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SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO. 59034-1-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CLERK OF SUPREME COURT  
STATE OF WASHINGTON

In re the Detention of:

CURTIS POUNCY,

Respondent.

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

The Honorable Helen H. Halpert, Judge

BY RONALD D. CARPENTER  
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ANSWER TO STATE'S PETITION

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SUPERIOR COURT  
KING COUNTY WASHINGTON

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A. IDENTITY OF ANSWERING PARTY

Respondent Curtis Pouncy, the appellant below, requests the relief stated in part C.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division One, issued its published decision in In re Detention of Pouncy, \_\_ Wn. App. \_\_, 184 P.3d 651 (2008), on May 19, 2008. A copy of the decision is attached to this answer as appendix A.

C. RELIEF REQUESTED

Pouncy requests that this Court deny the State's petition for review. In the event this Court grants the State's petition, then it should also grant review of the issues raised in Pouncy's answer.

D. COUNTERSTATEMENT OF ISSUE PRESENTED IN STATE'S PETITION

Pouncy's expert witness, Dr. Wollert, opined Pouncy was not likely to commit future acts of predatory sexual violence. During cross-examination, the State impeached the expert's testimony with findings of fact from an unrelated Yakima County Superior Court case. The Yakima judge had found Dr. Wollert's methodologies regarding risk assessment were not generally accepted in the community of mental health professionals who evaluate and assess persons in SVP matters. Dr. Wollert used the

same methodologies in Pouncy's case. Did the Court of Appeals correctly determine the trial court committed reversible error by allowing Pouncy's expert witness to be discredited through the use of judicial findings of fact entered in the unrelated case?

E. ISSUES RAISED IN ANSWER

1. Is reversal required because defense counsel was ineffective in failing to appropriately object to the Yakima findings or request a curative instruction?

2. The State's expert witness diagnosed Pouncy with a "personality disorder." The trial court failed to instruct the jury on the definition of this technical term despite defense counsel's request. Did the trial court abuse its discretion by allowing the jury to speculate on the meaning of an element of the State's case?

F. STATEMENT OF THE CASE

Pouncy respectfully refers this Court to the facts set forth in his opening brief at pages 2-12 and 23-25.

G. ARGUMENT

1. THE COURT OF APPEALS PROPERLY REVERSED COMMITMENT BECAUSE THE JURY HEARD INADMISSIBLE EVIDENCE THAT A JUDGE HAD DETERMINED THE METHODOLOGIES USED BY POUNCY'S EXPERT WITNESS WERE UNSOUND.

The State has framed the issue as whether "when accessing [sic] the weight and credibility of a defense expert witness, did the trial court abuse its discretion by allowing the jury to consider a prior judicial Frye determination rejecting some of the expert's theories." State's Petition for Review (PFR) at 1. Examination of the State's brief submitted to the Court of Appeals reveals no mention of Frye as the purported justification for admissibility. Having lost at the Court of Appeals, the State has reformulated its argument on Frye grounds.

In any event, this Court should deny review because the Court of Appeals correctly held the trial judge should have sustained defense counsel's foundation objection. Viewed in context, this objection "was premised upon the State's failure to qualify the Yakima judge as an expert witness in the areas of sex offender evaluation and psychology." Pouncy, 184 P.3d at 658.

Expert opinion is admissible under ER 702 only if the witness qualifies as an expert and the testimony would be helpful to the trier of fact.

State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). Expert testimony or opinion that lacks a proper foundation is inadmissible. State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006). Proper foundation includes qualifying the witness as an expert. State v. Baity, 140 Wn.2d 1, 18, 991 P.2d 1151 (2000).

The rationale of the Frye<sup>1</sup> standard is that expert testimony should be presented to the trier of fact only when the scientific community has accepted the reliability of the underlying principles. State v. Canaday, 90 Wn.2d 808, 813, 585 P.2d 1185 (1978). "In other words, scientists in the field must make the initial determination whether an experimental principle is reliable and accurate." State v. Copeland, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996) (citation omitted). "The Frye standard recognizes that judges do not have the expertise required to decide whether a challenged scientific theory is correct, and therefore courts defer this judgment to scientists." Id. (citation and internal quotation marks omitted).

The Yakima judge's findings constituted hearsay testimony. Pouncy, 161 Wn.2d 714 (citing Washington Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 687-88, 724 P.2d 997 (1986)). They represent the judge's opinion that Dr. Wollert's methodologies were not generally accepted in

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

the scientific community. The jury likely viewed this opinion as coming from an expert on the matter. Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 141 F. Supp.2d 320, 323 (E.D.N.Y. 2001). The State, however, never qualified the judge as an expert capable of giving such an opinion. Trial counsel's foundation objection was therefore proper.

The State nevertheless argues the Yakima judge's findings were admissible because they "constituted a judicial determination under the Frye standard that Dr. Wollert lacked general acceptance." PFR at 12.

The purpose of a Frye determination is to keep the jury from even hearing unsound expert opinion by preventing its admission into evidence. In re Det. of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003) (addressing use of actuarial instruments in SVP proceedings). The trial court's gatekeeper role under Frye ensures "'pseudoscience' is kept out of the courtroom." Copeland, 130 Wn.2d at 259.

But at the trial level the State made no effort to keep Dr. Wollert's assessment methods out of the courtroom by means of a Frye determination. On appeal, the State cannot explain why it failed to request a Frye determination before trial began or outside the presence of the jury. If the State truly believed Wollert's methodologies were based on unsound science, this is what it should have done. Instead, the State deliberately

chose to discredit Wollert's testimony with the most prejudicial means available rather than attempt to bar his testimony by means of a proper Frye determination made by the trial judge presiding over Pouncy's case.

No appellate decision has ever determined Wollert's methodologies fail the Frye test. A lone trial judge's determination in an unrelated case cannot substitute for a Frye hearing on the matter in this case. Nor does it allow the State to circumvent a potentially unfavorable Frye ruling by the presiding trial judge by waving around a nonbinding finding of another trial judge in a different case.

The State argues this Court should not second-guess the trial judge's decision to admit the Yakima findings under the abuse of discretion standard. PFR at 9-11. Yet the trial judge herself recognized the findings should not have been admitted. 18RP 4 ("On thinking about it again, I don't see why we should have in the record evidence that should not be there.").

Moreover, "discretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "The range of

discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The question is whether the Yakima findings were properly admitted. If they were not, then the trial judge abused her discretion.

The State further complains the Court of Appeals failed to conduct a harmless error analysis. PFR at 18. Not so. The Court of Appeals, in refuting the State's attempts to justify its use of the Yakima court's factual findings, recognized such findings by nature are unfairly prejudicial. Pouncy, 184 P.3d at 659-60. "Unlike the scientific community's process of peer review, there is no practical way for a scientist to defend against a judge's assessments of credibility." Blue Cross, 141 F. Supp.2d at 324. Courts have accordingly excluded out-of-court statements by judges on grounds of undue prejudice. Id. This Court should decline review because the Court of Appeals correctly decided reversal is required.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE AN APPROPRIATE EVIDENTIARY OBJECTION TO THE YAKIMA FINDINGS.

An alternative theory proposed by Pouncy in the Court of Appeals compels the same result. The Court of Appeals declined to reach Pouncy's claim that counsel was ineffective in failing to properly object to the Yakima findings because it determined counsel's foundation objection was sufficient. In the event this Court accepts review of the State's issue, the ineffective assistance claim raised by Pouncy should be considered as an alternative ground for reversal of the verdict. See Brief of Appellant (BOA) at 16-23; Reply Brief of Appellant (RBOA) at 3-7. Review is proper because Pouncy's ineffective assistance claim addresses the same issue for which the State seeks review.

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Counsel was deficient in failing to object on grounds of unfair prejudice under ER 403. The State presented the Yakima judge's findings in order to impress upon the jury that judicial authority had already determined Dr. Wollert's methodologies to be unsound. Judicial findings of fact presented as evidence "present a rare case where, by virtue of their

having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice." Nipper v. Snipes, 7 F.3d 415, 418 (4th Cir. 1993) (citation omitted).

The Yakima findings effectively constituted an expert opinion on the validity of Wollert's methodologies cloaked in the mantle judicial authority. A jury is inclined to "give exaggerated weight to a judge's supposed expertise on such matters." Blue Cross, 141 F. Supp.2d at 323, 324 (excluding factual findings of a different judge offered to impeach plaintiff's expert).

Counsel was also ineffective in failing to object to the findings as hearsay. "Hearsay" is an oral or written assertion, "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions. ER 802. Where the out-of-court statement of a non-testifying declarant is used to impeach a trial witness, the impeaching statement constitutes hearsay. State v. Williams, 79 Wn. App. 21, 27, 902 P.2d 1258 (1995). Hearsay may not be incorporated into questions asked for impeachment purposes. Sherman, 106 Wn.2d at 687-88.

As the Court of Appeals correctly recognized,<sup>2</sup> the Yakima court's findings are inadmissible hearsay because they are written assertions made by the nontestifying judge offered to impeach Wollert's credibility as an expert witness and to prove Wollert's methodologies were not accepted in the scientific community. The Yakima findings were statements, the Yakima judge was the declarant, and the judge did not make the statements while testifying at the trial. No hearsay exception applies. See BOA at 19-20; RBOA at 4-7.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Here, counsel's objection on an inappropriate ground was not the product of legitimate strategy: she was trying to keep the evidence out. She simply invoked the wrong ground for objection. No legitimate tactic could justify admission of judicial findings that Pouncy's expert witness used bogus methodologies. Pouncy derived no conceivable benefit from letting the jury consider this damaging evidence as it deliberated on his fate.

To demonstrate prejudice under an ineffective assistance claim, Pouncy need only show a reasonable probability that, but for counsel's error, the result would have been different. Thomas, 109 Wn.2d at 226.

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<sup>2</sup> Pouncy, 184 P.3d at 659.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Judicial findings of fact create a serious danger of unfair prejudice, as juries are likely to give disproportionate weight to such findings because of the imprimatur that has been stamped upon them by the judicial system. Nipper, 7 F.3d at 418. "In excluding judgments as hearsay, the courts have undoubtedly been influenced by the fact that jurors often attribute more importance to judgments than is warranted, and often regard judgments as conclusive proof despite instructions to the contrary." 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.75 (4th ed. 2006).

Sensing the overwhelming weight of authority is against the State's argument, the State alternatively suggests defense counsel waived the error by failing to insist on a curative instruction. PFR at 16-18. The State did not make this argument in the Court of Appeals. The State claims "[b]ecause Pouncy was not requesting the curative instruction, the trial court determined that she would not give the instruction." PFR at 17. But the trial judge, having already determined "I don't see why we should have in the record evidence that should not be there,"<sup>3</sup> informed the parties she was "going to strike it on my own motion." 18RP 37. There was no need

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<sup>3</sup> 18RP 4.

to affirmatively request a curative instruction based on the judge's representation that she would sua sponte strike the evidence. See State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990) (jury is presumed to obey the court's rulings and disregard remarks that are stricken); accord State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

As it turns out, the trial judge never told the jury that the evidence was stricken. The record does not show why. Assuming this was defense counsel's failing rather than the trial judge's, it is another instance of why counsel was ineffective in this case. Pouncy does not concede instruction to disregard the Yakima finding could have cured the problem. See Nipper, 7 F.3d at 418 (despite limiting instruction, hearsay findings made by judge in different case that were read to jury required reversal). But if instruction could have erased the unfair prejudice arising from the challenged evidence, then defense counsel should have pursued the proper curative measure. See Aho, 137 Wn.2d at 745 (review not precluded where invited error results from counsel's ineffectiveness).

A jury may find a person presents a serious risk of future sexual violence and therefore meets the SVP criteria when there is testimony from mental health experts linking a serious lack of control to a diagnosed mental abnormality or personality disorder and a history of sexual violence.

Thorell, 149 Wn.2d at 761-62. In SVP proceedings, "psychiatric testimony is central to the ultimate question" of whether a person suffers from a mental abnormality or personality disorder that makes him likely to engage in predatory acts of sexual violence. In re Pers. Restraint of Young, 122 Wn.2d 1, 58, 857 P.2d 989 (1993); In re Det. of Twining, 77 Wn. App. 882, 890, 894 P.2d 1331 (1995).

Admission of the Yakima findings undermined confidence in the outcome because the verdict hinged on which expert the jury believed. This case involved a classic battle of the experts. The State's expert testified Pouncy had a mental abnormality and personality disorder that made him likely to commit predatory acts of sexual violence in the future. Dr. Wollert reached the opposite conclusion. In weighing the validity of Dr. Wollert's testimony, upon which Pouncy's fate in large measure rested, it is reasonably probable the jury was influenced by the improperly admitted judicial finding.

3. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF PERSONALITY DISORDER.

The trial court did not give defense counsel's proposed instruction defining "personality disorder," an element of the case that the State needed to prove beyond a reasonable doubt. In so doing, the trial court committed

reversible error because the jury was left to invent its own meaning of the term. If this Court accepts review of the State's issue, this claim raised by Pouncy should also be reviewed under RAP 13.4(b) as an issue of substantial public importance.

The Court of Appeals rejected Pouncy's argument simply by noting Twining had already decided the issue and the trial court "did not abuse its discretion by following authority of such long-standing duration." Pouncy, 184 P.3d at 657; see Twining, 77 Wn. App. at 895-96.

Twining is poorly reasoned and constitutes an erroneous holding allowed to linger for far too long. This Court should overturn Twining and hold it is error not to define the term "personality disorder" for the jury when requested to do so.

"Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory." State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). "The technical term rule attempts to ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law." State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). Applying that same logic to SVP cases, the rule ensures

individuals are not involuntarily committed by a jury that misunderstands the definition of an SVP.

In Twining, both parties offered instructions defining personality disorder. Twining, 77 Wn. App. 895. After considering these definitions, the trial court decided to exclude an instruction on that term, leaving it to the parties to argue their definitions in closing. Id. Division Three held the court did not err in refusing to give the instruction but failed to explain why. Id. Twining cited State v. Allen, 101 Wn.2d 355, 678 P.2d 798 (1984), for the proposition that undefined terms may lead the jury to supply its own definition rather than an objective legal standard. Id. at 895-96. The court distinguished that case on the ground that Allen "was talking about statutorily defined terms with specific legal definitions," while "the definition of personality disorder is not so defined." Id.

The court in Twining misread this Court's decision in Allen. Allen held the trial court erred in failing to give an instruction defining the term "intent" for an attempted second degree burglary charge because "intent" was a technical term. Allen, 101 Wn.2d at 361. The legal meaning of intent, as defined by statute, differed from its commonly understood meaning. Id. at 360. The basis for its holding was that the jury, faced with terms that did not comport with common understanding, should not

be "forced to find a common denominator among each member's individual understanding of these terms and to determine on its own just what was their meaning." Id. at 362. "Although the jury may be able to hammer out a definition for intent and knowledge among themselves," reversal was required because "[t]here is no way to ascertain whether they used the proper, statutory definitions." Id.

Pouncy's jury was faced with the same dilemma of having to hammer out a definition of personality disorder among themselves, and there is no way to determine they agreed upon a proper definition of the term in the absence of sufficient guidance from the trial court.

The court's underlying assumption in Twining seemed to be that only a statutorily defined term could qualify as a technical term but failed to explain why this is so. Whether a term is technical does not turn on whether the term is defined by statute. A term is "technical" when it has a meaning that differs from common usage. Brown, 132 Wn.2d at 611. The term "personality disorder" has no common usage.

This Court recognizes "personality order" is a term of art employed by specialists in the psychiatric field. In Young, petitioners argued various terms in the SVP statute were unconstitutionally vague. Young, 122 Wn.2d at 49. The Court observed due process required "clear standards to prevent

arbitrary enforcement by those charged with administering the applicable statutes." Id. The Court held the SVP statute was not unconstitutionally vague because the term "mental abnormality" was defined by statute. In addition, the Court cited to the DSM in support of its position that the term "personality disorder" has "a well-accepted psychological meaning." Id. at 50. The "definitions" of these two terms provided the fact finder sufficient guidance as it sought to properly apply those standards to the particular set of facts before it. Id.

Lay jurors are not psychiatrists. Cf. In Re Det. of Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006) (determining whether a particular person in an SVP case possesses a mental abnormality as defined by RCW 71.09.020(8) "is based upon the complicated science of human psychology and is beyond the ken of the average juror."). Jurors are not schooled in the intricacies of the DSM, where the personality disorder term is defined. Young, 122 Wn.2d at 50. The Court of Appeals was unable to explain how average jurors could properly define a term for themselves when that term has a specialized meaning known only to those in the psychological profession.

The Court of Appeals cited the general proposition that instructions are sufficient if they allow each side to argue their theories of the case,<sup>4</sup> but "[t]he jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). Nor should the jury be held captive by the expert's definitions of what constitutes a personality disorder. See State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) ("Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.").

The error was not harmless because Pouncy's theory of the case was that he has neither a mental abnormality nor a personality disorder that makes him likely to commit predatory acts of sexual violence. Because the jury was free to disregard expert testimony that Pouncy had a mental abnormality,<sup>5</sup> there is no way of knowing the jury did not find Pouncy to be an SVP on the sole basis of having an undefined personality disorder. Reversal is required when there is no way to ascertain the jury considered a proper definition of a technical element of the crime in reaching its verdict. Allen, 101 Wn.2d at 362.

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<sup>4</sup> Pouncy, 184 P.3d at 657.

<sup>5</sup> CP 1010 (Instruction 22).

H. CONCLUSION

The State's petition should be denied. If this Court grant's the State's petition, however, it should also accept review of Pouncy's claims.

DATED this 18th day of July, 2008.

Respectfully submitted,

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