FILED
SEP 03, 2014
Court of Appeals
Division III
State of Washington

NO. 32193-2

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of:

JONATHAN PARSONS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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TABLE OF CONTENTS

I. ISSUES 1

A. Did The Trial Court Err In Permitting Testimony Regarding Parsons' Personality Disorder? 1

B. Whether The Trial Court's Admission Of Testimony Regarding Parsons' Personality Disorder Deprived Parsons Of His Right To A Unanimous Verdict When Only One Means Of Civil Commitment Was Present To The Jury? 1

C. Where Actuarial Instruments Have Repeatedly Been Determined To Be Admissible In Sex Predator Trials, Did The Trial Court Properly Admit Testimony Related To The Application Of The Static 99r? 1

D. Where The Purpose Of The Statute Is To Commit Individuals For Control, Care And Treatment, Did The Trial Court Err By Precluding The Use Of The Word "Incarceration"? 1

II. STATEMENT OF THE CASE 1

A. Procedural Facts 1

B. Sexually Violent Predator Trial 2

1. Parsons' Offense History 2

2. Pre-Trial Proceedings 4

3. Dr. Putnam's Trial Testimony 5

III. ARGUMENT 9

A. Evidence Of Parsons' Personality Disorder Was Relevant To Determine Whether He Suffered From A Mental Abnormality That Made Him More Likely To Engage In Predatory Acts Of Sexual Violence 9

1. Parsons Cannot Attack The Relevance Of The Testimony Of His Personality Disorder For the First Time On Appeal 9

2. Testimony Regarding Parsons' Personality Disorder Was Relevant To The Ultimate Question Posed To The Jury 12

3. Parsons Invited the Error He Now Alleges 14

B. As Personality Disorder Was Not Presented As A Means For Civil Commitment The Jury's Verdict Was Unanimous 15

C. The Trial Court Properly Admitted Testimony Related To The Static 99R Reference Groups 16

1. *A Frye* Hearing Is Not Required Where the Underlying Procedures or Methodology Are Not Novel. 17

2. Components Of A Comprehensive Sex Predator Assessment Are Not Subject To *Frye* 18

3. The Trial Court Properly Admitted Dr. Putnam's Testimony Under ER 702 and 703. 23

D. The Trial Court Did Not Err In Precluding The Use Of The Term Incarceration To Describe Civil Commitment 25

IV. CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Anderson v. Akzo,
172 Wn.2d 593, 260 P.3d 857 (2011) 17, 21, 24

Barefoot v. Estelle,
463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) 19, 23, 24

Burnside v. Simpson Paper Co.,
123 Wn.2d 93, 864 P.2d 937 (1994) 12

City of Seattle v. Patu,
147 Wn.2d 717, 58 P.2d 273 (2002) 14

Frye v. United States,
54 App. D.C. 46, 293 F. 1013 (1923) ..... passim

In re Aguilar,
77 Wn. App. 596, 892 P.2d 1091 (1995) 22

In re Berry,
160 Wn. App. 374, 248 P.3d 592 (2011) 18, 22

In re Campbell,
139 Wn.2d 341, 986 P.2d 771 (1999) 18, 19, 23, 24

In re Commitment of R.S.,
173 N.J. 134, 801 A.2d 219 (2002) 21

In re Det. of Thorell,
149 Wn.3d 724, 72 P.3d 708 (2003) ..... passim

In re Detention of Post,
170 Wn.2d 302, 241 P.3d 1234 (2010) 26

In re Halgren,
156 Wn.2d 795, 132 P.3d 714 (2006) 15, 18

In re Pers. Restraint of Young,
122 Wn.2d 1, 857 P.2d 989 (1993) 17, 18, 23

In re Robinson,
135 Wn. App 772, 146 P.3d 451 (2006) 18, 21

In re Strauss,
106 Wn. App. 1, 20 P.3d 1022 (2001) 18

In re Turay,
139 Wn.2d 379, 986 P.2d 790 (1999) 26

Lakey v. Puget Sound Energy,
176 Wn.2d 909, 296 P.3d 860 (2013) 25

Reese v. Stroh,
128 Wn.2d 300, 907 P.2d 282 (1995) 17

State v. Cauthron,
120 Wn.2d 879, 846 P.2d 502 (1993) 17

State v. Dye,
178 Wn.2d 541, 309 P.3d 1192 (2013) 25

State v. Gregory,
158 Wn.2d 759, 147 P.3d 1201 (2006) 18

State v. Halstien,
122 Wn.2d 109, 857 P.2d 270 (1993) 12

State v. Olson,
126 Wn.2d 315, 893 P.2d 629 (1995) 14

State v. Pam,
101 Wn.2d 507, 680 P.2d 762 (1984) 14

State v. Russell,
125 Wn.2d 24, 882 P.2d 747 (1994) 17, 18

State v. Scott,
110 Wn.2d 682, 757 P.2d 492 (1988) 10

State v. Studd,
137 Wn.2d 533, 973 P.2d 1049 (1999) 14

State v. Swan,
114, Wn.2d 613, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991) 12

Statutes

RCW 71.09 ..... 1, 11

RCW 71.090.060(1) 26

Other Authorities

5b Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, §702:21 (5th ed. 2007) 18

Rules

ER 401 ..... 12, 16

ER 402 12

ER 403 ..... 12, 16, 23

ER 702 ..... passim

ER 703 ..... passim

RAP 2.5(a) 10

I. ISSUES

A. Did The Trial Court Err In Permitting Testimony Regarding Parsons' Personality Disorder?

B. Whether The Trial Court's Admission Of Testimony Regarding Parsons' Personality Disorder Deprived Parsons Of His Right To A Unanimous Verdict When Only One Means Of Civil Commitment Was Presented To The Jury?

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D. Where The Purpose Of The Statute Is To Commit Individuals For Control, Care And Treatment, Did The Trial Court Err By Precluding The Use Of The Word "Incarceration"?

II. STATEMENT OF THE CASE

A. Procedural Facts

On February 27, 2012, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of Jonathan Parsons pursuant to RCW 71.09. CP 1. A jury trial on the petition began on December 9, 2013. Eight days later, the jury returned a verdict finding that Parsons was an SVP. CP 937. On the same day, the trial court entered an Order of Commitment. CP 938. On January 7, 2014, Parsons timely filed a Notice of Appeal. CP 939.

B. Sexually Violent Predator Trial

1. Parsons' Offense History

In 1989, eleven year old E.H. was a neighbor to fourteen year old Jonathan Parsons[1]. 2RP at 218. On October 1, 1989, E.H. went over to Parsons' home, bringing with him a pair of toy handcuffs. *Id.* Parsons proceeded to handcuff E.H. and take him to his bedroom, while telling him he was going to take him to jail. *Id.* Over E.H's protests and struggling, Parsons threw E.H. on the bed and removed his pants. *Id.* As E.H. struggled and fought, Parsons pulled E.H's penis out and kissed his penis. *Id.* Parsons then kissed E.H. and stuck his tongue in his mouth. *Id.* at 219. Parsons told E.H. not to tell anyone what happened. *Id.* at 547. E.H. was eventually able to escape and ran home. *Id.* at 219. Parsons admitted to having sexual contact with E.H. and was sentenced to 30 days in detention and twelve months of community supervision. *Id.* at 548.

On October 14, 1993, fourteen year old J.A. met Parsons, now eighteen years old, at a fast food restaurant. *Id.* at 221. Parsons offered J.A. a ride home, but rather than taking J.A. home, Parsons took him to a rural, secluded area. *Id.* While at this secluded spot, Parsons began to fondle J.A.'s genitals and sucked on his penis. *Id.* at 550. Parsons put his finger in J.A.'s anus in an attempt to open him up so that he could anally

[1] Parsons was born on February 4, 1975.

penetrate him with his penis. *Id.* at 221. When he was unsuccessful, he placed a second finger in J.A.'s anus and forcibly pulled his rectum apart until it bled. *Id.* at 221, 551. At this point in time, Parsons attempted to penetrate him with his penis, but was unable so he forced J.A. to put his penis in his mouth. *Id.* at 221. While this was occurring J.A. began to cry and Parsons pulled his hair and told J.A. that he owned him and don't ever say no to me again. *Id.* at 221-22. As Parsons forced J.A. to orally copulate him, he told him to deep throat it and shoved his penis down J.A.'s throat to the point where he could not breathe. *Id.* at 222, 551-52. Parsons then took J.A. back into town in his vehicle and J.A. ran home. *Id.* at 552. Parsons eventually pled guilty to Rape in the Third Degree and was sentenced to eighteen months in prison and twenty-four months of community supervision. *Id.* at 553-54.

In June of 1997, while still on community supervision, Parsons, now twenty two, met thirteen year old R.R. *Id.* at 554-55. Parsons groomed R.R., taking him fishing and playing games with him. *Id.* At some point after building this relationship, Parsons engaged in a sexual encounter with R.R. where Parsons touched R.R.'s genitals, made R.R. rub his penis, orally copulated R.R. and then rubbed his genitals against R.R.'s buttocks and ejaculated. *Id.* at 226-27.

A few days after this incident, Parsons took R.R. fishing in a remote area. *Id.* at 227. Once in the secluded area, Parsons told R.R. to pull down his pants. *Id.* When R.R. refused, Parsons pulled them down himself, bent the boy over a tree limb and anally raped him. *Id.* While R.R. was in extreme pain, bleeding and screaming, Parsons grabbed R.R.'s throat with both hands, telling the boy to shut up or I'll kill you. *Id.* Parsons continued to hold R.R. down and forcibly rape him. *Id.* at 556.

After the incident was reported it was determined that R.R. suffered anal injuries as a result of the assault. *Id.* at 557. Parsons was arrested approximately one month later in Oregon, and eventually pled guilty to the contact with R.R. *Id.* at 558. Parsons was sentenced to 175 months in prison. *Id.* Parsons discussed all three of these convictions with Dr. Putnam, relating that he initially thought all of these sexual encounters were consensual and he didn't understand why the boys said he forced them. *Id.* at 222-23.

2. Pre-Trial Proceedings

Parsons filed a number of pretrial motions, including one to exclude the opinion of Dr. Dana Putnam based on the SRA-FV pursuant to *Frye*[2] and ER 702-703 and one to exclude the opinion of Dr. Putnam

[2] *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

based on the Static 99R and Static 2002R reference groups pursuant to *Frye* and ER 702-703. CP 129-434; 515-724; 93-116.

The trial court heard arguments from counsel on December 6, 2013. 1RP at 93-136. The trial court granted Parsons' motion for a *Frye* hearing on the SRA-FV. CP 910-913. Based on the trial court's ruling, the State chose to proceed to trial without testimony regarding the SRA-FV. 1 RP at 123-36. The trial court denied Parsons' motion to exclude testimony regarding the Static 99R and Static 2002R reference groups, concluding that the Static 99R and Static 2002R are actuarial instruments and the admissibility of such evidence would be analyzed pursuant to ER 702 and 703. CP 915-918.

3. Dr. Putnam's Trial Testimony

The State presented expert testimony from licensed psychologist Dr. Putnam at the commitment trial. 2RP at 181-397. Dr. Putnam has over 15 years of experience evaluating sex offenders and has been conducting SVP evaluations since 1996. *Id.* at 188. Dr. Putnam conducted an SVP evaluation of Parsons in 2010 as a member of the Washington State Joint Forensic Unit. *Id.* at 201. He updated that evaluation in 2013. *Id.* at 201-02. For his evaluations, Dr. Putnam interviewed Parsons and reviewed multiple documents related to Parsons,

including police reports, psychological evaluations, and confinement records. *Id.* at 202-05.

Dr. Putnam found that Parsons had a pattern of sexual arousal to the physical or psychological suffering of pubescent boys and a pattern of serious difficulty controlling his sexually violent behavior. *Id.* at 250-52, 291-93. Based on this, Dr. Putnam diagnosed Parsons with sexual sadism. *Id.* at 250-52. Dr. Putnam also diagnosed him with a personality disorder that includes antisocial, borderline and dependent features. *Id.* at 240-41, 244. Dr. Putnam opined that Parsons' personality disorder interacts with his sexual sadism, explaining that "Mr. Parsons is a person with a lot of characteristics that all come together in one person. They're not all distinct features. They're all part of who he is." *Id.* at 281-82.

Parsons' sexual sadism and personality disorder impair his emotional and volitional control. *Id.* at 291-92. Dr. Putnam further went on to opine that Parsons' sexual sadism and personality disorder cause him serious difficulty controlling his sexual violent behavior, explaining Parsons "has continued to engage in this behavior despite sanctioning, despite consequences, despite participating in mental health treatment, he has continued to be in a position where he went out and sexually offended." *Id.* at 292. Dr. Putnam opined that Parsons' condition predisposes him to the commission of criminal sexual acts. *Id.* at 293. This condition constituted a

mental abnormality for Parsons, an opinion Dr. Putnam held to a reasonable degree of psychological certainty. *Id.* at 340-41.

Dr. Putnam also testified that Parsons' mental abnormality made him likely to engage in future acts of sexual violence. *Id.* at 340. Using a generally accepted risk assessment method, Dr. Putnam determined this likelihood by examining actuarial data, dynamic risk factors and protective factors. *Id.* at 297-99.

Actuarial data provided Dr. Putnam with a starting point in his risk assessment by indicating that Parsons was in the high risk category of sex offenders. *Id.* at 329. Dynamic risk factors are factors that have been found to relate to sexual recidivism that are not included in the static actuarial instruments which can be used as treatment targets in sex offender treatment. *Id.* at 334-35. Assessment of Parsons' dynamic risk indicated issues with intimacy deficits, poor cooperation with supervision both in the community and in custody, and a high degree of hostility and difficulty managing anger. *Id.* at 334-35. Dr. Putnam opined that Parsons did not demonstrate much insight into his offender behavior even after participating in sex offender treatment and his proposed release environment was inadequate. *Id.* at 337-38. He concluded that Parsons could not be safely released into the community. *Id.* at 340.

After the State rested, Parsons moved the trial court to dismiss the personality disorder prong from the petition and requested that the jury not be instructed regarding personality disorder as a means for civil commitment. *Id.* at 417-18. Parsons stated, however, "that doesn't mean I'm moving to strike any of the testimony about the personality disorder prong. Dr. Putnam talked about it playing into the mental abnormality, but by itself would not be sufficient." *Id.* at 418. The trial court denied the motion. *Id.* at 422.

At the end of trial, Parsons renewed his motion to have the personality disorder prong dismissed from the petition and requested the jury be instructed solely on mental abnormality as a means for civil commitment. *Id.* at 603-05. The State did not object to the motion and the jury was instructed with mental abnormality as the only means for civil commitment. *Id.* at 628; CP 919-936. Parsons also renewed his motion to suppress Dr. Putnam's testimony regarding the Static 99R and Static 2002R reference groups under ER 702 and 703. 2RP at 621-22. The trial court denied this motion indicating that while there was a disagreement between the experts, the testimony was that the Static 99R was widely used in the relevant scientific community and the use of the reference

groups was widely used, therefore the criticisms went to weight not admissibility.[3] *Id.* at 622-23.

After an eight-day trial, a unanimous jury determined that Parsons was a sexually violent predator, and an order of commitment was entered. CP 938. Parsons timely appealed. CP 939.

III. ARGUMENT

A. Evidence Of Parsons' Personality Disorder Was Relevant To Determine Whether He Suffered From A Mental Abnormality That Made Him More Likely To Engage In Predatory Acts Of Sexual Violence

Parsons argues that evidence of his personality disorder was irrelevant to the determination of whether or he suffered from a mental abnormality. App. Br. at 14. He further argues that evidence of a personality disorder did not "tend to show [his] mental abnormality made him likely to engage in predatory acts of sexual violence." App. Br. At 18. This argument was not preserved for appeal nor does it have merit.

1. Parsons Cannot Attack The Relevance Of The Testimony Of His Personality Disorder For the First Time On Appeal

Parsons now asks this Court to find that the trial court abused its discretion by admitting testimony related to his personality disorder.

[3] The trial court also noted that Parsons' expert testified that his way of choosing the reference groups was "unique." 2RP at 623.

Because Parsons never raised this issue below, this argument should not be considered by this Court.

RAP 2.5(a) provides in part:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

"RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Parsons did not timely raise this issue. In fact, he affirmatively waived this issue.

At no point during the trial did Parsons raise an objection regarding the relevance of this testimony or move to strike the testimony. While Parsons states that "the court initially denied [his] motion to strike the personality disorder evidence...", there was in fact no request to do so. App. Br. 15. In reality, at the time of his original motion, Parsons specifically stated he was not moving to strike the testimony, stating "that doesn't mean that I'm moving to strike any of the testimony about the personality disorder prong. Dr. Putnam talked about it playing into the mental abnormality, but by itself it would not be sufficient." 2RP at 418. As such, he cannot raise this issue at this juncture. RAP 2.5(a).

After the State rested its case, Parsons moved to dismiss the allegation that he "has a personality disorder which causes him substantial difficulty in controlling his behavior and would make him more likely than not to offend in a sexually violent way in the future" and argued that the jury should not be instructed regarding a personality disorder. 2RP at 416-18. Parsons asserted that "the state has in the petition made two allegations" and that the state could not prove the personality disorder prong beyond a reasonable doubt. *Id.* at 417. The basis of the motion, he asserted, was Dr. Putnam's testimony that "the personality disorder alone would not have been sufficient" to find that Parsons met the criteria of RCW 71.09. *Id.* at 417-18. Parsons moved the court to dismiss the personality disorder prong and instruct the jury only on the mental abnormality prong. *Id.* The court denied the motion at that time. *Id.* at 422. At the end of trial, Parsons renewed his motion during arguments regarding jury instructions. *Id.* at 604-05. At this time, the State agreed and the jury was instructed solely on mental abnormality. *Id.* at 628; CP 919-936.

This Court should decline to consider any claims relating to the relevance of the testimony regarding personality disorder.

2. Testimony Regarding Parsons' Personality Disorder Was Relevant To The Ultimate Question Posed To The Jury

Even if this Court were to consider the admissibility of the evidence at this time, Parsons' argument fails. Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. Relevant evidence is any "evidence having any tendency to make the existence of any 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. Even relevant evidence will be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent manifest abuse of that discretion. *State v. Swan*, 114, Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). Discretion is abused when based on untenable grounds or in a manifestly unreasonable manner. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994). "An evidentiary error which in not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (internal citations omitted).

Parsons argues that Dr. Putnam testified his personality disorder standing alone was not sufficient and cites to one statement in the record that purportedly supports this argument. App. Br. 14, 15. This argument mischaracterizes the testimony given by Dr. Putnam. When posed a question about whether or not the personality disorder standing alone was sufficient, Dr. Putnam responded:

> "What I'll say is as a hypothetical question that I'm being asked, if I was to exclude the other things that I know about him and only look at that, then I would say that didn't qualify. But that's not the reality of the person I'm looking at, that it is related to other things. So, yeah, that disorder without the sexual violence would not predispose one to sexual violence."

2RP at 376.

Parsons further argues that the trial court erred by permitting the State to rely on Parsons' personality disorder as evidence supporting Parsons' mental abnormality. App. Br. 14. This contention is not supported by the record. Nowhere in the record did the State argue that Parsons' personality disorder qualified as a mental abnormality or as a stand-alone basis for commitment. Rather the State presented evidence that Parsons' personality disorder interacts with and is related to his sexual sadism. 2RP at 281, 669-73. Furthermore, Dr. Putnam testified that his personality disorder contributes to Parsons' serious difficulty controlling his sexually violent behavior. *Id.* at 292. Dr. Putnam explained that "Mr.

Parsons is a person with a lot of characteristics that all come together in one person. They're not all distinct features. They are all part of who he is." *Id.* at 282. It is clear, as Parsons acknowledged during trial, that Dr. Putnam provided ample testimony that Parsons' personality disorder plays into his mental abnormality. His argument that the trial court erred in admitting the evidence fails. *Id.* at 418.

3. Parsons Invited the Error He Now Alleges

Even if the Court were to find error, Parsons' argument is barred by the doctrine of invited error. The purpose of that doctrine is to "prohibit[] a party from setting up error at trial and then complaining of it on appeal." *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). The doctrine applies even in cases where the error "results from neither negligence nor bad faith." *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.2d 273 (2002) (citing *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)).

At trial Parsons clearly stated he was not moving to strike the testimony regarding the personality disorder prong. 2RP at 418. He now claims this exact testimony is irrelevant and therefore inadmissible. Whether it was intelligent or negligent or wholly inadvertent, it is clear

Parsons invited the error of which he now complains. Parsons is precluded from challenging that testimony now.

B. As Personality Disorder Was Not Presented As A Means For Civil Commitment The Jury's Verdict Was Unanimous

Parsons also argues that because the jury considered inadmissible personality disorder evidence the verdict could not have been unanimous as to mental abnormality, and therefore his commitment must be vacated. App. Br. at 19. This argument is not supported by the record and therefore fails.

Where there is testimony at trial to the effect that the offender suffers from both a mental abnormality and a personality disorder, and where substantial evidence supports each, these two conditions "are alternative means for making the SVP determination." *In re Halgren,* 156 Wn.2d 795, 810, 132 P.3d 714 (2006). Alternative means for Parsons' civil commitment were not presented to the jury.[4] CP 919-936. Dr. Putnam testified that Parsons suffers from sexual sadism which constituted a mental abnormality which combined with his personality disorder increases his risk of re-offense. 2RP at 281-82, 292, 418. While Parsons was diagnosed with a personality disorder, it was not presented to the jury as a sufficient stand-alone basis for civil commitment. Instead, as even

[4] In his brief, Parsons acknowledges that the trial court instructed the jury solely on mental abnormality as the means of meeting the definition of a sexually violent predator. App. Br. At 20.

Parsons acknowledged during the trial, evidence was presented that Parsons' personality disorder interacted with his sexual sadism and contributed to his difficulty controlling his sexually violent behavior. *Id.* No alternative means were presented to the jury. Nothing in the record indicates any reliance on Parsons' personality disorder as a means for his civil commitment. Parsons' argument is not supported by the record and must be rejected.

C. The Trial Court Properly Admitted Testimony Related To The Static 99R Reference Groups.

Parsons argues that the trial court abused its discretion by failing to order a *Frye* hearing regarding the reference group selection for the Static 99R and Static 2002R. He contends the procedure was not generally accepted in the relevant scientific community. App. Br. at 24. . It is well established in this state that neither clinical judgment relating to risk assessment nor actuarial instruments used in those risk assessments are subject to subject to *Frye*, and the admissibility of such evidence is to be analyzed under ER 702 and 703. *In re Det. of Thorell*, 149 Wn.3d 724, 72 P.3d 708 (2003).

Parsons further argues that Dr. Putnam's method of selecting Static 99R and Static 2002R reference groups should not have been admitted pursuant to ER 702-703 and ER 401-403. His argument fails as

Washington State authority has already rejected this argument and indicated that these criticisms of Dr. Putnam's risk assessment go to its weight and not admissibility.

1. *A Frye* Hearing Is Not Required Where the Underlying Procedures or Methodology Are Not Novel.

A *Frye* hearing is required when a party seeks to admit "evidence based on novel scientific procedures..." *In re Pers. Restraint of Young*, 122 Wn.2d 1, 56, 857 P.2d 989 (1993) (citing *Frye*, 293 F. at 1014). "The *Frye* test is only implicated when the opinion offered is based upon novel science." *Anderson v. Akzo*, 172 Wn.2d 593, 611, 260 P.3d 857 (2011), citing *Reese v. Stroh,* 128 Wn.2d 300, 306, 907 P.2d 282 (1995). If the evidence does not involve new scientific principles or methods of proof, a *Frye* inquiry is unnecessary. *State v. Russell*, 125 Wn.2d 24, 69, 882 P.2d 747 (1994).

The "'core concern...is only whether the evidence being offered is based on established scientific methodology.'" *Young*, 122 Wn.2d at 56 (quoting *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993)). "It applies where either the theory and technique or method of arriving at the data relied upon is novel that it is not generally accepted by the relevant scientific community." *Anderson*, 172 Wn.2d at 611. *Frye* requires "general acceptance," not "***full*** acceptance[,]" (*Russell*, 125

Wn.2d at 41; Emphasis in original) and "can be satisfied by foundation testimony given in connection with the expert's testimony on the merits." Tegland, *Washington Practice: Evidence Law and Practice*, §702.21, at 100, citing *In re Strauss*, 106 Wn. App. 1, 20 P.3d 1022 (2001). "Once a methodology is accepted in the scientific community, the application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical or other specialized knowledge will assist the trier of fact." *State v. Gregory*, 158 Wn.2d 759 829-30, 147 P.3d 1201 (2006).

2. Components Of A Comprehensive Sex Predator Assessment Are Not Subject To *Frye*

For more than 20 years, the appellate courts of this State have consistently rejected arguments that the various components involved in a comprehensive sex predator risk assessment are subject to *Frye*. This is true whether the challenged evidence involves clinical assessment of risk (*Young*), actuarial instruments (*In re Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999); *Thorell*) the penile plethysmograph (*In re Halgren*, 156 Wn.2d 795, 806, 132 P.3d 714 (2006)), psychological diagnosis (*In re Berry,* 160 Wn. App. 374, 248 P.3d 592 (2011)), or a scale designed to identify and measure sexual interest in children. *In re Robinson*, 135 Wn.

App. 772, 146 P.3d 451 (2006). Such evidence, the courts have repeatedly held, is not "novel" and as such does not implicate *Frye*.

The question of admissibility of testimony regarding risk was raised in *In re Campbell, supra.* There, the appellant argued that the State's expert testimony on dangerousness, based on clinical assessment, should have been excluded due to the superiority of actuarial assessment. *Id.,* 139 Wn.2d at 375. The Supreme Court rejected the appellant's claim that no one could "predict dangerousness," holding that "[t]he differences in opinion go to the weight [of the evidence] and not the admissibility of such testimony.... Such disputes are within the province of the jury to resolve." 139 Wn.2d at 358 (citing *Barefoot v. Estelle,* 463 U.S. 880, 902, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

Four years later, the Supreme Court again had occasion to consider the applicability of the *Frye* standard to risk prediction, this time directly "whether actuarial instruments may be admitted to aid in the prediction of future dangerousness and, if these instruments are admitted, the appropriate test of their reliability." *Thorell,* 149 Wn.2d at 753. The Court began by noting that, "in greatly simplified terms," there are two broad approaches to conducting risk assessment: clinical judgment or actuarial assessment:

> The clinical approach requires evaluators to consider a wide range of risk factors and then form an overall opinion concerning future dangerousness. The actuarial approach evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense which may be adjusted (or not) by expert evaluators considering potentially important factors not included in the actuarial measure.

Id. The State argued that "the methods and procedures used to construct actuarial instruments are well accepted in the scientific community" and that appellant's arguments went to weight, not admissibility. *Id.* The Court agreed, noting that the Washington Association for the Treatment of Sexual Abusers (WATSA), which had joined the State, argued that actuarial instruments "anchor" their risk assessments. *Id.*

The crux of the parties' arguments, the *Thorell* Court noted, "is whether actuarial instruments should be viewed as novel scientific evidence" as argued by the appellant.[5] *Id.* at 754. The Supreme Court, rejecting the appellant's argument, noted that, "on two prior occasions, we have accepted evidence of predictions of future dangerousness in SVP commitment hearings ***as based on established scientific methodology and declined to require a separate hearing under Frye***." *Id.* at 755 (emphasis added). The *Frye* standard, the Court determined, "was satisfied by both

[5] *Thorell* was a consolidated case involving six appellants, all of whom had been committed as SVPs. Only Strauss raised the *Frye* argument.

clinical and actuarial determinations of future dangerousness." *Id.* at 756.[6] "Actuarial risk assessment instruments," the Court wrote, "may be admissible in evidence in a civil commitment proceeding under the SVPA when such tools are used in the formation of the basis for a testifying expert's opinion concerning the future dangerousness of a sex offender." *Id.* at 755, citing *In re Commitment of R.S.,* 173 N.J. 134, 801 A.2d 219, 221 (2002).

Calls for a *Frye* hearing in various other contexts have been rejected over the years as well. In *In re Halgren*, 156 Wn.2d 795, 806, 132 P.3d 714 (2006), the Supreme Court rejected appellant's argument for a *Frye* hearing prior to the State's expert's testimony regarding the results and implications of a penile plethysmograph (PPG) evaluation. Likewise, the Court of Appeals has rejected arguments that a *Frye* hearing was required prior to permitting an expert to testify both regarding the SSPI (Screening Scale for Pedophilic Interests) (*In re Robinson*, 135 Wn. App 772, 146 P.3d 451 (2006) (holding that the SSPI was based on items similar to the items used in other actuarial instruments and did not need an independent evidentiary analysis based on *Thorell)* and psychiatric

[6]The Supreme Court has more recently upheld the admissibility of purely clinical opinions, stating, "[m]any expert medical opinions are pure opinions and are based on experience and training rather than scientific data. We only require that "medical expert testimony ... be based upon 'a reasonable degree of medical certainty' or probability." *Anderson* 172 Wn.2d at 610.

diagnosis. *In re Berry*. 160 Wn. App. 374, 248 P.3d 592 (2011) (holding that a psychiatric diagnosis was not a novel scientific principle or procedure). *See also In re Aguilar*, 77 Wn. App. 596, 601-02, 892 P.2d 1091 (1995) (rejecting *Frye* argument and affirming admission of expert testimony assessing risk).

In this case, the trial court found that it was bound by *Thorell* and that neither clinical judgment relating to risk assessment nor actuarial instruments used in those risk assessments constitutes novel scientific procedures to necessitate a *Frye* determination. CP 915-918. The trial court's findings were supported by Dr. Putnam's testimony that in 2010, his application of the Static 99R and Static 2002R was the generally accepted method of use and that many other mental health professionals relied on this method to select a reference group[7]. 2RP at 327.

Because appellate courts of this state have determined that the use of actuarial instruments and clinical judgment are not subject to *Frye*, Parsons' argument fails.

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[7] Parsons also argues that the 2010 method is insufficient because it has been replaced by the SRA-FV. This argument is disingenuous. Parsons moved to suppress testimony regarding the SRA-FV and the trial court granted his motion. CP 93-116, 910-913. Dr. Putnam testified only to the method he used in 2010. 2RP at 318-321. Dr. Putnam did not testify, nor did the State argue, that the method he used in 2010 is currently the generally accepted method of use.

3. The Trial Court Properly Admitted Dr. Putnam's Testimony Under ER 702 and 703.

In rejecting arguments like those Parsons makes here, the Washington Supreme Court in *Campbell* cited its own precedent in *Young*, as well as United States Supreme Court precedent in *Barefoot v. Estelle,* 463 U.S. 880, 896-903, 103 S.Ct. 3383 (1983):

> [i]n determining that predictions of future dangerousness do not offend the United States Constitution, the United States Supreme Court noted 'the rules of evidence generally extant at the federal and state levels anticipate that relevant [sic], unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross-examination and contrary evidence by the opposing party.'

Campbell, 139 Wn.2d at 358, fn. 3. The Supreme Court went onto note that the State's expert testimony "was subjected to cross-examination by Campbell's counsel at trial and the jury was given the opportunity to hear testimony from Campbell's own expert countering [the State's expert's] testimony." 139 Wn.2d at 358. Such differences in opinion "are within the province of the jury to resolve." *Id.*, quoting *Barefoot*, 463 U.S. at 902. *See also Thorell*, 149 Wn.2d at 755. In considering a challenge to the use of actuarial instruments in *Thorell*, the Supreme Court cited its holdings in *Young* and *Campbell* to reject arguments that clinical or actuarial risk assessments were inadmissible pursuant to *Frye*, ER 403, ER 702 or ER 703. 149 Wn.2d at 757-58.

Parsons' criticism of Dr. Putnam's risk assessment in this case goes to the weight of the evidence and not its admissibility. The method Dr. Putnam relied upon in 2010, along with many other mental health professionals in his field, was based on the training he was provided by developers of the instrument, using only the characteristics the developers gave him and his clinical judgment. 2RP at 318-21, 326-28. At trial, Parsons was free to cross-examine Dr. Putnam about his method of selecting the Static 99R and Static 2002R reference groups in this case, and did so. *Id.* at 365-66. Furthermore, Parsons also presented the testimony of his own expert, Dr. Joseph Plaud, regarding the alleged weaknesses in Dr. Putnam's methods. *Id.* at 497-504. The difference in opinion between Dr. Putnam and Dr. Plaud, which Parsons argues demonstrates the unreliability of Dr. Putnam's testimony, goes to the weight of the evidence rather than its admissibility and are "within the province of the jury to resolve." *Campbell*, 139 Wn.2d at 358, quoting *Barefoot*, 463 U.S. at 902. *See also Thorell*, 149 Wn.2d at 755. As the Supreme Court noted in *Anderson*, "jurors are perfectly capable of determining what weight to give this kind of expert testimony." 172 Wn.2d at 609.

Parsons reliance on *Lakey* is misplaced. The expert in *Lakey* failed to follow the proper methodology which rendered his conclusions

unreliable. *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 920, 296 P.3d 860 (2013). In this case, Dr. Putnam followed the proper methodology as provided by the developers of the actuarial instrument. 2RP at 319-20, 328.

Dr. Putnam's risk assessment including his use of actuarial assessment and clinical judgment is not subject to *Frye*. The evidence was properly admitted under ER 702 and 703. This argument should be rejected.

D. The Trial Court Did Not Err In Precluding The Use Of The Term Incarceration To Describe Civil Commitment

Parsons argues that the trial court abused its discretion by precluding the parties from referring to commitment at the Special Commitment Center as incarceration. A trial court abuses its discretion when

> "(1) [t]he decision is 'manifestly unreasonable,' that is, it falls 'outside the range of acceptable choices, given the facts and applicable legal standard'; (2) [t]he decision is 'based on untenable grounds,' that is, 'the factual findings are unsupported by the record,'; or (3) [t]he decision is 'based on untenable reasons,' that is, it is 'based on an incorrect standard or the facts do not meet the requirements of the correct standard.'"

State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). It is clear the trial court's decision to strike a balance in this matter was not an abuse of discretion[8].

[8] After hearing arguments the trial court stated "I believe confined is the preferred word. Detained also is acceptable. I don't think incarcerated is a word I want to hear.... Confined or detained, I think, strikes the right balance." 2RP at 9.

At a SVP trial, the trier of fact is deciding only whether or not the State has proven beyond a reasonable doubt that the respondent is an SVP. *In re Detention of Post,* 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). To decide in the affirmative the jury must decide "three elements: (1) that the respondent 'has been convicted or charged with a crime of sexual violence,' (2) that the respondent 'suffers from a mental abnormality or personality disorder,' and (3) that such abnormality or personality disorder 'makes the person likely to engage in predatory acts of sexual violence if not confined to a *secure facility.*'" *Id.* at 309-10. A secure facility is a mental health treatment facility operated "for control, care, and treatment" of those determined to meet the definition of a SVP. RCW 71.090.060(1). The Washington State Supreme Court stated explicitly in *In re Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999), "the trier of facts role...is to determine whether the [respondent] constitutes an SVP; *it is not* to evaluate the potential conditions of confinement. *Post*, 170 Wn.2d at 311, citing *Turay*, 139 Wn.2d at 404.

Parsons argues that the State "sought to keep the truth of Parsons' detention from the jurors" to ease its burden of proof. App. Br. At 29. The jurors' sole job was to determine if the State had proven beyond a reasonable doubt that Parsons was a SVP. The consequences of their determination and conditions at the SCC are not relevant. *Post*, 170

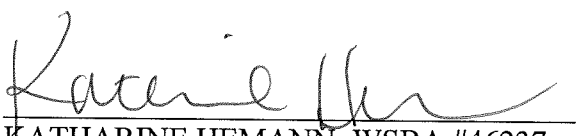
Wn.2d at 311; *Turay*, 139 Wn.2d at 404. The trial court did not abuse its discretion by striking a balance and precluding the use of the word incarcerated.

IV. CONCLUSION

For the reasons set forth above, this Court should affirm Parsons' commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 3 day of September, 2014.

ROBERT W. FERGUSON
Attorney General



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NO. 32193-2-III

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of: JONATHAN PARSONS, Appellant.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On September 3rd, 2014, I deposited in the United States mail, and sent by e-mail, true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

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

DATED this 3rd day of September, 2014, at Seattle, Washington.

Allison Martin
ALLISON MARTIN