Supreme Court No.: 89531-7
Court of Appeals No.: 67826-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: DETENTION OF:

EVERETTE BURD,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Appellant Everette Burd requests this Court grant review of the decision of the Court of Appeals, Division One, in *In re Detention of Everett Burd*, No. 67826-4-I, filed July 8, 2013. *See* RAP 13.4(b). A copy of the opinion is attached as Appendix A. On September 17, 2013 the Court of Appeals denied the State's Motion to Publish, which sought publication based on an issue for which Mr. Burd does not seek review.

B. ISSUES PRESENTED FOR REVIEW

1. The Sixth and Fourteenth Amendments, as well as article I, section 22 of our state constitution, separately and jointly guarantee an accused person the right to a meaningful opportunity to present a complete defense. Should the Court grant review to determine whether the trial court violated this substantial constitutional right when it excluded Mr. Burd's expert witness from testifying in rebuttal to the State's expert on an issue key to the defense—the validity of a diagnosis? RAP 13.4(b)(3).

2. This Court recently held that a prosecutor commits misconduct if he or she appeals to the jury's prejudices and passions and encourages a decision premised upon racial bias. *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). Should this Court grant review where the prosecutor argued to the majority white jury that "[w]hite women satisfy [Mr. Burd's]

predator" and where the Court of Appeals opinion contravenes *Monday*? RAP 13.4(b)(1), (3), (4).

3. To satisfy due process in an involuntary commitment proceeding, the State must prove a person is mentally ill and dangerous by at least clear and convincing evidence. Does RCW 71.09.020 violate due process by allowing for the involuntary commitment of a person who is merely "likely" to reoffend, that is, whose risk of reoffense is only "more probable than not?" RAP 13.4(b)(3).

4. Due process is violated when an involuntary civil commitment is based upon a diagnosis that is not accepted in the scientific community. Paraphilia NOS (nonconsent) is not included in the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM-IV or DSM-IV-TR) and is not widely accepted in the psychological community. Similarly, the diagnosis of antisocial personality disorder is overbroad and imprecise Should this court grant review of the significant constitutional question whether Mr. Burd's civil commitment violates due process where the State's diagnoses are constitutionally insufficient?

C. STATEMENT OF THE CASE

Everette Burd suffers from mild mental retardation, which went largely undiagnosed as a child. *E.g.*, RP 1109.[1] His family had trouble raising Mr. Burd in light of his special condition. RP 313-14; *see* RP 530 (parents beat him as a child). When Mr. Burd was thirteen years old, he was convicted of criminal trespass for entering through a window of a neighbor's home, picking through the underwear drawer of a twelve-year-old girl who resided there, and masturbating on the bed. RP 315; CP 4. A year later (and over twenty years ago), he sexually assaulted a 26-year-old house guest of a neighbor by grabbing her crotch. CP 4-5. Mr. Burd was placed in a residential group home and referred to treatment. RP 307-08, 320.

In 1997, Mr. Burd pled guilty to attempted rape in the first degree for a sexually-motivated attack on a young woman in a public building. CP 55.[2] Prior to his release at the conclusion of his sentence, the State filed a petition to indefinitely involuntarily commit Mr. Burd pursuant to Chapter 71.09 RCW. CP 1. In 2006, the court found probable cause to detain Mr. Burd pending trial, which was stayed while Mr. Burd appealed

[1] The transcript from the civil commitment trial is contained in consecutively paginated volumes and is referred to herein simply as RP. The transcript from the probable cause hearing is referred to herein as 7/24/06RP.

[2] The parties agreed this conviction satisfied the predicate act element of RCW 71.09.020(18) and 71.09.060. RP 50-51.

a related confinement issue. *E.g.*, 7/24/06RP 48; CP 90, 98. The civil commitment trial was eventually held in September 2011.[3]

At the commitment trial, the State presented testimony from its hired expert, Douglas Tucker. RP 621. Dr. Tucker diagnosed Mr. Burd with four mental abnormalities—paraphilia NOS (ncnconsent), mild mental retardation, fetishism, and schizoaffective disorder—and two personality disorders—antisocial personality disorder and borderline personality disorder. RP 648-51. The State argued the combination of these mental abnormalities and personality disorders rendered Mr. Burd more likely than not to commit a sexually violent offense if not committed indefinitely. RP 1438-40, 1442, 1453; CP 5. Respondent's counsel vigorously cross-examined Dr. Tucker regarding the reliability of his paraphilia NOS (nonconsent) diagnosis. *E.g.*, RP 877-97, 933-36.

Dr. Fabian Saleh found that Mr. Burd is a mildly mentally retarded individual who was unsophisticated and uneducated in his upbringing, which led to maladaptive behaviors. RP 1109, 1120. He did not diagnose Mr. Burd with a paraphilic disorder presently or in the past. RP 1120; *see* RP 1144 (testifying Burd did not present with anything close to sexual deviancy). The court excluded relevant portions of Dr. Saleh's testimony

[3] The trial initially commenced in July 2011 but was continued to September when Mr. Burd was not provided with prescribed medications. RP 154-56.

refuting acceptance of the controversial paraphilia NOS (nonconsent) diagnosis. RP 1045-50.

The jury found Mr. Burd to be a sexually violent predator and committed him indefinitely. RP 1491-92; CP 189-91. Division One of the Court of Appeals affirmed. Appendix A.

D. ARGUMENT IN SUPPORT OF GRANTING REVIEW

1. The trial court's exclusion of testimony from Mr. Burd's expert regarding the mental abnormality with which Mr. Burd was diagnosed raises a significant constitutional issue that this Court should review.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a complete defense. U.S. Const. amends. VI & XIV; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006); *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Article I, section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness). A defendant must receive the opportunity to present his version of the facts to the jury. *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d

297 (1973); *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999).

Here, the trial court excluded the respondent's expert witness's testimony about the nature of the debate surrounding the paraphilia NOS (nonconsent) diagnosis. On cross-examination, the State's expert, Dr. Tucker, testified that a debate about the diagnosis paraphilia NOS (nonconsent) took place at the 2010 meeting of the American Academy of Psychiatry and Law. RP 895. He conceded that in a "symbolic vote" 32 people "voted against paraphilic coercive disorder being included in the DSM-V and two people voted for it." RP 895-96. However, Dr. Tucker's testimony went on to minimize the audience as "people who were interested in [the] title and stopped in to hear [a political] debate." RP 897. He further testified that the debate centered around a "legal problem" rather than a medical diagnostic concern. RP 933-35.

Mr. Burd sought to rebut Dr. Tucker's testimony with testimony from Dr. Saleh regarding the nature of the conference at issue: that a debate could not be held without peer reviewed articles and proposals being submitted and that people vested in the outcome of the debates, such as forensic scientists, attended. RP 1045-46, 1048, 1090-96. This

information was based on Dr. Saleh's personal knowledge and experience; he is a former chair of the sex offender committee at the American Academy of Psychiatry and the Law and attended the conference at issue. RP 1045-46, 1076, 1090-91, 1093-94. But, the State moved to prevent Mr. Burd from offering Dr. Saleh's testimony regarding the context surrounding the informal vote as hearsay and without foundation, and the court granted the motion. RP 1045-50.

The evidence from Dr. Saleh was crucial to the respondent's case that paraphilia NOS (nonconsent) is not a valid diagnosis for commitment. *See id.*; RP 1093-94. Mr. Burd's counsel argued Dr. Tucker completely mischaracterized the conference. RP 1046, 1048, 1090. Contrary to the court's ruling, Mr. Burd's offer of proof demonstrated the excluded testimony would have been based on Dr. Saleh's personal knowledge, it was not hearsay, and the information was of the type that he would rely on to form his expert opinion. *See* ER 703; RP 1046, 1048, 1090-92, 1093-94.

Further, expert testimony may be based on out-of-court statements where the statements are of the type reasonably relied upon by experts in the particular field. *E.g.*, ER 703; *State v. Lucas*, 167 Wn. App. 100, 108-09, 271 P.3d 394 (2012) ("out-of-court statements on which experts base their opinions are not hearsay" and are properly admitted; citing

authority). Respondent's offer of proof showed experts in Dr. Saleh's field rely upon information at conferences such as the one at issue. RP 1090-91, 1093. The court's exclusion violated Mr. Burd's constitutional right to present a defense.

Though the trial court has the discretion to determine whether evidence is admissible, a defendant's inability to present relevant evidence implicates the fundamental fairness of the proceedings and the error must be analyzed as a due process violation. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924. Nonetheless, the Court of Appeals declined to analyze the constitutionality of the trial court's ruling, and provided no explanation for its failure to do so. *See* Appendix A at 6-7.[4]

The error excluded information critical to the defense regarding a key issue—whether Dr. Tucker's paraphilia NOS diagnosis was a valid and reliable basis to commit Mr. Burd. Consequently, it was not harmless and the conviction should be reversed and remanded for a new trial. *E.g.*, *State v. Gresham*, 173 Wn.2d 405, 434, 269 P.3d 207 (2012) (reversing where improperly admitted evidence was not harmless); *Maupin*, 128 Wn.2d at 930; *Jones*, 168 Wn.2d at 724.

[4] Even if the court's ruling did not rise to a constitutional violation, it was at least an abuse of discretion to exclude the evidence as irrelevant and hearsay.

2. The Court should review the State's flagrant and ill-intentioned misconduct resulting from its use of race to motivate the jury to make a decision on improper grounds, which was sanctioned by the Court of Appeals in contravention of *Monday*.

Prosecutorial misconduct violates a respondent's right to a fair trial where the prosecutor makes an improper statement that has a prejudicial effect. *E.g.*, *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991); *In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009).

Though a prosecutor has "wide latitude" to draw and argue reasonable inferences from the evidence, the State may not "invite the jury to decide any case based on emotional appeals." *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Gaff*, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason and "to act impartially in the interest only of justice." *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *accord State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993); U.S. Const. amends. V, XIV; Const. art. I, §§ 3, 22.

"A prosecutor gravely violates a defendant's Washington State Constitution article I, section 22 right to an impartial jury when the prosecutor resorts to racist argument and appeals to racial stereotypes or

racial bias to achieve convictions." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). "The gravity of the violation of article I, section 22 and Sixth Amendment principles by a prosecutor's intentional appeals to racial prejudices cannot be minimized or easily rationalized as harmless." *Id.* at 680.

Mr. Burd may raise the error even where there was no objection at trial, and "when a prosecutor flagrantly or apparently intentionally appeals to racial bias" the commitment must be vacated unless the State can show beyond a reasonable doubt that the misconduct did not affect the jury's verdict. *Monday*, 171 Wn.2d at 680; Const. art. I, § 22.

Here the State intentionally and improperly appealed to the jury's racial prejudices by arguing during rebuttal that "white women satisfy [Mr. Burd's] predator." RP 1480. The argument sought to incite the jury's passion and ensure commitment based on fear. The race of Mr. Burd's hypothetical future victims was irrelevant to the elements the jury had to find to commit. *See* CP 167 (to-commit instruction); RCW 71.09.060(1); RCW 71.09.020(18). The fact that Mr. Burd testified he is more attracted to white women than black women makes the comment no more relevant. *See* RP 537 (deposition testimony of Burd); RP 537-38;[5]

[5] The verbatim report reflects the following exchange between Douglas Tucker and Mr. Burd:

Exhibit 78.[6] Despite its irrelevance, the State repeated the comment—both times emphasizing that "white women" will be Mr. Burd's predatory target if the jury does not return a verdict to commit. RP 1479-80. The prosecutor's comments that "white women satisfy his predator" had no other purpose than to inflame the jury's passions and place the majority white jury in fear of failing to commit Mr. Burd.[7]

> Q: Were you, in, interested in white women more than black women, or other races?
>
> A: I like white women better.
>
> Q: Better?
>
> A: Yes.
>
> Q: And can you say why?
>
> A: Um, because always they, black women, don't satisfy [inaudible] they're, like prejudiced.
>
> Q: Okay. What – can you –
>
> A: And the white women look more prettier than a black one. Because I like the woman, a white woman with makeup on, uh and when a black woman wears makeup, you can't see it on them.

RP 537-38.

[6] The State and the Court of Appeals improperly rely on the State's transcript of the interview at Exhibit 78, but that transcript was not provided to the jury. Appendix A at 11 & n.26; Resp. Br. at 28 n.3, 29 (citing exhibit 72), 32 (same). Even if the Court relies on the transcript at Exhibit 72, however, the prosecutor's comments were irrelevant and selected to inflame the prejudices of the jury and encourage commitment on an improper basis—fear. *Cf. In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (citing to ABA standards admonishing prosecutors from using arguments calculated to inflame the passions and prejudices of jury).

[7] Chart from Appendix 2 of Petitioner's Brief, *State v. Lanciloti*, Washington Supreme Court No. 81219-5 (email from Washington State Center for Court Research showing 77 percent of King County, Seattle, jury pool is "White"), *available at* http://www.courts.wa.gov/content/Briefs/A08/812195%20chart%20from%20appendix%202%20of%20petitioner's%20brief.pdf; 2010 Census,

This improper appeal to racial bias cannot be held harmless beyond a reasonable doubt. The prosecutor's comment occurred during her very short rebuttal argument, immediately prior to the court releasing the jury to deliberate. *See* RP 1479-80. The prosecutor intentionally aimed to distract the jury from its actual task—determining whether the State satisfied the elements for indefinite commitment—by placing it in fear of releasing Mr. Burd. Such an inflamed, racial appeal is a rung bell that could not have been "unrung" by a curative instruction. *State v. Trickel*, 16 Wn. App. 18, 30, 553 P.2d 139 (1976), *rev. denied*, 88 Wn.2d 1004 (1977).

This Court should review the prosecutor's repeated use of racial bias to motivate the jury. *See Monday*, 171 Wn.2d at 681.

3. This Court should reexamine *Brooks* and review the constitutionally insufficient statutory standard that allows indefinite civil commitment upon a mere preponderance of the evidence.

RCW 71.09.060 requires a person may not be committed indefinitely unless the State proves beyond a reasonable doubt he is a sexually violent predator. RCW 71.09.060. A "sexually violent predator" is a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality

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U.S. Census Bureau (showing 72.9 percent of King County identifies as "White" alone or in combination with one or more other races).

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) (emphasis added). "'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 on the sexually violent predator petition." RCW 71.09.020(7) (emphasis added). This is the preponderance of the evidence standard.

Here, Dr. Tucker testified that one of the actuarial tests for recidivism showed Mr. Burd faced a 52 percent risk of reconviction if released. CP 5 (Static 99 test result); *see* RP 908-09. This is simply slightly more likely than not.

Such a standard conflicts with the constitutionally-required standard of proof in civil commitment proceedings. "[T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 427, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). The Constitution requires proof of present dangerousness by clear and convincing evidence. *Id.* at 433. "Clear and convincing evidence" means the fact in issue must be shown to be "highly probable." *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). Thus, civil commitment

is unconstitutional absent a finding that it is "highly probable" the person will reoffend. The "more probable than not" standard of RCW Ch. 71.09 violates due process.

Though this Court rejected the argument in *In re Det. of Brooks*, that opinion should be reexamined in light of subsequent caselaw. *See In re Det. of Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001). Since *Brooks* was decided, both the U.S. Supreme Court and this Court have held that involuntary commitment is unconstitutional absent a showing that a defendant has "serious difficulty" controlling dangerous, sexually predatory behavior. *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002); *In re Det. of Thorell*, 149 Wn.2d 724, 735, 72 P.3d 708 (2003). The evidence must be sufficient to distinguish a sexually violent predator "from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413; *Thorell*, 149 Wn.2d at 731.[8]

The "serious difficulty" standard of *Crane* and *Thorell* is akin to the "highly probable" standard, not the "more likely than not" standard outlined in the statute. *See Thorell*, 149 Wn.2d at 742 ("although this evidence need not rise to the level of demonstrating the person is completely unable to control his or her behavior," the State must prove the

[8] The Court of Appeals simply relied on *Brooks* in rejecting Mr. Burd's argument. Appendix A at 9-10.

person "has serious difficulty controlling behavior"); *see also In re Commitment of Laxton*, 254 Wis.2d 185, 203, 647 N.W.2d 784 (2002) (upholding Wisconsin's civil-commitment statute following *Crane* because statute required showing of "substantial probability that the person will engage in acts of sexual violence," and "substantially probable" means "much more likely than not").

The elevated standard of proof is necessary to support the "requirement that an SVP statute substantially and adequately narrows the class of individuals subject to involuntary civil commitment." *Thorell*, 149 Wn.2d at 737 (internal citation omitted). The State must "demonstrate[] the cause and effect relationship between the alleged SVP's mental disorder and a high probability the individual will commit future acts of violence." *Id.* at 737 (emphasis added); *cf.* Sentencing Guidelines Commission, *Recidivism of Adult Felons 2007* at 1 (recidivism rate among adult male felons generally is 63.3 percent).

Thorell is consistent with this Court's earlier pronouncements regarding the due process rights of those subject to civil commitment. In the seminal case of *In re Harris*, for example, the Court required "demonstration of a substantial risk of danger" to satisfy due process and "protect against abuse." *In re Harris*, 98 Wn.2d 276, 281, 654 P.2d 109 (1982). *Harris* emphasized that "involuntary commitment requires a

showing that the potential for doing harm is 'great enough to justify such a massive curtailment of liberty.'" *Id.* at 283 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)). Thus, "[t]he risk of danger must be substantial . . . before detention is justified." *Id.* at 284. Chapter 71.09 RCW violates due process because it requires only that the risk of danger be "likely" or "probable"—not substantial.

The fact that the statute mandates a "beyond a reasonable doubt" standard in one clause cannot save it because the standard is severely weakened in another clause by allowing for commitment only where it is "likely" a person will reoffend. A finding beyond a reasonable doubt that it is merely "likely" or "probable" that a person will reoffend creates a standard which, in the aggregate, is lower than clear and convincing evidence.

To pass constitutional muster, the statute must mandate a showing by clear and convincing evidence that the defendant will reoffend if not confined to a secure facility—not a showing that he "might" reoffend, will "probably" reoffend, or is "likely" to reoffend. *See Addington*, 441 U.S. at 420 (trial court properly instructed jury it had to find, by clear and convincing evidence, that the defendant required hospitalization in a mental hospital for his own welfare and protection or the protection of others—not that he probably needed hospitalization).

The Legislature has found that as a group, "sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high." RCW 71.09.010. Due process demands that this "highly likely" finding be made on an individual basis, for each person condemned to suffer indefinite confinement. This Court should grant review and hold that the "likely" and "more probably than not" standards of RCW 71.09.020 are unconstitutional.

4. The Court should grant review because the involuntary commitment violates due process as it is based upon diagnoses that are not accepted by the profession, overbroad, and insufficiently precise.

The diagnosis of paraphilia NOS (nonconsent) was invented by a single psychiatrist, has been explicitly rejected by the APA, is roundly criticized within the profession, and lacks medical recognition. Likewise, antisocial personality disorder is an imprecise and overbroad a diagnosis. This Court should grant review and hold due process prohibits the use of these constitutionally insufficient diagnoses a predicate for involuntary commitment.

The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty, and consequently, due process prohibits the State from committing persons unless they are both currently dangerous and have a mental abnormality. U.S. Const. amend

XIV; Const. art. I, § 3; *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); *Kansas v. Hendricks*, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *Thorell*, 149 Wn.2d at 731-32. It follows that involuntary civil commitment may not be based on a diagnosis that is either not medically recognized or is too imprecise to distinguish the truly mentally ill from typical recidivists who must be dealt with by criminal prosecution alone. *Foucha*, 504 U.S. 71; *Hendricks*, 521 U.S. 346; *Crane*, 534 U.S. 407.

The Supreme Court has upheld involuntary civil commitment only in cases in which the diagnosed disorder was one that "the psychiatric profession itself classifies as a serious mental disorder." *Hendricks*, 521 U.S. at 360; *id.* at 372 (Kennedy, J., concurring); *id.* at 375 (Breyer, J., dissenting); *Crane*, 534 U.S. at 410, 412. The disorder referred to by Dr. Tucker as paraphilia NOS (nonconsent) fails the Supreme Court's "medical recognition" or "medical justification" test, because it is not recognized by either the psychiatric profession in general, or the APA or the DSM-IV-TR in particular.[9] *E.g.*, Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 Journal of Sexual Offender Civil Commitment:

[9] The DSM-IV-TR was the version in effect at the time of Mr. Burd's commitment trial.

Science and the Law 17, 43 (2005); *see* RP 877-78 (Tucker acknowledges APA rejected diagnosis); 7/24/06RP 20-21 (testimony of Tucker that no explicit criteria to diagnose paraphilia NOS (nonconsent) exists that would be agreed on by all clinicians); RP 1188-98 (testimony of Saleh that diagnosis unreliable and rejected by APA as well as others). Put simply, it is a wholly unreliable and invalid diagnosis that fails to distinguish Mr. Burd from any "dangerous but typical recidivist" who cannot be civilly committed under the Due Process Clause. *Crane*, 534 U.S. at 413.

The United States Supreme Court has strongly suggested that antisocial personality disorder is simply "too imprecise a category to offer a solid basis for concluding that civil detention is justified." *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring); *accord Crane*, 534 U.S. at 413. The State's expert, Dr. Tucker, agreed that antisocial personality disorder is "way over representative in the criminal justice system." RP 705; *see, e.g.*, Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota's Sex Offender Commitment Litigation*, 92 N.W. U. L. Rev. 1279, 1291 & n.59 (1998) (collecting studies indicating that 75 to 80 percent of all prisoners are diagnosable with antisocial personality disorder).[10]

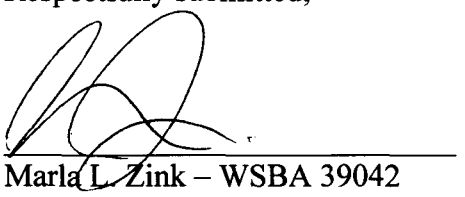
[10] The APA also has taken the position that antisocial personality disorder is an over-inclusive and inappropriate basis for civil commitment. For instance, in *Crane*, the APA appeared as *amicus curiae* and argued "the presence of 'antisocial personality

E. CONCLUSION

The Court should grant review of the above-noted significant constitutional issues. The prosecutor's use of race to inflame the passions of the jury is also of substantial public interest.

DATED this 17th day of October, 2013.

Respectfully submitted,



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disorder' as the condition causing the danger provides no meaningful limiting principle" for civil commitment statutes. Brief for the American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae in Support of Respondent, 2001 WL 873316, at *18.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of EVERETTE BURD,	)	No. 67826-4-I
Appellant.	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: July 8, 2013

GROSSE, J. — Failure to request a Frye[1] hearing on the validity of certain medical diagnoses precludes a defendant from challenging the validity of those medical diagnoses on appeal. Further, failure to request a Frye hearing does not constitute ineffective assistance of counsel where, as here, the diagnoses are accepted within the scientific community and our courts have previously held that Frye hearings are not required for those diagnoses. Finding no merit in the remaining arguments on appeal, we affirm the trial court's order of commitment.

FACTS

In 1989, at age 14, Everette Burd was found guilty of first degree criminal trespass for entering a neighbor's home, rummaging through a 12-year-old's underwear drawer, handling the undergarments, and masturbating on the bed. In 1991, Burd sexually assaulted a 26-year-old house guest of a neighbor. Burd forced his way in, pushed the woman down, and grabbed her crotch. The woman escaped and Burd was adjudicated for first degree burglary, indecent liberties, and criminal trespass. Burd was sentenced to 168 weeks. Pending his

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

appeal, Burd was released with conditions and treatment to be provided by Dr. Charles Lund.

Burd violated his conditions of release, including the sexual deviancy treatment requirements and was placed at Maple Lane School. While at Maple Lane, Burd pinched a staff member on her buttocks and grabbed her arm as she attempted to escape from him. He was also convicted of fourth degree assault at the age of 18. On August 27, 1996, Burd, then 20 years old, sexually assaulted a 17-year-old stranger, D.B. The victim had entered the bathroom in a church. While in the stall she noticed a man's shoes, and tried to leave. Burd grabbed her, placed her in a choke hold, and dragged her into another room. He ripped off her shirt and bra, squeezed her breasts, and placed his hands down her pants, uttering profanities. D.B.'s shouts were heard by another person who managed to pull Burd off D.B. Burd was arrested and pleaded guilty to first degree attempted rape for which he received a 90-month sentence.

In 1997, Burd was evaluated for his amenability for sex offender treatment. Burd admitted attacking a teenage boy and trying to rip off his clothes but denied that it was sexual. Throughout his incarceration, he had several sexually related infractions.

The State filed a petition to commit Burd as a sexually violent predator (SVP). Pending trial, Burd was admitted to the special commitment center in 2006, but refused treatment until 2009. When he began treatment he admitted that he had been masturbating the previous day for three hours nonstop to rape

fantasies involving the female staff at the hospital as well as women on the television.

At the commitment trial, the State presented expert testimony from Dr. Douglas Tucker, who conducted an assessment of Burd to determine if he met the SVP criteria. Dr. Tucker concluded that Burd's mental abnormalities predisposed him to commit sexual acts that endangered the health and safety of others and that he was likely to engage in predatory acts of sexual violence if not confined to a secure facility. Burd presented the expert testimony of Dr. Fabian Saleh, who disagreed with Dr. Tucker's diagnoses and questioned the validity of those diagnoses.

The jury found that Burd met the criteria for an SVP. Based on this finding, the trial court ordered him civilly committed. Burd appeals.

ANALYSIS

Burd first contends that his commitment violates his rights to due process because it is premised on diagnoses that are overbroad, insufficiently precise, and not accepted by the medical profession. Burd also contends he received ineffective assistance of counsel because his counsel failed to request a Frye hearing on the diagnoses of paraphilia not otherwise specified (NOS) nonconsent and antisocial personality disorder.

Under SVP commitment statutes, due process requirements are satisfied "if a finding of dangerousness is linked to the existence of a mental abnormality or personality disorder that makes it seriously difficult for the person with the

abnormality or disorder to control his or her behavior."[2] Burd contends that paraphilia NOS nonconsent is not recognized by the psychiatric profession and that the admission of Dr. Tucker's testimony therefore violated his due process rights.

This court rejected a similar argument in In re Detention of Post,[3] noting that such an argument constituted an improper attempt to sidestep a failure to challenge the diagnosis by means of a Frye hearing in the trial court:

> Post improperly attempts to transform that which should have been raised as an evidentiary challenge in the trial court into a question of constitutional significance on appeal. In point of fact, Post attempts to sidestep the fact that he did not seek a Frye hearing in the trial court, and, thus, has not preserved an evidentiary challenge for review.[4]

In a Frye challenge, the trial court determines whether a scientific theory or principle "'has achieved general acceptance in the relevant scientific community.'"[5] A party's failure to raise a Frye challenge before the trial court generally precludes appellate review. Because Burd did not raise the issues below, the State did not have an opportunity to respond fully to the challenge he now asserts for the first time on appeal. Burd's expert testimony challenging the

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[2] In re Det. of Post, 145 Wn. App. 728, 755, 187 P.3d 803 (2008), aff'd, 170 Wn.2d 302, 241 P.3d 1234 (2010) (citing Kansas v. Crane, 534 U.S. 407, 410, 413, 122 S. Ct. 867, 151 L. Ed 2d 856 (2002)).
[3] 145 Wn. App. 728, 187 P.3d 803 (2008).
[4] Post, 145 Wn. App. at 755-756.
[5] In re Pers. Restraint of Young, 122 Wn.2d 1, 56, 857 P.2d 989 (1993) (quoting State v. Martin, 101 Wn.2d 713, 719, 684 P.2d 651 (1984)), superseded by statute as stated in In re Det. of Thorell, 149 Wn.2d 724, 746, 72 P.3d 708 (2003) (LAWS OF 1995, ch. 216, § 9).

validity of the paraphilia NOS nonconsent diagnosis therefore goes to the weight of the evidence, not its admissibility.[6]

Burd's challenge to Dr. Tucker's diagnosis of antisocial personality disorder is likewise precluded from being raised on appeal. Burd argues that admitting evidence of this diagnosis violates due process guarantees because it is too imprecise and broad to differentiate a dangerous sexual offender from the typical criminal recidivist and, thus, the evidence was not helpful to the trier of fact under ER 702.[7] Again because Burd did not challenge Dr. Tucker's testimony on this basis below, he has waived the issue on appeal.[8]

Burd alternatively argues that his counsel's failure to request a Frye hearing on the medical diagnoses and to object to the admission of the antisocial personality diagnosis as being unhelpful under ER 702 denied him effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must demonstrate both (1) that his attorney's representation fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.[9] Washington courts have repeatedly upheld commitments based

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[6] See Post, 145 Wn. App. at 757 n.19; In re Det. of Berry, 160 Wn. App. 374, 382, 248 P.3d 592, rev. denied, 172 Wn.2d 1005 (2011).

[7] ER 702 provides that an expert witness may offer an opinion "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

[8] See Post, 145 Wn. App. at 756 n.16; see also In re Det. of Sease, 149 Wn. App. 66, 201 P.3d 1078 (2009) (civil commitment can be based on a personality disorder alone when supported by expert testimony).

[9] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

on paraphilia NOS nonconsent or antisocial personality disorder diagnoses under Frye or ER 702.[10]

Burd has not identified any SVP proceedings in which such evidence was excluded under Frye or ER 702. Indeed, any objection under ER 702 would have been overruled since courts have held that a civil commitment can be based on a personality disorder alone when supported by expert testimony.[11] On the record here, Burd cannot demonstrate any reasonable likelihood that the trial court would have excluded testimony on paraphilia NOS nonconsent and antisocial personality disorder diagnoses under either Frye or ER 702. Thus, Burd cannot demonstrate that his counsel was ineffective or that he suffered any prejudice.[12]

Exclusion of Evidence

Burd argues that the trial court erred in excluding portions of his expert's testimony. A trial court has broad discretion in admitting expert evidence and a party may introduce such evidence only where the expert is properly qualified, relies on generally accepted theories, and is helpful to the trier of fact.[13] An expert must have a sufficient factual foundation for his opinion.[14] Conclusory or speculative expert opinions that lack an adequate foundation are inadmissible.[15]

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[10] See Post, 145 Wn. App. at 757 n.18; Young, 122 Wn.2d at 37.
[11] Sease, 149 Wn. App. 66.
[12] See McFarland, 127 Wn.2d at 334-35; see also Berry, 160 Wn. App. at 382.
[13] ER 702; Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 590, 602, 260 P.3d 857 (2011).
[14] Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wn.2d 50, 104, 882 P.2d 703 (1994).
[15] Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (1991).

On cross-examination, Burd queried Dr. Tucker about a debate entitled "Stirring the DSM-V Caldron" that Dr. Tucker participated in at the annual American Academy of Psychiatry and the Law. At the conclusion of the debate, a symbolic vote was taken in which only two people in the audience voted to include paraphilic coercive disorder, while 32 people voted against its inclusion. Dr. Tucker characterized the audience as people who were not necessarily experts in sexual offenders.

Burd sought to continue this line of questioning with his own expert Dr. Fabian Saleh, but the State moved to exclude any testimony from Dr. Saleh about the informal vote that occurred at the debate. The State argued that because Dr. Saleh was not present, the testimony was hearsay and further there was no foundation for the reliability of the scientific evidence at the debate. In his offer of proof, Burd asserted that Dr. Saleh was the chair of the sex offender committee for several years at the American Academy of Psychiatry and the Law, that he would testify that in order to have a debate, peer reviewed articles and proposals had to be submitted, and that people vested in the outcome of the debates, including forensic psychiatrists attended. The court ruled that such a generic debate was not relevant under ER 703 as a basis for admissible expert testimony, and that Dr. Saleh's absence from the debate prevented him from characterizing the content and participators in the debate because he was not present. Because the testimony was hearsay, irrelevant, and not likely helpful to the jury, the trial court did not abuse its discretion by excluding it.

Jury Instruction

Burd argues that the evidence was insufficient to show that he suffered any mental abnormality or personality disorder and that the court erred in issuing the following instruction:

> [M]ental abnormality and personality disorder are alternative means to proving [the second element]. The jury need not be unanimous as to whether a mental abnormality or personality disorder has been proved beyond a reasonable doubt so long as each juror finds that at least one of these alternative means has been proved beyond a reasonable doubt.

Dr. Tucker testified that Burd suffered from four mental abnormalities—paraphilia NOS nonconsent, mild mental retardation, fetishism, and schizoaffective disorder, and two personality disorders—antisocial personality disorder and borderline personality disorder. Burd contends that because the State argued the combination of these diagnoses predisposed Burd to commit sexual violent offenses, the State failed to prove that each diagnosis in itself was sufficient to support a finding of mental abnormality or personality disorder.

But it is not the particular diagnosis that is the alternative means. Those diagnoses form the particular facts from which a jury could determine the presence of either a mental abnormality and/or a personality disorder. It is the presence of a mental abnormality and/or personality disorder that are two alternative means of establishing the mental illness element.[16] To do as Burd argues would create a means within a means unanimity analysis.

[16] In re Det. of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006).

In re Detention of Sease is instructive.[17] There, the State relied on two personality disorders to establish the required element of mental abnormality or personality disorder. As here, the parties did not disagree that unanimity rules apply in SVP cases.[18] Sease argued that because he had two personality disorders, the jury needed to be unanimous on which of the two diagnoses made him an SVP. The court rejected the argument stating:

> The SVP statute delineates two alternatives for satisfying the State's burden of establishing a mental condition "which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility"—mental abnormality or personality disorder. RCW 71.09.020(16). There is no dispute that Sease suffered from one or, possibly, two personality disorders.
>
> As in [In re Personal Restraint of] Jeffries, [110 Wn.2d 326, 752 P.2d 1338 (1988)] the jury here need only have unanimously found that the State proved that Sease suffered from a personality disorder that made it more likely that he would engage in acts of sexual violence if not confined to a secure facility. The jury need not have unanimously decided whether Sease suffered from borderline personality disorder or antisocial personality disorder. Therefore, the trial court did not err in failing to give a unanimity instruction and it is not an error that Sease can raise for the first time on appeal.[19]

"Likely to Reoffend" Standard

Burd next challenges the "likely to reoffend" standard for determining whether an offender is at risk for reoffense, a part of the SVP determination. He contends that this standard is inconsistent with the clear and convincing evidence standard that is constitutionally required. But as he acknowledges, our state

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[17] 149 Wn. App. 66, 201 P.3d 1078 (2009).
[18] In re Det. of Pouncy, 144 Wn. App. 609, 617, 184 P.3d 651 (2008), aff'd, 168 Wn.2d 382, 229 P.3d 678 (2010).
[19] Sease, 149 Wn. App. at 78-79; see also Halgren, 156 Wn.2d at 811 (unanimity instruction is not required as to which of the two types of mental illnesses specified in the statute underlies a determination that one is an SVP.)

supreme court has already rejected this argument in In re Detention of Brooks.[20]

The Brooks court stated:

> RCW 71.09.060(1)'s demand that the court or jury determine beyond a reasonable doubt that a defendant is an SVP means that the trier of fact must have the subjective state of certitude in the factual conclusion that the defendant more likely than not would reoffend if not confined in a secure facility. As set out in the statute, the fact to be determined is not whether the defendant will reoffend, but whether the probability of the defendant's reoffending exceeds 50 percent. As long as the SVP statute requires the fact finder to have the subjective belief that it is at least highly probable that the defendant is likely to reoffend, it meets the standard set forth in In re Dependency of K.R. Chapter 71.09 RCW meets and exceeds that standard. Brooks' constitutional claims fail.[21]

The "likely to reoffend" standard is constitutional.

Prosecutorial Misconduct

Burd argues that the prosecutor committed misconduct during her rebuttal argument. Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.[22] A prosecutor may not appeal to the passions of the jury and encourage it to render a verdict based on emotion rather than properly admitted evidence.[23] The prosecutor has wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the

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[20] 145 Wn.2d 275, 298, 36 P.3d 1034 (2001), overruled on other grounds by Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003).
[21] 145 Wn.2d at 297-98; see also In re Det. of Mulkins, 157 Wn. App. 400, 407, 237 P.3d 342 (2010) (rejecting an identical constitutional challenge to RCW 71.09.020).
[22] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)).
[23] State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

evidence in closing arguments.[24] Prejudice is established if there is a substantial likelihood the misconduct affected the jury's verdict. Where no objection is made to the remarks, the reviewability of the alleged prosecutorial misconduct depends on whether the prosecutor's conduct was so flagrant and ill-intentioned as to create prejudice that could not be negated by a curative instruction.[25]

The jury watched a video deposition of Dr. Tucker interviewing Burd.[26] In rebuttal argument, the prosecutor stressed that Burd was a predator, and did nothing more than paraphrase admitted testimony that the jury had already heard. Because the prosecutor's argument directly addressed Burd's own testimony and was responsive to issues argued by the defense, Burd fails to show that these remarks were improper.[27]

Accordingly, we affirm the commitment.

WE CONCUR:

COX, J.

[24] State v. Gregory, 158 Wn.2d 758, 860, 147 P.3d 1201 (2006).
[25] State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).
[26] Exhibit 78B is a CD (compact disc) of a portion of the transcript which was heard by the jury and Exhibit 72 provided by the State is an accurate transcription of that CD. Burd argues that the verbatim report of proceedings is the "official" record, but it is the CD itself that is official and was heard by the jury. The transcription the State provided to this court accurately reflects the recording of the CD.
[27] Stenson, 132 Wn.2d at 727.

APPENDIX B

Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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September 17, 2013

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CASE #: 67826-4-I
In Re the Detention of Everette Burd
Counsel:

Enclosed please find a copy of the Denying Motion to Publish entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk
ssd
Enclosure

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

In the Matter of the Detention of EVERETTE BURD,	)	No. 67826-4-I
Appellant.	)	ORDER DENYING MOTION TO PUBLISH

The respondent, State of Washington, has filed a motion to publish herein. The appellant, Everette Burd, has filed a response to the motion. The court has taken the matter under consideration and has determined that the opinion is not of precedential value.

Now, therefore, it is hereby

ORDERED that the unpublished opinion filed July 8, 2013, shall remain unpublished.

Done this 17th day of September 2013.

FOR THE COURT:

Grosse, J

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 67826-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent David Hackett, DPA
King County Prosecutor's Office-SVP/Detention Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 17, 2013