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Court of Appeals
Division III
State of Washington

NO. 32939-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

SHAWN BOTNER,

Appellant.

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

The Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In appellant's civil commitment trial under chapter 71.09 RCW, the court erred in admitting evidence of the Structured Risk Assessment - Forensic Version (SRA-FV) under the Frye¹ standard.²

2. The court erred in entering the following findings of fact and conclusions of law pertaining to the Frye hearing:

a. "The SRA-FV is generally accepted within the community of experts who evaluate sex offenders and assess their recidivism risk." CP 1702 (Finding of Fact (FoF) 10).

b. "The use of a split sample for validation of a risk assessment instrument is supported by a scientific theory that is generally accepted in the relevant scientific community." CP 1702 (Conclusion of Law (CoL) 5).

c. "The SRA-FV is an instrument that is capable of producing reliable results and is generally accepted in the scientific community." CP 1703 (CoL 6).

d. "The SRA-FV satisfies the *Frye* evidentiary standard." CP 1703 (CoL 8).

¹ Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

3. Appellant's attorney was constitutionally ineffective in failing to object to testimony that, under the Sex Offender Risk Appraisal Guide (SORAG), appellant's recidivism risk was 100%.

4. Appellant's attorney was constitutionally ineffective in failing to object when the State argued the jury need not find any particular psychosexual pathology in order to commit.

5. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Did the court commit reversible error in failing to exclude testimony on the SRA-FV because the State did not show the evidence was based on an established methodology generally accepted in the scientific community under the Frye standard?³

2. Was appellant's right to effective assistance of counsel violated when counsel failed to object to inflammatory and misleading evidence that appellant's risk of re-offense under the SORAG actuarial instrument was 100 percent?

3. Was appellant's right to effective assistance of counsel violated when counsel failed to object to closing argument that asserted the jury need not find any particular psychosexual pathology in order to commit him?

³ A petition for review of this issue is pending in In re Detention of Pettis, ___ Wn. App. ___, 352 P.3d 841 (2015), Washington Supreme Court no. 91876-7.

4. Did the cumulative effect of the errors in this case deprive appellant of a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

In 2006, the State filed a petition to have appellant Shawn Botner civilly committed under chapter 71.09 RCW. CP 1. After a trial in 2009, the jury found the State proved the allegations beyond a reasonable doubt and Botner was committed to the Special Commitment Center (SCC). CP 348-49, 514. On appeal, this Court reversed Botner's commitment because the State had failed to prove two of three alternative means for finding a recent overt act. State v. Botner, 168 Wn. App. 1017 (2012) (unpublished opinion). At a new trial in November 2014, a jury again found Botner met commitment criteria. CP 1884. Notice of appeal was timely filed. CP 1888.

2. Substantive Facts

a. Botner's History

Born in 1973, Botner, whose correct name is Bower, had a troubled childhood and adolescence. RP⁴ 311-14. He was in trouble with the law beginning at age 9 when he dropped a rock from an overpass onto the windshield of a passing car. RP 314. As a youth he also stole bicycles and candy bars and threw a rock at a bus window. RP 313-14.

⁴ RP refers to the report of proceedings from the 2014 trial unless otherwise specified.

Eventually, he also stole car stereos. RP 314-16. At age 13 or 14 he resisted arrest and was sent to juvenile detention for the first time. RP 314-16. He has used drugs nearly his entire life and has very little work history. RP 313-14. Now age 41, Botner testified he has had numerous sexual encounters with women, but no serious relationships. RP 396.

At age 15, he was convicted of indecent liberties with a younger cousin. RP 316-17. When he was 14 and she was six or seven, Botner testified, he touched her genitals, probably twice. RP 316-17. He was again sent to juvenile detention. RP 316-37. Before the age of majority, Botner was also convicted of escape (for not returning to serve the final part of his sentence) and two counts of vehicle prowl. RP 318-19.

At age 17, he testified, he began having thoughts of raping and hurting women. RP 319. These seemed to appear in conjunction with feelings of anger and hatred and he was bothered by them. RP 319. Nevertheless, eventually, he went out looking for someone to sexually assault. RP 320.

In 1991, when he was 18, Botner saw a woman enter a bathroom in Spokane's Riverfront Park. RP 320. He followed her in and grabbed her neck from behind, intending to rape her to get out his anger. RP 320-22. He admitted he was sexually aroused by the attack, or possibly simply by the power and control he was able to exert. RP 322. When the woman

struggled and screamed, he left. RP 320-21. He was arrested seven months later and served six months for unlawful imprisonment. RP 320, 322.

Three or four months after his release at age 19, in February 1992, Botner attacked a woman at Spokane's Adult Education Center. RP 324-25. Again, he testified, he was looking for someone to sexually assault. RP 325. When he saw the woman come out of the restroom, he wrapped an electrical cord, which he had brought with him for that purpose, around her neck and dragged her backwards into the bathroom. RP 325-27. When he picked her up and placed her on the toilet, she started to scream, so he ran out. RP 329. He denied intentionally injuring her face or being the cause of the bruises and blood found on her. RP 330-31. A couple of days later, Botner was arrested after his fingerprints were found on the bathroom stall. RP 331. He pled guilty to attempted first-degree rape and was sentenced to 110 months. RP 331.

In prison, Botner successfully completed a voluntary sex offender treatment program. RP 370, 372. He also got in fights and tested positive for illegal drugs. RP 332. He admitted that use of drugs and alcohol was one of the risk factors identified in his treatment. RP 373. Nevertheless, he began using methamphetamine about six months after his release. RP 376. He was released April 2, 2001. RP 335.

Botner testified it was after his release from prison in 2001 that he began occasionally dressing as a woman, only when he was alone. RP 373. Although he objected to the characterization, Botner admitted that isolation was also one of the risk factors identified during his sex offender treatment program. RP 373-74. He also masturbated to fantasies of rape, even though he had learned in treatment that doing so tended to reinforce these thoughts. RP 375-76. He admitted having homicidal thoughts but testified these were non-sexual thoughts about people he actually knew and who had angered him. RP 376.

After release, Botner also participated in weekly treatment aftercare meetings for his sex offender treatment, but has had no treatment since then. RP 397. He continued using marijuana and methamphetamine. RP 334. After four or five months, he returned to jail for violating his community custody conditions. RP 336. Over the next few years, he was arrested four or five more times and served a little over 300 days in jail for additional violations. RP 340.

He also served a six-month sentence for failing to register as a sex offender and one year and a day for assault and theft at his workplace. RP 341-45. He was released January 31, 2005. RP 345. He began using methamphetamine again as soon as he was released. RP 346. He also was

found in violation of his community custody again in 2005 and 2006 for having a knife and a club and for testing positive for drugs. RP 347-49.

In July 2006, Botner was living in an apartment in downtown Spokane, using methamphetamine and marijuana, and occasionally dressing as a woman. RP 377. In various places around town, he stashed duffle bags with sex toys, women's clothing, pornography, wigs, make-up, and collage "projects" for when he was high. RP 379.

In July 2006, a security guard at Gonzaga University received a call about women's clothing lying by a trail along the river at the edge of campus and went to check it out. RP 684-85. In what he described as an encampment hidden away between the trail and the river, he found a duffle bag belonging to Botner and a note in Botner's handwriting. RP 378, 384, 687-91.

Botner testified the note was a sex fantasy listing items that could be used in sexual activity: a dildo, a pocket pussy, two sexy outfits, handcuffs, vibrators, flavored lubricant, a blow-up doll. RP 387. The document reads:

Go in dressed as a woman, get all items you wish, smash clerk in head with black jack. Then lock door, tie up clerk, tape mouth shut, get all money and novelty items you desire, get clerk's keys and load items in car. Load clerk last. Go to park and have your way with the whore. Mags, novelties, sexy clothing, whole maniquin. Take clerk to river and continue to have way with, take car to remote area

and completely douse inside with gas and set on fire, wipe down outside of car for fingerprints. Dismember body with a saw, go buy cheap saw

RP 388-89.

On July 30, 2006, Botner was riding his bicycle wearing a bra stuffed with socks and a nylon stocking on his head of the type one would use under a wig. RP 392, 703, 714-15. He was three to five miles from Gonzaga University and a few blocks from a store selling pornography and adult novelty items. RP 720, 724-25. Police stopped him because it was dark and his bicycle did not have a headlight or rear deflector. RP 709-10. As police approached, he tossed away the hammer he was carrying because he did not want the police to see him as armed. RP 391.

He voluntarily consented to a search of his backpack. RP 717-18. Police found pornography, sexy toys, women's clothing, a women's wig, women's underwear, rubber gloves, a rope, and condoms. RP 393-94. When the officer pulled out the rubber gloves, Botner told him, "You'd be surprised on how you get caught." RP 718. He was not arrested, but knowing the police would contact his community custody officer, Botner quickly went home, packed his things, and did not return. RP 395-96.

On August 11, Botner was sanctioned 180 days for violating his community custody. RP 399, 748. During that time, the State filed a

petition to have him civilly committed under chapter 71.09 RCW. RP 399. He has been incarcerated ever since. RP 399.

Botner testified he does not believe additional sex offender or drug treatment would help him because drug use and sexual offending are choices. RP 397-99. He does not believe he would reoffend if released because in the past he had been released and made the choice not to reoffend. RP 398. He testified that, if released, he would move to Arizona to live with his step-father. RP 398.

b. Frye Hearing

Botner challenged the admissibility at trial of Dr. Harry Hoberman's testimony about the Structured Risk Assessment – Forensic Version (SRA-FV). CP 246. The SRA-FV is a tool for assessing dynamic, *i.e.* changeable, risk factors pertaining to sex offense recidivism. RP 517-18. The parties stipulated to a hearing based solely on the written briefing and the transcripts of expert testimony in a different case, which were made part of the record below. CP 1697-99.

At the prior hearing, Hoberman and Dr. Amy Phenix testified in support of their use of the SRA-FV despite significant limitations and criticisms by, among others, Dr. Brian Abbott who also testified. CP 1559-60, 1616, 1666. The testimony showed the SRA-FV was only recently (in 2013) published in a peer-reviewed journal. CP 1557, 1653.

The study designed to validate it used a split sample, *i.e.* a different segment of the same group used to develop the instrument, so it has not yet been independently replicated on a completely separate population. CP 1552-53, 1653, 1664. So far it has shown relatively low inter-rater reliability, meaning that different persons using the instrument may come up with different results. CP 1547, 1611-12.

After reviewing the stipulated documents, the court found all three experts credible and ruled the Frye standard was satisfied. CP 1701, 1703. The trial court entered the following findings and conclusions:

(1) “The SRA-FV is generally accepted within the community of experts who evaluate sex offenders and assess their recidivism risk.” CP 1702 (FoF 10);

(2) “The use of a split sample for validation of a risk assessment instrument is supported by a scientific theory that is generally accepted in the relevant scientific community.” CP 1702 (CoL 5);

(3) “The SRA-FV is an instrument that is capable of producing reliable results and is generally accepted in the scientific community.” CP 1703 (CoL 6);

(4) “The SRA-FV satisfies the *Frye* evidentiary standard.” CP 1703 (CoL 8).

c. Expert Testimony

i. *Hoberman's Diagnoses*

Hoberman, the State's expert, evaluated Botner most recently in 2013. RP 417, 422. He diagnosed Botner with sexual sadism disorder, other specified paraphilic disorder non-consent, pedophilic disorder, and antisocial personality disorder. RP 453-54, 458, 468-69, 475.

The Diagnostic and Statistic Manual of Mental Disorders, Fifth Edition (DSM) defines sexual sadism as a paraphilia involving sexual fantasies, urges, or behavior involving the physical or psychological suffering of another person. RP 451. The paraphilia amounts to a disorder when it is upsetting to the person or causes harm to the person or to others. RP 451-52. Hoberman based his diagnosis of Botner on Botner's commission of two attempted rapes in one year with what Hoberman described as more violence than necessary. RP 453-54. He also relied on Botner's statements to him that he often traded drugs for sex, which Hoberman described as behavior approximating rape. RP 442-43, 454. On cross-examination, Hoberman admitted the reports he read mentioned only coercion, pressure, or manipulation rather than actual force or restraint. RP 577-59. He also relied on Botner's reports of rape fantasies, admission of consensual sexual encounters involving bondage and refusal to answer when Hoberman asked if he thought about raping

women whose purses he stole. RP 442-43, 454-55. Hoberman believed this rose to the level of a disorder because Botner caused suffering to others and went to jail himself. RP 455-56.

Hoberman opined that Botner's sexual sadism disorder was a mental abnormality under the statute because it is an acquired condition that affects emotions and volition because it is tied to the sex drive, which has a very powerful influence on emotions and volitional control. RP 457. He testified that, in general, sexual sadism overcomes a person's will to resist and, in his opinion, Botner's criminal history and self-report showed that the disorder affected his emotions and volition. RP 457-58.

Hoberman also diagnosed Botner with pedophilic disorder. RP 458. He based this diagnosis on Botner's indecent liberties conviction for with his young cousin and a 2001 penile plethysmograph test (PPG) showing arousal to minors.⁵ RP 459-60, 465-66. The test showed higher arousal to the 10-17 year old age group than to adults and higher arousal to non-consensual than consensual stimuli, with the highest arousal to non-consensual scenarios with minors. RP 472. Hoberman conceded Botner was never found in possession of any pornography involving children and there was no way to know whether the stimulus for the PPG involved 10-year-olds or 17-year-olds. RP 591-93.

⁵ Hoberman also testified the PPG showed Botner was able to control his level of arousal to deviant stimuli. RP 468.

Hoberman also diagnosed Botner with other specified paraphilic disorder – nonconsent. RP 468-69. However, he explained this is not really a separate diagnosis from sexual sadism, which describes a more extreme subset of the same disorder. RP 469-70.

Hoberman also testified Botner met all seven criteria for antisocial personality disorder (APD), only three or four of which are required for a diagnosis. RP 475, 484. He testified that the sexual sadism disorder, other specified paraphilia, and APD each qualifies as a mental abnormality under the statute because they predispose Botner to criminal sexual acts rendering him a menace to the health and safety of others. RP 491-93.

Hoberman testified paraphilias tend to be chronic and pedophilia and sadism are especially likely to persist over time, almost to the same extent as sexual orientation. RP 471. Hoberman testified Botner continues to suffer from all three paraphilic disorders because he has had no effective treatment, there is no reason to believe his arousal patterns would change, and the note he wrote in 2006 indicates those arousal patterns are continuing. RP 544-48.

Hoberman also diagnosed Botner with transvestic disorder, relevant only because the presence of multiple paraphilias increases the risk of re-offense. RP 472-74. Hoberman considered but rejected

diagnoses of narcissistic personality disorder and borderline personality disorder. RP 485-87.

Psychopathy, according to Hoberman, is essentially a subset of APD, rather than a separate diagnosis, and is indicative of much greater risk of future antisocial behavior. RP 488. Botner's score on the Psychopathy Checklist-Revised (PCL-R) was 35, where the scale runs from zero to 40, the average male scores an 8, and the average male prisoner scores a 22. RP 488-89. Botner's score places him in the upper first percentile. RP 488-89.

ii. *Hoberman's Risk Assessment*

Hoberman employed numerous methods to assess Botner's risk of recidivism and arrive at the conclusion that he would, more likely than not, commit additional sexually violent offenses if not confined.

First, he discussed a 2004 Canadian study showing that 24 percent of 4,000 sex offenders committed a new offense over 15 years. RP 497. The rate was doubled for those with more than one prior sex offense conviction. RP 498. From this study and Botner's convictions for indecent liberties and attempted rape, Hoberman concluded Botner's risk of reoffending was 40 to 50 percent. RP 497-98. He opined that since Botner had targeted strangers in the past (making his offenses predatory), any future offenses would likely target strangers as well. RP 500.

Hoberman next considered a Washington study of those considered for civil commitment under chapter 71.09 RCW but where no petition was filed. RP 498-99. That study found that 29 percent committed a new sex offense over the next six years. RP 498-99.

Hoberman also used four different actuarial instruments to gauge Botner's risk: the Static-99, the Static-99R, the Static-2000R, and the Sex Offense Risk Appraisal Guide (SORAG). RP 503-05. The Static-99 showed a 52 percent chance of being convicted of a new sex offense over 15 years. RP 503-04. The Static-99R, which accounts slightly better for aging, calculated a 42 percent chance of reconviction over 10 years. RP 504. (To choose a reference group and arrive at the 42 percent score on the Static-99R, Hoberman used the results of three methods of dynamic risk assessment, including the SRA-FV. RP 626-27). The Static-2000R placed Botner in the moderate-to-high risk category, with a 46 percent probability of sexually reoffending within 10 years. RP 504.

Finally, the SORAG, which measures violence in general rather than only sex offenses, shows Botner as having a 100 percent chance of committing a violent offense over 10 years. RP 504-06. Hoberman clarified he did not believe this score meant Botner's risk of re-offense was 100 percent. RP 623. Hoberman explained that despite its lack of a focus on sex offenses, the SORAG was nonetheless relevant to Botner's

risk of sexually reoffending because many sex offenses are not reported or are charged or pled as non-sexually-motivated violent crimes. RP 504-05. As an example, he cited Botner's conviction for unlawful imprisonment, which he later admitted was, in fact, sexually motivated. RP 504-05.

Hoberman explained that actuarials cannot identify the risk for a given individual – only for the group with the same risk factors. RP 507-08. However, he noted that all four actuarials pointed in the direction of at least moderate risk, with three of the four indicating high risk, over time periods much shorter than Botner's expected 43 remaining years of life expectancy. RP 510-11. That fact and the general underreporting of sex offenses led him to opine that Botner would, more likely than not, commit a new sexually violent offense over the course of his life if released. RP 509-11.

Hoberman also relied on two forms of structured clinical judgment in assessing Botner's risk: the PCL-R and the Sexual Violence Risk-20 (SVR-20). RP 515. Hoberman testified Botner has 19 of the 20 risk factors identified by the SVR-20. RP 516-17. Particularly when combined with his PCL-R score, Hoberman testified it was his clinical judgment that Botner's risk of re-offense was high. RP 516-17.

Hoberman evaluated Botner's dynamic (i.e. changeable) risk factors using the SRA-FV and the Stable-2007. RP 518. He scored

Botner as 4.8 on the SRA-FV, which places him the category of having very high needs for treatment. RP 519-20. Botner also scored very high on the Stable-2007, which studies the presence of positive or negative social influences. RP 521-22. Hoberman concluded that both tests showed Botner had significant treatment needs that should be addressed to lower the risk of his being in the community. RP 523.

In addition to the two instruments, the SRA-FV and the Stable 2007, Hoberman also considered the collection of dynamic risk factors revealed by a meta-analysis of research on recidivism risk. RP 523-42, 627. Hoberman testified the two most significant risk factors for sexual re-offending are deviant sexual interests and antisocial or psychopathic traits; when, as in Botner's case, both are present in the same person, the risk is magnified. RP 523. He claimed prison-based treatment such as Botner completed is not very good at reducing risk, as demonstrated by the fact that almost immediately after release, Botner resumed risky behavior such as using pornography, fighting with his community corrections officer, using drugs, and frequenting areas such as parks where minors are likely to congregate. RP 524-26. He claimed this also shows Botner is not particularly amenable to standard treatment. RP 529.

He also found signs of risk in Botner's self-assessment. RP 539-40. In 2009, Botner told Hoberman his risk of reoffense was 25 percent

and he had no need for further sex offender or drug treatment. RP 539. In 2013, Botner told Hoberman his chance of re-offending was automatically 50-50, meaning either he would or he would not, but he still had no plans for any further treatment. RP 539-40. Hoberman testified Botner told him he had changed over time, but Hoberman saw similar results on psychological tests based on self-report in 1992, 2009, and 2013. RP 550-51. Because paraphilic disorders generally do not remit on their own, Hoberman explained that management and relapse prevention planning is critical. RP 541-43. Botner's risk was elevated because he has no plan for future management. RP 541-42.

Based on all the tools he used, Hoberman concluded it was more probable than not that Botner would commit future predatory acts of sexual violence if not confined in a secure facility. RP 551-52.

iii. *Hoberman's Assessment of Serious Difficulty Controlling Sexually Violent Behavior.*

Hoberman was also of the opinion that Botner's mental abnormalities and personality disorder caused him serious difficulty controlling his sexually violent behavior. RP 551-52. He opined that Botner's arousal and sexual pre-occupation caused a pressure to act on his sexual thoughts. RP 553-54. He opined Botner had difficulty resisting this pressure because he was angry, easily provoked, and had difficulty

controlling his anger and hostility toward women in particular. RP 554. Additionally, psychological testing indicated Botner was impulsive, lacked self-awareness, lacked self-control, and had difficulty planning ahead. RP 555-56. According to Hoberman, Botner's ability to control his behavior was further diminished because Botner was not ashamed, did not believe he needed help, and used drugs and alcohol, which further lowers his inhibitions. RP 557. He opined Botner was likely to commit predatory acts of sexual violence including violent and sadistic rapes against children. RP 558.

Finally, Hoberman testified that the note found on the trail and the items Botner possessed when he was stopped by the police caused him reasonable apprehension of harm to others. RP 567-68. Because there were no other written fantasies with the note, and because the note included no intervention attempt, he concluded it was not written as part of sex offender treatment, but as a plan. RP 571-72. Adding to Hoberman's concern was Botner's use of meth and failure to report to his Community corrections Officer. RP 569-71.

Hoberman opined Botner has several mental abnormalities and a personality disorder that make him more probable than not to engage in future acts of predatory sexual violence if not confined. RP 574.

d. Defense Expert

Dr. Theodore Donaldson testified on Botner's behalf. He opined there was insufficient evidence to diagnose Botner with sexual sadism because it appeared he was aroused by exerting power over another person, rather than specifically by causing pain and suffering. RP 786. He testified the diagnosis of other-specified paraphilia non-consent was invalid because there was no sign of specific arousal to non-consent as opposed to mere arousal and disregard for consent. RP 801-03.

Donaldson rejected the pedophilia diagnosis out of hand because Botner was not even 15 years old at the time of his only sex offense against a minor, and the DSM requires the person be at least 16 so that true pedophilia can be distinguished from normal adolescent experimentation and curiosity. RP 797-98.

Finally, Donaldson rejected APD as a diagnosis for anyone, declaring it to be merely a history of disruptive behavior. RP 807. Psychopathy, he acknowledged, was a valid category, but argued the PCL-R was not a valid instrument for identifying persons falling into this category. RP 809-10, 848. As far as risk assessment, Donaldson argued the actuarial instruments can only predict the average rate of re-offense for a group; it can never reveal anything meaningful about the future conduct of an individual. RP 813-15, 831-32. If the rate of reoffense for a group

is 31 percent, then out of 100 people, 31 reoffend and 69 do not. RP 884. But an individual either recidivates or does not, so the true risk is either zero or 100 percent. RP 883.

e. Closing Arguments

The State began its closing argument focusing on Botner's criminal history, arguing he re-offended despite increasing societal sanctions and learned from his mistakes. RP 961-66. The assistant attorney general (AAG) then moved on to discuss the testimony about mental abnormalities. She told the jury:

Now, as you heard from the testimony from both doctors that mental abnormality is a legal term, all right? It's your job, it's the jury's job, to determine whether the pedophilic features, whether the pathology of Mr. Botner qualifies as a mental abnormality.

The testimony from the doctors is intended to help you reach that conclusion. It's a legal conclusion. You're not being asked to find any particular diagnosis. You're not trying to figure out which one he might be diagnosed with. That's not your job. You're just supposed to take the information that you found helpful from their testimony that you found credible and apply it to the law.

He also told you how the DSM is a clinical tool it's not meant to be used in the legal world. It's not a perfect fit with the law. It's the best thing, though, that the State and -- both the State and the defense have to provide you to answer that legal question

RP 967 (emphasis added). The AAG then discussed the support for Hoberman's diagnoses and moved on to Donaldson's testimony. RP 968-

70. After thoroughly critiquing Donaldson's methods, motives, and conclusions, the AAG argued, "That's up to you to decide, but it seems awfully hard to believe when it's clear to anyone who's heard the evidence in this case that there is something seriously wrong with Mr. Botner. There's just no doubt about that." RP 976 (emphasis added). The argument concluded with discussion of the various risk assessments, the note, and the bicycle stop. RP 976-80.

Botner's attorney urged jurors to set aside their emotions and focus on the evidence. RP 982-83. She argued Botner could not be committed solely based on his history of three sex offenses, "There's no check the box committed a sex offense. He committed three sex offenses. Therefore, you're done. It's not that easy." RP 983.

Regarding the mental abnormality or personality disorder, she argued, "what we're talking about there is mental disorders, right? It's the DSM-5. Both of the experts talked about it. Both of them made reference to it, made reference to the fact it's not a perfect fit, right, but it's what we have." RP 985. She went on to question the evidence for Hoberman's diagnoses. RP 985-99. For example, she argued, "the specific reason you're directed to look at to make this particular diagnosis is that the arousal is from physical or psychological suffering of another. When you go and you compare that definition which comes right out of the DSM-5

with the known facts of these cases, it doesn't fit." RP 987. Botner's counsel also argued there was no evidence he had serious difficulty controlling his behavior and the actuarial statistics are only valid for groups, not individuals. RP 998-1003.

In rebuttal, the AAG argued the jury need not find any particular diagnosis in order to commit:

You heard his counsel argue there's a very limited universe here of evidence about his sexual offending and why he might offend, but I want to remind you that mental abnormality and personality disorders are a construct of the law.

You did hear testimony from both doctors to try to help you understand how psychology and the law fit together. You're not required when you look at these instructions, as Ms. Jany already told you, you're not required to find any particular paraphilia or any particular named sexual psychosexual pathology, but you heard a lot of testimony about that to help you determine whether or not there is, in fact, a mental abnormality.

RP 1012-13 (emphasis added). After again discussing the evidence for Hoberman's diagnoses and the reasons why actuarial instruments may underestimate risk, the AAG told the jury Botner was 100 percent likely to re-offend. RP 1012-13. Apparently commenting on Donaldson's testimony, she argued:

You heard testimony like that, which informs you and educates you that most sex offenders don't reoffend. Most sex offenders don't reoffend, and Mr. Botner's not, you know, 50 percent likely to re-offend or 42 percent likely to re-offend, 75 percent likely.

He's either going to re-offend or he's not. It's either zero or a hundred, and he already beat the odds. Most sex offenders don't reoffend. Most 15 year old kids who are convicted of molesting their cousin don't re-offend, but he did. After the one offense against Heather, he was a hundred percent likely to re-offend.

Most sex offenders don't re-offend, but after he went to jail for attempting – for attacking Gina Putnam, which we now know was sexual, his likelihood to re-offend was a hundred percent.

There's no reason for you to doubt in this case based on all the evidence that you've heard that Mr. Botner if not confined to a secure facility is more likely than not to re-offend in a sexually violent way.

RP 1016 (emphasis added).

C. ARGUMENT

1. THE COURT WRONGLY ADMITTED EXPERT TESTIMONY ON RISK ASSESSMENT UNDER THE FRYE STANDARD.

The SRA-FV is a “novel dynamic risk assessment instrument.” In re Det. of Ritter, 177 Wn. App. 519, 525, 312 P.3d 723 (2013), rev. denied, 180 Wn.2d 1028 (2014). “[W]here an expert witness derives a prediction of future dangerousness in whole or part from a novel dynamic risk assessment instrument like the SRA-FV, the trial court must hold a Frye hearing on the instrument before the expert may use it at trial.” Id. Frye rulings are reviewed de novo. Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011). Reviewing courts

undertake a searching review that is not confined to the trial record. State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996).

Evidence on the SRA-FV was inadmissible under the Frye standard because the State failed to prove that Hoberman's use of it to assess dynamic risk or choose a reference group on the Static-99R actuarial was generally accepted in the scientific community. Reversal is required because there is a reasonable probability the outcome would have been different absent the error.

- a. Evidence of Risk Assessment Based on the SRA-FV Was Inadmissible Under Frye Because the Method Has Not Achieved Consensus in the Scientific Community.

Under Frye, novel scientific evidence is admissible only where (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). Both the underlying theory and the method used to implement it must be generally accepted in the scientific community. State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001), overruled on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). The existence of a "significant dispute among qualified

scientists in the relevant scientific community” renders the evidence inadmissible. Id.

The court’s task is not to determine whether a scientific method is correct; such determination is beyond the expertise of judges. State v. Sipin, 130 Wn. App. 403, 419, 123 P.3d 862 (2005). Instead, its task is to determine whether the appropriate scientific community has generally reached consensus that the method is reliable. Id. at 419-20.

There are two basic approaches to risk assessment: clinical judgment and actuarial assessment. In re Detention of Thorell, 149 Wn.2d 724, 753, 72 P.3d 708 (2003). Risk factors may be static (unchangeable) or dynamic (changeable); dynamic risk factors are either stable (changing slowly) or acute (changing quickly). Ritter, 177 Wn. App. at 523 n.4. An actuarial instrument such as the Static-99R generally measures static risk factors (with the exception of age, which is dynamic). CP 1523. The SRA-FV, on the other hand, is a structured clinical judgment tool for evaluating “stable dynamic risk factors” and integrating them with “static risk factors” considered by actuarial instruments. Ritter, 177 Wn. App. at 523. “Thus, a prediction of future dangerousness based on the SRA-FV is neither purely actuarial nor purely clinical.” Id.

The SRA-FV considers three domains of stable dynamic risk factors: “Sexual Interests,” “Relational Style,” and “Self-Management.”

The sexual interests domain includes “Sexual preferences for children,” “Sexualized violence,” and “Sexual preoccupation.” The relational style domain includes “Emotional congruence with children,” “Lack of emotionally intimate relationships [with adults],” “Callousness,” and “Grievance thinking.” The self-management domain includes “Lifestyle impulsivity,” “Resistance to rules [and] supervision,” and “Dysfunctional coping.” Id. at 523 n.4. The evaluator arrives at a score based on assessment of the dynamic risk factors present. RP 519.

The SRA-FV was first published in a peer reviewed professional journal on December 30, 2013. David Thornton & Raymond A. Knight, Construction and Validation of the SRA-FV Need Assessment, *Sexual Abuse: A Journal of Research and Treatment* (December 30, 2013).⁶ The developers of the SRA-FV authored this article. They claimed the SRA-FV scores are statistically correlated with sexual recidivism and the SRA-FV has shown significant incremental validity in improving risk assessment relative to the Static-99R. Thornton & Knight (2013) at 1, 9-12.

In Botner’s case, Hoberman used the SRA-FV in two ways. First, he used it as one of three methods for assessing Botner’s dynamic risk factors and need for treatment. RP 518-23. From Botner’s score, he

⁶ The article was attached as Exhibit E to Dr. Brian Abbott’s Declaration, which was attached as Exhibit 2 to the Respondent’s *Frye* Hearing Memorandum. CP 361-76.

concluded Botner had very high need for treatment. RP 520, 523. Second, Hoberman used that score as one of three methods that contributed to his selection of a “reference group” on the Static-99R. RP 626. The Static-99R was one of four actuarial risk instruments Hoberman used, and it contains three reference groups to choose from: routine corrections, pre-selected for treatment, and high risk/high needs. RP 503-04, 626. According to Hoberman, Botner’s SRA-FV score placed him in the “high needs” reference group for the Static-99R, resulting in a 42% probability of being reconvicted of a sex offense over 10 years. RP 504.

The State did not meet its burden of showing a lack of significant dispute among experts that the SRA-FV was a reliable method of doing what it claims to do, for either of Hoberman’s applications of the test. The scientific debate regarding the SRA-FV continues on several fronts including validity (i.e. whether the instrument does what it purports to do) and inter-rater reliability (i.e. whether different persons applying the instrument obtain similar results).

b. Use of the SRA-FV to Select a Static-99R Reference Group Has Not Been Generally Accepted in the Scientific Community.

Hoberman, testifying for the State, acknowledged the 2013 Thornton article does not address using the SRA-FV to choose a reference group for

the Static-99R. RP 631; CP 1426-27. There is nothing published or peer reviewed on this use of the SRA-FV. CP 1423, 1571-72, 1622-23.⁷

There is a peer-reviewed publication, authored by someone who did not develop the SRA-FV, which addresses the validity of using the SRA-FV to choose Static-99R recidivism estimates: Brian Abbott, The Utility of Assessing “External Risk Factors” When Selecting Static 99R Reference Groups, Open Access Journal of Forensic Psychology 5, 58-118 (2013).⁸ Dr. Abbott concluded such a use is scientifically unjustified and leads to erroneous results. Abbott (2013) at 103-04. Abbott discovered “clinicians cannot rely upon the evaluatee’s total dynamic risk score to select a single Static-99R reference group.” Id. at 99.

According to Abbott, those who use the SRA-FV score to choose which recidivism estimates to use for the Static-99R assume that the members of the different Static-99R groups have a distinct and exclusive range of scores on the SRA-FV. Id. at 97, 102. For example, Thornton, in unpublished material, teaches evaluators to do the following: if the evaluatee scores a 3.3 or higher on the SRA-FV, then use the high risk recidivism rates for the Static 99R; if the evaluatee scores between 2.4 and

⁷ Phenix claimed there was research supporting it; it simply has not been published yet. CP 1637.

⁸ This article was attached as Exhibit D to the Abbott Declaration, which is Exhibit 2 to the Respondent’s *Frye* Hearing Memorandum. CP 330-59.

3.2 on the SRA-FV, then use the preselected for treatment group rates; and if the evaluatee scores a 2.3 or below on the SRA-FV, then use the routine rates. Id. at 93-94 (Table 2) and 99-100 (Table 4).

The validity of this procedure assumes all sex offenders in the high risk group would score a 3.3 or higher on the SRA-FV; all members of the preselected for treatment group would score between a 2.4 and a 3.2; and all members of the routine group would score a 2.3 or lower. Id. But Thornton did not ever actually score the SRA-FV on each member of the respective Static-99R groups. Id. at 95. Instead, he only scored a single sample of the high risk group. He then used that data to “statistically contrive” a Static-99R reference group selection model. Id.

According to Abbott, Thornton’s research suffers from a fatal flaw. If evaluators are to use a risk assessment instrument to select Static-99R reference groups, there must be three ranges of scores that are mutually exclusive, one for each Static-99R reference group. Id. at 93-94. This is not the case when evaluators use the SRA-FV to choose Static-99R reference groups. Abbott analyzed the raw data from the Static-99R developers and found that the members of the different Static-99R recidivism groups had a variation of SRA-FV scores and those SRA-FV scores overlapped all three of Thornton’s proposed cut scores. Id. at 97-100 (Tables 3 and 4). In short, the SRA-FV score is not a reliable method

of doing what Hoberman did in Botner's case - selecting a Static-99R reference group.

A recent article by the Static-99R authors, including Thornton, as much as conceded the lack of general acceptance for this use of the SRA-FV. The article recognized, "empirically combining static scores with other measures has the effect of creating a new actuarial measure, which needs to be evaluated on its own merits. There has been much less research on these new combined measures than there has been for Static-99R." Karl Hanson, et al., What Sexual Recidivism Rates Are Associated With Static-99R And Static-2002R Scores? 15 *Sexual Abuse: J. Res. & Treatment* 1, 25 (2015).⁹ While "[p]revious research indicates that there are a number of factors that add incrementally over STATIC scores . . . and that these factors should be considered in comprehensive risk assessments," "the ability of evaluators to improve accuracy by choosing reference groups has yet to be empirically tested." *Id.* at 29.

- c. The SRA-FV Is Not Generally Accepted in the Scientific Community Because It Has Not Been Cross-Validated or Replicated on an Independent Sample.

On a more general level, Abbott asserts that construct validity — whether the instrument actually measures what it says it measures — has

⁹ An "in press" version of the article is available here: http://www.static99.org/pdfdocs/Research-Hanson_Thornton_Helmus_Babchishin-2015.pdf (accessed August 10, 2015).

not been established for the SRA-FV. CP 1676-77. The SRA-FV was validated on a split sample of offenders (a sample taken from the same original Bridgewater population on which the SRA-FV was originally developed). CP 1553. Hoberman and Phenix testified use of a split sample for validation was not uncommon, but agreed it would have been preferable to cross validate on a different sample by different investigators, rather than a subset of the same sample by the same investigators. CP 1553, 1617.

Abbott pointed out that Thornton's results (the SRA-FV validation study) have not been replicated. CP 1664, 1666. This means, as Dr. Abbott explained, "[W]e have no idea if it will work in any other group of sex offenders." CP 1666. The SRA-FV items have never been proven by an acceptable statistic means to actually measure long-term vulnerabilities. CP 1424-25. The SRA-FV does not accurately predict sexual recidivism in terms of probability of risk; it has a 23 percent error rate in terms of misidentifying a nonrecidivist as a likely reoffender. CP 1668.

The lack of cross-validation on an independent sample of offenders taken from a different population is significant. CP 1552-53, 1653, 1664.¹⁰ Thornton, the developer of the SRA-FV, recognized "the present study has a number of limitations that must be addressed in future

¹⁰ Phenix testified the SRA-FV has "one cross-validation on a completely different sample of sex offenders," and while it is desirable to have repeated validation, she currently had no reservations about using it. CP 1616. She maintained the split sample process was common. CP 1617-18.

research. First, as we have noted, because the present results are limited to a particular population, cross validation of the scale on other populations is essential.” Thornton & Knight (2013) at 14.

Hoberman also conceded that the 2013 Thornton and Knight article acknowledged it was possible that the SRA-FV score may not, in a different sample, be a reliable measure of actual needs or risk. CP 1580. Phenix testified the SRA-FV is not designed to provide recidivism rates. CP 1619. She conceded there are no studies replicating the 2013 finding that the SRA-FV adds to the predictive validity of the Static-99R. CP 1628.

Thornton describes the SRA-FV as a “newly designed instrument.” Thornton & Knight (2013) at 1. He could only hypothesize that the results would generalize to other sex offenders: “it seems reasonable to hypothesize that the present results will generalize to a similar range of settings. Definitive evidence about this will, however, depend on new studies carried out with other samples.” Id. at 12.

Another reason it would be important to cross-validate on a different population is that, in subsequent validation studies, predictive validity tends to decrease.

It is well known that predictive validity tends to be stronger in initial validation studies than in cross validation studies, a pattern often referred to as shrinkage. Shrinkage occurs

because prediction equations capitalize on chance characteristics of the validation sample to achieve optimal prediction, and these same characteristics are not likely to be present to the same degree in a new sample.

Blair, Marcus & Boccaccini, Is There Allegiance Effect for Assessment Instruments? Actuarial Risk Assessment as an Exemplar, *Clinical Psychology: Science and Practice*, Vol. 15 Issue 4 at 349 (Dec. 2008). Blair studied three actuarial tools used in SVP proceedings (SORAG, VRAG, and Static 99) and found the predictive value for each instrument was highest in the initial validation studies (conducted by the developer of the instrument). Id. The value decreased in cross validations studies by the developers of the instruments, and further decreased in cross validation studies by independent researchers. Id.

One reason for this bias is that instrument authors may be unwilling to publish studies showing poor performance of their instruments. Id. Other researchers have discovered similar results. Singh, Grann and Fazel found evidence of a significant authorship bias specifically to risk assessment studies published in peer-reviewed journals. Singh, Grann & Fazel, Authorship Bias in Violence Risk Assessment? A Systematic Review and Meta Analysis, *PLOS ONE*, Vol. 8 Issue 9 (Sept. 2013). Such concerns illustrate the problem of treating the SRA-FV assessment as a reliable method accepted in the scientific community when it is still so new.

The court concluded, “The use of a split sample for validation of a risk assessment instrument is supported by a scientific theory that is generally accepted in the relevant scientific community.” CP 1702 (CoL 5). But Hoberman and Phenix, the State’s experts, did not testify to that effect. The State otherwise did not meet its burden of showing a lack of significant dispute among experts that use of a single split sample is sufficient to validate a risk assessment instrument. The trial court erred in concluding otherwise.

d. The SRA-FV Is Not Generally Accepted in the Scientific Community Because It Has Not Been Shown to Be Sufficiently Reliable.

Inter-rater reliability is the probability that experts will independently arrive at the same score when they apply the same instrument to the same offender based on the same available information. CP 1684. When an instrument lacks inter-rater reliability, it is an unreliable measure of risk because one cannot be sure of the subject’s actual score on the instrument. CP 1685. “[T]he lower the reliability of a given test, the lower the limit on the validity of the construct being measured. It should thus be no surprise that tests with reliability coefficients below .80 have been criticized for containing excessive error variance and, hence, poorer validity.” Kirk

Heilbrun, The Role of Psychological Testing in Forensic Assessment, Law and Human Behavior, vol. 16 No. 3 at 265 (1992).¹¹

The accepted minimum level of reliability in the field of psychology in a forensic setting is .80 to .90. CP 1686. It has been recommended that an instrument achieve a .8 or greater inter-rater reliability for forensic purposes when an individual's liberty is at stake. CP 1686.

One of the authors of the 2013 Thornton & Knight article trained, supervised and consulted with individuals who scored the SRA-FV. Thornton & Knight (2013) at 8. Even with these added safeguards to ensure reliability, the SRA-FV had low reliability: a .64 rating for a single rater working alone and .78 for two raters working together. Thornton & Knight (2013) at 9; CP 1564. Thornton acknowledged "The results of the study do raise a particular concern about the SRA-FV. The observed inter rater reliability was lower than desirable." Thornton & Knight (2013) at 13. In unpublished research, the SRA-FV could only muster a .55 rating. Abbott (2013) at 96; CP 1563.

¹¹ Hoberman argued Heilbrun's conclusion is not widely shared, and the .8 standard would not be met by most other widely used instruments and cannot be applied to risk assessments which are necessarily different from tests. CP 1565-66. He suggested .7 would be adequate reliability for risk assessment under a study by Mills et al in 2011. CP 1569. Two of the three studies of the SRA failed to meet even this lower standard. CP 1563, 1564. Hoberman conceded the low inter-rater reliability could occur because the SRA-FV is not accurately measuring what it purports to measure. CP 1580.

Hoberman and Phenix testified the relatively low inter-rater reliability of the SRA-FV was a concern. CP 1547, 1611, 1626. Hoberman and Phenix nonetheless justified use of the SRA-FV on the ground that the low inter-rater reliability could be due simply to the age of the sample or the training of the raters. CP 1548-49, 1613-14. Abbott believed the instrument is flawed because the rating criteria are inherently subjective. Abbott (2013) at 95. The low inter-rater reliability showed the SRA-FV was not doing a good job of measuring what it purported to measure. CP 1425. Due to the low inter-rater reliability, which scientists on all sides agreed was a concern, the court erred in concluding the SRA-FV was generally accepted in the relevant scientific community.

- e. The Testimony Shows a Lack of Consensus in the Scientific Community Regarding Use of the SRA-FV.

Despite the above-described limitations and concerns, Dr. Hoberman believed the SRA-FV is generally accepted among the State's evaluators for civil commitment in various states. CP 1573-74. Phenix testified she has testified in court about the SRA-FV for four years and it has been widely accepted. CP 1638. She routinely presents about the SRA-FV in training presentations. CP 1639-40. However, Hoberman and Phenix agreed they had not seen it used a defense evaluation even once in past twelve months. CP 1575, 1629-30.

In February 2011, California adopted the SRA-FV as its official dynamic risk assessment instrument for evaluating sex offenders' future dangerousness. Ritter, 177 Wn. App. at 524. But in September 2013, California switched to the Stable-2007/Acute-2007 instrument. Id.¹² The SRA-FV is used at the federal level under the Adam Walsh Act. CP 1640.¹³ But to what degree remains unspecified.

Abbott reviewed 60-65 SVP-type evaluations from California, in the past 12 months. CP 1434. About 20-25 evaluators were involved. CP 1434. He estimated that approximately half of the government's evaluators used the SRA-FV to select the reference group for the Static-99. CP 1434-35. Of the 20 or so defense experts that Abbott had communicated with, none used the SRA-FV. CP 1435.

There is still a significant debate that this new instrument employs a reliable methodology to predict risk of reoffense. Scientific evidence is inadmissible "[i]f there is a significant dispute among qualified scientists in the relevant scientific community." Gore, 143 Wn.2d at 302.

¹² Phenix claimed the Stable-2007 instrument replaced the SRA-FV because it was targeted to the California population at issue (parolees/probationers), and that many California evaluators still use the SRA-FV. CP 1621-22.

¹³ Under the Adam Walsh Child Safety and Protection Act, the federal government may seek the civil commitment of certain individuals determined to be a "sexually dangerous person." 18 U.S.C. § 4248.

Division Two of the Court of Appeals recently held the SRA-FV passes the Frye test. In re Detention of Pettis, ___ Wn. App. ___, 352 P.3d 841 (2015), petition for review pending (No. 91876-7). Division Three is not bound by Division Two's decision. McClarty v. Totem Elec., 119 Wn. App. 453, 469, 81 P.3d 901 (2003), rev'd on other grounds, 157 Wn.2d 214, 137 P.3d 844 (2006) (the decision of a division is not binding on another division); State v. Schmitt, 124 Wn. App. 662, 669 n.11, 102 P.3d 856 (2004) ("We need not follow the decisions of other divisions of this court."). The decisions of other divisions are rejected if unpersuasive. McClarty, 119 Wn. App. at 469; State v. Simmons, 117 Wn. App. 682, 687, 73 P.3d 380 (2003), aff'd, 152 Wn.2d 450, 98 P.3d 789 (2004).

Division Two's decision in Pettis should be rejected. Its conclusion that SRA-FV is generally accepted in the scientific community is flawed. This is the basis for its conclusion:

Dr. Phenix testified unequivocally that the tool was widely accepted in her field due to its good predictive accuracy. And there does not appear to be a *significant* dispute about the acceptance of the SRA-FV. There is some criticism from Dr. Abbott and Dr. Fisher, but the Frye standard does not require unanimity.

Pettis, ___ Wn. App. at ___, 352 P.3d at 848. Division Two reduced the number of scientists in the field that criticized the SRA-FV to two people. There was nothing in the record to rebut Phenix's testimony that the SRA-

FV was widely accepted. And from that, Division Two concluded the instrument was generally accepted.

The record in Botner's case is different. Of the 20 or so defense experts that Abbott was aware of, none used the SRA-FV. CP 1435. Only about half of the state evaluators he had reviewed during the past year from California used the SRA-FV. CP 1434. A general consensus has not been reached. And, as discussed above, there is a significant dispute about the SRA-FV's validity as an accurate predictor of reoffense.

f. The Error Is Prejudicial Because It Impacted a Material and Disputed Issue in the Case.

Reversal is required when there is a reasonable probability that, but for the Frye error, the outcome of his trial would have been different. Sipin, 130 Wn. App. at 421. Improper admission of evidence constitutes harmless error only if the evidence is of minor significance in reference to the evidence as a whole. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Expert testimony on the SRA-FV cannot be considered of minor significance in this case.

The two sides presented dueling expert opinions on whether Botner was likely to reoffend. Hoberman relied on the SRA-FV as an integral part of his risk assessment involving dynamic risk factors for the jury. RP 518-20, 629. Instead of a pure clinical evaluation of dynamic

risk factors, for which reasonable minds could differ, the State was able to impress the jury with a structured calculation of risk involving those factors. Hoberman admitted that he used the SRA-FV to choose the “high needs” reference group for Botner, and that if he had chosen another group, the 42% probability of re-offense would have been reduced. RP 626, 629. Further, the SRA-FV allowed Hoberman to opine Botner was more likely than not to reoffend, despite the fact that the Static-99R score, standing alone, did not place him in a reference group that was more likely than not to reoffend. RP 504, 511. The jury may have placed particular weight on this risk assessment tool when the jury should not have been allowed to consider it as evidence at all. Reversal is required because the outcome of the trial might reasonably have been different if the trial court had excluded the challenged evidence. Sipin, 130 Wn. App. at 421.

2. BOTNER’S COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO INFLAMMATORY TESTIMONY THAT UNDER THE SORAG, THE PROBABILITY OF REOFFENSE WAS 100 PERCENT.

Those subject to civil commitment under chapter 71.09 RCW are entitled to constitutionally effective counsel, reviewed under the same standard as criminal proceedings. See In re Detention of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)); see also RCW 10.101.005 (“The legislature

finds that effective legal representation must be provided for indigent persons . . . consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.”). Effective assistance of counsel is necessary to ensure a fair and impartial trial. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); State v. Ermert, 94 Wn.2d 839, 849, 621 P.2d 121 (1980). The touchstone of ineffectiveness is whether the fairness of the proceedings has been so undermined that the court no longer has confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Defense counsel’s failure to object to irrelevant and unfairly prejudicial evidence may constitute ineffective assistance of counsel. State v. Saunders, 91 Wn. App. 575, 578-81, 958 P.2d 364 (1998). To demonstrate ineffective assistance based on counsel’s failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. Id. at 579.

Psychiatric and psychological science is not in a position to determine with certainty whether a given person will reoffend. RP 507-08.

Hoberman admitted as much at trial. Id. Nevertheless, he was allowed to testify to the results of the SORAG, an actuarial instrument which calculated Botner's risk of reoffense at 100 percent. RP 506. Counsel was ineffective in failing to move to exclude this evidence that was far more inflammatory and prejudicial than probative of actual risk.

- a. Evidence of a 100 Percent Risk of Re-Offense Was So Inflammatory that an Objection Would Likely Have Been Sustained and It Was Unreasonable Not to Object.

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” State v. Miles, 73 Wn.2d 67, 70-71, 436 P.2d 198 (1968) (citation omitted). Prosecutors are not given carte blanche to introduce every piece of admissible evidence where that evidence is inflammatory and unnecessary. State v. Crenshaw, 98 Wn.2d 789, 807, 659 P.2d 488 (1983). Even relevant evidence is inadmissible when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403;¹⁴ State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

¹⁴ ER 403 provides in full: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

“When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” State v. Powell, 126 Wn.2d 244, 265, 893 P.2d 615 (1995). The danger of unfair prejudice exists whenever a piece of evidence tends to arouse an emotional or confused response by the trier of fact. State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). The danger of unfair prejudice also exists when the evidence tends to suggest a decision on an improper basis. State v. Haq, 166 Wn. App. 221, 261, 268 P.3d 997, rev. denied 174 Wn.2d 1004 (2012) (quoting State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)). Put another way, there is a danger of unfair prejudice when the evidence has a tendency to side-track the truth-finding process. State v. Hudlow, 99 Wn.2d 1, 12-14, 659 P.2d 514 (1983).

Testimony about an actuarial purporting to predict recidivism at 100 percent has a tendency to side-track the truth-finding process. It should go without saying that the current state of psychological and psychiatric science is not capable of predicting with 100 percent certainty who will reoffend. As Hoberman admitted at trial, actuarials can only predict results for a group of persons with characteristics similar to those of a given individual. RP 507-08. They cannot define a given individual’s risk of re-offense. Id. Hoberman also explained the SORAG measures all violent offenses, not

merely the sexually violent offenses the chapter 71.09 proceeding is concerned with. RP 506.

Nevertheless, Hoberman testified that Botner's results on the SORAG placed him in a group of offenders whose rate of re-offense was 100 percent over 10 years. RP 506. In a trial where the ultimate question for the jury to determine is whether the person will, more probably than not, reoffend, the impact of an actuarial instrument that appears to present the jury with certainty is enormous. And the likelihood is great that the appearance of certitude offered by a 100 percent outcome on an actuarial will confuse or mislead the jury into believing that the risk is actually 100 percent. It is also likely that the emotional impact of the 100 percent risk would render the jury less careful and more inclined to simply ensure the incarceration of a person who appears guaranteed to re-offend.

Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance. State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). The strong presumption that defense counsel's conduct is not deficient is overcome where there is no conceivable legitimate tactic explaining counsel's performance. Reichenbach, 153 Wn.2d at 130. Since the goal of providing a right to counsel is to ensure a fair trial, there can be no strategic reason for failing to

object to or move to exclude inflammatory evidence that undermines the fairness of the trial.

If asked to do so, the court would likely have excluded the evidence of the 100 percent risk statistic due to its confusing and misleading nature and likely emotional impact. In determining whether evidence should be excluded due to the danger of unfair prejudice or misleading and confusing the jury, courts consider: (1) the importance to the litigation of the fact for which the evidence is offered; (2) the strength and length of the chain of inference necessary to establish the fact; (3) the availability of alternative means of proof; (4) whether the fact for which the evidence is offered is being disputed; and (5) the potential effectiveness of a limiting instruction. State v. Kendrick, 47 Wn. App. 620, 628, 739 P.2d 1079 (1987) (quoting M. Graham, Federal Evidence § 403.1, at 180-81 (2d ed. 1986)).

Washington Courts have previously upheld use of actuarial tests in general in the face of challenges under ER 403. Thorell, 149 Wn.2d 724,; In re Detention of Robinson, 135 Wn. App. 772, 146 P.3d 451 (2006); In re Detention of Taylor, 132 Wn. App. 827, 134 P.3d 254 (2006). But no previous Washington case has addressed the prejudice and jury confusion that is likely to result when an actuarial appears to establish a 100 percent certainty of re-offense.

Here, the court would likely have concluded the SORAG testimony should be excluded.¹⁵ While the risk of re-offense is an essential and disputed fact in the civil commitment proceeding, Hoberman's risk assessment also relied on three other actuarial instruments, two other structured clinical judgment instruments, and two instruments for assessing dynamic risk. RP 503, 515, 518. There were numerous, far less prejudicial bases for the State to argue Botner would, more likely than not, reoffend. And the emotional impact of a prediction that appeared to guarantee re-offense could not be cured by an instruction.

The State may argue the court would have admitted testimony about the SORAG because it formed part of the basis for Dr. Hoberman's risk assessment. This argument should be rejected. ER 705 allows an expert to relay the factual basis for an opinion in appropriate circumstances. This does not mean all information relied upon by an expert should automatically be recounted at trial. In re Guardianship of Stamm, 121 Wn. App. 830, 837-38, 91 P.3d 126 (2004). An expert can testify regarding the basis for his opinion "only if the probative value of the basis for the opinion is not substantially outweighed by its prejudicial nature." State v. Acosta, 123 Wn. App. 424, 436, 98 P.3d 503 (2004) (citing, *inter alia*, State v. Furman, 122 Wn.2d 440, 452-53, 858 P.2d 1092 (1993)). Thus, whether an expert is permitted to

¹⁵ At Botner's first trial, the court denied a motion to exclude the SORAG score on relevance grounds. CP 131-32; 8/10/2009RP 64-65.

disclose the basis for an opinion involves the same balancing of probative value and help to the jury against the risk of prejudice. With other evidence available as a basis for the State's risk argument, the court would likely have found the 100 percent risk result unduly inflammatory if counsel had made a timely objection or motion to exclude.

b. Admission of This Inflammatory Testimony that Gave the Appearance of Certitude Undermines Confidence in the Outcome.

To prevail on a claim of ineffective assistance, Botner need not show that, more likely than not, he would have been released if this testimony had been excluded. Reversal is required whenever there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. That confidence is undermined here.

As discussed above, it was reasonably probable the jury was misled by the apparent guarantee of re-offense, despite Hoberman's attempts to qualify his testimony. And even if not consciously misled, the apparent certainty of the 100 percent risk statistic was likely to unfairly color their consideration of the other evidence in the case, such as the evidence of a mental abnormality that would be required for commitment.

There were good reasons to doubt whether Botner actually has any of the State's suggested mental abnormalities or personality disorders. As Donaldson pointed out, there was no evidence Botner was specifically aroused by pain or suffering, as would be required for a diagnosis of sexual sadism. RP 786. There was also no good evidence of arousal to pre-pubescent persons after the age of 16, as would be required for a pedophilia diagnosis. RP 584-92. Regarding the diagnosis of other specified paraphilia non-consent, Donaldson pointed out that it is eminently difficult to distinguish a person who is sexually aroused by non-consent (a paraphilic rapist) from a person who is sexually aroused and does not care whether the person consents (a rapist). RP 801-03. Finally, even Hoberman implicitly conceded that antisocial personality disorder or psychopathy alone would not predispose a person to violent sexual acts: "[T]here are some people who are very psychopathic, but not necessarily criminal. Sometimes people refer to them as politicians." RP 490-91.

Moreover, the State's closing argument only exacerbated the prejudice from the inflammatory actuarial testimony. In closing, the State argued Botner's risk was actually 100 percent because he had, in the past, re-offended. RP 1016. This argument compounded the prejudice from Hoberman's testimony about the 100 percent score on the SORAG and made

it more likely the jury would be misled or unduly swayed by their emotional reaction to the 100 percent risk statistic.

3. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE STATE'S MISCONDUCT IN SUGGESTING THE JURY COULD INVENT ITS OWN DIAGNOSIS OF MENTAL ABNORMALITY.

A prosecutor may not misstate the law and thereby mislead the jury. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). It is misconduct for the State to argue facts that are not in evidence during closing argument or encourage the jury to reach a verdict based on speculation and conjecture. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); Schmidt v. Pioneer United Dairies, 60 Wn.2d 271, 276, 373 P.2d 764 (1962). Prosecutorial misconduct may deprive the respondent of a fair trial and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Although proceedings under chapter 71.09 RCW are civil, rather than criminal, Washington courts have applied the criminal standard for prosecutor misconduct. See, e.g., In re Detention of Gaff, 90 Wn. App. 834, 954 P.2d 943 (1998).

In a civil commitment proceeding under chapter 71.09 RCW, due process, as well as statutory mandate, requires the jury to find the existence of a "mental abnormality" or "personality disorder" beyond a reasonable doubt. RCW 71.09.020(16); 71.09.060(1); In re Detention of Halgren, 156

Wn.2d 795, 809, 812, 132 P.3d 714 (2006). But here, the AAG told the jury it need not find any particular psychosexual pathology in order to vote to have Botner committed. RP 1012-13. This was misconduct because it suggested the jury could either invent its own mental diagnosis or commit Botner without finding any mental diagnosis at all. Counsel's failure to object permitted this erroneous argument to stand and undermines confidence in the fairness of the trial.

- a. The State Told The Jury It Could Commit Botner By Finding a Mental Abnormality Other Than Those Diagnosed By The State's Expert Witness Or None at All.

During closing argument, the State told the jury that, in deciding whether Botner had a mental abnormality, the jury was "not required to find any particular paraphilia or any particular named sexual psychosexual pathology." RP 1012-13. This argument encouraged the jury to render a verdict based on speculation, rather than the facts presented to them. It misstated the law by suggesting the jury could find a different mental abnormality either based on something other than the expert testimony or without finding any actual mental diagnosis at all.

In a chapter 71.09 RCW proceeding, "psychiatric testimony is central to the ultimate question of whether a person suffer from a mental abnormality" and for this reason is helpful to the trier of fact. In re Personal Restraint of Young, 122 Wn.2d 1, 58, 857 P.2d 989 (1993); In re Detention

of Twining, 77 Wn. App. 882, 890, 894 P.2d 1331 (1995). The entire reason for expert testimony on matters requiring “scientific, technical or other specialized knowledge” is to “assist the trier of fact to understand the evidence or to determine a fact in issue.” ER 702.

Expert testimony is required when an essential element in the case is best established by information that is beyond the expertise of a layperson. Berger v. Sonneland, 144 Wn.2d 91, 110, 26 P.3d 257 (2001); Harris v. Robert C. Groth, M.D., Inc., 99 Wn.2d 438, 449, 663 P.2d 113 (1983). “Medical facts in particular must be proven by expert testimony unless they are observable by a layperson’s senses and describable without medical training.” Harris, 99 Wn.2d at 449 (citation, internal quotation marks and brackets omitted). Expert testimony is required to prove a mental abnormality under chapter 71.09 RCW because determining whether a particular person possesses a mental abnormality “is based upon the complicated science of human psychology and is beyond the ken of the average juror.” In re Detention of Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006).¹⁶ A jury does not possess the specialized knowledge or

¹⁶ See also Thorell, 149 Wn.2d at 761-62 (expert testimony providing diagnosis of mental abnormality and linking abnormality to serious lack of control, gave jury sufficient evidence to commit under chapter 71.09 RCW); In re Detention of A.S., 138 Wn.2d 898, 915 n.7, 982 P.2d 1156 (1999) (physician testimony necessary to diagnose person with “mental abnormality” in involuntary commitment proceeding under Chapter 71.05 RCW).

medical training necessary to formulate its own diagnosis of unquestionably complex psychological processes. Harris, 99 Wn.2d at 449.

Experts in chapter 71.09 proceedings regularly rely on the DSM to diagnose mental abnormalities and personality disorders. See, e.g., Twining, 77 Wn. App. at 891-92. The State's expert in this case did likewise, diagnosing Botner with four disorders under the DSM. RP 453, 458, 468-69, 475. Hoberman testified to his opinion that any one of them could qualify as an abnormality under the statute, and also mentioned several other diagnoses that he considered and rejected as mental abnormalities. RP 485, 487, 491-93. A significant part of the defense strategy involved calling those diagnoses into question, based on both the DSM criteria and other considerations. See RP 987-97 (Botner's closing argument).

In proving a mental abnormality, the State is not limited to disorders included in the DSM. In re Pers. Restraint of Young, 122 Wn.2d 1, 28, 857 P.2d 989 (1993). But the jury *is* limited to disorders supported by the expert testimony presented at trial because their decision must be based on the evidence, not their own speculation. Nevertheless, the AAG suggested jurors in this case could act as do-it-yourself psychiatrists and commit Botner even if they rejected Hoberman's diagnoses. RP 966-67, 1012-13.

The State may argue it only meant to inform the jury it need not be unanimous about *which* of Hoberman's diagnoses met the legal criteria of a

mental abnormality. See Halgren, 156 Wn.2d at 810-11. But that is not what was argued. The State argued the jury was “not being asked to find any particular diagnosis” and was “not required to find . . . any particular named sexual psychosexual pathology” at all. RP 967, 1012-13. The State strongly suggested the jury could base its verdict on its own diagnoses or simply a gut feeling that “there is something seriously wrong with Mr. Botner.” RP 976.

Jurors find facts that have been established by the testimony and the evidence. They do not conjure them from their own intuition. Inviting a lay jury to play psychiatrist is tantamount to inviting a verdict based on conjecture because a jury could do nothing but speculate about what other abnormality Botner might have. To suggest jurors may ignore the psychiatric expert testimony in finding a mental abnormality is to transform the process of jury deliberation on the evidence into an exercise in make-believe.

Whether intentional or not, the effect of this argument was to suggest that the jury could find reasonable doubt as to every one of Hoberman’s diagnoses and still find, based on their own intuition, that Botner had a mental abnormality permitting his indefinite civil commitment under chapter 71.09 RCW. This was misconduct that relieved the State of its burden of proof. Botner’s attorney should have objected and requested a curative instruction from the judge.

- b. Counsel's Performance Was Deficient in Failing to Object to this Misstatement of the Law that Encouraged Jury Speculation and Relieved the State of Its Burden of Proof.

The failure to object to this argument fell below the Strickland standard of objectively reasonable performance by defense counsel. Due process requires the jury to unanimously find a mental abnormality beyond a reasonable doubt. Halgren, 156 Wn.2d at 809, 812. There was no possible strategic reason for failing to hold the State to that fundamental burden. This was not a passing comment that might have been dismissed as un-noteworthy. The theme began during the first part of closing argument and was reprised during rebuttal. RP 966-67, 976, 1012-13. Even if the more technical argument about the incomplete match between the DSM and the statute were unobjectionable, the State's true intent with this argument became clear when the AAG argued, "it's clear to anyone who's heard the evidence in this case that there is something seriously wrong with Mr. Botner." RP 976. The State's argument opened the door for the jury to commit Botner based not on the evidence of a mental abnormality, but on a gut feeling that "there is something seriously wrong" with him.

Counsel's strategy at trial was to point out the many ways in which Hoberman's diagnoses do not to meet the DSM's actual criteria. If Botner does not have any of the testified-to mental abnormalities, he cannot be

committed. Halgren, 156 Wn.2d at 809, 812. The State's argument unfairly undermined this strategy by essentially telling the jury it could commit Botner even if it agreed with the defense's criticism of the diagnoses. There was no valid strategy in failing to object.

c. Confidence in the Outcome Is Undermined Because the State's Argument Likely Misled the Jury About What It Needed to Find to Commit Botner.

As discussed above, prejudice exists and reversal is required when it is reasonably probable that, without counsel's error, the outcome of the trial would have been different. That is the case here. First, for the reasons discussed above, if counsel had objected and requested a curative instruction, the court would likely have given one clarifying that the jury could not simply invent its own diagnosis or find a mental abnormality without any diagnosis.

Without clarification, there is a reasonable probability that the jury rendered its verdict on an improper basis. As mentioned, the defense strongly critiqued Hoberman's diagnoses on several grounds. For example, Hoberman agreed a pedophilia diagnosis requires evidence after age 16 of arousal to pre-pubescent persons. RP 584-85. But the only evidence of pedophilia that Hoberman could point to was a sex offense committed when Botner was only 14, and a PPG showing arousal to persons age 10-17, with no evidence whatsoever whether the stimulus actually involved pre-

pubescent persons, or those in their late teens who could easily be mistaken for adults. RP 584-92. It is reasonably probable the jury would reject this diagnosis. Similarly, based on Donaldson's testimony, it would be reasonable for a jury to find there was no evidence Botner was specifically aroused by pain, suffering or coercion rather than simply being indifferent to it. RP 786, 802. Based on Donaldson's testimony, the jury could reasonably conclude APD was nothing more than a history of non-conformity to social norms and is not actually a mental abnormality. RP 807. This evidence presents a reasonable probability that the jury could reject all of Hoberman's diagnoses.

That the jury nonetheless voted to commit Botner presents a reasonable probability that it did so without actually finding a mental abnormality as required by the law and due process, or by speculating about abnormalities not supported by Hoberman's testimony. Instead of one of Hoberman's diagnoses, the jury could have speculated that Botner's anger towards women or drug addiction or general pre-occupation with sex to be a mental abnormality. Instead of relying on the expert medical testimony, the jury may have improperly relied on trying to find "a common denominator among each member's individual understanding" of a mental abnormality. In re Det. of Pouncy, 168 Wn.2d 382, 391-92, 229 P.3d 678 (2010) (quoting State v. Allen, 101 Wn.2d 355, 362, 678 P.2d 798 (1984)).

A verdict that has the effect of indefinitely confining a person to a psychiatric facility, perhaps for the rest of his life, cannot stand when the finding of abnormality may have been based on juror guesswork. The failure to object to the State's misconduct during closing argument requires reversal of Botner's commitment.

5. CUMULATIVE ERROR VIOLATED BOTNER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a new trial is required when errors, although individually not reversible error, cumulatively produce an unfair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The doctrine mandates reversal if the cumulative effect of these errors materially affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even where some errors are not properly preserved for appeal, the court has discretion to examine them for their cumulative effect on the fairness of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether cumulative error denied the defendant a fair trial. Ermert, 94 Wn.2d at 848.

Here, an accumulation of errors materially affected the outcome of the trial: (1) the AAG misled the jury into believing it could find a mental abnormality other than the ones diagnosed by Dr. Hoberman; (2) the AAG confused the jury with evidence and argument of a 100 percent risk of re-offense; and (3) the State was improperly permitted to present expert testimony about the SRA-FV, a novel scientific instrument that does not pass the Frye test for general acceptance in the scientific community. The cumulative effect of these errors denied Botner a fair trial.

D. CONCLUSION

For the foregoing reasons, Botner requests this Court reverse his commitment.

DATED this 26th day of August, 2015.

Respectfully submitted,

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

In re the Detention of Shawn Botner,)	
)	
STATE OF WASHINGTON/DSHS,)	
)	
Respondent,)	
)	
v.)	COA NO. 32939-9-III
)	
SHAWN BOTNER,)	
)	
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 26TH DAY OF AUGUST, 2015, 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, THE 26TH DAY OF AUGUST, 2015.

X *Patrick Mayovsky*