NO. 44137-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

MORGAN HEATH,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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I. ISSUES PRESENTED

A. Where a juror inadvertently discovered information that had already been repeatedly presented at trial, and mentioned that information to another juror, did the trial court err in denying Heath's motion for a mistrial?

B. Is a unanimity instruction required where the State presented evidence of both a mental abnormality and a personality disorder, and where sufficient evidence in the record supports each?

II. STATEMENT OF THE CASE

Heath, now 24, is a pedophile who has been offending against children and adolescent females since adolescence. His first conviction for a sexual offense occurred in 2003, when he was 14 years old. Heath was living with his father, his father's girlfriend, and the girlfriend's two-year-old daughter, A.S. CP at 594.[1] Over a period of roughly two months, Heath molested A.S. on "four or five" separate occasions, exposing himself to the girl, having her touch his penis, having her perform oral sex on him and penetrating her vagina with his penis. *Id.* at 595. Heath testified that his attempts to have intercourse with the child resulted in "extreme amounts of pain" on A.S.'s part, and that, when A.S. cried, Heath told her that, if she did not stop crying, he would try to push his penis farther into her. *Id.* at 595-96. He also told her that, if she told anyone what he had done, "her mom was going to go away." *Id.* Prior to molesting A.S., Heath had viewed pornography. *Id.* This aroused Heath sexually, and he

[1] Portions of Heath's video deposition were played to the jury. Those portions that were played can be found at CP 538-609. These were played to the jury at 10/9/2012 RP at 200-201.

"wanted to act out what [he had] been seeing in the pornography" with A.S. *Id.* at 596. Discussing these incidents with the State's expert, Dr. Amy Phenix, Ph. D., Heath confirmed these facts, indicating that "he did it because it felt good, and he did it because he got self-gratification out of it." 3 RP at 229. Heath was charged with one count of Rape of a Child in the First Degree for his assaults against A.S., pled guilty, and was sentenced to the Juvenile Rehabilitation Administration (JRA) for a period of fifteen to thirty-six weeks. Exs. 1, 2 & 3; CP at 594.

While in JRA, Heath participated in a sex offender treatment program and admitted to having had dreams of watching himself rape the two-year-old girl. Heath admitted to these dreams in his deposition, describing them as "nightmares. " CP at 597. This characterization was disputed by Dr. Phenix, who referred to them as "fantasies," noting that reports indicated that Heath had in fact masturbated to these memories for several years after the assaults had occurred. 3RP at 244-46.

After having completed his JRA sentence for the rape of A, Heath was released on community supervision. Heath violated the terms of his release repeatedly. In October 2004, Heath was convicted of theft and false reporting. CP at 587. Between December 2004 and July 2006, Heath was convicted of having physically assaulted four of his girlfriends (CP at 579-85). Several of these assaults resulted in no-contact orders, at least some of which he violated.

CP at 584-86. Based on behavior in 2006 and 2007, Heath was twice convicted for failing to register as a sex offender. Exs. 9 & 11.

During the three-year period between 2007 and 2010, Heath was supervised by Nancy Jo Nelson, a community corrections officer for the Department of Corrections. 2RP at 124, 126. Ms. Nelson testified that, in the three years that she supervised Heath, he committed at least 34 violations of the conditions of his release and spent over half of that three-year period in jail. 2RP 126-28, 155. These violations involved, *inter alia,* failing to maintain employment, failing to reside at an approved address, failing to abide by conditions of GPS monitoring and escaping community custody. 2RP at 135; 144-45.

Heath also violated the conditions of his community custody on numerous occasions by being in the presence of minors. 2RP at 135, 153. In July 2008, Heath was briefly employed at a carnival, an unauthorized employment site, operating a children's ride. 2RP at 138; 3RP at 249. In August 2008, immediately following his release from jail in Forks, Washington, Heath was provided with a bus ticket back to Bremerton, Washington. 2RP at 141. Instead of returning to Bremerton, however, Heath went to Tillicum Park in Forks where a festival was taking place. 2RP at 141-142. Ms. Nelson, who investigated this incident, testified that Heath was stopped by police when a concerned witness called for assistance after

hearing Heath say he had just been released from a maximum security prison. 2RP at 142. The police arrived to see Heath leading a young child out of the park on a pony. 2RP at 143.

Following his release from jail based on violation of his community supervision in February of 2010, Heath continued to violate the conditions of his release. Still on community supervision, Heath continued to be prohibited from being in the presence of children. 2RP at 154. Despite this prohibition, upon his release from jail, Heath began staying with his girlfriend Tammy in the presence of her children (12 and 13) and her children's friends. 2RP at 153; 3RP at 253. While staying at Tammy's apartment, Heath was observed repeatedly giving "piggy back rides" and "rolling around" with children at the apartment playground, praising a neighborhood dog when the dog began "humping" one of the children and encouraging the children to get on their hands and knees so the dog could "hump" them as well. *Id.* at 142-43, 153; 3RP at 196, 253-54. During this time, Heath lied to Ms. Nelson regarding where he was living. 2RP at 152; 3RP at 253. When Ms. Nelson learned that Heath had been staying at his girlfriend's apartment, she arrested him for several community supervision violations. 2 RP at 152.

Upon his arrest, various details emerged. Tammy's house, Ms. Nelson discovered, was a gathering place for Tammy's children's friends, who would hang out and drink alcohol there. 2RP at 153; CP at 604-605. Some of

this alcohol was purchased for the children by Heath. CP at 606. One of the children, thirteen-year-old A.C., stayed at Tammy's house frequently. 6RP at 606. A.C. testified that one night, she and Heath were watching television in the living room. *Id.* at 609. Heath was sitting on the floor and began wrestling with A.C. for the blanket covering her on the couch where she often slept. *Id.* at 610. Heath then climbed on top of A.C., pinned her arms over her head, and raped her. *Id.* at 610-613. A.C. left Tammy's house that night and did not return again except to get her belongings a few days later. *Id.* at 614-15. A.C. did not tell anyone what had happened with Heath until a juvenile detention officer asked during an intake interview whether she had ever been sexually assaulted or raped. *Id.* at 615. During approximately the same period, Heath also sexually assaulted 13-year old J.R., reaching down her pants and fondling her genitals. 3RP at 231. Heath ultimately pled guilty to Assault in the Fourth Degree with Sexual Motivation for the offense against A.C. and to Attempted Communication with a Minor for Immoral Purposes for his assault on J.R. Exs. 4, 5 & 6.

The State filed a petition to commit Heath as a sexually violent predator pursuant to RCW 71.09 on August 30, 2010, shortly before he was due to be released from jail on the two offenses against A.C. and J.R. CP at 1-3. At the State's request, Dr. Amy Phenix submitted a psychological evaluation of Heath before the case was filed and submitted an updated

evaluation before trial. 3RP at 222-226. Dr. Phenix' evaluations were based upon an extensive review of Heath's records, as well as an interview with Heath at the Special Commitment Center.[2] *Id.* at 219-220. Dr. Phenix concluded that Heath meets the criteria for the following diagnoses, listed in the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition-Text Revision ("DSM-IV-TR"):

- Pedophilia, Sexually Attracted to Females, Nonexclusive Type
- Borderline Personality Disorder
- Antisocial Personality Disorder

3RP at 233. Dr. Phenix determined that Heath suffers from both a mental abnormality and a personality disorder that makes him likely to commit predatory acts of sexual violence if not confined to a secure facility. 3 RP at 313-314.

The case proceeded to trial and on October 15, 2012, a unanimous jury determined that Heath was a sexually violent predator. Heath was committed to the care and custody of the Department of Social and Health Services. He now appeals.

III. ARGUMENT

On appeal, Heath raises two issues. First, he argues that he is entitled to a new trial based on juror misconduct when jurors "discussed" "extrinsic evidence" one of the jurors had "researched" on the Internet, and then "lied"

[2] The Special Commitment Center (SCC) is a secure, DSHS-run facility for the care and treatment of persons detained pursuant to the sexually violent predator act.

to the court when questioned. Second, he argues that he was entitled to a unanimity instruction that would have required the jury to determine whether, based on a personality disorder alone, Heath was likely to reoffend. Neither argument has merit. First, there was no juror misconduct where a juror innocently came upon information already repeatedly disclosed at trial, and then mentioned that fact to another juror. Second, no unanimity instruction is required where commitment is based on both a mental abnormality and personality disorder, and there is sufficient evidence to support each, and there is no requirement that the jury determine whether, standing alone, the personality disorder makes the person likely to reoffend. This Court should affirm Heath's commitment.

A. The Trial Court Properly Denied Heath's Motion For A Mistrial Based On Juror Misconduct

Heath argues that his right to a fair trial was violated when a Juror 11 "gathered addition evidence" (App. Br. at 7) and "looked up" Heath's custody status and "shared that information with other jurors." App. Br. at 7.[3] He further argues that the jurors "initially lied" about their activities, (*Id.* at 4); that Juror 11 only "reluctantly" acknowledged both that she had found Heath's custody status on line and that she had shared that information with Juror 8. Heath, however, mischaracterizes the record, taking what appears to have been an innocent

[3] Elsewhere Heath alleges, without citation to the record, that Juror 11 "shared what she learned with at least one other juror." App. Br. at 3.

mistake followed by a brief remark, and transforming it into an error of such egregious proportions that he was deprived of his right to a fair trial. When the actual record is considered, his argument fails. There was no juror misconduct, and no showing that the jury "considered" any evidence that was not presented in the course of trial. Moreover, even if the jurors' actions are determined to constitute misconduct, there was no prejudice, and Heath is not entitled to a new trial.

1. Standard Of Review

The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and a trial court's denial of a motion for a new trial will not be reversed on appeal unless there is a clear showing of abuse of discretion. *State v. Pete,* 152 Wn.2d 546, 552, 98 P.3d 803 (2004); *State v. Balisok,* 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). An abuse of discretion occurs when no reasonable judge would have reached the same conclusion. *Id.*

2. There Is No Evidence That Any Juror "Lied."

Courts are generally reluctant to inquire into how a jury arrives at its verdict. *Balisok,* 123 Wn.2d at 117. There is a long-standing policy in favor of "stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury," and there must be a "strong, affirmative showing of misconduct" in order to overcome this policy. *Id.*, 123 Wn.2d at 118. It is

misconduct for a jury to consider extrinsic evidence and if it does, that may be a basis for a new trial if the defendant has been prejudiced. *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740 (2006). "'Novel or extrinsic evidence is defined as information that is *outside all the evidence* admitted at trial, either orally or by document.'" *Balisok,* 123 Wn.2d at 118 (quoting *Richards v. Overlake Hosp. Med. Ctr.,* 59 Wn. App. 266, 270, 796 P.2d 737 (1990)) (emphasis added). If what the jury has done "has the effect of putting them in possession of *material* facts which should have been supported by evidence upon the trial, but which was not offered, this generally constitutes such misconduct as will vitiate the verdict." *Id.* at 119, citing *State v. Everson,* 166 Wn. 534, 7 P.2d 603, 80 A.L.R. 106 (1932) (emphasis added). The court's inquiry is an objective one. The question is whether the extrinsic evidence "could have affected the jury's determinations." *State v. Caliguri,* 99 Wn.2d 501, 509, 664 P.2d 466 (1983). While litigants are entitled to a fair trial, this does not mean that they are entitled to a perfect one. *In re Detention of Broten*, 130 Wn. App. 326, 336-37, 122 P.3d 942 (2005) (citing *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 553, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)).

Here, Heath has failed to make a "strong, affirmative showing of misconduct" (*State v. Balisok, supra*) in this case. Heath alleges that Juror 11 "looked up" Heath's custody status. App. Br. at 4. This assertion, however,

misstates the evidence. The matter came to the court's and parties' attention on the morning of the third day of trial[4] by way of a note submitted to the bailiff. 4RP at 319, 324-25. The note, from Juror 9, indicated that:

> Oct. 9 at 4:20 PM: We as juroys [sic] were waiting to leave in jury room. A juroy [sic] said "is he incarcerated now?" A couple juroys [sic] said yes. One juroy [sic] was talking to a friend juroy [sic]. She stated I ~~try~~ ~~tried~~ looked to see where he was on the internet. And the other jury said "where is he". She shook her head but I did not hear what she said.

CP at 863. In the course of discussing this note, the trial court pointed out that the jury "know[s] he was incarcerated. That's not a surprise. That has come up a number of times," (4RP at 319-20) and asked Heath's attorneys to identify the possible prejudice. *Id.* at 321. In responding, counsel for Heath did not deny that this information had already come into evidence in a number of ways on a number of occasions. Rather, they emphasized the danger of others on the panel knowing that one of their group had "ratted out" another, and the danger for a "dynamic" among the panel that "has gotten out of control." *Id.* "There's a dynamic that is not part of this case, it's going on as a result of this note all by itself, and it's just not right." *Id.*

The court decided to question each juror individually, and began by questioning Juror 9, who has written the note. Juror 9 indicated she did not know name or juror number of the persons to whom she referred in the note, and that she had not told anyone that she had sent a note to the court. 4RP at

[4] Petitioner's Opening Statement was made on October 8.

325. When each of the remaining jurors was questioned, each was asked whether he or she had heard any information about this case or Morgan Heath in the jury room from any other juror, or whether s/he had heard anyone "discuss anything about Internet searches." *Id.* at 326-331. Jurors 1 through 12 all indicated they had heard nothing about Heath or Internet searches. *Id.*

At some point it appears that the parties and the court, based on the description provided by Juror 9, agreed that Juror 11 was the person alleged to have made the comment about having "looked up" information about Heath on the Internet. 4RP at at 344. After argument, the court called Jurors 9 and 11 back for further questioning. The following exchange with Juror 11 occurred:

> **Court:** I had some follow-up questions to ask you. Please be seated. The follow-up question is, did you look up anything on any Internet site about Mr. Heath?
>
> **Juror 11**: I use the Kitsap County web site for my job, so I was on that, but no, absolutely not.
>
> **Court:** Did you look up and see who is in custody in the jail?
>
> **Juror 11**: We do that on a daily basis at work anyway.
>
> **Court:** So you did that on this case?
>
> **Juror 11:** I just saw his name on there. That's all I saw.
>
> **Court:** Did you share with anybody that you had looked that up and seen that on the Internet site?

Juror 11: I just said I was on the Kitsap County web site and I use that for work on a daily basis.

Court: You told somebody he was incarcerated?

Juror 11: I saw his name. That's all I said. I just—we didn't discuss the case. We said nothing. There was no discussion whatsoever.

Court: Do you know who you made the statement to that you had looked on the Kitsap County web site? Which juror it was?

Juror 11: Um, well, there was somebody that said something. I believe it was—

Court: Do you know what they are wearing today?

Juror 11: I think it was the pharmacist? I am not sure what number he is.

Court: I know who he is.

Juror 11: I did not discuss the case at all. I mean, basically we were told not to do that. And I was not on the Internet researching anything. It's just that that's what we do. In my line of work, I am on there all the time for what I do…

Court: Where are you employed?

Juror 11: State Farm Insurance.

Court: Other than who you described as the pharmacist, juror number 8, do you think anyone else heard you talk about that?

Juror 11: I don't think so. And it wasn't even a discussion.

Court: And, do you think that knowing this information, that his name shows up on that web site,

> will have any impact on you being able to fairly hear this case?
>
> **Juror 11:** No, absolutely not. No. I mean, we have clients, because I work for State Farm Insurance, sometimes we—that's where we look for our clients....It would have no bearing for me.

Id. at 345-47.

The court next called Juror number 8, "the pharmacist," back. 4RP at 347. The following exchange occurred:

> **Court:** Mr. Whitley, in the jury room yesterday at 4:20, did you hear any of the jurors talk about looking up on the Kitsap County web site, looking up Mr. Heath?
>
> **Juror 8**: No.
>
> Court: You didn't hear—Did you hear anybody discuss incarceration.
>
> **Juror 8**: No. Oh, whether or not he was incarcerated?
>
> **Court:** Right.
>
> **Juror 8:** Yeah, somebody said something about they were wondering what—what was it—whether or not he was incarcerated.
>
> **Court:** Did you hear anyone respond to that question?
>
> **Juror 8:** Not that they knew or anything like that. It was something about, I don't know, if he is or whatever type thing.
>
> **Court:** Do you think that would have any impact on you being a juror in this case?

> **Juror 8**: No. I guess I would assume most people are incarcerated if they are in this situation.

Id. at 347-48.

The court denied Heath's motion for a mistrial, noting that "The fact that Mr. Heath is incarcerated is well known to the panel. It's come in through many different ways, and that he's been incarcerated since February, 2010 has come in also. There were no motions in limine about that, and that's properly before the jury." 4RP at 353-54. Juror 11, the court continued, "was very clear that she just made a remark," and Juror 8 "was pretty much in accord" with Juror 11's representations that there was no further discussion. *Id.*

From this mole hill, consisting solely of an innocent mention of non-material information already extensively discussed at trial, made to a person who appears to have thought little of the remark because it contained information he already assumed to be true, Heath seeks to construct a mountain of prejudice so great it cannot possibly be overcome. This attempt fails.

Heath's argument is premised on various assumptions that are not supported by the record. First, he assumes that the jurors "lied" to the court and counsel. A far more likely explanation for the jurors' answers to the court's initial questions is that both failed to fully grasp the full range of information that the court was attempting to elicit with its questions. When asked whether she heard "any discussions in the jury room about the defendant or about the respondent, Morgan Heath," Juror 11 indicated that

she had not. 4RP at 327. She was then asked whether she had heard "anybody discuss any information obtained from the Internet," and again, said that she had not. *Id.* When she was later questioned more precisely, she indicated that, while using a website that she used "for work on a daily basis," she saw, apparently inadvertently, that Heath was at the Kitsap County Jail. *Id.* at 345. She stated that "I just said that I was on the Kitsap County web site and I use that for work on a daily basis," repeatedly emphasizing that the Kitsap County website is "just...what we use. In my line of work, I am on there all the time for what I do." *Id.* at 345-46. Nor, she emphasized, was there any "discussion" about that information or Heath. "I saw his name. That's all I said. I just—we didn't discuss the case. We said nothing. There was no discussion whatsoever." *Id.* at 345. She went on: "I did not discuss the case at all. I mean, basically we were told not to do that. And I was not on the Internet researching anything. It's just that that's what we use. In my line of work, I am on there all the time for what I do." *Id.* at 346.

Juror 11, while using a website she used daily for work, happened upon a piece of information about which there has already been extensive testimony at trial—that is, that Heath was currently incarcerated. Mentioning or confirming that fact to another juror would not necessarily, in her mind, come within the ambit of a "discussion" of "information obtained from the Internet." 4RP at at 326. Likewise, although the term "discussion" may mean

different things to different people[5] (and it was not defined in the instructions), there is no reason to believe that Juror 8 "lied" to the court simply because he did not characterize being given a piece of information he already assumed to be true and about which there was no further conversation as a "discussion" of "information obtained from the Internet." Such an exchange obviously did not, in either juror's mind, constitute the sort of behavior that would violate the court's instructions. To invalidate the result of a lengthy trial "because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *McDonough,* 464 U.S. at 555. Heath's argument fails.

3. The Information Conveyed By Juror 11 Was Not "Extrinsic Evidence."

Nor was there was nothing "extrinsic" about the information provided by Juror 11. As the trial court correctly pointed out, at the point at which Juror 11 mentioned to Juror 8 that Heath was incarcerated, there had already been repeated references to that fact. In his deposition, portions of which had been played to the jury the day before (3RP at 200-01) Heath had made numerous references to having been incarcerated since February 2010, and to being at the SCC. *See e.g.* CP at 539, 543, 546 & 548 (references to Heath's

[5] The term "discussion" is defined by Webster's as "consideration of a question in open usu. informal debate." *Webster's Third new International Dictionary.* 1981. Springfield, Massachusetts: Merriam-Webster.

being at the SCC), 554 (Q: "You've been incarcerated since about February of 2010, correct? A: Yeah.), 569 (incarcerated since February of 2010). Likewise, Ms. Nelson from the Department of Corrections testified that she supervised him from 2007 "until he went to the Special Commitment Center" on the first day of trial. 2RP at 127. Dr. Phenix had, as well, already made abundantly clear that Heath was not free in the community: Her testimony regarding Heath's risk was presented entirely in terms of his risk "if released" to the community, a discussion that made sense only if one assumed that he was not currently in the community. Dr. Phenix testified that she considered "how could he be safe in the community, should he be released to the community," and indicated that he had about a year and a half left of parole or community supervision "once he's released." 3RP at 311. She concluded by stating, "I don't think that he is safe to be released to the community." *Id.* at 312.

The information conveyed by Juror 11 to Juror 8 was neither novel nor extrinsic to the evidence already presented at trial, Heath's argument fails.

4. The Information Conveyed From Juror 11 to Juror 8 Was Not Material

Nor was the information conveyed by Juror 11 material to the verdict. Where consideration of extraneous evidence is alleged, the court must make an objective inquiry "into whether the extraneous evidence *could* have

affected the jury's verdict." *Allyn v. Boe,* 87 Wn. App. 722, 729-30, 943 P.2d 364, 369 (1997). Here, there is no possibility that this information could have affected the verdict. Heath could not conceivably been prejudiced in any way by one juror's having mentioned to another a fact already known to both, that is, that Heath was currently incarcerated. Even trial counsel were unable to identify any prejudice to Heath beyond the potential for some jurors to believe another in their midst had "ratted out" another juror (4RP at 321), a concern that would appear to have been alleviated by Juror 9's statement that she did not believe that any other juror knew that she had sent a note to the court. *Id.* at 325. Both jurors 8 and 11 emphasized that this information would not affect their ability to be fair and impartial jurors (*Id.* at 345-48), and Heath has failed to put forth any plausible theory for how it might have conceivably affected their impartiality. Moreover, the court subsequently re-instructed the jury regarding their conduct during the evidentiary phase of the trial, including the need to "keep your mind free of any extraneous influences so you can decide this case based on the evidence produced in the courtroom, the witnesses here in the courtroom, and the law as I give it to you." 4RP at 365. Juries are presumed to follow instructions, including curative instructions. *Lockwood v. AC& S, Inc.*, 44 Wn. App. 330, 358, 722 P.2d 826 (1986). Likewise, the jury was again instructed, prior to deliberations, that "evidence" consisted of testimony and exhibits "admitted, during the trial"

(CP at 871), regarding their duty to consider all of the evidence the court had admitted (CP at 871) and their duty to assure that the parties receive a fair trial. CP at 874. Because juries are presumed to follow instructions of the court they are also presumed to have "disregarded extraneous matters." *State v. Bourgeois*, 133 Wn.2d 389, 409; 945 P.2d 1120 (1997). His argument fails.

5. The Court Properly Denied The Motion For Mistrial Based On A Comment Regarding Dr. Phenix

Heath next argues that the trial court should have granted a mistrial because "jurors expressed their praise for the state's hired expert...before Mr. Heath had even been allowed to conduct cross examination." App. Br. at 7. Again, Heath mischaracterizes the evidence.

During the court's inquiry into Juror 11's remark about Heath's incarceration, Juror 13 said that "somebody" was commenting about" "Dr. Phenix's articulating speech." *Id.* at 332. At the request of the defense, Juror 13 was brought back for further questioning about this incident. The following exchange occurred:

> **Court:** Ms. Niemeyer, I want to follow up. You said you heard some sort of comment about Dr. Phenix. What kind of comment was it?
>
> **Juror 13**: Her speech was so articulated. It was just praise. Nothing about the case.
>
> **Court:** It wasn't about what she was testifying to, but her speech was very articulate?

> **Juror 13:** Yes. That was it. Very smart. Very articulate. That was all I heard.

4RP at 355.

Based on this brief exchange, Heath argues that "jurors expressed their praise," for the State's expert, thereby violating the instruction that they not discuss the case or evidence before deliberations. App. Br. at 7. Heath cites to absolutely no authority in support of the proposition that a juror's comment that a particular witness is articulate constitutes misconduct or requires a new trial, nor does he even attempt to formulate an argument as to why or how this prevented him from having a fair trial. This argument should be rejected.

B. Heath Was Not Entitled To A Unanimity Instruction

Finally, Heath argues that his right to a unanimous jury was violated because there was neither a unanimity instruction nor a special verdict form requiring that the jury identify the precise basis for commitment—that is, whether he was likely to reoffend based on a personality disorder or a mental abnormality. App. Br. at While he concedes that no such instruction is required where there is substantial evidence to support either condition, he argues that no such substantial evidence was offered in his case, and as such reversal is required. His argument fails. The State presented substantial evidence of both a mental abnormality and a personality disorder that, acting together, resulted in

his having serious difficulty controlling his sexually violent behavior and made him likely to reoffend. As such, no unanimity instruction was required.

Heath asserts that he was deprived of his rights to due process because the court did not give a unanimity instruction requiring the jury to determine which of his disorders made him likely to reoffend. App. Br. at 8. Heath does not contest the fact that there was sufficient evidence in the record to support the conclusion that he suffers from both a mental abnormality and a personality disorder. He argues, however, that "there must be sufficient evidence to permit a juror to conclude the personality disorders, by themselves, make Mr. Heath more likely than not to reoffend." App. Br. at 12.

Heath cites no authority for this proposition, nor is there any. Indeed, the courts reached the opposite conclusion: Where there is testimony at trial to the effect that the offender suffers from both a mental abnormality and a personality disorder, and where substantial evidence supports each, these two conditions "are alternative means for making the SVP determination." *In re Halgren,* 156 Wn.2d 795, 810, 132 P.3d 714 (2006). "To force the State to elect or the jury to rely on only one...would unnecessarily introduce a requirement that is not present in the statute. It would also compromise the value of the clinical judgments of expert witnesses in this difficult area. Neither the constitution nor the statute requires this." *In re Halgren* 124 Wn. App. 206, 215, 98 P.3d 1206 (2004). Affirming the Court of Appeals'

decision on this issue, the Supreme Court noted that, "because both mental illnesses are predicates for the SVP determination, the two mental illnesses are closely connected..." and that "these two means of establishing that a person is an SVP may operate independently or may work in conjunction." *Halgren,* 156 Wn.2d at 810.

Consistent with *Halgren,* an identical argument to that raised by Heath was rejected by the Court of Appeals in *In re Ticeson,* 159 Wn. App. 374, 246 P.2d 550 (2011). Ticeson, like Heath, had been diagnosed with both a paraphilia and a personality disorder. *Id.,* 159 Wn. App. at 388. The State's expert testified that, while a personality disorder did not usually cause a person to engage in predatory acts of sexual violence, Ticeson's personality disorder caused him to have difficulty controlling his behavior. *Id.* at 378. While Ticeson did not contest either of these diagnoses, he argued on appeal that there was insufficient evidence to show that his personality disorder, standing alone, made him likely to reoffend and that, as such, a unanimity instruction was required. *Id.*

The Court of Appeals rejected this argument. Citing the Supreme Court's decision in *Halgren,* the Court noted that the State's expert had testified that Ticeson's personality disorder causes him serious difficulty controlling his sexually violent behavior. Such testimony, this Court found, "is sufficient to allow a rational juror to find Ticeson's personality disorder

makes him likely to reoffend." 159 Wn. App. at 389. As such, the Court found that there was substantial evidence to support either alternative means, and no unanimity instruction was required. *Id.*

Here, Heath does not argue that there was not substantial evidence to support either alternative means: Both experts agreed that Heath suffered from an antisocial personality disorder . 3RP at 233; 5RP at 508. In addition, Dr. Phenix testified extensively regarding the presence of a mental abnormality in the form of pedophilia. 3RP at 233-256; 279-281. She also testified regarding the connection between Heath's antisocial personality disorder and his risk of re-offense, stating that an antisocial personality disorder "can further sex offending" because the person does not care about the consequences of acting on his urges to have illegal sexual contact. *Id.* at 258-59. Heath, she testified, has serious difficulty controlling his sexually violent behavior. *Id.* at 281. His antisocial personality disorder contributes to his sexually violent behavior because it is a "permission giver." *Id.* If you have antisocial attitudes, she explained, "then you don't care" and are "more likely to act on your pedophilia." *Id.* Heath, she testified, "has a severe antisocial personality disorder, and I don't think at any time in his history he has been able to demonstrate that he's willing to comply with any rules for his behavior, either in a custodial setting or in the community in particular..." *Id.* Such testimony is sufficient under both *Halgren* and *Ticeson*, and no

unanimity instruction was required. Heath's right to a unanimous jury was not violated, and there was sufficient evidence presented to sustain his commitment.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Heath's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 22nd day of August, 2013.

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NO. 44137-3-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: MORGAN HEATH, Appellant	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On August 22, 2013, I sent via electronic mail and United States mail true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

Gregory Link
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SEATTLE, WA 98101
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of August, 2013, at Seattle, Washington.

Allison Martin
ALLISON MARTIN

WASHINGTON STATE ATTORNEY GENERAL

August 22, 2013 - 3:56 PM

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