

NO. 32193-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re Detention of Jonathan Parsons,

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN PARSONS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Robert Lawrence-Berrey, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

The Yakima County Superior Court committed Jonathan Jahue Parsons to the Special Commitment Center under chapter 71.09 RCW. This was error for several reasons.

First, the trial court instructed the jury solely on the mental abnormality prong of RCW 71.09.020(18), but nonetheless permitted the jury to consider Parsons's alleged personality disorder. Because the State's expert indicated the personality disorder did not predispose Parsons to commit sexually violent acts, Parsons's alleged personality disorder was not relevant to the question of whether Parsons suffered from a mental abnormality or whether a mental abnormality made Parsons more likely to engage in predatory acts of sexual violence.

Second, the trial court erroneously permitted the jury to consider irrelevant evidence of Parsons's alleged personality disorder in determining whether Parsons suffered from a mental abnormality. This allowed the jury to rely on evidence that was irrelevant to whether Parsons suffered from a mental abnormality or whether Parsons was likely to engage in future acts of sexual violence. Because the jury was permitted to consider both relevant and irrelevant evidence in reaching its verdict, it severely undermines the verdict's unanimity.

Third, the trial court permitted testimony regarding the State's expert's methods for selecting Parsons into the "high risk, high needs" reference group for the purpose of establishing Parsons's future risk of recidivism. However, the expert's methods had never been scientifically validated. Nor were the methods generally accepted in the relevant scientific community. The trial court should have excluded the evidence under ER 702 because it was unreliable and therefore not helpful to the trier of fact. At the very least, the trial court should have held a Frye¹ hearing to establish the general acceptance of the expert's methods in the scientific community.

Fourth, the trial court granted the State's motion in limine to preclude Parsons from referring to his involuntary civil commitment as incarceration. But both the United States and Washington Supreme Courts have pronounced that involuntary civil commitment *is* incarceration. By erroneously restricting Parsons's language, the trial court eased the State's burden of proof and deprived the jury of a realistic assessment of the Special Commitment Center.

Based on these errors, the trial court should not have committed Parsons to the Special Commitment Center. Therefore, this court must reverse the trial court's commitment order and remand for a new trial.

¹ Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

B. ASSIGNMENTS OF ERROR

1. The trial court erred in committing Parsons to the Special Commitment Center. CP 938.

2. The trial court erred in permitting the State to argue and the jury to consider irrelevant evidence of Parsons's alleged personality disorder that did not qualify as a mental abnormality, as the trial court only instructed the jury on Parsons's alleged mental abnormality.

3. By instructing the jury solely on mental abnormality but allowing the jury to consider evidence of Parsons's alleged personality disorder that did not qualify as a mental abnormality, it is unclear what the jury relied on in reaching the verdict. Thus, the trial court erred in accepting the jury's verdict because it was not clear the verdict was unanimous.

4. The trial court erred in permitting the State's expert testimony regarding selecting Parsons for the "high risk, high needs" reference group because the expert's methodology had never been scientifically validated and therefore was not reliable. The trial court should have excluded the State's expert's testimony per ER 702.

5. The trial court erred in refusing to conduct a Frye hearing to examine the State's expert's methodology to select the reference group in which Parsons belonged, as the expert's methods were not generally accepted in the relevant scientific community.

6. The trial court erred in refusing to allow Parsons to refer to his commitment as incarceration because involuntary civil commitment is incarceration.

Issues Pertaining to Assignments of Error

1. When the trial court instructs the jury solely on mental abnormality, and any alleged personality disorder falls outside the definition of mental abnormality, has the trial court permitted the jury to consider wholly irrelevant evidence in rendering its verdict?

2. When the trial court instructs the jury solely on mental abnormality, but allows the jury to consider evidence of an alleged personality disorder that falls outside the definition of mental abnormality, is it impossible to discern which evidence the jury relied on to come to its verdict? Was the jury verdict therefore not unanimous?

3. When an expert's methods to select a reference group are based merely on logical inference and clinical judgment and have never been tested to determine scientific validity, are the methods unreliable and must they therefore be inadmissible under ER 702?

4. When an expert's methods to select a reference group are based merely on logical inference and clinical judgment, and are not generally accepted in the relevant scientific community, must a court conduct a Frye hearing?

5. When involuntary civil commitment qualifies under the law as incarceration, is it error for the trial court to preclude reference to involuntary civil commitment as incarceration?

C. STATEMENT OF THE CASE

1. The State's petition and evaluations

On February 27, 2012, the State petitioned to commit Parsons under chapter 71.09 RCW. CP 1-2, 4-10. The certification for determination of probable cause recounted that Parsons had first committed a sexually violent offense in 1989 at the age of 14, when he handcuffed an 11-year-old neighbor and forcibly kissed and sucked on his penis. CP 5. As a juvenile, Parsons was charged with and convicted of child molestation in the first degree based on this incident. CP 1, 5.

The next qualifying offense was in 1997 when 22-year-old Parsons sexually assaulted a 13-year-old boy, R.R., in Yakima. CP 5. Initially Parsons touched R.R.'s genitals, performed oral sex, and ejaculated on R.R.'s buttocks. CP 6. A few days later, Parsons invited R.R. to go fishing. CP 5-6. In a secluded location, Parsons anally raped R.R. CP 5. Based on these acts, Parson was convicted of second degree rape of a child and second degree child molestation. CP 1, 5.

Per the End of Sentence Review Committee's request, Dana Putnam, Ph.D., conducted a sexually violent predator evaluation of Parsons. CP 4,

21-53. In his 2010 report, Putnam concluded that Parsons suffered from the following mental abnormalities:

Paraphilia, Not Otherwise Specified (NOS),
Nonconsensual Sexual Activity with Prepubescent and
Pubescent Males, with Sadistic Features

Dissociative Amnesia, Provisional

Polysubstance Dependence (alcohol, amphetamine,
cocaine, heroin, LSAD, marijuana, mushrooms, and
phencyclidine), In a Controlled Environment

CP 45. Putnam also diagnosed Parsons with “Personality Disorder NOS, with Antisocial, Borderline, and Dependent Features.” CP 45. Following his evaluation, Putnam concluded “that Mr. Parsons, by reason of his mental abnormality, is more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility.” CP 53.

In October 2013, Putnam supplemented his evaluation. CP 242-54. Noting that the DSM-5 had been released since his initial evaluation, Putnam diagnosed Parsons with Sexual Sadism Disorder, in a controlled environment; Dissociative Amnesia, provisional; Alcohol Use Disorder; Cannabis Use Disorder; Opioid Use Disorder; Other Hallucinogen Use Disorder; and Stimulant Use Disorder, Amphetamine. CP 250. With regard to Parsons’s substance use disorders, Putnam noted the disorders were “In a Controlled Environment.” CP 250. As for Parsons’s personality disorder, Putnam diagnosed, “Other Specified Personality Disorder, Mixed with

Antisocial, Borderline, and Dependent Features.” CP 250. Putnam explained that his updated diagnoses “have changed somewhat, [but] the bases for these diagnos[e]s are essentially the same as previously discussed by this evaluator.” CP 250. Putnam claimed, “Parsons was diagnosed with Sexual Sadism Disorder instead of Paraphilia NOS because his presentation and history fits closely with the DSM-5 description of the disorder and captures his condition better than the previously rendered diagnosis.” CP 250. Based on these diagnoses, Putnam concluded that “Parsons, by reason of his mental abnormality and personality disorder, is more likely than not to engage in predatory acts of sexual violence if not confined to a secured facility.” CP 254.

2. Pretrial proceedings

The trial court heard Putnam’s testimony regarding his initial evaluation to determine whether the State had established probable cause that Parsons would engage in predatory sexually violent acts if not confined in a secure facility. 1RP² 1-40. The trial court determined the State met its burden. 1RP 37.

Parsons filed three pretrial motions to exclude Putnam’s testimony on the basis of ER 702 and Frye. CP 129-724. Two are relevant here.

² This brief will refer to the reports of proceedings as follows: 1RP - February 15, October 21, November 12, and December 6, 2013; 2RP - December 9, 12, 13, 16, 17, and 18, 2013; 3RP - excerpted trial proceedings regarding Putnam’s testimony from December 11, 2013.

First, Parsons contended that Putnam's use and reliance on the SRA-FV, the Structured Risk Assessment - Forensic Version, was not scientifically validated and therefore unreliable, and failed to satisfy ER 702. CP 525-54. In addition, Parsons asserted the SRA-FV failed to satisfy Frye because it was not generally accepted in the scientific community. CP 518-24, 530-54. In addition to legal argument, Parsons offered the declaration of Brian Abbott, Ph.D., who concluded that the SRA-FV had not attained general acceptance in the scientific community. CP 570-72. Joseph Plaud, Ph.D., who would later testify at trial for the defense, concluded peer reviewed studies demonstrated that the SRA-FV was not reliable nor generally accepted in the scientific community. CP 629-30.

The trial court, considering this court's recent decision in In re Detention of Ritter, 177 Wn. App. 519, 213 P.3d 723 (2013), determined that any testimony regarding the SRA-FV required a Frye hearing. CP 910-13; 1RP 87-88, 102, 104-05. However, the trial court also indicated that if the State chose not to elicit Putnam's testimony regarding the SRA-FV, and rely only on the 2010 evaluation factors, then there would be no need for a Frye hearing. 1RP 123-24, 128. To avoid a Frye hearing, the State agreed not to present evidence regarding the SRA-FV. 1RP 129; 3RP 5-7.

Parsons's second Frye and ER 702 motion pertained to Putnam's placement of Parsons in the "high risk, high needs" reference group to

measure Parsons's likelihood of recidivism. CP 129-58; 1RP 121, 130-31. Parsons contended that Putnam's reliance on logical inference to select the reference group in which Parsons belonged was not reliable and was not generally accepted in the scientific community. CP 129-58. To support these claims, Parsons included Dr. Abbott's declaration and several scholarly articles criticizing Putnam's methodology because it had never been scientifically validated. CP 160-73, 175-205, 256-86, 288-300, 302-25, 398-428. Despite Parsons's submission that demonstrated Putnam's placement in the "high risk, high needs" reference group was neither reliable nor generally accepted in the scientific community, the trial court deemed Putnam's testimony admissible and refused to conduct a Frye hearing. CP 915-18; 1RP 131, 134-35.

At trial, Putnam acknowledged that no scientific instrument was available to select Parsons's reference group, and admitted it was based solely on his own logical inference. 2RP 321. Putnam also conceded that no study had ever been conducted that demonstrated his methodology for selecting the reference group was valid or reliable. 2RP 366. Given Putnam's testimony, Parsons renewed his motion under ER 702 and Frye toward the end of trial, which the trial court again denied. 2RP 621-22.

Aside from Parsons's challenges to the State's evidence, the State moved in limine to exclude any reference to Parsons's confinement in the

Special Commitment Center as incarceration. 2RP 8-9. Parsons objected, stating, “Incarceration, that’s an acceptable word, an accepted definition of the word. Commit is listed as a synonym under the dictionary the reality is that Mr. Parsons is going to be and is locked up, that incarcerate is a perfectly appropriate word to use.” 2RP 8. The State responded that “incarcerate, our point is that we don’t want it to sound like this is punitive Incarceration just sounds a little more punitive. This is a detention for treatment.” 2RP 8. The trial court ruled in the State’s favor: “I believe that confined is the preferred word. Detained also is acceptable. I don’t think incarcerated is a word I want to hear. So no one should intentionally use the word incarcerated. Confined or detained, I think, strikes the right balance.” 2RP 9; see also CP 903.

3. Trial

At trial, Putnam testified regarding Parsons’s sexually violent offenses and his diagnoses of Parsons, generally conforming to the discussion above. 2RP 175-253, 268-350, 353-98. However, when cross-examined regarding Parsons’s alleged personality disorder, Putnam acknowledged, “if I was to exclude the other things that I know about him and only look at [the personality disorder], then I would say that didn’t qualify So, yeah, that [personality] disorder without the sexual violence would not predispose one to sexual violence.” 2RP 376.

After the close of the State's evidence, Parsons moved to dismiss evidence pertaining to Parsons's alleged personality disorder: "The state has to prove each element of the petition beyond a reasonable doubt, and they can't prove the personality disorder prong." 2RP 417. The court understood "that [Putnam] admit[ted] that if the personality disorder was standing alone that it wouldn't be sufficient" 2RP 418. Ultimately, however, the court denied the motion, stating, "The reason why is that I believe that there was testimony from Putnam sufficient to link the personality disorder with the respondent's difficulty in controlling his dangerous behavior." 2RP 422.

When it came time to instruct the jury, however, the trial court indicated, "The expert testimony is somewhat confusing as far as which conditions constitute the mental abnormality and which the personality disorder." 2RP 600-01. The court proposed to list in the jury instructions the specific diagnosed conditions that qualified as a mental abnormality and the specific diagnosed conditions that qualified as a personality disorder. 2RP 601.

In response to the court's suggestion, defense counsel noted he did "not believe that standing alone the personality disorder is a sufficient basis" for commitment. 2RP 604. In addition, counsel argued,

If we send this case to the jury with instructions without this language, then on appeal, if Mr. Parsons is committed, the Court of Appeals is not going to be able to

tell what the jury made their decision based on. They've got quite a bit of evidence on either sadism or paraphilia NOS. They have no evidence separately on personality disorder.

So you're leaving them with the idea that some of them could believe beyond a reasonable doubt a personality disorder by itself is enough, and some of them could believe that sadism by itself is enough. Then they would [not] be unanimous and all the sudden we'd have a verdict that's partially based on insufficient evidence. There's not substantial evidence of the personality disorder prong.

Our position is either the state should choose, which they could do right now, and send the case to the jury only on the mental abnormality prong, or you need to instruct them so that we can parse out what they actually do when they make their decision.

2RP 604-05.

Following significant argument and the State's agreement to instruct the jury regarding mental abnormality only, the trial court determined it was "not going to instruct on the minute diagnoses that are – the specific diagnoses set forth in the petition." 2RP 637; see also 2RP 644 (court asking whether Parsons had an exception to "the change that the state made by basing their case on mental abnormality rather than personality disorder" in the jury instructions).

Thus, the trial court instructed the jury to consider only whether "Parsons currently suffer[ed] from a mental abnormality which causes serious difficulty in controlling his sexually violent behavior" and whether a "mental abnormality ma[de] . . . Parsons likely to engage in predatory acts of

sexual violence if not confined to a secure facility.” CP 925, 2RP 658. The words personality disorder do not appear in the jury instructions, but the trial court still allowed the State to rely on Parsons’s alleged personality disorder as evidence supporting Parsons’s alleged mental abnormality. 2RP 637. In closing arguments, the State argued that Parsons’s alleged personality disorder qualified as a mental abnormality. 2RP 671-73, 711.

4. Verdict and commitment

Following trial, the jury determined the State proved beyond a reasonable doubt that Parsons qualified as a sexually violent predator. CP 937; 2RP 727-30. The trial court issued an order of commitment confining Parsons to the Special Commitment Center. CP 938.

Parsons timely appeals. CP 939-41.

D. ARGUMENT

1. EVIDENCE OF PARSONS’S PERSONALITY DISORDER WAS IRRELEVANT TO DETERMINE WHETHER PARSONS SUFFERED FROM A MENTAL ABNORMALITY THAT MADE HIM MORE LIKELY TO ENGAGE IN PREDATORY ACTS OF SEXUAL VIOLENCE

Putnam testified that Parsons’s alleged personality disorder, standing alone, did not make Parsons more likely to engage in predatory acts of sexual violence. 2RP 376. Based on this acknowledgment, the parties agreed the court should not instruct the jury regarding Parsons’s alleged

personality disorder. Instead, the trial court instructed the jury to consider only whether “Parsons currently suffer[ed] from a *mental abnormality* which causes serious difficulty in controlling his sexually violent behavior” and whether a “*mental abnormality* ma[de] . . . Parsons likely to engage in predatory acts of sexual violence if not confined to a secure facility.” CP 925 (emphasis added); 2RP 658 (emphasis added). Nonetheless, the trial court permitted the State to rely on Parsons’s alleged personality disorder as evidence supporting Parsons’s alleged mental abnormality. 2RP 637. Because the State’s evidence concededly did not link a personality disorder to Parsons’s emotional or volitional capacity that predisposed him to commit dangerous criminal sexual acts—which is the statutory definition of “mental abnormality”—evidence of Parsons’s personality disorder was not relevant to the question of whether Parsons suffered from a mental abnormality. The trial court erred in allowing the jury to consider this irrelevant evidence when determining whether Parsons suffered from a mental abnormality or whether such a mental abnormality made Parsons more likely to commit sexually violent acts. This court must accordingly reverse.

Under the pertinent definitional statute, “[s]exually violent predator” means 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). As the definition makes clear, to qualify as a sexually violent predator, a person may have either a personality disorder or a mental abnormality that makes the person likely to commit acts of sexual violence absent confinement.

In this case, Putnam indicated that the personality disorder alone would not suffice to predispose Parsons to sexual violence. 2RP 376. Because evidence of the personality disorder was insufficient to show Parsons was likely to commit sexually violent acts, Parsons moved to strike the State’s allegation that Parsons suffered from a personality disorder. 2RP 419, 421. Although the court initially denied Parsons’s motion to strike the personality disorder evidence, Parsons renewed his motion in the context of jury instructions. Because the evidence was insufficient to demonstrate the personality disorder affected Parsons’s volition, Parsons argued the court should instruct the jury only regarding Parsons’s alleged mental abnormality. 2RP 422, 604. Given the State’s agreement, the trial court granted Parsons’s motion and instructed the jury only on mental abnormality. CP 925; 2RP 628, 658.

Parsons also requested that the court list the specific conditions the jury could consider as mental abnormalities. 2RP 606, 625, 632-33. As defense counsel stated, “There has to be a mental abnormality that causes

him to commit sexually violent acts and that affects his volitional control.”

2RP 632. In contrast, the State argued,

all of the evidence should be considered and is appropriately considered by the jury in determining whether or not [Parsons] meets the definition. For clarity[’s] sake, if we remove personality disorder from this instruction, the jury is left with determining whether he has a mental abnormality, and all of that evidence goes into that determination for the jury.

2RP 629. Ultimately, the trial court agreed with the State, stating, “I am not going to instruct on the minute diagnoses . . . the specific diagnoses set forth in the petition.” 2RP 637. Thus, the trial court allowed all the evidence—whether it pertained to Parsons’s alleged mental abnormalities or to Parsons’s alleged personality disorder—to be considered by the jury to determine whether Parsons suffered from a mental abnormality that made him likely to engage in sexually violent acts if not confined to a secure facility.

The trial court erroneously disregarded the statutory definition of mental abnormality when it allowed the State to rely on evidence of Parsons’s alleged personality disorder to argue that Parsons suffered from a mental abnormality. Under that statutory definition, a mental abnormality is “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of

others.” RCW 71.09.020(8).³ That is, for a person to have a qualifying mental abnormality under RCW 71.09.020(8), it must have an impact on his or her volition to commit dangerous and criminal sexual acts. Because the definition of mental abnormality requires some impact on volitional control, the presence of a personality disorder that does not predispose a person to commit acts of sexual violence plainly falls outside the statutory definition of mental abnormality. In other words, a personality disorder that does not affect volitional capacity can never qualify as a mental abnormality because mental abnormalities, by definition, must always affect volitional capacity.

In this case, the State’s own expert conceded that Parsons’s personality disorder did not predispose him to sexual violence. Because Parsons’s alleged personality disorder concededly did not affect his volitional control in committing sexually violent acts, his personality disorder did not qualify under the definition of mental abnormality. Indeed, a personality disorder that had no bearing on Parsons’s volition or control was not at all relevant to the determination of whether Parsons suffered from

³ In contrast, “personality disorder” is defined as

an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychiatrist.

RCW 71.09.020(9).

a mental abnormality or whether such a mental abnormality made Parsons likely to engage in predatory acts of sexual violence if not confined.

To be sure, “[r]elevant evidence’ means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401; accord State v. Weaville, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). All relevant evidence is admissible whereas “[e]vidence [that] is not relevant is not admissible.” ER 402. Here, because Parsons’s alleged personality disorder did not affect his volitional capacity, it had absolutely no tendency to show whether Parsons suffered from a mental abnormality, which again, by definition, must affect volitional capacity. RCW 71.09.020(8). In the same vein, because evidence of a personality disorder had no tendency prove Parsons suffered from mental abnormality, neither did it tend to show that Parsons’s mental abnormality made him likely to engage in predatory acts of sexual violence. Accordingly, evidence of Parsons’s alleged personality disorder was wholly irrelevant to the mental-abnormality-focused question the jury had to answer in order to find Parsons met the statutory criteria for commitment.

The trial court therefore erred in permitting the State to rely on irrelevant personality disorder evidence to meet its burden that Parsons suffered from a mental abnormality affecting his volitional capacity and that

the mental abnormality made Parsons likely to engage in predatory acts of sexual violence if not confined in a secure facility. This error could not have been harmless.

An error in admitting evidence is prejudicial if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982), abrogated in part on other grounds by Davis v. United States, 512 U.S. 452, 461, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); accord State v. Ashurst, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986). Because the trial court allowed the jury to consider both relevant and irrelevant evidence to determine whether the State proved Parsons met commitment criteria, it is impossible to say whether the jury relied only on relevant evidence in reaching its verdict. Thus, under any stretch of the imagination, the trial court’s error in admitting irrelevant evidence could not have been harmless. This court must reverse the trial court’s commitment order.

2. BECAUSE THE JURY IMPERMISSIBLY CONSIDERED INADMISSIBLE PERSONALITY DISORDER EVIDENCE TO DETERMINE WHETHER PARSONS SUFFERED FROM A MENTAL ABNORMALITY, THE VERDICT COULD NOT HAVE BEEN UNANIMOUS AS TO MENTAL ABNORMALITY

In State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976), our supreme court held that where the State relies on more than one alternative

means at trial, a jury verdict may not stand if the evidence is insufficient to support all the argued alternatives. In the chapter 71.09 RCW context, our supreme court has applied the Arndt analysis to conclude “that ‘mental abnormality’ and ‘personality disorder’ are alternative means for making the SVP determination.” In re Detention of Halgren, 156 Wn.2d 795, 810, 132 P.3d 714 (2006). Thus, the question here is whether “‘a rational trier of fact *could* have found each means of [meeting the sexually violent predator definition] proved beyond a reasonable doubt.’” Id. at 811 (quoting State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988)). The answer is no.

As discussed above, Parsons’s alleged personality disorder did not predispose Parsons to sexual violence. 2RP 376. Thus, the alleged personality disorder was insufficient to support the verdict because, as Putnam concluded, it did not make Parsons “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” In this respect, the personality disorder alternative means of RCW 71.09.020(18) could not have been satisfied.

For this reason, the trial court instructed the jury solely on the mental abnormality means of meeting the definition of sexually violent predator. CP 925; 2RP 658. However, the trial court allowed the jury to consider evidence of Parsons’s alleged personality disorder in determining whether Parsons’s mental abnormality made him likely to engage in sexually violent

acts unless confined. 2RP 637. Although the trial court did not instruct the jury on both alternate means, as a factual matter it still permitted the jury to consider both alternate means in reaching its verdict. Because the personality disorder alternative did not make Parsons more likely to engage in predatory acts of sexual violence if not confined, no rational trier of fact could have found that means of the sexually violent predator definition proved beyond a reasonable doubt. Accordingly, there was not “substantial evidence to support each of the means charged.” Arndt, 87 Wn.2d at 377. Therefore, it is impossible to tell whether the verdict was unanimous. This court must reverse.

3. PUTNAM’S REFERENCE GROUP MATCHING TO DETERMINE LIKELIHOOD OF RECIDIVISM WAS UNRELIABLE AND SHOULD HAVE BEEN EXCLUDED UNDER ER 702

- a. ER 702 permits the admission of reliable evidence only

The trial court admitted Putnam’s testimony regarding his selection of Parsons into the high-risk, high-needs reference group for the purpose of determining a likelihood that Parsons would reoffend. Because Putnam himself acknowledged that the reliability of the reference group selection process had never been tested, the trial court abused its discretion in admitting this evidence. Without this unreliable evidence, the jury could not

have made any determination regarding Parsons's probability of recidivism. This court must reverse.

ER 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Expert testimony is usually admissible under ER 702 if it will be "helpful to the jury in understanding matters outside the competence of ordinary lay persons." Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011). However, "[u]nreliable testimony does not assist the trier of fact." Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 918, 296 P.3d 860 (2013). This court should reverse a trial court's decision to admit expert testimony where the court abuses its discretion. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

Putnam testified on direct that he looked "at Mr. Parsons' history and look[ed] at the specific characteristics of the people who had been in the norm group and identify how close his history was to the different norm group histories. His actually is actually overlapping considerably with the preselected for high risk, high needs norm group." 2RP 319. Although Putnam claimed he had been trained with guidelines to determine the norm group, 2RP 319-20, he acknowledged, "There is not an instrument for

picking a norm group. We don't have an instrument that is, okay, now go through and score whether they belong in this particular norm group. It's a logical inference," 2RP 321. In addition, during cross examination, Putnam admitted that there was no "specific study showing how to match or relating to matching the groups." 2RP 366.

Putnam's testimony in this regard was consistent with the defense expert, Joseph Plaud, Ph.D. As Putnam admitted, Dr. Plaud testified there had never been "any interrater reliability studies that have been done on the . . . reference group selection process . . . that has been scientifically verified as valid." 2RP 501. During cross examination, Plaud also called the selection process into norm groups employed by Putnam "silly" because "[t]hey change all the time, and there's no real criteria for selecting them." 2RP 575.

Because both experts in this case agreed there was no scientifically validated manner of selecting the reference groups, Putnam's method of selecting Parsons into the high-risk, high-needs group was concededly unreliable. Because Putnam's reference group selection was not reliable, it could not have been helpful to the trier of fact, and thus was not admissible under ER 702. Lakey, 176 Wn.2d at 918. The trial court therefore abused its discretion in admitting Putnam's reference group testimony. Moreover, because Putnam's reference group methods provided the sole proof of

Parsons's risk of reoffending, the trial court's error in admitting Putnam's testimony could not have been harmless.

- b. The trial court should have conducted a *Frye* hearing to establish that Putnam's reference group methodology was generally accepted in the relevant scientific community

Even if this court disagrees and concludes the reference group evidence was reliable, Parsons was entitled to a Frye hearing on this issue. Washington courts use Frye to determine whether the scientific theory of an expert opinion and its underlying methodology have been generally accepted in the relevant scientific community. Anderson, 172 Wn.2d at 601, 603. If an expert's opinions are based in a generally accepted science, Frye is not implicated. Id. at 611-12.

Parsons moved for a Frye hearing to address the reliability and general acceptance of the reference group matching employed by Putnam. CP 129-434. Parsons provided the declaration of Brian Abbot, Ph.D., who concluded that Putnam's reference group selection process had not achieved general acceptance in the scientific community. CP 171-72. Parsons also provided several articles demonstrating that Putnam's methods were not generally accepted because they were neither reliable nor valid. See CP 175-76 ("The reliability and validity of the cohort-matching process has not been established and Wollert (2010) reported how classification error (the

probability of selecting an erroneous reference group to compare to the individual being assessed) reduces the accuracy of the observed sexual recidivism rates.”); CP 258 (“The recidivism rates contained in actuarial tables are the product of the amalgamated risk characteristics of the group and, therefore, the risk data cannot be ascribed to a particular individual . . . since the risk facts for the individual may vary substantially from that of the group.”); CP 263 (“A significant additional problem in applying the Static 99R to an individual is that it is difficult, perhaps impossible, to determine which of the four reference groups is the best fit for the individual.”); CP 320 (“Without these measures of reliability and validity, clinicians cannot inform triers of fact about the degree of error in risk assessment opinions necessary for them to give appropriate weight to the proffered evidence.”); CP 398 (“Available data do not consistently support the use of the ‘Selected for High Risk/Needs’ comparison group for persons involved in the civil-commitment process.”); CP 405 (noting approach similar to Putnam’s as “tautological”); CP 414 (“Guidelines for choosing a non-representative comparison group on the basis of clinical considerations should be tested empirically before being used by a forensic evaluator.”). This scholarship demonstrates that Putnam’s methodology in selecting Parsons’s reference group has been placed in serious doubt. Therefore, under Frye, Putnam’s methods cannot qualify as

being generally accepted in the scientific community. The trial court erred in concluding otherwise and should have conducted a Frye hearing.

Moreover, the general acceptance of Putnam's methods is belied by his own report and testimony. Putnam used logical inference to assign Parsons to one of four reference groups in his 2010 evaluation. CP 237; 2RP 321. However, in his 2013 update, Putnam employed a different method, the SRA-FV,⁴ "to provide guidance for the selection of the appropriate norm reference norm in relation to the Static-99R . . . and Static-2002R. CP 252. The fact that Putnam employed a different methodology for determining the reference group for Parsons severely undermines the trial court's determination that Putnam's 2010 methodology continued to be generally accepted in the scientific community. Thus, short of concluding that Putnam's reference group selection methods were unreliable and inadmissible, the trial court at least should have conducted a Frye hearing to establish the general acceptance of Putnam's methods for placing Parsons in the high-risk high-needs reference group.

⁴ Following In re Detention of Ritter, 177 Wn. App. 519, 525, 312 P.3d 723 (2013), in which this court ruled that the SRA-FV was a "novel dynamic risk assessment instrument" necessitating a Frye hearing, the trial court properly required a Frye hearing to address the SRA-FV's reliability. CP 910-13; 1RP 108-11. To avoid a Frye hearing on the SRA-FV, the State decided to proceed by relying solely on the reference group selection Putnam used for his 2010 evaluation of Parsons. 1RP 128-29; 3RP 5-7

In sum, this court should hold that Putnam's reference group testimony was inadmissible under ER 702 because it was unreliable and thus unhelpful to the fact finder. This court should reverse Parsons's commitment on this basis. Alternatively, this court should remand with instructions for the trial court to conduct a Frye hearing to establish that Putnam's reference group methodology was generally accepted in the relevant scientific community.

4. DETENTION UNDER CHAPTER 71.09 RCW IS INCARCERATION AND THE TRIAL COURT ERRED IN PRECLUDING PARSONS FROM REFERRING TO IT AS INCARCERATION

The State successfully moved in limine to exclude reference to Parsons's detention in the Special Commitment Center as incarceration. 2RP 8-9. Because an erroneous understanding of the law led the trial court to restrict Parsons's use of language at trial, the trial court abused its discretion.⁵ It is reasonably probable that the outcome of the trial would have differed had Parsons been allowed to inform the jury that his detention was, in reality, incarceration. This court must accordingly reverse.

As our supreme court has unequivocally stated, “[C]ommitment is a deprivation of liberty. It is *incarceration* against one's will, whether it is called ‘criminal’ or ‘civil.’” In re Detention of D.F.F., 172 Wn.2d 37, 40

⁵ A trial court abuses its discretion if it employs the incorrect legal standard or if its decision is based on untenable reasons. State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

n.2, 256 P.3d 357 (2011) (emphasis added) (alteration in original) (quoting Application of Gault, 387 U.S. 1, 50, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)). The highest courts of our state and our nation have directly answered the question of whether involuntary civil commitment qualifies as incarceration. It does. Yet the trial court forbade Parsons from referring to his detention as incarceration because the trial court did not “think incarcerated [was] a word [it] want[ed] to hear” and opined instead that “[c]onfined or detained . . . [struck] the right balance.” 2RP 9. The trial court’s view directly conflicts with the United States and Washington State Supreme Courts’ statements on this subject. The trial court thus plainly abused its discretion by granting the State’s motion in limine, as it based its decision on an erroneous view of the law. See State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

The trial court’s restriction on Parsons’s language was prejudicial as it could have changed the outcome of trial. See Robtoy, 98 Wn.2d at 44 (holding evidentiary error not prejudicial unless the outcome of the trial would be materially affected). The State wished to refer to Parsons’s incarceration in the Special Commitment Center as commitment, confinement, or detention because “[i]ncarceration just sounds a little more punitive. This is not a punitive action. This is a detention for treatment.” 2RP 8. This statement reflects the State’s awareness that jurors might have

more difficulty deciding to punish Parsons rather than deciding only to “treat” him. For this reason, the State sought to keep the whole truth of Parsons’s detention from the jurors and instead employed a legal fiction that eased its burden of proof. If Parsons had been able to disclose to the jurors that his confinement at the Special Commitment Center constituted a continuation of his incarceration using a term that courts have already recognized as an accurate description, there is a reasonable probability that the jury would have come to a different conclusion.

The trial court precluded Parsons from referring to his civil commitment as incarceration on an untenable ground. The ruling directly conflicts with clear and unmistakable declarations of law that involuntary civil confinement *is* incarceration. The trial court thus abused its discretion. Had the jury been given the full picture, it very well might have reached a different conclusion. This court must accordingly reverse.

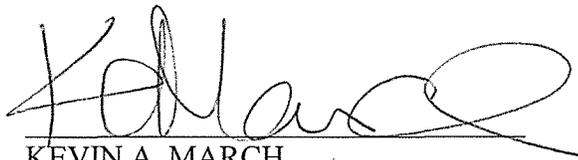
E. CONCLUSION

By permitting the jury to consider irrelevant evidence in rendering its verdict, the trial court undermined the fairness of the proceedings and ensured the jury verdict could not have been unanimous. The trial court also should have excluded unreliable expert testimony that Parsons belonged in the high risk, high needs reference group, or at least should have conducted a Frye hearing on this issue. This error also permitted the jury to rely on irrelevant evidence. Finally, Parsons should have been able to use a term courts have held accurately describes his involuntary civil commitment. These various errors undermined the proceedings below at every turn. This court must accordingly reverse the trial court's commitment order and remand for a new and fair trial.

DATED this 3d day of July, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'K. March', written over a horizontal line.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

In re Detention of Jonathan Parsons,)	
)	
STATE OF WASHINGTON)	
)	
Respondent,)	COA NO. 32193-2-III
)	
v.)	
)	
JONATHAN PARSONS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL PER AGREEMENT OF THE PARTIES PURSUANT TO GR30(b)(4) AND/OR BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF JULY 2014.

X *Patrick Mayovsky*