91221-1

NO. 44575-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE DETENTION OF

CHARLES H. ROBINSON

STATE OF WASHINGTON, Respondent,

vs.

CHARLES H. ROBINSON, Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Charles Robinson asks this Court to accept review of the court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner requests that this Court review the unpublished opinion filed by the Court of Appeals for Division II on December 16, 2014.

C. ISSUES PRESENTED FOR REVIEW

1. It was argued on appeal that the trial court erred when it allowed the state to introduce into evidence a video deposition it took of the petitioner in its case in chief pursuant to CR 32(a) when Mr. Robinson was present at the time of trial.

Whether the Court of Appeals erred when it determined that the argument on appeal was from a basis not raised in the trial court?

2. Whether the Court of Appeals was in error when it affirmed that the sexual predator statute did not violate the petitioner's Fifth Amendment and due process rights even though it was argued that the SVP statute is so punitive in its effect to negate the label of being merely a civil statute?

3. Whether the Court of Appeals erred when it decided that after review of all the testimony and exhibits there was sufficient evidence to support the trial court's conclusion that the appellant was a sexually violent

predator (SVP)?

D. STATEMENT OF THE CASE

On December 18, 2007, the state filed a petition alleging that the Charles Robinson[1] was a sexually violent predator as defined by RCW 71.09.020(18). CP 70, 497. On December 21, 2007 the trial court entered an order affirming probable cause and directed that the respondent be detained at the Special Commitment Center on McNeil Island. *id.* Mr. Robinson has been held involuntarily in this secure facility to date.

This is a period of seven years after he has finished serving his sentence on the predicate offense of Child Molestation in the First Degree contrary to RCW 9A.44.083.[2] He was convicted of this offense on March 9, 2001 in Jefferson County Superior Court.

Prior to his Washington conviction, Robinson was convicted in California in 1987 for the crime of Lewd and Lascivious Acts with a Child Under Age 14. CP 72. He was sentenced to six years and was paroled in 1991 for three years. *id.*

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[1] Mr. Robinson is referred to as the respondent in the trial court proceedings and as the petitioner in this appeal. The state is referred to as the respondent.

[2] This is a sexually violent offense as defined by RCW 71.09.020 (17). Robinson was initially sentenced to life imprisonment without parole. That sentence was reduced on appeal to 89 months imprisonment. CP 71.

During a home visit on March 23, 1992 Robinson was observed by his parole officer sitting in a lawn chair watching 4 or 5 youngsters playing outside of his back door. The officer also discovered two knives. CP 127. Three days later five knives were discovered. CP 128. During this incident Robinson admitted that he brought a seven year old boy into his bathroom. *id.* He denied that he molested the child. CP 499. He was sentenced to one year's confinement and released on March 26, 1993. CP 73.

According to Sharon L. Guss' video deposition, she was Mr. Robinson's parole agent in California on September 28, 1993. On that date she went to his house to perform a search. CP 223. Searching his room she found "some magazines that had to do with children." CP 224. Also, located in a trunk in the garage were "Children's clothing. Little boys underpants. Some toys."[3] CP 226. In the interim, Mr. Robinson arrived in a vehicle driven by one of his friends. Inside the vehicle were the driver's two female daughters, both under the age of 8. CP 224.[4]

According to Mr. Robinson's deposition he served a one year sentence for these violations. CP 230. Guss re-supervised Robinson

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[3] Also included in the trunk was a hospital gown, sweatshirt, numerous toys, marbles and badges from youth organizations. CP 229.

[4] One of the conditions of Robinson's parole was not have contact with minor children. CP 225; 274- Ex. 1.

beginning in September 1994. In December 1994 she observed him walking with the same two girls holding their hands in City of Dinuba, Tular County, California. CP 234-5. According to the exhibits to Guss' deposition, Mr. Robinson was released on September 28, 1994. CP 241, CP 278-Ex. 3.

Mr. Robinson's parole time in California lapsed on January 16, 1995. CP 74. He moved to Port Townsend in 2000 with his girlfriend Heather Taylor when she moved in with her parents. CP 342. He was arrested in Jefferson County, Washington in July 2000 for his involvement with WB, when he was being baby-sat by Robinson. He was convicted in March 2001. I RP 52.

Trial Testimony

Mr. Robinson's video deposition was objected to by his attorney but was admitted into evidence.[5] I RP 35-6, ex. 21. The video was played intermittently during the trial. The State called Ronald D. Page, a clinical psychologist, who interviewed Mr. Robinson while he was in prison in 2006. I RP 46,49. Dr. Page was of the general opinion that: "Robinson is ego based in his reference and is manipulative and pursued a lifestyle of a predatory pedophile." FF 15, CP 600.

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[5] Also admitted was exhibit 20: the video disk of the 11/15/12 deposition and exhibit 22 a transcript of the video deposition. I RP 40-1.

The state also called its primary expert witness Dr. Harry Goldberg of California. II RP 87. He diagnosed Mr. Robinson as pedophilia, personality disorder NOS[6] with antisocial personality traits and more recently with psychotic disorder NOS. II RP 106. Moreover, he was of the opinion that Mr. Robinson's pedophilia effected his emotional or volitional capacity to control his behavior. II RP 135-6.

Dr. Goldberg was also was called to testify whether Mr. Robinson's current condition makes him more likely than not to commit "predatory acts of sexual violence" unless he is confined in a secure facility for treatment. CP 75, II RP 141. He testified that after reviewing the risk assessment tools he was of the opinion that Mr. Robinson was "...likely to engage in sexually violent predatory behavior, as a result of his diagnosed mental disorder." III RP 192, 196. He concluded his testimony by stating his opinion that Mr. Robinson suffers from a mental abnormality and from a personality disorder that causes him serious difficulty in controlling his sexually violent behavior. II RP 196. And was likely to engage in predatory acts of sexual violence if he was not confined in a secure facility. *id.*

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[6] NOS was described as meaning "not otherwise specified" used in the *Diagnostic and Statistics Manual Version 4, Text Revision.* It is a catch-all category describing an unusual type of disorder. II RP 123.

James C. Manley was the clinical psychologist expert for the petitoioner. III RP 260. He had been licensed since 2000 and had previously been employed at the Special Commitment Center (SCC) in 1999 for two years performing annual reviews and commitment evaluations. III RP 261. Since then he has been in private practice, except for another four years of re-employment at the SCC in the forensic unit. III RP 263. After performing extensive research into Mr. Robinson's case profile he was of the opinion that Mr. Robinson's diagnosis was pedophilia non-exclusive type. The second diagnosis was major depression, moderate chronic, with intermittent psychotic features. RP 311.

Robinson was described as being at the "lower level of intellect and thus illiterate." III RP 318. Dr. Manley did not render an axis II diagnosis for Mr. Robinson. He felt that he did not suffer from a personality disorder. He was also of the opinion that Mr. Robinson was not a substance abuser.

Dr. Manley agreed with Dr. Goldberg that Mr. Robinson was of moderate to high risk to re-offend based on the Static-99, but did not meet the criteria for RCW 71.09. III RP 333, 356. Although he diagnosed Mr. Robinson with pedophilia, he did not find that he suffered from a mental abnormality. FF 46, CP 609.

The trial court found and concluded that the petitioner is a sexually

violent predator. CP 611, CL 9, 1/18/13 RP 26. On February 22, 2013 the Respondent filed a notice of appeal to the Court of Appeals. CP 474.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE COURT OF APPEALS ERRED WHEN IT DECIDED THAT THE PETITIONER WAIVED HIS RIGHT TO CHALLENGE THE ADMISSION OF HIS VIDEO DEPOSITION.

Prior to trial the appellant's attorney argued:

> "...I would object to the admissibility of the video deposition. Mr. Robinson is present. He's available, if he does so testify. The deposition was taken at a time when–in the Special Commitment Center, when he was –part of his confinement was that he didn't have any real knowledge that it could be –that he had an alternative to present his own testimony live. So at this time, we would just simply object to the admissibility of the video deposition." I RP 36.[7]

The Court of Appeals' decision violated RAP 14.4(b)(1)(decision in conflict with decision of supreme Court); RAP 13.4(b)(2) (decision in conflict with a another division); 13.4(b)(3) (significant question of law under the Constitution) and 13.4(b)(4) (petition involves issue of substantial public interest). (see appendix where RAP 13.4(b) is set forth in full.) The Court of Appeals determined that the argument on appeal was arguing from a basis not raised in the trial court. Court of Appeal's

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[7] After further argument the record shows: "THE COURT: All right. And so is there any basis under the rule or any other authority that makes presentation and publication or admission of the deposition inappropriate. MS. JARDINE: No, Your Honor." I RP 37.

decision at 12. (Hereinafter referred to as App. Op.)

However, the state had cited *In re Detention of Stout,* 159 Wn.2d 357, 150 P.3d 86 (2007) in support of its position. The petitioner argued in the Court of Appeals that *Stout* is distinguishable from the issues at bench. *Stout* addressed the constitutional rights of Stout to be present at the video-deposition of an adverse witness: the sexual victim of a predicate burglary conviction. There was no argument presented that addressed the issue of a person's ability to object to the offer of their own video-deposition into evidence by the state in its case in chief.

Here, the state was allowed by the trial court to bootstrap that holding as justification for admission of the video-deposition over Mr. Robinson's initial objection that he was present and available. I RP 36. All of the above was argued in the Court of Appeals. App. Br. 11-12.

CR 43(a)(1)[8] states in part as follows: "In all trials the testimony of witnesses shall be taken orally in open court unless otherwise directed by the court or provided by rule or statute." According to the concurring opinion in *Stout:* "The rule presupposes that witnesses must be physically present in the courtroom to give live, oral testimony." *id.* at 386. In the case at bench, the trial court allowed the state to introduce and show- at

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[8] See appendix for complete text of CR 43(a)(1).

intervals between "live" testimony- Mr. Robinson's video deposition. He was present in the courtroom for the majority of the trial.[9]

The state also argued in the trial court that the video deposition of Mr. Robinson should be admitted pursuant to CR 30((b)(6); CR 31 and CR 32(a)(2). I RP 36-7. The appellant addressed these arguments in its opening brief at 13 and then cited authority at pp.13-16.

The state also cited and argued CR 32 (a) at the trial court level. The appellant addressed this issue in its opening brief and discussed relevant authority to support its position. App. Br. at 16-18.

The appellant concluded its arguments with reference to fact that the trial court did not make a ruling or enter a finding of the unavailability of Mr. Robinson at the commencement of the trial. This was in direct response to the petitioner's trial attorney's argument that began: "I would object to the admissibility of the video deposition. Mr. Robinson is present. He's available, if he does so testify." I RP 36, App. Br.at 11.

II. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE SVP STATUTE IS NOT A CRIMINAL STATUTE NOTWITHSTANDING ITS PUNITIVE EFFECT.

The Court of Appeals decided as follows:

"We reject Robinson's contention that the Act is

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[9] After Dr. Manley testified on direct examination, Mr. Robinson waived his right to be present for the remainder of the testimony. RP 359.

> so punitive in purpose or effect as to become a criminal statute. As such, the Fifth Amendment, by its own terms, is inapplicable to Robinson's commitment proceedings, and he had no right to remain silent. *Young,* 122 Wn.2d at 51."

App. Op. At 10 (citing *In re Pers. Restraint of Young,* 122 Wn.2d 1, 857 P.2d 989 (1993)).

The Court of Appeals decision raises a significant question of law under the Constitution of the State of Washington and of the United States. RAP 13.4(b)(3). In addition, this Court should accept this petition for review because Mr. Robinson's petition involves an issue of substantial public interest that should be re-examined by the Supreme Court. RAP 13.4(b)(4).

The SVP statute is so punitive in effect so as to negate a civil label. The statute, in effect, becomes criminal. When a statute is criminal the Fifth amendment privilege against self-incrimination must be applied. Here, Mr. Robinson should have been warned of his Fifth Amendment Right to remain silent before his Video-deposition was taken by members of the Attorney General's Office.[10] Because the SVP proceedings are criminal in nature, Robinson was entitled to refuse to answer questions.

Much of the background information about Mr. Robinson, which

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[10] Both the examiner and videographer were Assistant Attorney Generals and both represented the State during the ensuing trial. CP 282-3.

was subsequently used by the state's experts against him was based on his own incriminating statements or answers provided during questioning by authoritative figures i.e. his video deposition.

The following factors or examples clearly show that Washington's SVP statute is a criminal statute, designed with a punitive effect:

Robinson was advised of his "absolute right to be present during the trial when he requested that he be excused at the end of Dr. Manley's direct examination. III RP 359. He was asked by the court to waive any further presence during the proceedings. RP 360, 362.

Then, after trial, the court found "...that the State has proven beyond a reasonable doubt that all the elements of the sexually violent predator statute have been met....". CP 611, ff 53. The language used and the terms used are criminal law terms and criminal burdens of proof.

Examination of the SVP statute reveals its criminal nature based on statutory provisions within the Act. For instance, before a person may be found to be an SVP they first must have committed a sexually violent offense. A sexually violent offense is a list of sexual crimes or common law crimes that have been sexually motivated. RCW 71.09.020(15). The State must prove that the sexually violent act was sexually motivated beyond a reasonable doubt. RCW 71.09.060(1).

The SVP proceedings are initiated by a probable cause hearing to believe that the person named in the petition is a SVP. RCW 71.09.040(1).[11] There is a right to be represented by counsel at the probable cause hearing. RCW 71.09.040(3). Like the criminal law, an indigent person will be provided assistance of counsel. *id.* There is the right to present evidence on his or her own behalf. RCW 71.09.040(3)(a). There is the inherent criminal law right "to cross-examine witnesses who testify against him or her." RCW 71.09.040(3)(c).

The criminal law occupies a central role in the SVFP proceedings. Like the criminal law, the person has a right to assistance of counsel "at all stages of the proceedings under this chapter." RCW 71.09.050(1). Likewise, the statute guarantees rights of indigent persons to appointment of counsel. RCW 71.09.050(1). The highest standard of proof in the law is required: proof beyond a reasonable doubt. RCW 71.09.060(1). As in a criminal trial the person has a right to a unanimous jury verdict and not a 10 person verdict that is employed in a civil trial. RCW 71.09.060(1). Criminal defendant's in Washington also have a right to a unanimous jury

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[11] Prior to these proceedings whenever it appears that a person is about to be released from confinement, the agency charged with jurisdiction is mandated to refer a person who meets the criteria of SVP to the prosecuting attorney of the county in which an action may be filed and to the attorney general's office. RCW 71.09.025(1)(a).

verdict. Wash. Const. Art. 1, sec. 21; *State v. Ortega-Martinez*,124 Wn.2d 702, 707, 881 P.2d 2134 (1994).

Mr. Robinson was advised that he had the absolute right to appeal within 30 days of entry of the findings of fact and conclusions of law. 1/18/13 RP 28. He was entitled to an order of indigency to prosecute his appeal. *id.*, CP 471-2, RAP 15.2(b)(1)© expressly refers to commitment proceedings under RCW 71.09. These are the same safeguards as criminal appellants. RAP 15.2 (b)(1)(a), entitled " Determination of Indigency and Rights of Indigent Party."

The test according to whether a statute purported to be civil in nature is criminal in its effect is set forth in *Allen v. Illinois,* 478 U.S. 364, 106 S.Ct 2988, L.Ed.2d 296 (1986).

The Self-incrimination clause of the Fifth Amendment:

> "...provides that no person "shall be compelled in any criminal case to be a witness against himself." This Court has long held that the privilege against self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is the defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota v. Murphy,* 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L. Ed.2d 409 (1984) (quoting *Lefkowitz v. Turley,* 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973)); *McCarthy v. Arndstein,* 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924)."

Allen v. Illinois, 478 U.S. 369, 106 S.Ct. 2991.

In *Allen* the Illinois Sexually Dangerous Persons Act was deemed to be civil in nature primarily because the Illinois legislature under the act provided care and treatment. By contrast the Washington legislature has declared in the SVP Act that long term confinement is contemplated and that treatment is remote. [12]

The legislature's own findings support the argument that the statute promotes either of "the traditional aims of punishment-retribution and deterrence" *Kennedy v. Mendoza-Martinez.* 372 U.S. 144, 168, 83 S.Ct. 554, 567, 9 L.Ed 2d 644 (1963).

The dissenting opinions in *Allen v. Illinois*, supra at 478 U. S. 376, 106 S.Ct. 2995 support the argument that the Fifth Amendment privilege should apply to SVP proceedings. The dissent listed the similar relationship with the Illinois Act to criminal law proceedings. Also, the dissent pointed out that even if a state declared its purpose to be treatment and rehabilitation, the Fifth Amendment would still apply. Otherwise, there would be nothing to prevent a state "...from creating an entire corpus

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[12] "The legislature finds that a small but extremely dangerous groups of sexually violent predators exist who do not have a mental disease or defect that renders then appropriate for the existing involuntary treatment act, chapter 71.05, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious, mental disorders and then return them to the community...."

of "dangerous person" statutes to shadow its criminal code." 478 U.S. at 381, 106 S.Ct. at 2998.

Chief Justice Alexander similarly argued in his dissenting opinion in *In re Detention of Thorell,* 149 Wn.2d 724, 72 P.3d 708 (2003) regarding the majority's holding that lack of control is not a separate element of an SVP commitment:

> "Ultimately, the majority's approach weakens all of our fundamental civil liberties for the sake of confining indefinitely an unpopular group by stripping it of those rights which are due every person and which were secured through the blood and sacrifice of our forefathers This I reject."

Thorell, 149 Wn.2d at 774.

Matthews v. Eldridge

According to the tests established in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) the factors to consider to determine what process is due[13] in any proceeding are:

(1) The private interest that will be affected by the official action. This factor is in favor of petitioner's claim to the 5th Amendment privilege.

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[13] "[D]ue process is flexible and calls for procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2660, 33 L.Ed.2d 484 (1972).

> (2) The risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards.

This factor favors allowing the assertion of the 5th Amendment protections in SVP proceedings. The State uses information gleaned from the individual by experts employed by the State. Part of the experts function is to gather incriminating evidence and statements by the individual to be used against him or her in proceedings where the individual faces indefinite confinement and loss of liberty. RCW 71.09.050(1). An issue may arise at which point in the SVP proceedings the 5th Amendment privilege may be asserted i.e, after the probable cause hearing for instance.

> (3) The third factor is the government's interest; including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Again, the third factor favors acknowledging the 5th Amendment right against self-incrimination in SVP proceedings. The government would simply conserve its resources by not having its experts extensively interview or video tape individuals if they chose to exercise the privilege. The court stated in *Matthews*: "But the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." *id.* 424 U.S. 349, 96 S.Ct. 909.

The ultimate consideration is fairness. Like the fundamental right

to be heard, even though it does not involve the same stigmas and hardships of a criminal conviction, the fundamental right to remain silent should be a part of the SVP due process. See generally, *Armstrong v. Manzo*, 380 U.S. 545,552, 85 S.Ct. 1187,1191, 14 L.Ed.2d 62 (1965).[14]

III. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT WHICH HAD CONCLUDED THE PETITIONER WAS A SEXUALLY VIOLENT PREDATOR.

There was not sufficient evidence to warrant the conclusion that Mr. Robinson was a sexually violent predator (SVP). The trial court found and ordered that the respondent was a sexually violent predator pursuant to RCW 71.09.020(18).[15] CP 611. An SVP is any person who has been "convicted of or charged with a crime of sexual violence and who suffers

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[14] Compare *In re Det. Of Williams*, 147 Wn.2d 476,491, 55 P.3d 596 (2002) . The court stated: "We hold that the mental examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under RCW 71.09.040(4)." .

"The Legislature has expressly provided that evaluations by experts are allowed in a proceeding following commitment as a sexually violent predator in the absence of full statutory language for pretrial discovery. It can be inferred that the Legislature did not intent for the State to conduct such evaluations." *Id.* at 491.

See Wis. Stat. Ann. Sec. 980.05(1m)(West 1998) (Wisconsin affords all SVP's the same constitutional rights as criminal defendants.) *Stout*, at 374, n. 14.

[15] (See trial court's finding of fact: 12,44 and 53 in the appendix.). Also see conclusion of law 9: "The evidence presented at the Respondent's trial proves beyond a reasonable doubt that the Respondent is a sexually violent predator, as that term is defined by RCW 71.09.020(18)." CP 611.

from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

The Court of Appeals erred when it determined that the trial court did not error in reaching its findings of fact and conclusions of law that Mr. Robinson was a Sexually Violent Predator. App. Op. At 19- 22. This Court should accept review pursuant to RAP 13.4(b)(1),(2), (3) and (4).

The standard of review is set forth in *In re Detention of Thorell,* 149 Wn.2d 724, 72 P. 3rd 708 (2003). In order to uphold Mr. Robinson's commitment on review the appellate must find that there was sufficient evidence of the following elements beyond any reasonable doubt:

> "(1) That the respondent has been convicted of or charged with a crime of sexual violence; and
> (2) That the respondent suffers from a mental abnormality or personality disorder, which causes him serious difficulty in controlling his sexually violent behavior; and
> (3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility."

Thorell, 149 Wn.2d at 758-59[16]

As a general rule of review:

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[16] The State is required to establish that a respondent meets the criteria for commitment as a sexually violent predator by presentation of proof beyond a reasonable doubt. *In re Detention of Turay*, 139 Wn.2d 379,407-08, 986 P.2d 790 (1999).

> "When this court reviews the sufficiency of the evidence in sexually violent predator commitment proceedings the evidence when viewed in the light most favorable to the State must be sufficient to allow a rational trier of fact to conclude that the person has serious difficulty controlling behavior and fits the criteria of a sexually violent predator."

In re Detention of Kelley, 133 Wn.App. 289, 295, 135 P.3d 554 (Div. I 2006) *review denied*, 159 Wn.2d 1019 (2007). As *Stout* makes clear the burden of proof is on the State to show that an individual is an SVP beyond a reasonable doubt. *Id.* at 365.

In reviewing the sufficiency of the evidence presented by the State, the Court is required to use the standard provided for criminal cases. There proof beyond a reasonable doubt is also required. Failure to meet the constitutional standard of sufficiency as to any required element of proof should result in reversal and dismissal of the petition against the respondent. *State v. Green*, 94 Wn.2d 216, 618 P.2d 628 (1980).

"The Washington sexually violent predator statute is premised on a finding of the present dangerousness of those subject to commitment." *In re Detention of Henrickson,* 140 Wn.2d 686, 692, 2 P.3d 473 (2000). Accord *In re Detention of Turay*, 139 Wn.2d at 424 where the court stated:

""Furthermore, in *Young,* we held that 'before a person can be civilly committed; the state must prove that the individual's mentally ill and dangerous." *Young*, 122 Wn.2d at 37. (footnote omitted).

Here, it was shown by the petitioner that:

1. He did not molest any children at any time when he was on parole and in their presence. This included the family for which Mr. Robinson twice served two years of confinement for parole violations for being in the presence of the two sisters.

2. There were no reports from SCC of any loss of ability to control his behavior while confined. Nor any reports of loss of control of Robinson's behavior during the time he served his prison sentence for Child Molestation at McNeil Island.

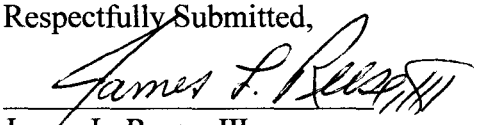
Mr. Robinson did not cut out pictures of children from magazines. He did not engage in any inappropriate sexual behavior with youthful looking inmates. Yet, the trial court-as it did in nearly all the petitioner's expert's testimony-discounted these significant factors.

F. CONCLUSION

This court should accept review of this petition and reverse the Court of Appeals' decision terminating review.

Dated this 13th day of January, 2015.

Respectfully Submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of:	No. 44575-1-II
CHARLES ROBINSON,	UNPUBLISHED OPINION
Respondent.	

BJORGEN, A.C.J. — Charles Robinson appeals a trial court order involuntarily committing him as a sexually violent predator (SVP) pursuant to chapter 71.09 RCW, Washington's sexually violent predator act (the Act). Robinson claims that the trial court committed constitutional or evidentiary error by allowing the State to introduce his testimony through a video deposition. Robinson also contends that the trial court erred by making numerous factual findings unsupported by the record and by concluding that he is an SVP. We reject Robinson's claims and affirm the findings of fact, conclusions of law, and the order of commitment.

FACTS

In 1987, while Robinson lived in California, Robinson's parents introduced him to friends of theirs, a family with a young boy named AM.[1] AM's family invited Robinson to attend church with them, and he ultimately became the leader of AM's bible study group. Robinson also babysat AM. One night, while watching six-year-old AM overnight in the church, Robinson sexually molested him multiple times. California charged Robinson with three counts

[1] We use initials to identify minor victims of sexual assault.

of lewd and lascivious acts with a child under age 14, and Robinson pleaded guilty to a single count, receiving a six-year prison sentence.

Robinson served approximately four years of his sentence before the State paroled him to the community. Two of the terms of Robinson's parole forbade contact with minors or involvement in youth groups. Robinson's inability to comply with these terms resulted in three parole violations.

Robinson's first violation occurred when his parole officer paid him a home visit to investigate allegations that Robinson had contacted minor children. Robinson admitted to having taken a seven-year-old boy into his bathroom, but denied that anything sexual had occurred. Robinson also admitted to playing and wrestling with some of the neighborhood children, but again denied any inappropriate contact. A search of Robinson's home disclosed numerous knives, which the terms of Robinson's parole prohibited him from possessing. Robinson served a year in prison for these violations of the conditions of his parole.

Shortly after his release, Robinson's new parole officer searched his residence because of concerns about his behavior. The parole officer found children's interest magazines, a Sunday school flyer, children's underwear, children's toys, and badges from a youth organization in Robinson's possessions. Robinson showed up in the company of two very young girls during this search. Robinson's parole officer took him into custody for violating the conditions of his parole, and he served another year in prison.

Less than three months after his release, Robinson's parole officer chanced across him walking down the street, holding hands with the same two girls the parole officer saw with him when she searched his residence. Robinson stated that he was babysitting the two girls and that

he had done so on several occasions. Robinson's parole officer again took him into custody, and he remained incarcerated until his term of parole expired.

After his release, Robinson moved to Washington State, where he worked as a maintenance man at an apartment complex. Robinson met a woman and her young child, WB, when he showed them an apartment in the complex. Robinson befriended the two, giving them things he found abandoned in the complex's storage units. Eventually Robinson offered to babysit WB, and WB's mother agreed to Robinson's offer.

WB alleged that Robinson had touched him inappropriately while babysitting. An investigation into these allegations disclosed several other children at the apartment complex who also claimed that Robinson molested them, including a three-year-old boy, a four-year-old girl, a five-year-old boy, and a six-year-old girl. Although he would later deny making the statement at his SVP commitment proceeding, Robinson told the investigating officers that he was unable to control his sexual urges related to young children.[2]

The State charged Robinson with first degree child molestation for the inappropriate contact with WB. After a trial, the jury returned a guilty verdict, and the trial court found that Robinson had used a position of trust to facilitate the commission of a crime involving a vulnerable victim. The trial court used these findings to impose an exceptional sentence of life in prison on Robinson, although Robinson ultimately received only 89 months after a successful appeal.

[2] The State introduced Robinson's statement through the testimony of its expert psychologists, who learned of the statements through Robinson's medical and criminal files. The State's trial brief indicated that it would introduce this testimony as substantive evidence, and Robinson did not object on hearsay grounds at trial.

In 2007, prior to Robinson's scheduled release, the State filed a petition alleging that he was an SVP and seeking his commitment pursuant to the Act. A court found that there was probable cause to believe Robinson was an SVP, and a contested bench trial on Robinson's commitment ensued.

Proving that Robinson was an SVP required the State to show, beyond a reasonable doubt, that he "ha[d] been convicted of or charged with a crime of sexual violence and . . . suffer[ed] from a mental abnormality or personality disorder which ma[de] [him] likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). For purposes of the Act, a mental abnormality is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the [potentially committed 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).

To show that Robinson had been charged with, or convicted of, a crime of sexual violence, the State offered the documents used to charge Robinson with molesting AM and WB, Robinson's guilty plea for the charges involving AM, and the felony judgment and sentence resulting from the jury's verdict that he molested WB.

To show that Robinson suffered from a congenital or acquired condition, the State offered Robinson's testimony admitting to molesting AM, the guilty plea for molesting AM, the judgment and sentence for molesting WB, and testimony that Robinson had molested other children at the apartment complex. The State also offered Robinson's video deposition testimony. The State's experts, Drs. Ronald Page and Harry Goldberg, opined, based on this evidence and their reviews of his medical and police records, that Robinson suffered from

pedophilia and that this pedophilia was a chronic condition that he suffered from at the time of the commitment proceedings.

The State also offered the evidence about Robinson's molestation of children and his parole violations to show that Robinson's pedophilia affected his emotional or volitional capacity, predisposing him to the commission of criminal sexual acts in a degree making him a menace to the health and safety of others. Goldberg testified, based on this evidence, that Robinson's pedophilia impaired his volitional capacity and predisposed him to committing crimes of sexual violence against young children.[3] Page concurred.

Finally, to show that Robinson was likely to engage in predatory acts of sexual violence if not confined in a secure facility, Goldberg opined, based on his interview with Robinson, review of Robinson's police and medical files, and use of six actuarial risk assessment tools, that Robinson was more likely than not to commit acts of predatory sexual violence unless confined in a secure facility.[4] Again, Page concurred, testifying that, based on his interview with Robinson and review of Robinson's police and medical records, he believed that Robinson would commit predatory acts of pedophilia unless committed as an SVP.

Goldberg and Page specifically rejected some of the arguments Robinson would later advance to show he was not an SVP. First, Goldberg disagreed that Robinson's advancing age would reduce his risk of committing predatory sexual violence below that necessary for

[3] Both Page and Goldberg also diagnosed Robinson with other afflictions not relevant to this appeal.

[4] Goldberg used the Static-99R, the Static-2002R, the MnSOST-R, the SORAG, the HARE PCL-R, and the SRA:FV risk assessment tools.

commitment. Goldberg noted that the actuarial instruments already accounted for Robinson's age, meaning that in spite of any decreased libido associated with aging, the risk assessments still indicated that he remained likely to commit acts of predatory sexual violence unless committed. Second, both Page and Goldberg testified that Robinson's lack of pedophilic behavior during his incarceration for molesting WB did not mean that he no longer had a mental abnormality. Indeed, both opined that Robinson suffered from pedophilia and diminished volitional control at the time of the commitment proceeding.

In defense, Robinson offered the testimony of Dr. James Manley. Manley agreed that Robinson suffered from pedophilia.[5] However, in contrast to Page and Goldberg, Manley opined that Robinson's pedophilia did not constitute a mental abnormality and did not make him likely to reoffend unless confined. Manley contended that finding a mental abnormality required a recent indication of decreased volitional control. Manley opined that Robinson had shown volitional control, because no evidence indicated that he had committed crimes of sexual violence while on parole or that he had engaged in pedophilic behavior during his incarceration for abusing WB. Manley also testified that the "urges and behaviors" associated with pedophilia "tend to mitigate with age or decrease" and that Robinson's age meant that he had essentially aged out of dangerousness. Verbatim Report of Proceedings VRP (Trial) at 325.

Manley disputed Goldberg's finding that Robinson was more likely than not to reoffend unless confined, relying on his scoring of Robinson on two risk assessment tools. Under cross-examination, Manley admitted to mistakenly underscoring Robinson on both of these risk

[5] Like Page and Goldberg, Manley also diagnosed Robinson with a secondary condition not relevant to this appeal.

assessment tools, but he adhered to his conclusion that Robinson did not pose a sufficient risk of committing further acts of predatory violence to warrant commitment under the Act.

The trial court found the testimony of Goldberg and Page to be credible. The trial court also found that the State had proven beyond a reasonable doubt that Robinson had committed a crime of sexual violence, suffered from a mental abnormality and a personality disorder, and was more likely than not to commit further acts of predatory sexual violence unless confined in a secure facility. Consequently, the trial court concluded Robinson was an SVP and ordered his commitment.

Robinson appeals.

ANALYSIS

Robinson challenges his SVP commitment on two grounds. First, he contends that, by allowing the State to admit his video deposition testimony in the SVP proceeding, the trial court violated his right to remain silent and the evidentiary rules requiring live witness testimony. Robinson also contends that the evidence presented at trial was insufficient to support many of the trial court's findings of fact or its order of commitment. We affirm.

I. RIGHT TO SILENCE

Robinson contends that the trial court erred by allowing the State to introduce his video deposition, because his right to remain silent entitled him to refuse to answer any questions. Robinson claims that the right to remain silent applies in SVP commitment proceedings through either the self-incrimination clause of the Fifth Amendment or the due process clause of the Fourteenth Amendment to the United States Constitution. Because Robinson's claim involves a

constitutional right, we review it de novo. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). We find no error.

A. The Fifth Amendment

Robinson first argues that he had a right to remain silent because SVP commitment proceedings are essentially criminal proceedings, triggering the protections of the Fifth Amendment. We disagree.

The self-incrimination clause of the Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. By its terms, the right to remain silent found in the Fifth Amendment applies in criminal proceedings, although courts have held that this right also applies in any civil matter where "the penalty imposed is punishment tantamount to a criminal sanction." *In re Pers. Restraint of Young*, 122 Wn.2d 1, 51, 857 P.2d 989 (1993). Our Supreme Court has determined that the right to remain silent does not apply in SVP commitment proceedings because such proceedings are civil proceedings that do not impose "punishment tantamount to a criminal sanction" on a person committed as an SVP. *Young*, 122 Wn.2d at 18-23, 50-52, 59.

Despite *Young*'s contrary holding, Robinson contends that the right to remain silent applies to SVP commitment proceedings because chapter 71.09 RCW "'is so punitive either in purpose or effect'" as to "establish[] criminal proceedings for constitutional purposes." *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248-49, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980)) (first alteration in original). We find his contentions unpersuasive.

First, Robinson argues that because SVP commitment proceedings use some of the procedural safeguards the constitution imposes on criminal proceedings, SVP commitment proceedings are criminal in nature. This argument, however, was rebuffed in *Hendricks*, 521 U.S. at 364-65 and *Allen v. Illinois*, 478 U.S. 364, 371-72, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986), which reasoned that the use of some constitutional protections required in criminal trials in SVP commitment proceedings does not transform such proceedings into criminal ones.

Second, Robinson contends that the Act is criminal because it allows the State to detain the potentially committed person during commitment proceedings. The *Young* court held that the restraints on liberty permitted by the Act served civil purposes and thus did not transform it into a penal statute. *Young*, 122 Wn.2d at 21-23. As Robinson's potential detention before and during trial are part of these restraints on liberty, his argument must fail.

Third, Robinson maintains that the Act is punitive in purpose and effect because the State may only file a petition against a person who has committed a crime of sexual violence. The fact that the legislature does not "apply [chapter 71.09 RCW] to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one." *Allen*, 478 U.S. at 370. Requiring the State to prove a prior crime of sexual violence is required, "not to punish past misdeeds, but primarily to show the [potentially committed person's] mental condition and to predict future behavior" consistent with the requirements of due process. *Allen*, 478 U.S. at 371. Therefore, limiting SVP commitment proceedings to those convicted of criminal sexual violence does not make the SVP proceeding criminal in nature.

Fourth, Robinson claims that the long-term detention and treatment permitted by the Act distinguishes it from similar acts deemed civil in nature. The Act, however, requires the release of committed persons "as soon as they are no longer dangerous." *Young*, 122 Wn.2d at 20-21. Indeed, chapter 71.09 RCW allows an individual to petition for release at any time and requires annual reviews. RCW 71.09.090. These provisions link the restraint of a committed person's liberty with the civil purposes of chapter 71.09 RCW, treatment and incapacitation, and show that any restraints are not punitive in nature. *Hendricks*, 521 U.S. at 364.

Finally, Robinson contends that the legislature has allowed for the assertion of Fifth Amendment rights in other involuntary commitment proceedings and appears to argue that this makes all involuntary commitment proceedings criminal. Robinson did not raise this argument in his opening brief and, therefore, waived it.[6] *Ives v. Ramsden*, 142 Wn. App. 369, 396, 174 P.3d 1231 (2008).

We reject Robinson's contention that the Act is so punitive in purpose or effect as to become a criminal statute. As such, the Fifth Amendment, by its own terms, is inapplicable to Robinson's commitment proceedings, and he had no right to remain silent. *Young*, 122 Wn.2d at 51.

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[6] Even if we reached the merits of Robinson's claim, we would reject it. As noted, the legislature may, by statute, provide for constitutional protections in proceedings where not constitutionally required. This does not, however, transform those proceedings into criminal matters. *Hendricks*, 521 U.S.at 364-65. Robinson's contention here is actually an equal protection claim. *See In re Det. Of Thorell*, 149 Wn.2d 724, 745-55, 72 P.3d 708 (2003). Our Supreme Court has already concluded the legislature had a rational basis to distinguish between other involuntary commitment proceedings and those pursuant to the Act for purposes of the right to silence. *Young*, 122 Wn.2d at 51-52. Accordingly, there is no equal protection violation. *See Thorell*, 149 Wn.2d at 751.

B. The Fourteenth Amendment

Robinson also contends that the balancing test used to determine whether due process requires a procedural safeguard before the deprivation of a protected interest requires allowing the assertion of the right to remain silent in SVP proceedings.[7] *See Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Again, we disagree.

The United States Supreme Court has already determined that the due process clause does not import the right to silence into SVP commitment proceedings. *Allen*, 478 U.S. at 374-75. The Supreme Court reasoned that *Mathews* and its balancing test only apply to procedural safeguards intended to ensure the reliability of deprivation proceedings. *Allen*, 478 U.S. at 374-75. The right to remain silent exists because of notions about the nature of the Anglo-American system of justice, not because it ensures the reliability of confessional statements. *Allen*, 478 U.S. at 375 (quoting *Rogers v. Richmond*, 365 U.S. 534, 540-41, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961)). The right to remain silent, therefore, "has no place among the procedural safeguards discussed in *Mathews v. Eldridge*," and Robinson's due process argument lacks merit. *Allen*, 478 U.S. at 375.

II. Deposition Testimony

Robinson next alleges that, if the State could compel his testimony, it needed to do so by calling him to the witness stand rather than playing his video deposition. We hold that Robinson waived this challenge and decline to reach its merits.

[7] The due process clause provides that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

Generally, we will not review claims of errors made for the first time on appeal. RAP 2.5(a). More specifically, a litigant may not assign error to an evidentiary ruling on a basis not raised at trial. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). Requiring litigants to raise possible errors in the trial court allows for their contemporaneous correction, obviating the need for a retrial and serving important goals of judicial economy and fairness. *Powell*, 166 Wn.2d at 82.

Robinson's attorney made a general objection to the State's attempt to admit his video deposition testimony. However, when the State cited court rules allowing the deposition's admission, the trial court asked Robinson's counsel whether there "[wa]s . . . any basis under the rule or any other authority that makes presentation and publication or admission of the deposition inappropriate?" VRP (Trial) at 37. Robinson's counsel replied, "No." VRP (Trial) at 37. Under *Powell*, 166 Wn.2d at 82, Robinson waived his claim.[8]

III. FINDINGS OF FACT

Robinson next assigns error to 29 of the trial court's findings of fact. We find no merit in his arguments, with one exception having no effect on our disposition of Robinson's appeal. We therefore affirm the trial court's findings.

We review a trial court's factual findings for substantial supporting evidence in the record. *In re Det. Of Kistenmacher*, 134 Wn. App. 72, 75, 138 P.3d 648 (2006). Substantial evidence is evidence sufficient "'to persuade a rational fair-minded person the premise is true.'"

[8] Again, even if we reached the merits of this claim, we would reject it. The civil rules govern SVP commitment proceedings. *In re Det. of Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002). The State's use of Robinson's deposition testimony is fully consistent with ER 801(d)(2) and CrR 32(a)(2); *see Young v. Liddington*, 50 Wn.2d 78, 79-80, 309 P.2d 761 (1957) (permissible to use deposition of party opponent as substantive evidence during a litigant's case-in-chief).

Kistenmacher, 134 Wn. App. at 75. We defer to the fact finder's determinations about witness credibility and the persuasiveness of the evidence, as well as its resolution of conflicting testimony. *State v. Mashek*, 177 Wn. App. 749, 756, 312 P.3d 774 (2013) (quoting *State v. Liden*, 138 Wn. App. 110, 117, 156 P.3d 259 (2007)).

A. Findings of Fact 4, 5, 15, 33, and 43

Robinson first contends that the trial court erred in finding that he placed himself in positions of trust in order to groom his victims. Robinson contends that he only babysat when asked to do so and that no evidence at trial showed any grooming.

Robinson's own testimony, along with the opinion testimony of Page and Goldberg, provides substantial evidence to support these findings of fact. Robinson testified that AM's family asked him to babysit for them, indicating that he occupied a position of trust. Robinson testified that he volunteered to babysit WB, an offer that WB's mother accepted, again indicating that he occupied a position of trust. Robinson had attained these positions of trust by accompanying AM's family to church and becoming a youth group leader and by giving WB's mother items she needed for her apartment. Page and Goldberg both opined that these activities were Robinson's attempts to gain the trust of AM's and WB's parents to get access to the children. Goldberg also testified that, in his opinion, Robinson wanted access to children in order to groom them. Thus, substantial evidence supports the trial court's finding that Robinson placed himself in positions of trust in order to groom his victims.

B. Finding of Fact 13

Robinson next challenges the trial court's finding that, based on his two convictions for child molestation offenses, he "has an ongoing and recurring interest in children that qualifies

him as a pedophile." Clerk's Papers (CP) at 600. Robinson contends this is a conclusion of law or, alternatively, no evidence supports a finding he is a pedophile.[9]

The record contains substantial supporting evidence for the trial court's finding that Robinson is a pedophile. Each of the expert psychologists, Page and Goldberg for the State and Manley for Robinson, testified that, based on the evidence, Robinson met the clinical definition of a pedophile.

C. Finding of Fact 16

Robinson next challenges the trial court's finding that "Dr. Page opined and felt strongly that [he] posed a high risk to re-offend." CP at 601. Robinson's challenge to this finding is puzzling. Page testified to exactly what the trial court found. Robinson appears to challenge the finding because Page did not need to offer this opinion when evaluating Robinson. That is irrelevant. The fact that Page did so provides substantial evidence supporting the trial court's finding.

D. Finding of Fact 23

Robinson next challenges the trial court's finding that there were allegations that Robinson molested a "three-year-old girl" and harassed a twelve-year-old boy. CP at 602-03. As Robinson notes, the testimony indicated there were allegations of molestation involving a three-year-old boy, not a girl. Nonetheless, the trial testimony provided substantial evidence for the substance of the trial court's finding that there were allegations involving a three-year-old

[9] It is a finding of fact. Whether Robinson suffers from pedophilia is a factual issue relevant to a legal determination that he is a SVP.

child. Robinson's challenge to the portion of the finding related to the twelve-year-old boy is without merit as both he and Goldberg testified to the substance of the trial court's finding.

E. Findings of Fact 26, 27, and 31

In his challenge to finding 28, discussed below, Robinson argues that the court erred in adopting findings of fact 26, 27, and 31, which summarized Goldberg's testimony that Robinson had a mental abnormality and a personality disorder. Robinson did not assign error to these findings and makes no argument as to how the record does not substantiate them, other than he presented contrary testimony from Manley. Robinson waived his claim of error. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).[10]

F. Findings of Fact 28, 29, 30, 33, 48, 49, 50, and 51

Robinson also challenges the trial court's findings that he showed impaired volitional control. Robinson contends that Manley testified that he had volitional control based on his time in the community without any sex offenses and his lack of pedophilic behavior during his incarceration for molesting WB.

Substantial evidence supports the trial court's findings that Robinson had impaired volitional control. This evidence includes Robinson's two criminal convictions, three parole violations for contact with children despite express prohibitions against doing so, Goldberg's and Page's opinions that he sought out access to children in spite of the penalties for doing so and that Robinson's pedophilia impaired his volitional control, and Robinson's own statements that he could not control his urges.

[10] Regardless, given that the findings summarize Goldberg's testimony, substantial evidence supports them and we defer to the trial court's resolution of any conflict between Goldberg's and Manley's testimony.

Further, Goldberg and Page testified that Robinson's lack of pedophilic behavior during his incarceration did not show his volitional control was unimpaired. While Manley testified in a contrary manner, the trial court explicitly found Goldberg's testimony credible. We defer to the trial court's resolution of conflicting testimony. Thus, substantial evidence supports the trial court's finding that Robinson had impaired volitional control.

G. Finding of Fact 31

Robinson next challenges the trial court's finding that he "has not resolved his sexual urges and his fantasies" concerning children and that he would commit new acts of pedophilia if released, given his lack of treatment. CP at 605. Robinson claims that no evidence suggests he would molest children as he has been offense free for 13 years and that any lack of treatment is not his fault.

Substantial evidence supports the trial court's finding. Goldberg testified that, based on the results from the risk assessment screening he performed on Robinson, he believed Robinson was more likely than not to commit predatory sexual violence if released. Page concurred on the basis of his interview with Robinson and review of Robinson's records. Indeed, Page essentially testified to the wording of the trial court's finding. Any fault for lack of treatment is irrelevant to the trial court's finding, which is supported by Goldberg's testimony about the effect of Robinson's lack of treatment. Finally, both Page and Goldberg testified that Robinson continued to suffer from pedophilia at the time of the commitment proceedings, indicating that he had not resolved his pedophilia. Substantial evidence supports this finding.

H. Findings of Fact 34-37

Robinson next challenges the trial court's findings related to Goldberg's diagnosis that Robinson was a pedophile and Goldberg's use of various risk assessments to determine Robinson was more likely that not to engage in predatory sexual violence unless committed. Goldberg testified to the substance of each of those findings, and substantial evidence therefore supports them. Page concurred that Robinson would commit further acts of predatory sexual violence unless confined. The trial court found Goldberg's and Page's testimony credible. Thus, Robinson's argument that Manley testified in a contrary manner is irrelevant, since we defer to the trial court's resolution of conflicting testimony. Robinson's challenge fails.

I. Finding of Fact 40

Robinson next challenges the trial court's finding related to Goldberg's use of the SRA:FV (Structured Risk Assessment: Forensic Version) risk assessment tool. Robinson argues that the testimony about the instrument was inadmissible as the instrument has not satisfied the general acceptance and reliability requirements of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which governs novel scientific testimony. However, as the State argues, Robinson did not raise his *Frye* challenge with the trial court and has therefore waived it. *In re Det. of Post*, 145 Wn. App. 728, 755-56, 187 P.3d 803 (2008); *In re Det. of Taylor*, 132 Wn. App. 827, 836, 134 P.3d 254 (2006).

J. Findings of Fact 41 and 47

Robinson challenges these findings by contending that the trial court erred in discounting the effect his age would have on the likelihood he would commit further sexual offenses if released.

Substantial evidence supports the trial court's findings. Goldberg testified that the Static-99R risk assessment tool already accounted for Robinson's age when determining whether he was more likely than not to reoffend. Goldberg testified that, as a result, further consideration of Robinson's age would double credit Robinson with any decrease in likelihood of recidivism, introducing error into the relevant calculations. While Robinson cites Manley's contrary testimony, we defer to the trial court's resolution of Goldberg's and Manley's conflicting testimony. Thus, Robinson's contention fails.

K. Finding of Fact 42

In challenging this finding, Robinson contends that the trial court erred in discounting the effect his plans to go work in the construction industry in California would have on the likelihood he would reoffend.

Substantial evidence supports the trial court's finding. Goldberg testified that Robinson had no realistic plans to find work: he had not been in the work force in California in decades and had no contacts there. Goldberg testified further that Robinson's plans to return to California would increase, rather than decrease his likelihood of committing further predatory sexual violence. Again, Robinson cites Manley's conflicting testimony, but we defer to the trial court's resolution of the conflict between Goldberg's and Manley's testimony. Accordingly, Robinson's contention fails.

L. Finding of Fact 43

Robinson also claims that the trial court erred in finding that his past sexual misconduct was predatory. Since Page testified to exactly that, substantial evidence supports the trial court's finding.

M. Finding of Fact 52

Finally, Robinson challenges the trial court's finding that he exhibited denial during his testimony. Robinson claims that he "volunteered considerable information" about his offenses. Br. of Appellant at 50.

Substantial evidence supports the trial court's finding. Page and Goldberg both testified about Robinson's denial. With regard to Robinson's own testimony, he repeatedly either provided minimal answers, attempted to avoid answering questions about molesting AM or WB, or attempted to move the testimony on to other issues.

IV. ORDER OF COMMITMENT

Robinson next argues that the trial court erred in concluding he was an SVP. Specifically, Robinson contends that the trial court ignored (1) evidence of his volitional control and (2) the State's failure to present recent evidence of impaired volitional control because he did not show pedophilic behavior during his incarceration for molesting WB. We disagree.

To commit Robinson as an SVP, the State needed to prove (1) he had been convicted of, or charged with, a crime of sexual violence as defined in RCW 71.09.020(17) and that (2) he suffered from "a mental abnormality or personality disorder," which (3) made him "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). Proving that Robinson had a "mental abnormality" required the State to show that Robinson had "a congenital or acquired condition affecting" his "emotional or volitional capacity" predisposing him "to the commission of criminal sexual acts in a degree constituting [him] a menace to the health and safety of others." RCW 71.09.020(8). Proof of these elements shows the potentially committed person poses a current threat to public safety and ensures that

the State commits only dangerous mentally ill individuals, rather than allowing for the commitment of "typical criminal recidivist[s]." *In re Det. of Thorell*, 149 Wn.2d 724, 736, 72 P.3d 708 (2003).

We review a challenge to the sufficiency of the evidence supporting a trial court's determination that a person is an SVP using the criminal standard of review. *Thorell*, 149 Wn.2d at 744. Under that standard, evidence is sufficient when, taken in the light most favorable to the State, a rational trier of fact could find all the elements necessary to commit the individual as an SVP beyond a reasonable doubt. *Thorell*, 149 Wn.2d at 744; RCW 71.09.060(1). A committed person challenging the sufficiency of the evidence supporting a determination that they are an SVP admits the truth of all of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. O'Neal*, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007).

Robinson first claims that the State failed to show beyond a reasonable doubt that he had a mental abnormality as required by RCW 71.09.020(17), because he showed volitional control by not molesting any children during his parole. Robinson appears to ask us to hold that the State must show beyond a reasonable doubt that he can *never* control his behavior to prove a mental abnormality. Neither Washington's commitment scheme nor due process requires the State to carry such a burden of proof in SVP commitment proceedings. RCW 71.09.020(8) (proof of a mental abnormality only requires showing impairment of volitional capacity, not its elimination); *Kansas v. Crane*, 534 U.S. 407, 411-12, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) (due process does not require the State to show a complete inability to control behavior for SVP commitment).

We hold that the State introduced evidence that would have allowed a rational trier of fact to conclude beyond a reasonable doubt that Robinson suffered from impaired volitional control. Robinson's pedophilia caused him to molest at least two young children, resulting in lengthy prison incarcerations. Regardless of whether Robinson correctly claims that he did not molest any children during his parole, his pedophilia drove him to make contact with children in violation of his parole, resulting in his incarceration on three separate occasions. Further, Robinson told the officer investigating the molestation of WB that he could not control his urges toward children. Based on this evidence, Page and Goldberg testified that Robinson's pedophilia impaired his volitional control. While Manley offered contrary testimony, the trial court found Page and Goldberg's testimony to be credible, and we defer to the trial court's resolution of the conflicting testimony.

Robinson next contends that the State failed to show volitional impairment during his incarceration for molesting WB. Robinson appears to contend that the State failed to show recent evidence of his inability to control his behavior and therefore failed to show he was currently dangerous at the time of the SVP commitment proceeding. *See In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) ("[t]he dangerousness must be current.").

Dangerousness within the meaning of SVP commitment arises from a condition affecting the potentially committed person's volitional capacity, predisposing him or her to future predatory sexual violence. RCW 71.09.020(8), (18); *Thorell*, 149 Wn.2d at 736. The record contains sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that the State proved Robinson's current dangerousness at the time of his commitment proceedings. Page and Goldberg testified that Robinson suffered from pedophilia at the time of

the commitment proceeding. Page and Goldberg also testified that Robinson's pedophilia decreased his volitional control such that, in their opinion, Robinson would likely commit future acts of predatory sexual violence if not confined. Goldberg specifically rejected the argument that Robinson makes here, namely that the absence of pedophilic behavior during his incarceration for molesting WB shows his volitional control, and, thus, that he is no longer dangerous. Again, while Manley offered contrary testimony, we defer to the trial court's resolution of the conflicting testimony on this issue. Robinson's contention fails.

CONCLUSION

We affirm the trial court's findings of fact, conclusions of law, and order committing Robinson as a SVP.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

Maxa, J.
MAXA, J.

Lee, J.
LEE, J.

Finding of Fact 12:

"The court finds, beyond a reasonable doubt, based on the expert psychological testimony presented at trial that Mr. Robinson does suffer from a mental abnormality and a personality disorder; and that his mental condition causes him serious difficulty in controlling his sexually violent behavior...." CP 599-600.

Finding of Fact 44:

"The court accepts the evaluations and conclusions of the State's expert, Dr. Goldberg, and finds that Mr. Robinson is a sexually violent predator, as is defined under the statute." CP 608.

Finding of Fact 53:

"In conclusion, the Court finds that the State has proven beyond a reasonable doubt that all elements of the sexually violent predator statute have been met as to Mr. Robinson. He does qualify as a sexually violent predator under the law of our state." CP 611.

RCW 71.09.060
Trial — Determination — Commitment procedures.

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition. The community protection program under RCW 71.09.250 may not be considered as a placement condition or treatment option available to the person if unconditionally released from detention on a sexually violent predator petition. When the determination is made by a jury, the verdict must be unanimous.

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. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in *RCW 71.09.020(15)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030.

If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services for placement in a secure facility operated by the department of social and health services for control, care, and treatment until such time as: (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community.

If the court or unanimous jury decides that the state has not met its burden of proving that the person is a sexually violent predator, the court shall direct the person's release.

If the jury is unable to reach a unanimous verdict, the court shall declare a mistrial and set a retrial within forty-five days of the date of the mistrial unless the prosecuting agency earlier moves to dismiss the petition. The retrial may be continued upon the request of either party accompanied by a showing of good cause, or by the court on its own motion in the due administration of justice provided that the respondent will not be substantially prejudiced. In no event may the person be released from confinement prior to retrial or dismissal of the case.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be or has been released pursuant to RCW 10.77.086(4), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.086(4) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to

the parties shall constitute action of record for purposes of this rule.

(D) Other Grounds for Dismissal and Reinstatement. This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

(3) *Defendant's Motion After Plaintiff Rests.* After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) **Dismissal of Counterclaim, Cross Claim, or Third Party Claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **Costs of Previously Dismissed Action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) **Notice of Settlements.** If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court *promptly* of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk. [Amended effective September 1, 1997.]

RULE 42. CONSOLIDATION; SEPARATE TRIALS

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury.

RULE 43. TAKING OF TESTIMONY

(a) **Testimony.**

(1) *Generally.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(2) *Multiple Examinations.* When two or more attorneys are upon the same side trying a case, the attorney conducting the examination of a witness shall continue until the witness is excused from the stand; and all objections and offers of proof made during the examination of such witness shall be made or announced by the attorney who is conducting the examination or cross examination.

(b) and (c) [Reserved. See ER 103 and 611.]

(d) **Oaths of Witnesses.**

(1) *Administration.* The oaths of all witnesses in the superior court

(A) shall be administered by the judge;

(B) shall be administered to each witness individually; and

(C) the witness shall stand while the oath is administered.

(2) *Applicability.* This rule shall not apply to civil ex parte proceedings or default divorce cases and in such cases the manner of swearing witnesses shall be as each superior court may prescribe.

(3) *Affirmation in Lieu of Oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) **Evidence on Motions.**

(1) *Generally.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(2) *For Injunctions, etc.* On application for injunction or motion to dissolve an injunction or discharge an attachment, or to appoint or discharge a receiver, the notice thereof shall designate the kind of evidence to be introduced on the hearing. If the application is to be heard on affidavits, copies thereof must be served by the moving party upon the adverse party at least 3 days before the hearing. Oral testimony shall not be taken on such hearing unless permission of the court is first

(b) **Decision Terminating Review.** A party seeking review of a Court of Appeals decision terminating review may first file a motion for reconsideration under rule 12.4 and must file a "petition for review" or an "answer" to a petition for review as provided in rule 13.4.

(c) **Interlocutory Decision.** A party seeking review of an interlocutory decision of the Court of Appeals must file a "motion for discretionary review" as provided in rule 13.5.

(d) **Incorrect Designation of Motion or Petition.** A motion for discretionary review of a decision terminating review will be given the same effect as a petition for review. A petition for review of an interlocutory decision will be given the same effect as a motion for discretionary review.

(e) **Ruling by Commissioner or Clerk.** A ruling by a commissioner or clerk of the Court of Appeals is not subject to review by the Supreme Court. The decision of the Court of Appeals on a motion to modify a ruling by the commissioner or clerk may be subject to review as provided in this title.

[Amended effective June 7, 1979; September 1, 1983; September 1, 1994.]

References

Rule 12.3, Forms of Decision; Rule 17.3, Content of Motion, (b) Motion for discretionary review.

RULE 13.4. DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) **How to Seek Review.** A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file proof of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.

(b) **Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) **Content and Style of Petition.** The petition for review should contain under appropriate headings and in the order here indicated:

(1) *Cover.* A title page, which is the cover.

(2) *Tables.* A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where cited.

(3) *Identity of Petitioner.* A statement of the name and designation of the person filing the petition.

(4) *Citation to Court of Appeals Decision.* A reference to the Court of Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration.

(5) *Issues Presented for Review.* A concise statement of the issues presented for review.

(6) *Statement of the Case.* A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record.

(7) *Argument.* A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.

(8) *Conclusion.* A short conclusion stating the precise relief sought.

(9) *Appendix.* An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) **Answer and Reply.** A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for

PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 14th day of January, 2015, I hand delivered for filing the original Petition for Review in In re the Detention of Charles H. Robinson, Court of Appeals Cause No. 44575-1-II, to the Court of Appeals at 950 Broadway, Ste. 300, Tacoma, WA 98402; deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Counsel for Respondent Fred Wist, Attorney General's Office, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104-3188/ Erin Jany, Attorney General's Office, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104-3188; and mailed one (1) copy of the same to Petitioner at his last known address: Charles Robinson, P.O. Box 88600, Steilacoom, WA 98388.

James L Reese III

Signed and Attested to before me this 14th day of January, 2015 by James L. Reese, III.

Julia T. Reese

Notary Public in and for the State of Washington residing at Port Orchard.
My Appointment Expires: 04/04/17