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NO. 36153-5

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

In re the Detention of Donald Curbow

STATE OF WASHINGTON,

Respondent,

v.

DONALD CURBOW,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Donald Curbow appeals the order committing him as a sexually violent predator following a unanimous jury verdict. The sole issue raised on appeal is whether the State presented sufficient evidence that Curbow is a sexually violent predator. In particular, Curbow challenges the sufficiency of the State's proof that he is more likely than not to commit predatory acts of sexual violence, claiming that the actuarial and testimonial evidence supporting that element is unreliable.

Curbow's argument is meritless and completely misapprehends this Court's role in assessing a sufficiency challenge. The relevant inquiry is whether, viewed in the light most favorable to the State, the evidence is sufficient to support the jury's verdict. The answer in this case is yes. The State presented ample evidence to support the jury's verdict, including expert testimony from a clinical psychologist who diagnosed Curbow with several mental disorders and opined that Curbow has a mental abnormality that makes him likely to engage in predatory acts of sexual violence. The expert based his conclusion on a comprehensive evaluation and risk assessment, which was fully detailed at trial.

Curbow does not challenge the admission of any of this evidence. Indeed, Washington courts have long accepted the use of actuarial evidence in sexually violent predator proceedings and have determined that such

evidence is well-accepted in the scientific community. Curbow's arguments instead ask this Court to reweigh the evidence and reach a different conclusion than the jury, which is flatly prohibited. This Court should affirm the jury's verdict.

II. RESTATEMENT OF THE ISSUE

- A. **Where the State presented expert testimony that Curbow suffers from a mental abnormality and is likely to engage in predatory acts of sexual violence if not confined in a secure facility, was there sufficient evidence to support the jury's verdict that Curbow is a sexually violent predator?**

III. RESTATEMENT OF THE CASE

A. **Curbow's Sexual Offense History**

Donald Curbow has a history of sexual violence against young boys. His precise number of victims is unknown. *See* RP 582-83. At one point, Curbow reported that he had 20 victims between the ages of 12 and 17. CP 546; RP 582. He now claims that this was an exaggeration and that he has between five and six victims. CP 545; RP 582-83.

When Curbow was 21, he had sexual contact with a 14-year-old boy. CP 544; RP 599. When he was 24, he had sexual contact with a 13-year-old boy. CP 545; RP 596. In addition, Curbow has been convicted of four sexually violent offenses.

In 1995, when Curbow was 38, police arrested him in Oregon after finding him in a car parked on the side of the road with a 13-year-old boy.

CP 63-64, 528, 539-42, 556, 854-66; RP 582-83. Curbow's belt was unbuckled, and the boy was not wearing a shirt. CP 859-60, 538. The boy told police that Curbow squeezed his penis. CP 857-58. Curbow admitted touching the boy's penis and subsequently pled guilty to two counts of attempted sexual abuse in the first degree. RP 1981, 1533; CP 5, 526, 542, 556. He was sentenced to 36 months in prison. CP 5, 65.

Following his release from prison in Oregon, Curbow was placed in temporary housing by the State and was under the supervision of the Oregon Department of Corrections. CP 437, 439-44. About nine months later, Curbow absconded from probation and fled to Spokane. CP 436-38, 442-45; RP 1983. Curbow failed to register as a sex offender upon moving to Washington. CP 445-46. After several months, Curbow ultimately ended up residing in a nursing facility in Spokane Valley. CP 451.

While living in the nursing facility, Curbow became friends with a female employee. CP 452; RP 1992-93. The employee had an 11-year-old grandson. CP 452, 457. One day, the employee asked Curbow to babysit her grandson, and Curbow agreed. CP 458-59. He decided to take the boy to a nude beach. CP 460-61. Once they were alone, Curbow touched the boy's penis and orally raped him. CP 463-64, 476, 486-88; RP 1770. He recorded these offenses on a video camera that he had brought with him to the park. CP 464-65, 469, 480-81; RP 1639-40, 1770. Curbow masturbated

while he committed these offenses. CP 488. He said that he was aroused when he saw the boy naked. CP 475.

In 1999, police arrested Curbow on a charge of voyeurism after a man reported that Curbow looked under the stall divider in a public restroom. CP 5-6, 497-500, 507; RP 591. After Curbow's arrest, an employee of the nursing facility searched his room and found sexually explicit photos of young children. CP 507-12; RP 591, 913-15. The children in the images were nude and were performing sexual acts. RP 591. The employee called police, and a subsequent search revealed drug paraphernalia, a video camera, and videotapes with sexually explicit footage of children. CP 511-13; RP 913-15, 954, 959-67. One of the tapes included footage of Curbow's sexual offenses against the 11-year-old boy. RP 956, 959-74.

Based on these events, Curbow entered an Alford plea to one count of rape of a child in the first degree, and he pled guilty to one count of child molestation in the first degree. CP 6; Supp. CP ___ (Ex. P-8, Statement of Defendant on Plea of Guilty). In light of this plea, the State dismissed Curbow's pending voyeurism charge. CP 6; RP 1666. Curbow received a sentence of 200 months in Department of Corrections. CP 6; RP 833, 1991; Supp. CP ___ (Ex. P-9, Judgment and Sentence).

While in prison, Curbow cut out and collected pictures from magazines of males, including young teenagers. RP 892-93, 1107-09, 2005-08. Curbow also received multiple infractions, including many for fighting with other inmates. RP 641, 834.

B. Sexually Violent Predator Civil Commitment Trial

In June 2016, the State petitioned to commit Curbow as a sexually violent predator.¹ CP 1-2. The case proceeded to a jury trial in May 2018. *See* RP 1-2237.

At trial, the State presented evidence from several witnesses, including Dr. Harry Hoberman, Ph.D., a clinical psychologist. RP 482-525, 560-701, 742-903, 1034-1212. In general, Dr. Hoberman testified that that Curbow had several mental disorders, including pedophilic disorder, hebephilic disorder, hypersexual disorder, substance use disorder, and antisocial personality disorder. RP 580, 597, 610, 620, 625, 630. He also testified that Curbow has significant traits associated with narcissistic personality disorder and high psychopathy. RP 630, 672-74.

Dr. Hoberman testified that Curbow's pedophilic disorder and hebephilic disorder constitute mental abnormalities as that term is defined

¹ A "sexually violent predator" is "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

by the sexually violent predator statute. RP 580, 597. He testified that Curbow's hypersexual disorder and substance use disorder do not constitute mental abnormalities but instead are "potentially contributory or facilitative of sexual offending." RP 627.

Dr. Hoberman also testified that Curbow's mental abnormalities and personality disorder make him likely to engage in predatory acts of sexual violence if not confined to a secure facility. RP 780-81. Dr. Hoberman reached this conclusion after conducting a comprehensive risk assessment, which included reviewing thousands of pages of records, interviewing Curbow and other individuals, administering personality tests, utilizing actuarial risk assessments tools, applying structured professional judgment, and considering dynamic risk factors and other relevant considerations. *See* RP 501-05, 507-11, 523, 584-86, 678-82, 745. The four actuarial instruments Dr. Hoberman used were the Static-99, the Static-99R, the Static 2002-R, and the Sexual Appraisal Risk Assessment Guide ("SORAG"). RP 681-83, 689, 742.

Curbow presented evidence on his own behalf, including testimony from Dr. Christopher Fisher, Psy.D, a clinical psychologist. RP 1221-36, 1430-1872. Dr. Fisher also diagnosed Curbow with pedophilic disorder. RP 1458. He based this diagnosis on Curbow's offenses against young boys, his possession of sexually explicit photos of minors, and his admitted

sexual attraction to boys as young as age 13. RP 1458-60, 1773-74. But Dr. Fisher did not believe that Curbow's disorder constituted a mental abnormality under the law. RP 1458, 1460-61, 1587-89. In his view, the disorder no longer impaired Curbow's volitional control to such a degree that he would be more likely than not to reoffend. RP 1460-61. He considered Curbow an opportunistic offender. RP 1644.

Dr. Fisher also conducted a risk assessment to evaluate Curbow's risk of re-offense. When evaluating risk, Dr. Fisher utilized the Static-99R and the Psychopathy Checklist Revised. RP 1433, 1503, 1518-63. He testified that the Static-99R and the Static-2002R are some of the most common risk assessment tools used by experts. RP 1498-99, 1801. After considering these instruments and other factors, Dr. Fisher concluded that Curbow was not likely to re-offend. RP 1589-90, 1707-11.

At the conclusion of the trial, the jury unanimously found beyond a reasonable doubt that Curbow is a sexually violent predator, CP 1113. The trial court subsequently entered an order committing Curbow to the custody of the Department of Health Services at the Special Commitment Center for control, care, and treatment. CP 1127. Curbow now appeals.

IV. ARGUMENT

Curbow claims that the State failed to prove beyond a reasonable doubt that he met the requirements for civil commitment. Brief of Appellant

at 1. This argument fails because ample evidence supports the jury's verdict, including expert testimony from a clinical psychologist who opined that Curbow has a mental abnormality that makes him likely to engage in predatory acts of sexual violence. The expert's opinion was based on actuarial data and clinical judgment.

Curbow does not challenge the admission of any evidence in this case, and in any event, it is well-established that such evidence is admissible in sexually violent predator proceedings. Instead, Curbow's central challenge asks this Court to reweigh the evidence presented at trial and reach a different result, but this request fails because appellate courts cannot reweigh evidence or substitute their opinion for the trier of fact. For these reasons, this Court should affirm.

A. Ample Evidence Supports the Jury's Verdict That Curbow Is a Sexually Violent Predator

Contrary to Curbow's assertions, the State presented sufficient evidence at trial that Curbow is a sexually violent predator. Indeed, when viewed in the light most favorable to the State, ample evidence supports the jury's verdict.

Appellate courts evaluate the sufficiency of the evidence in sexually violent predator proceedings under the standard applicable in criminal cases. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). When

evaluating the sufficiency of the evidence, “the relevant question is whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements . . . beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). “[A]ll reasonable inferences must be drawn in favor of the State.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.*

In this case, to prove that Curbow is a sexually violent predator, the State was required to prove the following elements beyond a reasonable doubt:

- (1) That Donald Curbow has been convicted of a crime of sexual violence, namely Rape of a Child in the First Degree or Child Molestation in the First Degree;
- (2) That Donald Curbow suffers from a mental abnormality which causes him serious difficulty in controlling his sexually violent behavior; and
- (3) That this mental abnormality makes Donald Curbow likely to engage in predatory acts of sexual violence if not confined to a secure facility.

CP 1099.

A “mental abnormality” means “a congenital or acquired condition affecting the emotional or volitional capacity² which predisposes the person to commit criminal sexual acts to a degree that makes the person a menace to the health and safety of others.” CP 1102. “Likely to engage in predatory acts of sexual violence if not confined in a secure facility” means “that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding.” CP 1103.

Here, when viewed in the light most favorable to the State, the evidence in this case readily meets the above standard. Curbow does not appear to dispute the State’s proof of the first element—that he has been convicted of a crime of sexual violence. In any event, the State presented sufficient evidence of Curbow’s prior convictions for crimes of sexual violence, including testimony and records related to these offenses. *E.g.* RP 1981, 1533; 833, 1220, 1437, 1991; CP 526, 542; Supp. CP __ (Ex. P-9, Judgment and Sentence).

Curbow also does not appear to dispute the State’s proof of the second element—that he suffers from a mental abnormality which causes him serious difficulty in controlling his sexually violent behavior. Indeed, the State presented sufficient evidence to satisfy this element too, including

² “‘Volitional capacity’ means the power or capability to choose or decide.” CP 1102.

testimony from Dr. Hoberman who opined that Curbow's pedophilic disorder and hebephilic disorders constitute mental abnormalities, cause him serious difficulty controlling his behavior, and affect his emotional volitional capacity in a way that makes him likely to re-offend. RP 578-80, 597, 781-82.

Dr. Hoberman testified that he diagnosed Curbow with pedophilic disorder based on Curbow's criminal convictions for sex offenses against prepubescent boys, his admissions of other victims, evidence that Curbow has experienced sexual fantasies and urges related to prepubescent children, and his possession of sexually explicit images of young boys. RP 582-83, 589-96. Curbow previously reported that he had sexually explicit thoughts of boys as young as age 12 and that he thinks about giving them fellatio and seeing their erection. RP 592-93. He told Dr. Hoberman in 2013 that he offended against younger boys "because I feel attracted to them. It's more than just sex. It's getting a thrill out of the manipulation." RP 593.

Dr. Hoberman testified that he diagnosed Curbow with hebephilic disorder based on Curbow's sexual behavior with, and sexual arousal to, boys who are older than age 13. RP 598-99, 617. He noted that Curbow self-reported sexual behavior with boys ages 14 to 18 and reported a deviant sexual interest in "teens." RP 599-600. In addition, Curbow admitted to masturbating to teens and listed his risk factors as "being alone with a

teen” and ““hanging out where teens congregate.”” RP 600, 1101. More recently, Curbow admitted that he had recurrent inappropriate sexual thoughts involving past experiences with teens and creating new fantasies while he masturbates. RP 601. Curbow admitted at trial that he is sexually attracted to teenagers. RP 2044, 2052.

In addition to pedophilic disorder and hebephilic disorder, Dr. Hoberman also diagnosed Curbow with several other disorders including hypersexual disorder and substance use disorder. He testified that these two disorders did not constitute mental abnormalities, but they contributed to Curbow’s sexual offending and were relevant to his risk of re-offense. RP 627. Dr. Hoberman also diagnosed Curbow with antisocial personality disorder, explaining that Curbow demonstrates failure to conform to social norms, deceitfulness, impulsivity, irritability and aggressiveness, reckless disregard for the safety of others, irresponsibility, and lack of remorse. RP 630-49. He further testified that Curbow has significant traits associated with narcissistic personality disorder, including a sense of entitlement, lack of empathy, and arrogance, and that Curbow has high psychopathy, as indicated on the Psychopathy Checklist Revised test. RP 630, 650-51, 665, 672-74.

Finally, the State also presented ample proof of the third element—that Curbow’s mental abnormality makes him likely to engage in predatory acts of sexual violence if not confined to a secure facility.

Dr. Hoberman testified that he conducted a comprehensive risk assessment of Curbow, which included reviewing thousands of pages of records, interviewing Curbow and other individuals, administering personality tests, utilizing actuarial risk assessment tools, applying structured professional judgment, and considering dynamic risk factors and other relevant considerations. *See* RP 501-05, 507-11, 523, 584-86, 678-82, 745. Dr. Hoberman provided significant detail about his methodology at trial. He explained that he considers a variety of approaches to risk assessment, including group data and individual characteristics, in order to “see what degree they converge, point in the same direction, or potentially point in different directions.” RP 524.

Dr. Hoberman testified that he administered four actuarial risk assessment instruments. These were the Static-99, the Static 99-R, the Static-2002R, and the SORAG. RP 681-83, 689, 742. In general, these actuarial instruments consider various factors statistically associated with risk of re-offense and provide recidivism estimates for groups of sex offenders with particular scores. *See* RP 678-81, 743.

Curbow's score on the Static-99, the first actuarial instrument, placed him in a "high" risk category. RP 747-48. His score is associated with a 44% likelihood of being reconvicted for a new sex offense over five years after release and a 54% rate of recidivism after ten years. RP 748. The second actuarial instrument, the Static-99R, took into account the fact that Curbow is over 60 years old. RP 749. His score on that instrument was a 6³, which placed him in the "well above average group." RP 751. This score indicated that Curbow is in the 94th percentile of sex offenders, has a relative risk four times the median score, and has an absolute recidivism risk of 26% over five years and 37% over ten years.⁴ RP 749-50. Dr. Hoberman testified that these two instruments had comparable predictive accuracy, but he used them both because they provided different information. RP 690, 786.

Curbow's score on the third instrument, the Static-2002R placed him in the 88th percentile of sex offenders. RP 751. His relative risk was three times the median score and his absolute recidivism risk estimate was 23% over five years. RP 751-52. Dr. Hoberman used this instrument because it measured theoretical areas of risk. *See* RP 691. The last

³ Curbow asserts in a footnote that "there was some question at trial of whether the score of '6' was a miscalculation." Brief of Appellant at 16 n. 5 (citing RP 749-50, 794). But his record citations do not support his assertion. Moreover, Dr. Hoberman unequivocally testified that he correctly scored this instrument. *See* RP 1191-93, 1196-97.

⁴ Dr. Hoberman determined that Curbow is more similar to the "high risk, high need" sample group, and he thus utilized the results for that sample. RP 749.

instrument, the SORAG, utilizes interpersonal violence as the best measure of sex offense recidivism. RP 752. Curbow's score on that instrument indicated a recidivism rate between 72 and 80 percent over a ten-year range. RP 753. Dr. Hoberman utilized that instrument because it provides a "different contribution to understanding risk" and uses a "different measure of recidivism to provide an estimate of sex offender recidivism." RP 743.

Next, Dr. Hoberman applied structured professional judgment, which is a process where the evaluator's clinical judgment is guided by instruments that identify specific characteristics and variables associated with sex offender recidivism. RP 753-54. In this case, he considered Curbow's score on the Psychopathy Checklist Revised test, explaining that higher scores on that test have been associated with sex offender recidivism. RP 754. Curbow's score, a 33, was high and above the cutoff for a clinical "psychopath." RP 672-74. Dr. Hoberman also considered the Sexual Violence Rating-20 test, which considers 20 risk factors associated with a higher risk of sexual offense recidivism. RP 756. He testified that Curbow exhibited some degree of 14 out of the 20 risk factors, such as deviant sexual arousal, psychopathy, and substance abuse problems. RP 756. He testified that studies show that a combination of deviant sexual interests and psychopathy is associated with greater risk of sex offender recidivism. RP 778.

In addition, Dr. Hoberman considered dynamic risk factors, which are changeable factors linked to an increased risk of reoffending. RP 757-58, 763. In doing so, he utilized two measures of dynamic risk: the Structured Risk Assessment-Forensic Version and the Stable-2007. RP 759. Curbow's score on the first instrument was 4.5, which places him in a "very high needs category" and indicates "that exceptional levels of risk management are appropriate." RP 766. Curbow's score on the second instrument was 18, which was a "high" score. RP 769.

Lastly, Dr. Hoberman considered a number of other factors relevant to Curbow's risk of recidivism that were not captured by the risk assessment instruments. RP 770-76. For example, he considered Curbow's age. RP 770. He acknowledged that crime tends to decline with age, but he pointed to scientific literature indicating that there is a subgroup of persistent sexual offenders who do not stop committing sex offenses as they get older and that people who have a high sex drive early in life tend to maintain that sex drive even as they age. RP 771, 1138. Dr. Hoberman concluded that a further reduction in risk estimates based on Curbow's age was not warranted. RP 770-71. Dr. Hoberman also considered personality changes and testified that dramatic personality changes are rare as people age. RP 771-72. Dr. Hoberman also considered Curbow's participation in sex

offense treatment but concluded that Curbow had not made sufficient treatment progress that would decrease his risk. RP 775-76.

After considering the actuarial instruments, structured professional judgment, dynamic risk factors, and other considerations, Dr. Hoberman testified that in his professional opinion, Curbow has a high level of risk. RP 779-80. He also testified to a reasonable degree of psychological certainty that Curbow suffers from a mental abnormality or personality disorder that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. RP 780-81.

Based on this testimony, the State presented ample evidence to support the jury's unanimous verdict.

B. Curbow Does Not Challenge Any Evidentiary Rulings in This Case, and It is Well-Established that Clinical and Actuarial Evidence May Be Admitted in Sexually Violent Predator Cases

Curbow does not challenge the admission of any of the above evidence. He does not assign error to any of the trial court's evidentiary rulings, and he does not argue that any of the testimony or evidence should have been excluded.⁵ See Brief of Appellant. Indeed, Curbow appears to recognize that clinical and actuarial evidence is admissible and that

⁵ "It is well settled that a party's failure to assign error or to provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n. 4, 69 P.3d 895 (2003).

arguments about the reliability of such evidence goes to weight. *See id.* at 24 (acknowledging that “once a methodology, such as clinical and actuarial risk assessment, has been accepted in the scientific community, applying that science to a particular case goes to weight and not admissibility”).

In any event, the Washington Supreme Court has long held that clinical and actuarial evidence may be admissible in sexually violent predator proceedings and is well accepted in the scientific community. For example, in *In re Detention of Young*, 122 Wn.2d 1, 56, 857 P.2d 989 (1993), the Court upheld the admission of clinical predictions of future dangerousness and concluded that such evidence was based on established scientific methodology and was sufficiently reliable such that a *Frye*⁶ hearing was unnecessary. Similarly, in *In re Detention of Thorell*, 149 Wn.2d 724, 753-58, 72 P.3d 708 (2003), the Court determined that actuarial instruments may be admissible to aid in the prediction of future dangerousness and that they are not novel scientific evidence and satisfy the *Frye* standard.

Curbow relies on *In re Detention of Campbell*, 139 Wn.2d 341, 376, 986 P.2d 771 (1999) to claim that “strictly clinical predictions of dangerousness and actuarial methods have in the past been found highly

⁶ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

unreliable.” Brief of Appellant at 24. But Curbow fails to mention that the portion of the case he quotes is from the dissent. *See id.* Thus, this case does not stand for the proposition that actuarial instruments are “highly unreliable.” Moreover, as already discussed, *Thorell* conclusively determined that actuarial evidence may be admitted in sexually violent predator cases and is well accepted in the scientific community.

C. Appellate Courts Cannot Reweigh Evidence or Substitute Their Judgment for the Trier of Fact

Curbow’s primary argument is that the actuarial and testimonial evidence presented in this case is insufficient because “its validity and usefulness has been questioned by researchers and experts.” Brief of Appellant at 22. In support of this argument, he relies on various journal articles and websites. *See id.* at 25-33. This Court should reject Curbow’s argument because it asks this Court to reweigh the evidence presented at trial and reach a different conclusion than the jury, which is flatly prohibited.

As Curbow appears to recognize, disagreements about the reliability of actuarial instruments go to the weight of the evidence, not its admissibility. *See* Brief of Appellant at 24; *see also In re Det. of Halgren*, 156 Wn.2d 795, 807, 132 P.3d 714 (2006) (citing *Thorell*, 149 Wn.2d at 755-56). But it is well-established that “[a]ppellate courts do not hear or

weigh evidence, find facts, or substitute their opinions for the trier of fact.”
Bale v. Allison, 173 Wn. App. 435, 458, 294 P.3d 789 (2013) (quoting
Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d
226 (2009)); *cf. State v. King*, 135 Wn. App. 662, 668, 145 P.3d 1224
(2006); *Boeing Co. v. Heidi*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002).
Instead, appellate courts “defer to the trier of fact to resolve conflicts in
testimony, weigh evidence, and draw reasonable inferences therefrom.”
King, 135 Wn. App. at 668; *State v. Thomas*, 150 Wn.2d 821, 874-75, 83
P.3d 970 (2004). An appellate court is “simply not permitted to reweigh
evidence and come to a contrary finding.” *Quinn*, 153 Wn. App. at 717.

Here, by claiming that the actuarial evidence submitted in this case
is insufficient because “its validity and usefulness has been questioned,”
Curbow essentially argues that this Court should give little weight to that
evidence or find it unpersuasive. Brief of Appellant at 22. Such an argument
fails, because it asks this Court to reweigh the evidence and substitute its
opinion for the jury. It also fails because it is contrary to the mandate that
the appellate court accept the State’s evidence as true and view all
reasonable inferences in the light most favorable to the State. *See State v.*
Jackson, 145 Wn. App. 814, 818, 187 P.3d 321 (2008).

The jury was the sole judge of the credibility and the weight of the
evidence presented in this case. *See CP 1093*. The jury was entitled to credit

Dr. Hoberman's opinion and methodology, including his testimony about the validity of the actuarial instruments that he utilized and his belief that Curbow's advancing age did not sufficiently mitigate his risk of re-offense. *See, e.g.*, RP 689-91, 770-71, 784-89, 1163-64, 1168-71, 1183-95. It was also entitled to reject Dr. Fisher's testimony, which countered Dr. Hoberman's opinions and methodology and provided contrary opinions about the reliability and validity of various risk assessment tools. *See, e.g.*, RP 1503-16, 1558-62, 1565-73, 1678-87, 1808-09. Both experts were vigorously cross-examined, and it was within the province of the jury to resolve this conflicting testimony. This Court should defer to the jury on these determinations.

This Court should also reject Curbow's attempts to discredit the evidence presented at trial with facts from journal articles and websites. *See* Brief of Appellant at 26-33. Courts examine sufficiency based on the evidence presented at trial. *See State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996). Curbow discusses the findings of several journal articles related to actuarial instruments, but he fails to cite to anything in the record indicating that these facts were presented to the jury. *See* Brief of Appellant at 26-33. Thus, to the extent that Curbow relies on these articles and websites as additional substantive evidence, he essentially asks this Court

to consider evidence outside the appellate record.⁷ This is improper not only because it asks this Court to weigh evidence against competing evidence, but also because it asks this Court to weigh evidence presented at trial with competing evidence not before the jury.

Finally, this Court should reject arguments that are unsupported by citations to authority. For example, Curbow asserts that “one thing the experts can agree on” is that “[a]s an offender reaches 60 years and older, the impulsivity and tendency toward antisocial behaviors significantly diminish to such a point that risk of reoffense is, at its highest five percent and zero at its lowest.” Brief of Appellant at 33. But he provides no citation to support this assertion. Thus, this Court should not consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

V. CONCLUSION

The State presented ample evidence that Curbow is a sexually violent predator. Curbow’s arguments to the contrary merely reflect a disagreement with the jury’s assessment of the evidence; they do not undermine the sufficiency of the evidence supporting the jury’s verdict. For the foregoing reasons, this Court should affirm.

⁷ A party may point out improper evidence that the Court should not consider in a brief; it is not necessary to file a motion to strike. *Engstrom v. Goodman*, 166 Wn. App. 905, 909 n.2, 271 P.3d 959 (2012).

RESPECTFULLY SUBMITTED this 3 day of September,

2019.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script, appearing to read "Kelly A. Paradis", written over a horizontal line.

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NO. 36153-5

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of:

DONALD CURBOW,

Appellant.

DECLARATION OF
SERVICE

I, Malia Anfinson, declare as follows:

On September 3, 2019, I sent via electronic mail, per service agreement, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

Marie Trombley
marietrombley@comcast.net

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, 2019, at Seattle, Washington.


MALIA ANFINSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

September 03, 2019 - 3:40 PM

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