adoption of the Community Protection Act. Thus, a similarly situated alleged SVP would face the same procedures as Mines at the SVP trial.<sup>6</sup>

Nor is Mines similarly situated to SVP respondents who faced a special sexual motivation allegation at their criminal trials. *Abolafya*, 114 Wn. App. at 146. In *Abolafya*, the state alleged that Abolafya's predicate offense of residential burglary was sexually motivated. *Id.* at 142-43. The trial court granted Abolafya's motion to dismiss, finding that the state could not prove sexual motivation because it had not alleged new evidence beyond what existed in the criminal certification for probable cause. *Id.* at 143. On appeal, Abolafya argued – exactly as does Mines – that he was similarly situated to other SVP respondents against whom sexual motivation findings had been entered at their criminal trials. *Id.* at 145. Because such SVP respondents had received higher protections

---

<sup>6</sup> This is demonstrated by one of Mines' own arguments. The trial court that sentenced him for assault first degree found that the crime was sexually motivated. Ex. 4 ("Mines . . . with intent to rape . . . did assault a female child with use of a deadly weapon."). However, as Mines himself points out, under procedures used at the time the court's finding is insufficient because it was made at sentencing and there is no indication it was made beyond a reasonable doubt. Brief of Petitioner/Appellant at 15-16.

than he would, he reasoned, he was being treated unequally for arbitrary reasons. *Id.*

Division one rejected Abolafya's argument that he was similarly situated to such SVP respondents. The court held that the other SVP respondents had received higher protections during a time when they were facing criminal sanctions, including increased prison sentences or longer probationary periods. *Id.* at 146. Abolafya, as a civil respondent, did not qualify for the heightened protections of a criminal defendant. *Id.*

Mines attempts to distinguish *Abolafya* by arguing that Division I "falsely characterized Abolafya's comparison." Brief of Petitioner/Appellant at 24-25. He is incorrect. The *Abolafya* court characterized the classes as follows:

The first class consists of [1] ***respondents*** who received the full procedural protections of a criminal trial on the predicate offense and special allegation of sexual motivation. The second class consists of [2] ***respondents*** who are forced to defend against a special allegation of sexual motivation at a civil trial during which they have no right to remain silent and during which there will be presentation of evidence that would have been inadmissible at the criminal trial.

114 Wn. App. at 145 (emphasis added). Mines, notwithstanding his attempt to distinguish *Abolafya*, identifies the same classes (though in reverse order):

(1) [T]he civil commitment detainees who, at their civil commitment trial, are confronted for the first time with a sexual motivation allegation with respect to a past conviction and (2) the civil commitment detainees whose

allegations of sexual motivation were proven at the earlier criminal proceeding.

Brief of Petitioner/Appellant at 24.

Mines is attempting to create a distinction without a difference. Division I did not “falsely characterize” the two classes of individuals. It merely noted the difference in the time at which the protections were applied – for one class during criminal proceedings and for the other during the SVP trial. 114 Wn. App. at 146. The court correctly determined that Abolafya was not similarly situated to SVP respondents who received higher protections at a time when they were facing increased criminal penalties. *Id.*

Division I, assuming *arguendo* that the classes were similarly situated, went on to apply the appropriate equal protection test. The court concluded that the legislature had a rational basis for disparate treatment based on the disparity in goals between the criminal and civil commitment statutes. *Id.* at 146-47. The Abolafya court correctly analyzed this issue and its decision is squarely on point. Mines did not receive unequal protection of the law.

**5. RCW 71.09.020(17)(c) Does Not Violate Mines’ Right To Due Process**

Lastly, Mines makes a general due process argument against the sexual motivation procedure. Though throughout this section of his brief he does not identify the type of challenge he makes, this last argument is a facial challenge to the statute. To make this challenge Mines must demonstrate that there is no set of circumstances in which the statute can

be constitutionally applied. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). This he cannot do.

Mines argues that the statute, as interpreted by *Abolafya*, would create an “open season” for prosecutors to file SVP petitions against respondents where the state could not prove sexual motivation under the criminal laws. Brief of Petitioner/Appellant at 25-26. To find circumstances where this is not true, the current facts will do. Mines was convicted of assault first degree in 1970. There was no sexual motivation allegation because at that time sexual motivation was not statutorily defined, prosecutors were not required to specially allege it as an aggravator, and the trial court could find it on its own at the time of sentencing. There certainly was no want of evidence: 40 years later, Mines’ victim clearly recounted an attempted vaginal rape and forced oral copulation at knife point. 2RP at 54-65. As it turned out, the state did not even need her testimony to prove sexual motivation. Mines’ admission to his own expert constituted conclusive substantive evidence against him at trial. 5RP at 61; ER 801(d)(2). There was no due process violation.

The trial court correctly denied Mine’s motion to dismiss the SVP petition. This Court should uphold the trial court’s decision and affirm the commitment order.

**B. The Trial Court Did Not Abuse Its Discretion When It Denied Mines’ Motion to Bifurcate the Proceedings**

Mines asserts that the trial court abused its discretion because it denied his motion to bifurcate the issue of whether he had committed a

recent overt act from the rest of the trial. As is apparent from the definition of “recent overt act” in RCW 71.09.020(12), granting Mines’ motion would have created two nearly identical lengthy trials that would have been an indefensible judicial extravagance. The trial court did not abuse its discretion.

**1. Standard of Review**

Though bifurcation should not be liberally applied, the decision to do so is a matter within the trial court's discretion. CR 42(b); *Myers v. Boeing Co.*, 115 Wn.2d 123, 140, 794 P.2d 1272 (1990). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A decision is manifestly unreasonable if it takes a view no reasonable person would take. *Id.*

**2. Bifurcation Would Have Produced Two Nearly Identical, Lengthy Trials**

Due process requires that the State prove the “current dangerousness” of an SVP respondent. *In re Detention of Albrecht*, 147 Wn.2d 1, 10, 51 P.3d 73 (2002). To prove dangerousness after a respondent has been released from a sexually violent offense back into the community, the State must show that, after release, the respondent committed a recent overt act. RCW 71.09.020(12), .030; *Albrecht*, 147 Wn.2d at 11. “Recent overt act” is defined as follows:

"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 of the history and mental condition of the person engaging in the act or behaviors.

RCW 71.09.020(12).

Mines argues that the trial court should have bifurcated the recent overt act proceedings from the rest of the trial “to ensure a fair determination of whether the recent over act had been committed[.]” Brief of Petitioner/Appellant at 27. The trial court had discretion to do so pursuant to CR 42(b). Bifurcation, however, would have resulted in two nearly identical trials, because the state would have presented most of the same evidence to show proof of the second prong of the recent overt act definition.

The state alleged that Mines had committed a recent overt act in August, 2003, based on his acts and threats towards another inmate. CP at 2. To prove the acts and threats, the state presented the testimony of Jeromy B. 3RP at 23-33. That testimony established the following separate and distinct acts and threats:

- (1) After Jeromy witnessed Mines in a shower stall with another inmate, Mines told Jeromy to go out to the yard;
- (2) Mines told Jeromy he would have to perform a sex act on Mines;
- (3) Mines threatened at least twice to kill Jeromy, or severely hurt him, if he did not submit to sex;
- (4) Mines ordered Jeromy to follow him into the shower that night;
- (5) Jeromy was forced to masturbate Mines in the shower;

- (6) Mines orally copulated Jeromy, against his will;
- (7) later that night, Mines masturbated Jeromy;
- (8) Mines then orally copulated Jeromy again;
- (9) when a correctional officer attempted to find out if Jeromy was okay, Mines became upset and interfered;
- (10) Mines told Jeromy to go to the recreation center;
- (11) Mines told Jeromy he would have to submit again;
- (12) Mines told Jeromy to follow him to the shower stall again;
- (13) In the shower, Mines put Vaseline on Jeromy's penis;
- (14) Mines masturbated Jeromy again;
- (15) Mines had Jeromy put his penis in Mines' anus.

3RP at 26-32.

If the jury decided that any of the sexual assaults above had occurred, they could have found Mines had committed a recent overt act by causing harm of a sexually violent nature. RCW 71.09.020(12). But they could also find a recent overt act if (1) they believed that one of the above acts or threats, or a combination thereof, or all of them, occurred and (2) such would create a reasonable apprehension of sexually violent harm in the mind of an objective person who was informed about Mines' history and mental state. *Id.* In order to make that finding, the jury had to consider the rest of the evidence – Mines' criminal history and the victim and expert testimony.<sup>7</sup>

---

<sup>7</sup> In closing argument counsel for the petitioner argued both prongs of the recent overt act definition. See 7RP at 52-54.

Bifurcation must be “carefully and cautiously applied” to situations where it will “manifestly promote convenience and/or actually avoid prejudice.” *Brown v. General Motors Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461 (1965). “Piecemeal litigation is not to be encouraged.” *Id.* Here, a bifurcated trial would have produced two identical hearings – one to prove a recent overt act, and one to prove the predicate offense, mental state, and risk to reoffend if released. RCW 71.09.020(18) (definition of SVP). Because bifurcation would have resulted in complete redundancy and virtually no benefit, the trial court would have abused its discretion if it had *granted* Mines’ motion.

Mines cites no authority holding that bifurcation is necessary under the facts of this case. There is, however, persuasive authority from a mental health commitment case that is on point. *In re Field*, 412 A.2d 1032 (N.H., 1980). In *Field*, the appellant raised the same issue as Mines:

Michael argues that bifurcation was necessary because he was prejudiced in his ability to defend against his commitment when evidence concerning his behavior, psychiatric history and dangerous tendencies was intermingled with proof of specific acts to demonstrate dangerousness.

412 A.2d 1033. Like Mines, the appellant in *Fields* claimed violations of his due process and equal protection rights. *Id.*

The *Fields* court rejected the appellant’s arguments, finding the purpose of a mental health commitment proceeding to be different from,

for example, a criminal proceeding where proof of a specific act is the central issue:

The focus of a criminal trial is to determine whether the defendant is guilty of committing specified acts. Although testimony concerning commission of acts is necessary to prove dangerous mental illness, acts which demonstrate the mental condition, unlike acts in a criminal proceeding, are not the focus of the inquiry, but are merely evidence bearing on the issue of dangerousness. In an involuntary commitment proceeding, the petitioner must prove the existence of mental illness and must produce evidence of a dangerous mental condition. Certainly, it is illogical to claim that introduction of evidence concerning Michael's mental state, dangerous tendencies and unorthodox behavior prejudices his case where his mental condition is the specific issue. We are not persuaded that we should require a bifurcated hearing in an involuntary civil commitment proceeding under RSA ch. 135-B.

*Id.* at 1033-34. As in *Fields*, the issues below were whether Mines is mentally ill and dangerous. A unitary trial was the proper forum to determine those facts.

### **3. The Unitary Trial Did Not Violate Mines' Equal Protection Rights**

Mines raises another equal protection argument, this time directed towards the trial court's denial of his bifurcation motion. He argues that he is similarly situated to respondents who have been found incompetent to be tried for their predicate offense. Because such respondents have the right to a bifurcated trial on the issue of whether they committed the predicate offense, Mines reasons, he has the right to a separate trial on the recent overt act issue. Mines' comparison does not hold up; he is not

similarly situated to respondents who were found incompetent to stand trial on their predicate offense and his equal protection rights were not violated.

The statute permits SVP proceedings against persons who do not have a conviction for a sexually violent offense because they were found incompetent to stand trial. RCW 71.09.030(1)(c). In such cases the state can prove the predicate offense in a bifurcated proceeding where criminal rules and protections apply. RCW 71.09.060(2).

Unlike a person found incompetent to stand trial for their predicate offense, Mines pled guilty to, and was convicted of, assault first degree. He enjoyed the full panoply of rights owed to the criminal defendant and waived them. *In re Detention of Stout*, 159 Wn.2d 357, 376, 150 P.3d 86 (2007). The incompetent person has not had that opportunity. This fundamental difference provides a rational basis for differentiating between the two. *Id.*

In *Stout*, the appellant argued that his equal protection rights were violated when substantive evidence was presented at the SVP trial through a videotaped deposition. *Id.* at 362. Like Mines, he argued that he was similarly situated to persons found incompetent in regards to their predicate offense. *Id.* at 374-75. The incompetent person, he argued, has a sixth amendment right to confrontation under RCW 71.09.060(2), while he was denied the right to personally confront his victim in court. *Id.* The *Stout* court rejected the argument, concluding that “a rational basis for the distinction between competent and incompetent SVP detainees with regard

to constitutional protections is readily discernable.” *Id.* at 376. The distinction was based on the opportunity the competent SVP had to previously contest the charges against him. *Id.*

There is no separate procedure identified in RCW 71.09 for proving a recent overt act, for either class of persons. Mines’ argument appears to be based on a mistaken reading of the statute. He believes that, “[T]he state would never find itself in the situation of having to prove the commission of a recent over act by an incompetent person.” It is not clear how he arrived at that conclusion. Like any other respondent, a person found incompetent to stand trial on a sexually violent offense can be released back into the community and then commit a recent overt act. For example, in the only reported case of a bifurcated hearing under RCW 71.09.060(2), the respondent was first found incompetent to stand trial on a charge of rape of a child in the first degree. *In re Detention of Greenwood*, 130 Wn. App. 277, 279, 122 P.3d 747 (2005). Released into the community, he offended again. *Id.* at 279-80. Had the second offense been a recent overt act rather than a sexually violent offense, the state would have had to prove a recent overt act at the SVP trial.

The differences between competent and incompetent SVP respondents support different constitutional procedures for addressing the predicate offense. There is no similar statutory basis or rationale for extending such procedures to the recent overt act element. As argued *supra*, a separate hearing would be completely redundant. The trial court

correctly denied Mines' motion for a bifurcated trial on the recent overt act element.

**C. The Trial Court Did Not Abuse It's Discretion When It Admitted Evidence of Crimes With Which Mines had been Charged**

Mines assigns error to the trial court's decision to admit certified copies of two charging documents. He argues that this evidence violated his right to a fair trial because he was not convicted of those charges when he pled guilty to different, non-sexual offenses. The evidence, however, was relevant to Mines' risk assessment, completed the story of his crimes and provided context to his ostensibly non-sexual convictions. The trial court did not abuse its discretion. In the alternative, any error was harmless.

**1. Standard of Review**

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *In re Detention of Coe*, \_\_\_ Wn. App. \_\_\_, 250 P.3d 1056 (2011).<sup>8</sup>

**2. The Charging Information was Relevant to the Risk Assessment**

The two prior charging documents at issue were relevant to the SVP risk assessment. The risk assessment was based in part on actuarial scales. 3RP at 133. Actuarials statistically combine risk factors that

---

<sup>8</sup> Mines frames the issue as a due process violation. This appears to be an extension of "a trend that is troublesome—the 'constitutionalization' of most assignments of error in criminal cases." *State v. Turnipseed*, \_\_\_ Wn. App. \_\_\_, 2011 WL 1991752 at 9 (Sweeney, J. concurring).

research has shown to be correlated with sexual reoffense. *Id.* A person is scored on the scale to determine a risk estimate. *Id.*

Research indicates that a sexual recidivist has an increased risk for future offending. 3RP at 140. Actuarial scales attempt to accurately capture a person's criminal sexual history by counting the person's sexual charges and convictions. 3RP at 134; 4RP at 6. Sexual charges are meaningful even where no conviction results. 3RP at 142.

The state's expert scored Mines on an instrument called the Static-99. It has an item that captures sexual criminal history and which is entitled, "Prior Sex Offenses." 3RP at 139. It measures sexual offenses prior to the most current, or index, offense and is the most highly weighted item. *Id.* Mines had "six plus charges or convictions" on this item. 3RP at 140.

The evidence was relevant. Relevant evidence has a tendency to make consequential facts more or less probable than they would be in the absence of the evidence. ER 401. Here, the total number of sexual offenses with which Mines has been charged over his lifetime is a fact of direct consequence to the assessment of his recidivism risk. That assessment is at the heart of the final element the state must prove under RCW 71.09.020(18): ". . . the person [is] likely to engage in predatory acts of sexual violence if not confined in a secure facility." The trial court did not commit error.

### 3. The Charging Information was Relevant to Mines' Criminal Sexual History

This case is unique in that each of Mines' three possible predicate offenses was a conviction for a facially non-sexual crime. The original charging documents were relevant to prove Mines' pattern of entering into non-sexual plea agreements for sexual crimes. Such facts are germane in this civil case, where the person's entire criminal sexual history is relevant. Admitting the two documents completed the story of the crimes and provided a context for the ensuing convictions.

Mines cites no case law authority to support his argument. Persuasive authority, however, holds that original charging documents are relevant in SVP proceedings. *Miller*, 186 P.3d 201. In *Miller*, the SVP was initially charged with attempted rape, but was convicted of burglary. 186 P.3d at 203. He appealed the admission of the rape charge. *Id.* at 204. The court found no error, first because "uncharged prior conduct is material and admissible in a trial to determine if an individual is a sexually violent predator." *Id.*; *See Coe*, 250 P.3d at 1061 (unadjudicated offenses relevant to risk SVP poses to community). The court relied on a Washington case holding that, where a crime appears non-sexual on its face, evidence of sexual motivation is admissible at the SVP trial. 186 P.3d at 204-5 (citing *Abolafya*, 114 Wn. App. at 144-45). The court also found that, because the evidence at trial showed the crime was, in fact, a sexual crime, evidence of the original charge was relevant and admissible. *Id.* at 205. *Miller* is directly on point.

It is not uncommon to find original charges and plea information in reported Washington SVP cases. For example, in 1986 a respondent was charged with second degree statutory rape, involving a victim alleged to have also been his prior victim. *In re Detention of Law*, 146 Wn. App. 28, 34, 204 P.3d 230 (2008). He pled guilty to two counts of communicating with a minor for immoral purposes (CWMIP). *Id.* In 1992 he was charged with rape of a child in the first degree, but pled guilty to kidnapping in the first degree and CWMIP. *Id.* In 1991, a respondent was charged with raping and stabbing his girlfriend. *In re Detention of Wright*, 138 Wn. App. 582, 584, 155 P.3d 945 (2007). He pled guilty to assault with sexual motivation. *Id.* And in 1993, a respondent was charged with attempted rape in the first degree and burglary in the first degree. *Abolafya*, 114 Wn. App. at 140. He pled guilty to one count of residential burglary. *Id.* The facts admitted into evidence in these cases and others help present the true picture of the respondent's criminal history.

Mines was not prejudiced by the charging evidence in this case because it fit well with his denials. For example, Mines questioned the validity of the charges to which he had pled guilty, and attempted to use his light sentences to cast doubt on his culpability:

Q. [Mines' Counsel] Did you notice that in this case Calvin Mines seemed to have gotten very light, relatively speaking, sentences for the charges brought, given his history?

A. [State's Expert] Yeah, it seemed that way, yes.

Q. [Mines' Counsel] You know, I think one of these was a rape. That last one was Rape in the Third Degree, and he had a substantial felony record and he got 60 months. Doesn't that fact that these sentences seemed to be light, for what people like yourself, professionals, would see? Doesn't that raise a question as to the validity of the underlying charges?

4RP at 106-7. Then, in closing argument, Mines counsel said:

And the State had its option. In other words, it could have said, no, Mr. Mines, we're not going to let you have a guilty plea. We're going to bring you to trial. And when we bring you to trial we're going to ask the judge for the maximum we can get against you. But the reason that they don't do that, and maybe that they haven't done that, which you are, part of the reason you are to consider that they have haven't done that, is that there was something wrong with the cases that Mr. Mines was charged with. In other words, there was something factually wrong that made the State afraid that if they brought him to trial they would not be able to get the conviction that they're after.

7RP at 58. Continuing his theme, Mines used the plea deals to cast doubt on specific crimes:

Which to me, that is probably explained just like some of these others explained why Calvin Mines didn't get a charge of oral sex in his first crime in '69, and he didn't get more than 22 months on the Angela C[.] matter, and they didn't make him plead guilty to a sex charge in the C[.] matter. They made him plead guilty to Unlawful Imprisonment, because they didn't believe that the evidence was good enough to go to trial on, so they wanted to get a plea out of him, which his lawyers advised him to do.

7RP at 61-62.

The evidence was also useful to the state. On another occasion, Mines sought to portray himself as accepting responsibility for his crimes

because he allegedly pled guilty to everything charged. 5RP at 9. In closing argument, Mines' counsel asserted that Mines had "pled guilty to every crime he has ever been charged with." 7RP at 57. That inaccurate statement was at odds with the initial charging documents. Both sides benefitted from admission of the charging evidence and there was no error.

#### **4. Any Error Was Harmless**

Should this Court conclude that admission of the initial charging documents was error, it should find that error 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 evidentiary error is harmless unless it was reasonably probable that it changed the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Mines claims error in the admission of two documents. The first is the Spokane County Information charging him with rape in the second degree with forcible compulsion, against victim Christina S. Ex. 5; Brief of Petitioner/Appellant at 36. This was entered concurrently with the Substitute Information charging Mines with Unlawful Imprisonment, to which he pled guilty. Exs. 6, 7. Mines alleges that the Information (1) conveyed the impression that the state believed the rape charge, (2) would have vouched for the victims' credibility and (3) would have buttressed the non-substantive expert testimony. Brief of Petitioner/Appellant at 39-40.

Mines' claim flies in the face of the evidence. He claims prejudice from the rape charge and asserts that only the unlawful imprisonment charge should have been admitted. But at trial Mines admitted the rape and denied unlawful imprisonment.<sup>9</sup> *See* Brief of Petitioner/Appellant at 37 (citing Ex. 18 at 33, 38-39, 41). Mines could not be prejudiced by a rape charge he admitted was true.

The other document Mines' objected to is the initial Island County Charge of rape of a child in the third degree, against victim Angela C. Ex. 9; Brief of Petitioner/Appellant at 36. This was entered concurrently with the Amended Information charging Mines with Unlawful Imprisonment, to which he pled guilty. Exs. 10, 11.

Mines makes the same claims of prejudice about Exhibit 9. But for the exact same reasons, his claims are again contradicted by the evidence. The initial charge of rape of a child in the third degree alleged as follows:

That the said defendant, CALVIN J. MINES, . . . did engage in sexual intercourse with another person, to wit: A.C., . . . who was at least 14 years old but less than 16 years old and not married to the defendant, and the defendant was at least 48 months older than the victim[.]

Ex. 9. Mines claims prejudice from the rape charge and asserts that only the unlawful imprisonment charge should have been admitted. But Mines admitted the rape of a child and denied unlawful imprisonment. *See*

---

<sup>9</sup> Mines' also made a contradictory admission that he had unlawfully imprisoned Christina S. for "a few hours;" it came in substantively under ER 801(d)(2). 5RP at 63.

Ex. 18 at 21-22, 24 (Mines claims he had consensual sexual intercourse with 15 year old child). Evidence of a charge that Mines admits cannot possibly be prejudicial to him.

Assuming that Exs. 5 and 9 caused Mines any unfair prejudice, it was harmless because it was dwarfed by the compelling trial testimony of six of his victims. The jury learned that, over a 34-year period, Mines had committed violent sexual assaults with weapons, by choking, by tying up, and with threats to kill or injure his victims. 2RP at 54-65, 95-108, 134-40, 167-79; 3RP at 23-33; 6RP at 53-81. Deprived of the female victims he preferred in the community, he assaulted males when incarcerated. There is no reasonable probability that the two documents charging crimes admitted by Mines changed the outcome of the trial. Any error was harmless.

**D. The Trial Court Did Not Abuse It's Discretion When It Declined to Give Mines' Erroneous Proposed Limiting Instruction**

Mines proposed a limiting instruction and the trial court declined to give it. He argues that he was unfairly prejudiced by the court's decision.

ER 105 requires a court to give a proposed limiting instruction under certain circumstances.<sup>10</sup> A trial court's ruling on the propriety of a limiting instruction is reviewed for an abuse of discretion.

---

<sup>10</sup> ER 105 provides:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

*State v. Gallagher*, 112 Wn. App. 601, 611, 51 P.3d 100 (2002) (citing *State v. Ramirez*, 62 Wn. App. 301, 305, 814 P.2d 227 (1991), *review denied*, 118 Wn.2d 1010, 824 P.2d 490 (1992)).

The trial court here did not abuse its discretion because the instruction Mines proposed was an incorrect statement of the law that would have improperly restricted the jury's consideration of the evidence. Mines proposed the following instruction:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony by Mathew E[.], Bradley B[.] and Joseph C[.] and may be considered by you only for the purposes of proof of mental abnormality and proof of current dangerousness. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP at 951.

Mines' proposal erred by restricting the jury from considering the evidence as support for the recent overt act allegation. As argued *supra*, the second prong of the recent overt act definition requires the jury to consider "any act, threat or combination thereof" in light of Mines' "history and mental condition." RCW 71.09.020(12). The testimony Mines sought to limit was probative of his history and mental condition. *In re Detention of Young*, 122 Wn.2d 1, 50, 857 P.2d 989 (1993) (manner in which crimes were committed probative of motivation and mental state of respondent). It would have been error to prohibit the jury from considering that testimony when deciding the recent overt act element.

Mines' proposal was also illogical because it required the jury to disregard the testimony of some victims, but not others. The testimony of all of Mines' victims was probative of his history and mental state; to arbitrarily limit consideration to only some is a violation of ER 105, because evidence is either admissible for a purpose or it is not. Because the jury could consider victim testimony in deciding whether Mines had committed a recent overt act, it could consider all of the victim testimony for that purpose. Mines' proposed instruction sought to prevent the jury from any consideration of the male victims' testimony. CP at 951. The confusion in his proposed instruction was evident elsewhere. Mines' proposed instruction for the definition of a recent overt act was wildly inaccurate, as was his proposed Verdict Form A. Compare CP at 950, 952 with RCW 71.09.020(12).

Having made these unacceptable proposals, Mines was not relieved of the burden to propose an appropriate instruction. Trial courts are not obligated to give a limiting instruction that is not proposed. *State v. Russell*, 171 Wn.2d 118, 123, 249 P.3d 604 (2011). The trial court here correctly rejected Mine's proposal and did not abuse its discretion.

Alternatively, any error was harmless. The recent overt act definition has two prongs, and there was substantial evidence to prove the second. The failure to give a limiting instruction did not affect the outcome of the trial. *See In re Detention of West*, 2011 WL 1679393 at 5, 11 (failure to give required limiting instruction in SVP case was harmless error).

**IV. CONCLUSION**

For the foregoing reasons, the State requests that this Court affirm the order civilly committing Mines as an SVP.

RESPECTFULLY SUBMITTED this 6th day of June, 2011.

ROBERT M. MCKENNA  
Attorney General



---

MALCOLM ROSS, WSBA #22883  
Assistant Attorney General  
Washington State Attorney General's Office  
800 Fifth Ave., Ste. 2000  
Seattle, WA 98104  
(206) 389-2011