

NO. 68579-1

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

In re the Detention of:

CLAY PARSONS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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I. ISSUES

- A. **Did The Trial Court Properly Determine That There Was Probable Cause To Hold Parsons For Trial?**
- B. **Were Parsons' Rights To Due Process Violated When The Trial Court Granted His Request To Waive His Right To Be Present At His Trial?**

II. FACTS

A. Criminal History

Clay Parsons is a serial rapist who has been convicted of four sexually violent offenses as defined by RCW 71.09.020(17). Two of these were violent rapes of strangers, one of whom, a 12-year-old girl, Parsons abducted off the street. CP at 259-263. One was a brazen sexual assault in which Parsons broke into a home and fondled a young woman as her husband slept beside her. *Id.* at 263-66. His most recent sexually violent offense involved an attempted rape of a 10-year-old girl, whom he attacked in her home. *Id.* at 263-71.¹ Three of these offenses happened within a three-month period in 1983. *Id.* at 259-71. These crimes, however, represent only the tip of Parsons' criminal iceberg: Parsons has admitted to having sexually assaulted somewhere between 31 and 44 victims between roughly 1980 and 1989. CP at 283-86; 303-304. His

¹ The facts of Parsons' offenses are taken from a psychological evaluation by Dr. Will Damon, which was submitted in support of the State's Certification for Determination of Probable Cause. CP at 254-327.

sexual assaults have included, *inter alia*, fondling, intercrural sex, and vaginal and anal rape, sometimes at knifepoint. *Id.* His unajudicated victims include a 70-year-old woman, a 5-year-old boy, his three teenaged sisters, his two young nieces; his boss's teenaged daughter; and other women into whose homes he crept while they slept, sometimes next to their husbands. *Id.* The vast majority of his assaults involved force or threats of deadly force. *Id.* A number of these assaults occurred while Parsons was in the Marine Corps in Modesto, California and Okinawa, Japan. During this period, Parsons planned "military missions" which entailed cruising residential areas looking for a female in a home he could enter without being detected. *Id.* at 284. He planned these "missions" in detail, leaving the military base by climbing the fence so there would be no record of his departure and wearing clothes he had determined would make him hard to see and would be easy to both put on and take off quickly. *Id.* He admitted engaging in these "missions" approximately 40 times, with about half resulting in sexual contact. *Id.* Parsons considered a "mission accomplished" when he successfully achieved sexual contact. *Id.* Later discussing these assaults, Parsons admitted to having an "intense desire, a burning feeling" to break into residential homes to rape women. *Id.*

Parsons' crime spree came to a temporary end when he was apprehended and convicted of three sexually violent offenses in 1984: First Degree Rape; First Degree Kidnapping and First Degree Burglary. CP at 194;196-200. While in prison following conviction, Parsons expressed deep remorse for his acts: In a 1984 letter to the sentencing court, Parsons wrote that he had "been saying it over and over again how sorry and remorseful I am about what I did that brought me here. I realize that it's not enough just to say this, but I know in my heart that I wouldn't, or rather couldn't, do these crimes again as long as I live." CP at 267.

Parsons was mistaken. Less than seven months after having been released on parole in 1989, he struck again, this time forcing entry in the home of 10-year-old girl and pushing her into the bedroom. CP at 268-270,308, 322. She resisted, biting his hand; he fled. *Id.* He was ultimately convicted of Attempted First Degree Rape. CP at 194, 200-01.

Nor did Parsons' behavior in prison after his 1989 conviction support his claims of repentance. A Department of Corrections Classification Referral dated June 3, 1993, describes Parsons as "adept at manipulation," working "very hard at appearing to rehabilitate himself, even asking repeatedly "[c]an I do anything else to help myself look better?" CP at 292. In 1998, he received mail from an organization called

International Children Sponsors because he had sent money to the organization in order to sponsor a child. *Id.* Several months later, he was counseled after having received an infraction because he had sent a letter to a child. *Id.* Parsons reportedly maintained that he had no knowledge of the person's age, "but wrote the letter to let her know how well written her piece was and to encourage her to continue journalism." *Id.*

B. Probable Cause Certification and Hearing

Parsons was about to be released from his sentence for the 1989 Attempted Rape conviction when the State filed a sex predator petition against him in February of 2010. CP at 194-327. In support of its probable cause certification, the State filed two psychological evaluations. The first was by Dr. Will Damon, Ph.D. who, after interviewing Parsons and considering voluminous files and records in this case, concluded that Parsons suffered from a mental abnormality² in the form of a "constellation of disorders" (Pedophilia, Sexually Attracted to Females, Nonexclusive Type, Paraphilia Not Otherwise Specified, Nonconsent, Alcohol Dependence in Institutional Remission, Cannabis Abuse, and an Antisocial Personality Disorder). CP at 302. This

² "Mental Abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8)

“constellation of disorders...predispose[s] him to the commission of criminal sexual acts.” *Id.* at 308. Dr. Damon also concluded that both Parsons’ Pedophilia and his Paraphilia NOS Nonconsent affect his volitional capacity, noting that, despite having been “repeatedly apprehended and charged with engaging in sexual behavior with prepubescent children,” he could not stop his offending behavior. *Id.* He also noted that Parsons’ attempted rape of the 10-year-old girl in 1989, when he had been out less than seven months, “occurred while he was on parole for his 1983 sexual offenses, underscoring the strength of his urges to reoffend.” *Id.*

Dr. Damon determined that Parsons’ Paraphilia NOS Nonconsent also affects his volitional capacity. Dr. Damon observed that, in 1983, after having been apprehended for three of his sexually violent offenses, Parsons admitted to investigators “that he could not control his offending behavior. He stated that he knew it was wrong, and he tried to stop it by praying and promising himself that each time would be the last, but it continued.” CP at 308. In 1989, Dr. Damon continued, Parsons informed a parole officer that he “could not control his desires to rape, and he was discouraged that after prison, his desire to rape was still strong.” *Id.* Dr. Damon concluded that Parsons “has serious difficulty controlling his behavior” as evidenced by the fact that “his drive to engage in pedophilic

and coercive sexual behavior overcame obvious barriers such as 1) his victims' ages and distress, 2) the legal ramifications his sexual offending behavior could manifest, 3) the presence of people (often husbands or boyfriends) asleep in the same room, and 4) the presence of appropriate adult sexual partners." *Id.* Parsons' Antisocial Personality Disorder, he determined, affects his emotional capacity in that "it makes him less likely to respond appropriately to other people's fear and distress." *Id.* at 309. "In summary," Dr. Damon concluded, "Mr. Parsons meets the first criterion (Criterion A) as a sexually violent predator as he has a mental abnormality which predisposes him to the commission of sex offenses to a degree constituting him a menace to the health and safety of others." *Id.*

Dr. Damon next moved to the question of whether, as a result of his mental abnormality, Parsons is more likely than not to "**engage in** predatory acts of sexual violence." RCW 71.09.020(18)(emphasis added). Dr. Damon began his risk assessment by scoring Parsons on various actuarial instruments that assess the offender's risk of arrest or reconviction for re-offense based on static—that is, unchanging--historical factors. After first determining that Parsons should be treated as a member of a "high-risk" group for purposes of these instruments, Dr. Damon concluded that Parsons' risk of being **convicted or charged** for sexual offenses ranged from 35.5 to 39.7 over a 10-year period, and

42.6 over a 15-year period.³ CP at 312-325. Although a third instrument⁴ placed Parsons' risk of *re-arrest* for a sexual offense within six years at 57%, Dr. Damon, based on a recent training by the instrument's author, reduced that number to 30%. CP at 318. All of these instruments, he noted,

underestimate the probability that he will *commit* a new sexual offense. In other words, it is well known that many sexual offenses go unreported and undetected. Therefore, the probability that an offender will *commit* a new sexual offense *is necessarily higher than the probability that he will be detected, arrested, prosecuted, and convicted of committing a new sexual offense.*

CP at 325 (emphasis added).⁵

Dr. Damon then considered various “dynamic” risk factors—that is, factors subject to change—that “significantly contribute information to the prediction of sexual recidivism above that given by established static

³ The two instruments referenced here are the Static-99R and the Static-2002R.

⁴ The MnSOST-R, or Minnesota Sex Offender Screening Tool, Revised.

⁵ The appellate courts of this state have frequently acknowledged this fact. In *In re the Detention of Lewis*, 134 Wn. App. 896, 143 P.3d 833 (2006), Division III rejected appellant's challenge that the evidence was insufficient to commit him because the actuarial instrument used by the State's expert showed only a 44% likelihood that he would reoffend. 134 Wn. App. at 905-06. In rejecting appellant's argument, the Court noted that the Static-99 measures reconvictions, “which underestimates risk of reoffense.” *Id.* at 906. Citing the expert's testimony that dynamic risk factors also played a role in increasing Lewis' risk of reoffense, the Court rejected Lewis' argument that his risk of reoffense was limited to probability estimates on the actuarials and accepted that additional evidence, including that the actuarials underestimate risk, could be used in assessing risk. *Id.* Similarly, in *In re the Detention of Kelley*, 133 Wn. App. 289, 135 P.3d 554 (2005), this Court, rejecting Kelley's challenge to the validity and accuracy of certain actuarials, specifically noted that Kelley's own expert conceded that actuarials can underestimate risk of reoffense. 133 Wn. App. at 296-97.

actuarial measures.” CP at 320. Reviewing these factors, Dr. Damon concluded that Parsons continued to show deficits in his capacity for relationship stability and demonstrated a continuing tendency toward emotional identification with children. *Id.* at 320-21. In addition, Parsons showed continuing evidence of hostility toward women, a lack of concern for and weak connections to others, sexual preoccupation, a tendency to use sex to cope with aversive emotions, deviant sexual interests, lack of cooperation with supervision, impulsivity, poor problem solving skills, and, finally, a tendency to feel hostile, victimized and resentful or to be vulnerable to emotional collapse when stressed. *Id.* at 321-23. Having concluded that Parsons showed evidence of 12 of 13 identified dynamic risk factors, Dr. Damon went on to observe that Parsons did not show evidence any “protective factors,” that is, factors that tend to decrease the risk of further sexual offending. CP at 323-24.

Although Dr. Damon commented that Parsons’ sex offense history was “extremely troubling in its longevity and number of victims,” and that he “undoubtedly poses a risk of sexual reoffense,” he ultimately concluded that Parsons did not meet criteria for commitment because the estimated likelihood of reoffense, as measured on the various instruments, were “significantly” less than 50%. CP at 325-27. In addition, he noted that Parsons, in the year before the State’s Petition was filed, had participated

in one year of sex-offender specific treatment and would continue to be in treatment while on parole. *Id.* at 326.

Prior to the probable cause hearing, the Attorney General's Office retained a second expert, Dr. Henry Richards, Ph.D. CP at 209-238. Dr. Richards reviewed the discovery materials considered by Dr. Damon, as well as Dr. Damon's report. CP at 209. Dr. Richards fundamentally concurred with Dr. Damon's diagnosis, adding only certain features to Dr. Damon's diagnosis of Antisocial Personality Disorder. CP at 218. Unlike Dr. Damon, however, he assessed Parsons in the "high" range of psychopathy⁶ (CP at 231-32) and expressed doubt that Parsons had made real treatment gains. *Id.* at 234. In addition, although he agreed with the scores Dr. Damon had assigned Parsons on various actuarial instruments, he disagreed as to the implications of those scores, finding that, once a confidence interval was applied to those scores, the estimated percentages on the upper range of those instruments placed Parsons "in risk categories that include the strong possibility of recidivism, exceeding the 51% percent threshold for civil commitment." CP at 237. He went on to note that "these estimates also do not take the consideration of a lifetime

⁶ Dr. Damon had assessed his psychopathy score as in the "moderate" range. CP at 319.

exposure to risk, or for crimes that go undetected by law enforcement, which was likely the case for many of Mr. Parsons' previous offenses." *Id.*

At the probable cause hearing Parsons argued that the State had no authorization to obtain a second report. CP at 74-185; RP 5/20/10 at 5-6. Without ruling on the question of the propriety of that second report, the trial court found probable cause on the basis of Dr. Damon's report, and stated that, as such, "even without Richards' report, there is a sufficient basis for probable cause..." RP 5/20/2010 at 22-23. The court denied Parsons' motion to dismiss and entered an order finding probable cause, of which Parsons did not seek discretionary review. *Id.*; CP at 72-73. The case proceeded to trial and on March 12, 2012, a unanimous jury determined that Parsons was a sexually violent predator. CP at 4. Parsons was committed to the care and custody of the Department of Social and Health Services, and he now appeals.

III. ARGUMENT

Parsons argues that the trial court "exceeded its authority" in making a finding of probable cause, and that this case should be reversed on that basis. He also argues that the trial court violated his constitutional rights by informing him that, if he wished to waive his right to be present at his trial, he would not be permitted to later change his mind and come back to court.

These arguments are without merit. The trial court properly found probable cause based on the report of Dr. Will Damon, which set forth “sufficient facts” upon which the court could make such a determination. Even if this Court determines that that decision was incorrect, a finding of probable cause could properly be made based on the report of Dr. Henry Richards. Finally, the trial court did not violate Parsons’ right to be present at his trial when it granted his clear request to allow him not to appear. This Court should affirm the trial court’s order of commitment.

A. Standard of Review

In determining whether probable cause is established, the appellate courts review the same evidence presented below. *State v. Chamberlin*, 161 Wn.2d 30, 40–41, 162 P.3d 389 (2007). “What this means is where the probable cause finding was error, appellate review cures the error.” *Id.*

This probable cause hearing stage of the proceedings is not a commitment trial; it is merely a preliminary determination stage *prior* to the commitment trial. “Its purpose is to prevent wrongful detention during the 45-day evaluation period *prior* to the commitment trial. Such a proceeding is most similar to the probable cause or pretrial release hearing held in criminal cases...

In re the Detention of Campbell, 139 Wn.2d 341, 354, 986 P.2d 790 (1999)(emphasis added). The term probable cause, although not defined in RCW 71.09, should be accorded its common meaning:

An apparent state of facts found to exist upon reasonable inquiry (that is, such inquiry as the given case renders convenient and proper), which would induced a reasonably intelligent and prudent [person] to believe, in a criminal case, that the accused person had committed the crime charge, or in a civil case, that a cause of action existed.

Black's Law Dictionary, 1081, 5th Edition, West's Publishing, 1979. A trial court's legal conclusion of whether evidence meets the probable cause standard is reviewed de novo. *State v. McCuiston*, 174 Wn.2d 369, 382, 275 P.3d 1092 (2012).

B. Any Alleged Errors In The Probable Cause Determination Are Now Moot

Parsons argues that the trial court exceeded its authority in making a finding of probable cause, and that this case should be reversed on that basis. App. Br. at 21. Parsons' argument is without merit, and indeed was rejected by our State Supreme Court almost 20 years ago. In *In re Young*, 122 Wn.2d 1, 857 P. 2d 989 (1993), Petitioners Young and Campbell argued that their rights to due process had been violated by the trial court's denials of their repeated requests to appear before the trial courts and contest probable cause, and that reversal of the juries' verdicts was required.⁷ 122 Wn.2d at 43, 47. The Court agreed that due process required a probable cause hearing, but determined that, "[w]hile this

⁷ Young and Cunningham's cases were consolidated on appeal; they had two separate trial court proceedings.

requirement was not complied with here, *it had no bearing on the ultimate outcome of petitioners' trials*; thus the omission in this instance does not require reversal." *Id.* at 47 (emphasis added). Likewise, even assuming trial court error of constitutional proportions in Parsons' case, any alleged error had no effect on the ultimate outcome of this case and reversal is not required.

Parsons' seeks to distinguish *Young*, saying that "since *Young* did not claim there were substantive flaws in the probable cause findings, the court had no reason to believe the outcome would be different had a proper hearing been held. *Id.* at 47." App. Br. at 21. This statement misrepresents the *Young* Court's decision. In fact, the decision contains no mention of whether *Young* or *Cunningham* claimed "substantive flaws" in the probable cause findings, and the decision does not indicate whether they argued that they had been prejudiced by not being permitted to appear. The Court simply determined that, because the error—an error of constitutional magnitude—"had no bearing on the ultimate outcome of petitioners' trials," reversal was not required. This decision was completely consistent with longstanding precedent. It is well established that "a prejudicial error, which will justify the setting aside of a verdict and granting a new trial, is one which affects of presumptively affects the final result of the trial." *St. v. Craig*, 82, Wn.2d 777, 784, 514 P. 2d

151(1973). Parsons could have, but did not, seek discretionary review of the trial court's finding of probable cause. A unanimous jury has now determined, after a full-scale trial in which no errors are alleged, that Parsons meets criteria for commitment as a sexually violent predator. Any possible error in the probable cause determination is now moot.

Nor is Parsons able to identify any possible prejudice. He seems to seek to do so by asserting that, had the court not exceeded its authority, release would have been mandated, and "unless he committed a recent overt act [ROA] upon his release, the State could not seek his commitment." App. Br. at 16. Parsons, however, misapprehends the applicable law.

Parsons is correct that, had the trial court not found probable cause, release would have been mandated, since it is the finding of probable cause that triggers the order taking the person into custody and the person's continued detention pending trial. RCW 71.09.040(1), (4). The purpose of the pre-trial probable cause hearing, as explained by the Washington State Supreme Court, "is to prevent *wrongful detention* during the 45-day evaluation period prior to the commitment trial." *Campbell*, 139 Wn.2d at 354.

Parsons, however, seems to suggest that release of the offender pending trial is the same thing as dismissal of the underlying petition, and

indeed his motion at the trial court reflects this confusion. CP at 79.⁸ These are, however, two distinct remedies. While the court would have been required to release him pending trial had it not found probable cause, the underlying action would have survived and, as such, the requirement that the State plead and prove a recent overt act pursuant to RCW 71.09.060(1)⁹ would not have been triggered. No proof of an ROA is constitutionally or statutorily required when, on the day the petition is filed, the person is incarcerated for a sexually violent offense or an act that constitutes a sexually violent offense. *In re Henrickson*, 140 Wn.2d 686, 697-98, 2 P.3d 473(2000). Because Parsons was incarcerated on the 1989 conviction for Attempted Rape when the State's petition was filed, no ROA would have been required, even had he been released pending trial.

C. The Trial Court's Entry Of An Order Of Probable Cause Was Proper

Parsons argues that, because the trial court found probable cause based on Dr. Damon's report despite the fact that Dr. Damon did not conclude that Parsons was an SVP, the trial court "lacked authority" to detain Parsons and order a commitment trial. App. Br. at 6. He also argues

⁸ Parsons titled his motion "Respondent's Motion To Dismiss For Lack Of Probable Cause, but argued that the *case "should be dismissed* for lack of probable cause" because "there is no probable cause *to hold Mr. Parson's* [sic] for trial." CP at 79.

⁹ RCW 71.09.060(1) provides in pertinent part that "If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act.

that the trial court “impermissibly disregarded” contrary evidence “to conclude Parsons met the criteria for civil commitment” and “misrepresented or misunderstood the essential legal requirements to support a petition for civil commitment.” App. Br. at 11. Parsons’ arguments are without merit. The court’s determination, when viewed both in context and in its entirety, is clearly correct.

1. The Trial Court Correctly Determined That There Was Probable Cause Based On Dr. Damon’s Report

Parsons argues that the trial court “disregarded” Dr. Damon’s report, and that it was not permitted to do so. App. Br. at 11. The trial court, however, did not disregard Dr. Damon’s report, and indeed the facts upon which the trial court based its ultimate conclusion were based on and taken from that report. Parsons’ assertion is based on the misapprehension that the trial court was required to accept not only the facts set forth in Dr. Damon’s report, but Dr. Damon’s ultimate opinion, that is, that Parsons was not a sexually violent predator. This is, however, not correct.

It is well established that the trial court is not bound by an expert’s conclusion. *State v. Toomey*, 38 Wn. App. 831, 837, 690 P.2d 1175 (1984); *review denied* 103 Wn.2d 1012, 1985 WL 320793 (1985) and *cert. denied*, 471 U.S. 1067, 105 S.Ct. 2145, 85 L.Ed.2d 501 (1985). This principle extends to the probable cause context. It has long been the rule

in Washington, for example, that, even if the State concedes that probable cause does not exist, the trial court is not bound by that determination if that determination was erroneous. *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988). *See also Dettore v. Brighton TP., Etc.*, 91 Mich. App. 526, 534, 284 N.W.2d 148, 151 (1979) (party's concession or admission concerning question of law or legal effect of a statute as opposed to a statement of fact is not binding on the court).

Even if one were to view Dr. Damon's ultimate conclusion as additional "evidence" to be considered by the trial court, this result would not change. Probable cause is determined by considering the total facts of each case, viewed in a practical, non-technical manner. *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). In the criminal context, for information to amount to probable cause, "it does not have to be conclusive of guilt, and it does not have to exclude the possibility of innocence." *Garcia v. County of Merced*, 639 F.3d 1206, 1209 (9th Cir. 2011). Police are not required "to believe to an absolute certainty, or by clear and convincing evidence, or even by a preponderance of the available evidence" that a suspect has committed a crime. All that is required is a "fair probability, given the totality of the evidence, that such is the case." *Id.* As such, the presence of "exculpatory" evidence does not prevent a finding of probable cause. The fact, for example, that a suspect

performs well on one or more field sobriety tests will not vitiate the existence of probable cause to arrest for DUI based upon other factors or observations. *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 847, 43 P.3d 43, *review denied*, 147 Wn.2d 1024, 60 P.3d 92 (2002). Nor is there any requirement that the available evidence be considered in the light most favorable to the party subject to arrest. *Id.*

“A court reviewing the sufficiency of the State’s evidence in an SVP annual review hearing must be permitted to look at the facts contained in the report to decide whether they support the expert’s conclusions. After making that determination, the court can decide whether the evidence, if believed, amounts to probable cause.” *In re Jacobson*, 120 Wn. App. 770, 775, 86 P.3d 1202 (2004). Here, the trial court considered all of the facts contained in Dr. Damon’s report, and properly determined those facts established probable cause. Basing his determination of probable cause “upon the record that is before me,” and “confining myself to the report of Dr. Damon,” the court determined that “it is clear that probable cause had been established.” RP 5/20/2010 at 20. In so ruling, the court made clear that it understood that it was not permitted to weigh the evidence, but simply to determine whether there was sufficient evidence for a finding of probable cause “for the detention and subsequent evaluation” of the respondent. *Id.* at 18.

In reaching that conclusion, the court pointed to the fact that, according to Dr. Damon's report and "by Mr. Parsons' own admission," Parsons had between 31 and 41 victims, and that Dr. Damon had determined Parsons' "constellation of disorders" "all predispose him to the commission of criminal sexual acts." RP 5/20/2010 at 18. The court also noted that Dr. Damon, in concluding that Damon was not "more likely than not" to reoffend, had considered the fact that Parsons would be on parole upon release. *Id.* Noting that Dr. Damon had also pointed out that some of Parsons' criminal behavior occurred while he had previously been on parole, the court observed that "[i]t didn't stop him before, and to this court's knowledge our parole system hasn't gotten any better. And as I have frequently criticized from the bench, probably gotten worse." *Id.* at 20-21

The court then considered Dr. Damon's discussion of the actuarial instruments and how they should be interpreted. The court noted that Dr. Damon stated that, on two of the instruments, Parsons scored in the moderate to high range, and in the high range for a third instrument. RP 5/20/2010 at 21. Although Dr. Damon conceded that, because these instruments measure whether the person will be *arrested or convicted* for a new offense, the instruments "underestimate the probability that he will *commit* a new offense," Dr. Damon ultimately concluded that the

scores—“in the 42nd percentile range,” (*Id.* at 21)—were “significantly” below the 50% threshold he believed necessary for commitment. CP at 326. The court correctly observed that “I don’t know if 8 percent is *significantly* less than 50 percent when what you’re talking about on the 50 percent scale is being *arrested or convicted.*” *Id.* at 21-22 (emphasis added). The court likewise rejected Dr. Damon’s conclusion that, because Parsons would be 60 in eight years, his risk should “now be reduced,” noting that there was not “any showing that his health or anything else” that would reduce his risk prior to age 60. *Id.* at 22. It also cited various concerns expressed in Dr. Damon’s report regarding Parsons’ lack of a positive social network, his substance abuse problems, and his behavior in prison, concluding that “[a]ll of that leads this court to the unmistakable conclusion that based upon the standard of probable cause, that Mr. Parsons reaches that level of likely to reoffend.” *Id.* at 22.¹⁰

Reviewing the trial court’s discussion of Dr. Damon’s report, it is clear that it did not “disregard” that report. Rather, it properly determined that there was probable cause to hold Parsons for trial based on that report.

¹⁰ It is not entirely clear that Parsons disagreed with this position at the trial court. Although arguing that the trial court was required, based on Dr. Damon’s report, to dismiss, defense counsel also commented that “I do believe that the State could have had probable cause found with Dr. Damon’s report.” RP 5/20/2010 at 16.

The trial court's determination is supported by the record, and its decision should be affirmed.

2. The Trial Court Applied The Correct Standard For Probable Cause

Parsons next argues that the trial court “misrepresented or misunderstood the essential legal requirements to support a petition for civil commitment.” App. Br. at 11. Specifically, Parsons argues that, by stating that the State must demonstrate that Parsons “is likely to engage in future *violent criminal offenses*,” as opposed to “predatory acts of sexual violence,” as required by RCW 71.09.020(17), the trial court “improperly muddled” the “constitutionally critical distinction” between the two phrases. *Id.* at 12 (emphasis added). Having thus “diluted the evidentiary threshold,” Parsons continues, the court then improperly characterized Dr. Damon’s report in order to impermissibly reject Dr. Damon’s conclusion. *Id.* at 13-14.

Parsons constructs his argument by carefully culling from the record the few occasions upon which the trial court, speaking colloquially, used various shorthand terms rather than painstakingly reciting statutory language. Both the purpose and the function of the probable cause hearing were, however, abundantly clear, and there is no persuasive evidence that the trial court did not understand the issues before it.

Prior to the probable cause hearing, the State filed its Petition and Certification for Determination of Probable Cause, both of which clearly state the statutory requirements. CP at 194-207. At the hearing, the State, setting forth the State's burden, clearly articulated the requirements that the person have been convicted of a "crime of sexual violence" and be deemed likely to commit "predatory acts of sexual violence." RP 5/20/2010 at 10, 11, 12, 14. Both the defense and the Court, however, spoke somewhat less precisely: The defense referred to the likelihood a respondent will commit a "sexually violent offense" in the future (as opposed, as the State had explained and as the statute provides, to "predatory acts of sexual violence"). *Id.* at 17. Although the trial court, likewise, spoke colloquially, it clearly understood that the question was not merely whether Parsons would commit "criminal offenses." Rather, the court stated that part of its task was to determine whether Parsons has been "previously convicted of violent offenses that meet the definition under RCW 71"—that is, "sexually violent offenses" as defined by RCW 71.09.020. *Id.* at 19. Referring to the mental component requirement, the trial court referred to "criminal sexual offenses," which, while, again, not the precise language of the statute, makes clear that the court understood that the statute does not target those likely to commit non-sexual offenses. Discussing the actuarial instrument used by Dr. Damon, the court again

references “risk for sexual reoffense.” *Id.* at 21. Parsons’ argument that the court misunderstood or diluted the statutory requirements is without support in the record and must be rejected.

3. Dr. Richards’ Evaluation Provides An Alternate Basis Upon Which To Affirm The Trial Court’s Finding Of Probable Cause

A trial court judgment may be affirmed on any grounds supported by the pleadings and the proof, even if the trial court’s specific reason for granting the judgment was in error. *Niven vs. Bartells*, 97 Wn. App. 507, 983 P.2d 1193 (1999) *citing Tropiano v. City of Tacoma*, 105 Wn.2d 873, 876-877, 718 P.2d 801 (1986). As such, Dr. Richards’ report serves as an alternate basis for supporting the decision of the trial court.

Parsons argues that this Court cannot consider the evaluation of Dr. Richards in order to “save” the trial court’s finding of probable cause both because the trial court did not review that report and because the report was improperly obtained. App. Br. at 17. The basis for this argument appears to be twofold: One, Parsons appears to suggest that his participation in that interview was not voluntary, and two, he argues that it was not authorized by law. Both arguments fail.

Parsons cites *In re Strand*, 167 Wn.2d 180, 217 P.3d 1159 (2009) in support of the contention that the second evaluation by Dr. Richards was “obtained without authority of law” because the State is permitted to

obtain only “‘a’ ‘singular’ evaluation,” asserting that the *Strand* Court’s decision “emphasized the ‘singular’ nature of the noun ‘evaluation.’” App. Br. at 17-18.

This argument mischaracterizes the holding in *Strand*. At issue in *Strand* was whether the State could perform “a current mental health evaluation” of an offender prior to the commencement of SVP proceedings pursuant to RCW 71.09.025(1)(b)(v), or whether the State was restricted, as *Strand* argued, to the use of pre-existing mental health evaluations. *Id.*, 167 Wn. 2d at 185. The *Strand* Court’s discussion of the article “a” (as opposed to “the”) and use of the term “singular” had nothing to do with the question of whether the State is limited to only one pre-filing evaluation. Rather, the question was whether the State could obtain a *new* evaluation specifically for the purpose of the sex predator proceeding or was required to rely on evaluations already in existence:

In this case, the statute is phrased “provide ... [a] current” and uses the indefinite article “a” as opposed to a definite article, such as “the.” “A” is “used as a function word before most singular nouns other than proper and mass nouns when the individual in question is undetermined, unidentified, or unspecified.” Webster’s, *supra*, at 1. ***Therefore, by choosing the use of an indefinite article instead of using a definite article, the legislature intended to provide “a current mental health evaluation” that is undetermined (i.e., yet to be done) rather than “the current mental health evaluation,” which has already been determined.***

167 Wn. 2d at 188-89 (emphasis added). The Court also rejected Strand's argument that RCW 71.09.040 provided "the exclusive means for obtaining mental examinations of civil commitment respondents," noting that the cases cited "did not address the use of voluntary examinations that took place prior to the commencement of SVP proceedings." *Id.* at 190.

Dr. Richards' evaluation of Parsons was precisely such a voluntary evaluation. Although Parsons repeatedly intimates that the interview with Dr. Richards was somehow involuntary, the record does not support this claim. Although provided with numerous opportunities to actually provide evidence of this—or indeed even assert it clearly-- Parsons repeatedly failed to do so. Citing his Motion to Dismiss For Lack of Probable Cause (CP at 74-185), Parsons asserts that he "explained that he was not sufficiently apprised of Richards' role in evaluating him and did not voluntarily submit to the evaluation. Supp. CP ___, Sub No. 21 (page 3-4)." App. Br. at 20. This mischaracterizes the contents of that Motion. On the cited pages,¹¹ Parsons stated only that "[i]t is unlikely that Mr. Parsons was told that the first expert had found that he did not meet the criteria for civil commitment." CP at 77. This assertion was unsupported by any declaration by Parsons himself, who, in fact, had retreated from this rather weak assertion by the time of the probable cause hearing. At

¹¹ The pages of the Motion are actually not numbered.

that hearing, Parsons' counsel stated that "Mr. Parsons had just been told half an hour before he met with Mr. Richards that the State's evaluation had come back and found that he did not meet criteria and then he was told that another person would like to talk to you. He went in and there was Dr. Richards who said I'd like to talk with you. He at that point agreed..." RP 5/20/2010 at 4-5.

On appeal, Parsons' argument has undergone still further transformation, in that he now argues that there was "no evidence" that he "adequately understood" understood Dr. Richards' role, and that the trial court, in declining to consider Dr. Richards' report, "acknowledged" this. App. Br. at 21. The portions of the record cited by Parsons in support of these assertions, however, do not support his argument. At no point did the trial court suggest that any alleged lack of information conveyed to Parsons in the course of the interview with Dr. Richards played any role in its ultimate decision to disregard Dr. Richards' report. Rather, the court simply indicated that, because it had found probable cause based on Dr. Damon's report, there was no need to address further arguments. *Id.* at 22-23.¹²

¹² "Now, obviously Dr. Richards disagrees with Dr. Damon, but because of what I have concluded, I don't think I need to get to the position of counsel and that is, well, if you don't read Richards [sic] report, you're going to dismiss. What I'm saying to you is even without Richards' report, there is a sufficient basis for probable cause, and I would deny the motion to dismiss." RP at 22-23.

Review of the cited portions of the record makes this clear. In the course of objecting to consideration of Dr. Richards' report, defense counsel noted that Dr. Richards had met with Parsons, and asserted that "we don't know exactly what he said to Mr. Parsons about how he was authorized to meet with him." RP 5/20/2010 at 6. The trial court, referring to this remark when explaining its ruling, said that, "in arriving at the decision that I'm making, I will take the respondent's attorney's statements as a proffer of proof that at the time that Dr. Richards went in for his evaluation of Mr. Parsons, Mr. Parsons had been told shortly before the evaluation that the evaluation of Dr. Damon was favorable, that he was told that [he] did not have to participate in the Richards evaluation, but he was not told of anything else." *Id.* at 18.

There is simply no evidence that Parsons' did not want to talk to Dr. Richards, and indeed there is much evidence to the contrary. Dr. Richards' report contains a lengthy discussion of his pre-interview discussion with Parsons, including the fact that Parsons signed consent to participate in the interview and to allow audio taping of the session. CP at 220. Parsons, Dr. Richards' commented, was "accepting" of the conditions of the interview "and appeared eager for feedback." *Id.* Parsons was "cooperative with the interview process," and Dr. Richards commented that he experienced Parsons "as very determined with a

specific agenda of persuading or convincing me that he was ready for release, and entertaining no doubts about his ability to...be successful in convincing me and of the rightness of his overall cause and agenda for the meeting.” *Id.* at 221. Nor did Parsons, who appeared telephonically at the probable cause hearing and who commented at one point that he would have “a lot to say,” (RP 5/20/2010 at 21) ever assert that the interview was not voluntary. Once permitted to speak at the probable cause hearing, he delivered what appears to be a prepared statement which, although spanning almost five pages, makes no mention of his current assertion that he did not understand the purpose of the interview or that he did not wish to participate, even in retrospect. RP 5/20/2010 at 23-27. As such Parsons makes even less of a showing of the involuntary nature of his statements than Strand, who, the court observed, at least made the “self-serving assertion that he made his repeated and consistent statements involuntarily.” 167 Wn.2d at 193.

Parsons provides no basis upon which to conclude that the report by Dr. Richards was improper or should not have been considered by the trial court. Dr. Richards’ report, which reviews the discovery in the case and concludes that Parsons is “likely” to reoffend, provides an alternate basis for affirming probable cause.

D. Waiver Of Right To Be Present

Finally, Parsons argues that his rights to due process were violated when the trial court, ruling on his request to waive his presence at trial, ruled that, once he had waived his right to be present, he would not be permitted to change his mind and later appear at court. App. Br. at 22-29. In other words, Parsons' asserts that his constitutional rights were violated when he agreed, having requested that he not be required to attend trial, that he would not be able to come and go from trial as he pleased.

Parsons' argument is without merit. Having not raised this issue below, Parsons should not be permitted to raise it for the first time in this appeal. Parsons cannot show error, much less manifest error of constitutional proportions. The trial court's ruling was correct and his argument should be rejected.

1. Standard of Review

A trial court's decision regarding voluntary absence is reviewed for abuse of discretion. *State v. Garza*, 150 Wn.2d 360, 365-66, 77 P.3d 347 (2003). A trial court has abused its discretion when its "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Woods*, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001).

2. The Trial court Did Not Abuse Its Discretion By Allowing Parsons To Exercise His Right Not To Be Present At Trial

At the beginning of trial, after a conference in chambers, counsel for Parsons indicated that “Mr. Parsons is very concerned about sitting through this trial. He doesn’t want to be here any longer. He would like to waive his presence. He doesn’t want to testify, either.” RP 2/29/12 at 2. The State objected, indicating that it believed that there was “some strategic plan” behind his request, and that his absence prejudiced the State’s case in several ways: the jury’s opportunity to see the “entire affect [sic] of the trial with the testimony, presentation of witnesses, my case, and then Mr. Parson’s as well.” *Id.* at 3. The trial court, stating that Parsons had a right to waive his presence at trial, stated that he would not “involuntarily require him to be here during the trial.” *Id.* After again noting Parson’s right to be present at trial, the court then informed Parsons that, if he waived that right, he would not be able to change his mind and return. *Id.* at 4. Continuing the inquiry, the court then stated that it wanted to be sure that Parsons was “fully informed as to what your waiver means,” and told Parsons that that waiver “may be prejudicial to you with the jury.” *Id.*

After having specifically requested that he be permitted to waive his presence at trial, and having been painstakingly advised as to the

implications of that waiver, Parsons now argues that his constitutional rights to be present were violated by his request having been granted. This argument is frivolous and must be rejected.

Pursuant to RAP 2.5(a), the appellate court may refuse to review any claim of error which was not raised in the trial court. There are several exceptions to this general rule, none of which apply here. Parsons, by claiming that his rights to due process were violated, appears to suggest that the trial court's error in placing conditions on his voluntarily absenting himself from his trial constitutes a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Because he cannot meet this high standard, his argument must be rejected.

Searching for a possible error of constitutional proportions, Parsons cites to *State v. Garza*. That case, however, is of no help to Parsons, in that facts and circumstances of that case bear no resemblance to those of Parsons. *Garza*, in the midst of his trial relating to alleged attempts to elude police in a high-speed chase, was delayed on his way to trial when, on the way to court, he was arrested and jailed by police in an unrelated matter. 150 Wn. 2d at 362. The trial court, having apparently become impatient with Garza's repeated tardiness during his trial and unaware that Garza had been arrested and detained, determined that Garza had voluntarily absented himself from trial and made the decision to

proceed in his absence. *Id.* Garza, on appeal, argued that the trial court's decision to proceed in his absence violated his rights under the Sixth Amendment to be present at trial. The Supreme Court agreed, stating that the trial court's "hasty determination of voluntary absence" did not satisfy the requirement that the trial court "sufficiently inquire into the circumstances of a defendant's absence." *Id.* at 369. Finding the trial court's decision to proceed after only five minutes "manifestly unreasonable," the Court determined that the determination of voluntary absence without reference to the presumption against waiver was an abuse of discretion. *Id.*

Garza is inapposite. First, it is, of course, a criminal case in which relief was pursued under the Sixth Amendment, and Parsons does not have the same Sixth Amendment rights in an SVP proceeding. *Strand*, 167 Wn.2d at 191. Secondly, there was substantial evidence that Garza's absence was not, in fact, voluntary. Upon arrest, Garza claimed to have asked the arresting officer to contact the trial court and tell them he would not be coming in. 150 Wn.2d at 364. Six days after the guilty verdict was entered in his absence, Garza moved for a new trial.

In stark contrast to these facts, there is no evidence whatsoever that Parsons' absence was not entirely and continuously voluntary. Parsons himself specifically and unequivocally initiated the discussion regarding

waiver, and made clear that he sought a complete and total release from any requirement that he appear in court. His attorney stated that he was “very concerned about sitting through this trial,” and “doesn’t want to be here any longer.” RP 2/29/12 at 2. Indeed, he also sought to preclude the State from calling him as a witness. *Id.* When told that he would not be permitted to change his mind, Parsons indicated repeatedly that he still wished to waive his presence at trial and that he understood and “appreciated” the trial court’s permitting him to do so.¹³ *Id.* at 4-5. At no point did Parsons take issue with the breadth of the trial court’s ruling, or indicate in any way that he sought a more flexible policy related to his absence than that reached by the trial court. Nor is there any evidence that,

¹³ The colloquy was as follows:

Court: If you now waive your right to be present throughout the trial, that is a waiver effective for the rest of the trial. You can’t then come back tomorrow and say, oh, I’ve changed my mind, I want to be here. Do you understand that?

Parsons: Yes, Sir.

Court: And is that what you intend on doing?

Parsons: Yes sir. There is no strategic reason for this. I don’t want to cause any further trauma for the victims seeing me or any of that. So I’d rather just prefer to not be amongst this. I really appreciate it, sir.

Court: I just want to make sure that you are fully informed as to what your waiver means. And that waiver may be prejudicial to you with the jury. If the jury sees you are not here, they may take that into account in rendering a verdict.

Parsons: Yes, sir, I understand.

RP 2/29/12 at 4-5.

over the course of the trial, Parsons did in fact change his mind or regret having made the voluntary waiver that he did. His claim fails.

IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 8th day of April, 2013

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NO. 68579-1

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention Of:

CLAY PARSONS,

Appellant

DECLARATION OF
SERVICE

I, Allison Martin, declare as follows:

On April 8, 2013, I sent via email and the United States mail true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

Nancy Collins
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
nancy@washapp.org

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

DATED this 8th day of April, 2013, at Seattle, Washington.


ALLISON MARTIN

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