SUPREME COURT NO. _____
COA NO. 32762-1-III

IN THE SUPREME COURT OF WASHINGTON

IN RE DETENTION OF SCOTT HALVORSON:

STATE OF WASHINGTON,

Respondent,

v.

SCOTT HALVORSON,

Petitioner.

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

The Honorable Harold D. Clarke, III, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Scott Halvorson asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Halvorson requests review of the decision in In re Detention of Scott Halvorson, Court of Appeals No. 32762-1-III (slip op. filed Aug. 11, 2016), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Where the State's expert did not rely on the personality disorder, alcohol dependence or cannabis abuse diagnoses as the mental abnormality that made Halvorson likely to reoffend and the trial court instructed the jury solely on mental abnormality as the basis to commit, whether the trial court erred in permitting the jury to consider evidence of these diagnoses because they were irrelevant under ER 401 and unduly prejudicial under ER 403?

2. Where the question of whether Halvorson currently suffered from a nonconsent paraphilia was a central issue at trial, did the court violate ER 412 and his constitutional right to present a complete defense in excluding evidence that an identified victim had previously consented to sexual asphyxiation, which supported the defense theory that she consented to sex with Halvorson?

3. Whether cumulative error violated Halvorson's constitutional due process right to a fair trial?

D. STATEMENT OF THE CASE

In 2012, the State filed a petition seeking Scott Halvorson's civil commitment under chapter 71.09 RCW, relying on Dr. Judd's evaluation that Halvorson met the definition of a sexually violent predator (SVP). CP 1-50. Before trial, Halvorson's counsel moved to exclude reference to Judd's diagnoses of antisocial personality disorder, alcohol dependence and cannabis abuse. CP 1216-20; RP[1] 231-32.

Counsel argued that Judd relied only on the paraphilia and pedophilia diagnoses in opining that Halvorson had a mental abnormality that made him likely to reoffend. CP 1219-20. Judd did not opine the antisocial personality disorder, alcohol dependence and cannabis abuse conditions predisposed Halvorson to commit acts of sexual violence, and did not rely on them for his opinion that Halvorson met the SVP definition. CP 1220. Counsel thus contended evidence of these diagnoses was irrelevant under ER 401 and would likely confuse and mislead the jury under ER 403. CP 1220. The trial court ruled the personality disorder, alcohol dependence and cannabis

[1] The verbatim report of proceedings is referenced as follows: RP - seven consecutively paginated volumes consisting of 7/24/14, 8/18/14, 8/19/14, 8/20/14, 8/21/14, 8/25/14, 8/26/14, 8/27/14.

abuse diagnoses were "appropriate" and that the prejudice from the latter two diagnoses did not outweigh their relevance. RP 312-13.

Before trial, Halvorson's counsel also moved under ER 412 to admit evidence that an identified victim, D.S., was observed exchanging sex for money with another man at a bar called The Flame; and was observed requesting another man to cut off her air supply during sexual intercourse in 2006. RP 268-79, 294-97; CP 1622-49. The offer of proof for the latter piece of evidence came from deposition testimony provided by Ms. Anstine, who knew D.S. for many years. CP 1627-32. Anstine knew D.S. engaged in prostitution activities, including at The Flame. CP 1628-29. She observed D.S. engage in a particular act of prostitution at a hotel in which D.S. asked the customer to choke her. CP 1629-32.

Counsel argued D.S.'s prior act of consent to sexual asphyxiation was important to the defense because Dr. Judd relied on the assault/rape conviction involving D.S. as a basis to opine Halvorson currently suffered from paraphilia - nonconsent. CP 1644. The proffered evidence supported Halvorson's expected testimony that the sex between Halvorson and D.S. was consensual, which provided a basis to argue Halvorson had actually lived in the community for a decade without exhibiting signs or symptoms of the alleged mental abnormality. CP 1644-45. Further, independent evidence that D.S. had previously consented to sexual asphyxiation could be used to

undermine Dr. Judd's opinion that Halvorson currently suffered from a dangerous mental abnormality. CP 1647-48.

The court admitted evidence that D.S. traded sex for money on a specific occasion, but excluded evidence of the prior consensual asphyxiation incident. RP 313-15. It described the event as "somewhat remote" and "kind of speculative." RP 314-15.

Dr. Judd, testifying for the State, informed the jury that Halvorsen suffered from paraphilia, NOS - nonconsent (other specified paraphilic disorder - rape), pedophilia, antisocial personality disorder, alcohol dependence and cannabis abuse. RP 653-55, 669-70, 673-74, 715-16, 729. Judd opined Halvorson has mental abnormalities in the form of paraphilia and pedophilia that make him more likely than not to commit predatory acts of sexual violence. RP 711, 747. Judd relied on a number of past events in reaching his opinion. RP 651, 655, 657-58, 660-61, 671-72, 714-16. Halvorson had sexual contact with his two younger sisters as a juvenile. RP 576, 579-82, 611-18. 26 years before the commitment trial, Halvorson pled guilty to indecent liberties against a girl based on a 1987 event. Ex. 2, 3. Halvorson also pled guilty to first degree rape against a girl based on an event that occurred pending sentencing on the indecent liberties conviction. Ex. 6, 29; RP 361, 366-67, 731-35, 781-82. Twenty years later, in 2008, a jury convicted Halvorson of third degree rape and

second degree assault against D.S., an adult female, based on an event that occurred in 2007. Ex. 11; RP 661, 734.

Halvorson gave his version of what happened with D.S. at the commitment trial. He testified he knew D.S. from previous encounters, including one at The Flame. RP 471-80, 484-86. On the night in question, D.S. agreed to have sex with Halvorson in exchange for $40 to buy cocaine. RP 497. They had consensual sex. RP 499-500. During the course of that sexual encounter, D.S. asked him to choke her so that she could "get off." RP 500. Halvorson agreed and cut off her air supply while having sex with her. RP 500-01. Halvorson denied raping her but acknowledged causing petechial hemorrhages from choking. RP 470, 541.

While Dr. Judd opined Halvorson has mental abnormalities in the form of paraphilia and pedophilia that make him more likely than not to commit predatory acts of sexual violence (RP 711, 747), Judd did not believe an antisocial personality disorder predisposes someone to engage in a sexually violent offense. RP 680, 746-47, 752-53. But the interaction between mental abnormality and the personality disorder increased the probability that someone is likely to reoffend insofar as the personality disorder implicates lack of remorse, empathy and concern about the impact on one's behavior on others. RP 680-81, 746-47. Judd used

clinical judgment to arrive at his opinion that Halvorson was at high risk to reoffend. RP 766-67, 822-23.

Dr. Donaldson, a psychologist testifying on behalf of Halvorson, opined there was insufficient evidence to conclude Halvorson currently suffered from a mental abnormality. RP 835, 842-43, 861. According to Donaldson, there is almost no science to support such a finding. RP 870. Paraphilia diagnoses have poor reliability. RP 845, 854-55. The paraphilia - non-consent diagnosis is not scientifically credible and was "basically contrived in order to somehow shoehorn rapists into a mental illness." RP 848-49. The pedophilia diagnosis, meanwhile, lacks empirical evidence to back it up. RP 846, 898. Halvorson had not shown symptoms of pedophilia for many years. RP 893. Antisocial personality disorder diagnoses also have poor reliability. RP 862. Donaldson further testified there was insufficient evidence to show Halvorson had serious difficulty controlling sexually violent behavior. RP 853. There is no way to accurately predict an individual's risk of sexual reoffense. RP 856, 859. The jury nonetheless found Halvorson met the SVP definition. CP 1418.

On appeal, Halvorson argued the trial court committed reversible error in admitting evidence of the antisocial personality disorder, alcohol dependence and cannabis abuse diagnoses because they were irrelevant and unfairly prejudicial. Brief of Appellant (BOA) at 8-16. Halvorson further

argued the trial court violated his right to present a defense by excluding evidence that the latest identified victim, D.S., consented to being choked before while engaging in a sex act. BOA at 16-30. The Court of Appeals rejected these arguments and affirmed. Slip op. at 1, 9.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. EXPERT TESTIMONY DIAGNOSING HALVORSON WITH A PERSONALITY DISORDER, ALCOHOL DEPENDENCE AND CANNABIS ABUSE WAS IRRELEVANT UNDER ER 401 AND INADMISSIBLE UNDER ER 403.

Testimony about Halvorson's personality disorder, alcohol dependence and cannabis abuse diagnoses were irrelevant because the jury was not instructed on personality disorder as means to commit Halvorson, and the other two diagnoses were not relied on by the State's expert as mental abnormalities. In light of the "to commit" instruction, such testimony was misleading and confusing under ER 403. The trial court thus erred in allowing the jury to consider expert testimony that Halvorson suffered from these mental conditions. The question of whether the basis of commitment is limited by how the jury is instructed is an issue of substantial public importance because it arises in any SVP case where the jury is instructed on only one alternative means as a basis to commit, to the exclusion of the other means. Further, whether the trier of fact can rely on mental conditions that do not qualify as mental abnormalities or personality disorders in deciding

whether someone meets the SVP definition is a recurring issue. For these reasons, review is warranted under RAP 13.4(b)(4).

Chapter 71.09 RCW authorizes the commitment of those found to meet the SVP definition. RCW 71.09.060(1). An SVP is "any person who has been convicted of or charged with a crime of sexual violence and who suffers 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). "Mental abnormality" and "personality disorder" are alternative means for making the SVP determination.[2] In re Detention of Halgren, 156 Wn.2d 795, 810, 132 P.3d 714 (2006). The "to commit" instruction required the State to prove Halvorson suffers from a mental abnormality, not a personality disorder, and that this mental abnormality makes him more likely than not to commit predatory acts of sexual violence. CP 1397.

The "to commit" instruction impacts what evidence is relevant. It is fundamental that the jury must decide the case based on the law as

---

[2] "Mental abnormality" means "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). "Personality disorder" means "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment." RCW 71.09.020(9).

embodied in the court's instructions. The jury was instructed on this point. CP 1392 ("You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case."). Based on the way the jury was instructed, it could not consider the personality disorder as contributing to risk of reoffense. Evidence of Halvorson's personality disorder was irrelevant to the mental abnormality-focused question the jury had to answer in order to find Halvorson met the statutory criteria for commitment. It was therefore improper to allow Dr. Judd to testify that Halvorson suffered from a personality disorder and that this disorder contributed to his risk of reoffense.

The "to commit" instruction limited the State to the mental abnormality means of proving Halvorson met the commitment criteria, but Dr. Judd relied on the personality disorder to boost his risk assessment. RP 680-81, 746-47. Consistent with Dr. Judd's testimony, the State argued to the jury that the personality disorder folded into the risk of reoffense. RP 1068-69. But Judd's testimony was irrelevant because the jury was only authorized to consider whether a mental abnormality made Halvorson more likely than not to commit predatory acts of sexual violence, not whether the personality disorder did, even as a contributing factor. Testimony on the personality disorder was also inadmissible under ER 403 because it was presented to the jury as something to consider in reaching its verdict while

the "to commit" instruction did not authorize the jury to consider evidence of a personality disorder in deciding whether the State had proven its case.

The Court of Appeals believed "[t]he State was entitled to draw upon Mr. Halvorson's general personality and history to place his mental abnormality in context and meet its burden to prove future risk of recidivism." Slip op. at 6 (citing In re Detention. of Audett, 158 Wn.2d 712, 147 P.3d 982 (2006) (State presented sufficient evidence when respondent's alcoholism combined with his pedophilia to create a risk of recidivism); In re Detention of Sease, 149 Wn. App. 66, 201 P.3d 1078, review denied, 166 Wn.2d 1029, 217 P.3d 337 (2009) (combination of a variety of risk factors relevant to proving risk of recidivism)).

But neither case cited by the Court of Appeals involved the situation where the "to commit" instruction was limited to one means of proving SVP status but the State relied on evidence of the other means. Audett, 158 Wn.2d at 727-28; Sease, 149 Wn. App. at 5, 78-80 (jury instructed only on personality disorder means, and expert only relied on personality disorder diagnosis to show risk of reoffense).[3]

[3] See Brief of Appellant in Sease at 7 (confirming jury instructed only on personality disorder, not mental abnormality, as means to commit) (available at http://www.courts.wa.gov/content/Briefs/A02/366002%20appellant.pdf); Brief of Respondent in Sease at 17 ("At Sease's request, the court eliminated the alternative means of a 'mental abnormality' as a basis for commitment from the jury instructions.") (available at

The Court of Appeals contradicts itself. On the one hand, it opines "The court's instructions protected Mr. Halvorson against the risk the jury would improperly convict him on the personality disorder prong of the SVP statute." Slip op. at 6. On the other hand, it maintains the jury was fully entitled to consider the personality disorder evidence as contributing to risk of reoffense. Id.

The Court of Appeals said "The State clarified in closing argument that Mr. Halvorson's mental abnormality was the basis for commitment but that the personality disorder folded into the risk assessment." Id. That itself is a contradiction. If the personality disorder folded into risk assessment, then it forms a basis for commitment, even though the "to commit" instruction only allowed the jury to consider a mental abnormality as that which makes him likely to reoffend. The State's closing argument exacerbated the prejudicial effect of Dr. Judd's objectionable testimony and ensured the jury would improperly consider it in determining whether Halvorson was likely to reoffend.

Further, it is undisputed that the alcohol dependence and cannabis abuse diagnoses proffered by Dr. Judd do not qualify as a mental abnormality or a personality disorder. Judd acknowledged these diagnoses did not factor into his risk assessment. RP 716-17. Yet the trial court

---

www.courts.wa.gov/content/Briefs/A02/366002%20respondent.pdf).

admitted this evidence over defense objection anyway. The jury was not supposed to be able to consider either mental condition as something that "makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility" because they did not qualify as a mental abnormality or personality disorder. RCW 71.09.020(18).

If mental conditions other than mental abnormalities and personality disorders could be considered in making the SVP determination, the separation between typical criminal recidivists and those worthy of being civilly committed collapses. That poses a constitutional problem. A diagnosis of a mental abnormality or personality disorder, "when coupled with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a jury to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP." In re Detention of Thorell, 149 Wn.2d 724, 761-62, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990, 124 S. Ct. 2015, 158 L. Ed. 2d 496 (2004). The fact finder is therefore required "to find a link between a mental abnormality and the likelihood of future acts of sexual violence if not confined in a secure facility." Thorell, 149 Wn.2d at 743. It is this link that distinguishes the typical criminal recidivist from those may be civilly committed consistent with due process.

Id. at 731-32; In re Detention of Froats, 134 Wn. App. 420, 430, 140 P.3d 622, 627 (2006), review denied, 60 Wn.2d 1022, 163 P.3d 795 (2007).

In Halvorson's case, the alcohol and cannabis diagnoses are not mental abnormalities or personality disorders, and the State's expert did not rely on them as contributing to risk of reoffense. Allowing the jury to consider these diagnoses as evidence that Halvorson met the SVP definition severs the constitutionally required link between mental illness and risk of sexually violent reoffense.

Audett and Sease pointed to evidence of alcoholism/alcohol dependency as contributing to risk of reoffense in their sufficiency of evidence analyses. Audett, 158 Wn.2d at 729; Sease, 149 Wn. App. 79-80. Neither case involved a challenge to the propriety of relying on such evidence as a basis to commit. As such, they are not controlling precedent on the point. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) ("In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised."). But cases such as these show the issue reoccurs. Halvorson's case presents the opportunity to clarify whether diagnosed mental conditions that do not qualify as mental abnormalities or personality disorders can be relied on to prove SVP status.

The Court of Appeals opined the trial court "probably" should have granted Halvorson's pretrial motion for exclusion, but there was no reversible error because Halvorson "volunteered" his struggles with alcohol and marijuana in his testimony before Dr. Judd testified. Slip op. at 7. The Court of Appeals overlooked the long-standing rule that a party is entitled to preemptively disclose damaging evidence that has already been ruled admissible as a matter of strategy. State v. Thang, 145 Wn.2d 630, 646, 41 P.3d 1159, 1167 (2002). A party that introduces preemptive testimony only after losing a battle to exclude it cannot be said to introduce the evidence voluntarily, and so does not waive the error in admitting the evidence for appeal. Thang, 145 Wn.2d at 648.

2. THE COURT VIOLATED HALVORSON'S DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE IN EXCLUDING EVIDENCE THAT AN IDENTIFIED VICTIM CONSENTED TO SEXUAL ASPHYXIATION ON A PREVIOUS OCCASION.

The trial court did not allow evidence that D.S. previously consented to being choked while having sex. In so doing, the court violated ER 412 and Halvorson's due process right to present a complete defense. This evidence was relevant because the defense theory was that D.S. consented to being choked. The proffered testimony bolstered Halvorson's account of the event, the credibility of which was otherwise shaky standing alone. The court's ruling prejudiced Halvorson's right to

have the jury consider all relevant evidence in determining whether he met the commitment criteria. It circumscribed his ability to argue Dr. Judd's opinion was based on an inaccurate understanding of Halvorson's interaction with D.S. The issue presents a significant question of constitutional law, warranting review under RAP 13.4(b)(3). Insofar as the Court of Appeals exposed its misunderstanding of basic rules on hearsay and relevance, review is warranted as an issue of substantial public importance under RAP 13.4(b)(4) because other cases will be affected in the absence of corrective measures from this Court.

Civil commitment is a significant deprivation of liberty triggering due process protection. Thorell, 149 Wn.2d at 731 (citing Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Those with a liberty interest at stake have the right to present a defense. In re Welfare of Hansen, 24 Wn. App. 27, 36, 599 P.2d 1304 (1979). "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Under ER 412(c),[4] Halvorson should have been allowed to present evidence of D.S.'s previous consent to erotic asphyxiation to support his argument that D.S. consented to sex with him. There is a particularized factual similarity between Halvorson's interaction with D.S. and her interaction with the other man: sexual asphyxiation. Being choked to derive sexual pleasure is an unusual phenomenon. Its distinctiveness provides enough similarity between D.S.'s past consensual sexual activity and Halvorson's claim of consent to make it relevant. See State v. Hudlow, 99 Wn.2d 1, 11, 659 P.2d 514 (1983) (construing rape shield statute (RCW 9A.44.020) and recognizing factual similarities between prior consensual sex acts and the questioned sex acts claimed to be consensual makes the evidence relevant test); State v. Jones, 168 Wn.2d 713, 723, 230 P.3d 576 (2010) (distinctive sexual patterns showing consent are relevant).

Evidence that D.S. engaged in erotic asphyxiation on another occasion with another man made it more likely that she consented to sex and being choked by Halvorson. Dr. Judd's understanding of the event was that Halvorson violently choked D.S. while raping her. RP 734. Judd relied on this incident in support of his opinion that Halvorson suffered

[4] ER 412(c) provides "evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."

from a mental abnormality (paraphilia - nonconsent) that made him likely to reoffend. Id. This incident, which occurred in 2007, was the last and by far the most recent sexual offense relied on by Judd in forming his opinion. The others were much more remote, having occurred many years earlier. The jury was likely to place great weight on this most recent act in determining whether Halvorson currently met the SVP definition.

Evidence that D.S. consented to sexual asphyxiation on a prior occasion was an important part of the defense theory. The excluded evidence was probative of the defense theory that D.S. consented to sex with Halvorson and being choked by him, which supports the argument that he did not commit an act of sexual violence against her. In turn, such evidence subverted a key factual basis for Dr. Judd's opinion that Halvorson suffered from the paraphilia.

Although the trial court did not exclude the evidence based on hearsay and the State did not argue hearsay on appeal, the Court of Appeals opined it was unclear what D.S. meant, and that if she was expressing a statement of desire "her statements would appear to be inadmissible hearsay because they would be offered for the truth of the assertion that D.S. wanted to be choked." Slip op. at 9.

The Court of Appeals did not grasp that the "choke me" statement is circumstantial evidence of her state of mind, which is not barred by the

hearsay rule. The statement is not offered to show that the man actually choked her. See State v. Crowder, 103 Wn. App. 20, 26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024, 21 P.3d 1150 (2001) ("Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay."). The statement is offered to show her state of mind — an expression of intent that she be choked, which evinces consent to being treated in that manner. See ER 803(a)(3) (statement of the declarant's then existing state of mind (such as intent) is exception to hearsay rule); Crowder, 103 Wn. App. at 26-27 (circumstantial evidence of state of mind is not hearsay).

Alternatively, the Court of Appeals opined if D.S. issued a command, "the statements would not appear to be relevant" because "D.S. was purportedly engaged in prostitution at the time of her prior statements. Given this context, it is far from certain that any commands issued by D.S. would have been a result of her own desires or preferences." Slip op. at 9. Construed as a command, the statement is not hearsay. State v. Fish, 99 Wn. App. 86, 96, 992 P.2d 505 (1999), review denied, 140 Wn.2d 1019, 5 P.3d 9 (2000). As for relevancy, this is an example of an appellate court imposing its view of the evidence over how the jury could have viewed this evidence. The defense theory was that D.S. consented to being choked by Halvorson. All facts tending to establish a party's theory, or to

qualify or disprove the testimony of an adversary, are relevant. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978). Evidence that D.S. consented to sexual asphyxiation with another man supports the defense theory. It is not for the Court of Appeals to affirm exclusion of evidence on relevance grounds because it does not agree with the defense theory, or because the evidence is susceptible to different interpretations.

Finally, the Court of Appeals mused "Had D.S. still been alive and able to respond to the allegation that she had previously said, 'Choke me. Choke me,' our analysis might well be different." Slip op. at 9. Why? Whether an out-of-court statement is admissible to show state of mind, or whether a statement is relevant, does not depend on whether the declarant is unavailable. ER 803(a)(3) (availability of declarant immaterial). This injection of an additional requirement that the declarant be available to explain what she meant by the statement is unprecedented.

3. CUMULATIVE ERROR VIOLATED HALVORSON'S CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

The state and federal constitutions guarantee the right to due process of law. U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Those subject to involuntary commitment are entitled to due process protection. Thorell, 149 Wn.2d at 731-32. Due process requires a fair trial. State v.

Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Under the cumulative error doctrine, a party is entitled to a new trial when it is reasonably probable errors, even though individually not reversible error, cumulatively produce an unfair trial. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). The accumulation of errors identified above unfairly affected the outcome of Halvorson's trial.

F. CONCLUSION

For the reasons stated above, Halvorson requests that this Court grant review.

DATED this 12th day of September 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

FILED
Aug. 11, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In re the Detention of	)	No. 32762-1-III
	)	
SCOTT R. HALVORSON,	)	
	)	UNPUBLISHED OPINION
Appellant.	)	

PENNELL, J. — Scott Halvorson appeals an order of commitment based on a jury finding that he is a sexually violent predator (SVP). Mr. Halvorson argues the admission of improper, prejudicial evidence deprived him of his right to a fair trial. We affirm.

FACTS

Mr. Halvorson[1] has a lengthy history of sex offenses. During his SVP trial, Mr. Halvorson testified about his history and denied responsibility for most of the past allegations against him, including those resulting in convictions. With the exception of inappropriate sexual contact with his sisters as a juvenile, Mr. Halvorson testified his other past sex offense accusations were fabricated, misconstrued, or occurred while he was blacked out from alcohol.

---

[1] Mr. Halvorson currently goes by the name Raymond Scott Reynolds. However, the majority of the record refers to him as Scott Halvorson, and the State filed an SVP petition under this name.

Mr. Halvorson's most recent conviction was in 2008 for third degree rape and second degree assault. The victim of that crime is a female identified as D.S. She sustained petechial hemorrhaging and other bruising from the assault. Mr. Halvorson maintained he had consensual sex with D.S. and that the bruising occurred because D.S. asked to be choked during intercourse.

Before the SVP trial, Mr. Halvorson sought permission to introduce evidence corroborating his claim that he had consensual sex with D.S. Pertinent to this appeal, Mr. Halvorson moved under ER 412 to introduce evidence that a witness had once observed D.S. requesting another man "choke" her during an act of prostitution. Br. of Resp't at 21. The trial court excluded the evidence, commenting that the proffered incident was "somewhat remote" and "also kind of speculative." 2 Verbatim Report of Proceedings (VRP) (Aug. 19, 2014) at 315. The court ruled the evidence did not appear to be relevant.

In addition to requesting permission to admit evidence, Mr. Halvorson also moved to exclude testimony by the State's expert witness, Dr. Brian Judd. Mr. Halvorson objected to testimony from Dr. Judd about his diagnoses of antisocial personality disorder, alcohol dependence, and marijuana abuse. The trial court overruled Mr. Halvorson's objections, explaining the diagnostic testimony was "appropriate" and admissible. *Id.* at 312. The court noted some prejudicial effect in admitting the alcohol

dependence and marijuana abuse evidence but concluded it did not warrant exclusion.

At trial, Dr. Judd testified he had diagnosed Mr. Halvorson with paraphilia not otherwise specified (nonconsent), pedophilic disorder, antisocial personality disorder, alcohol dependence in a controlled environment, and cannabis abuse disorder. According to Dr. Judd, the pedophilia and paraphilia are mental abnormalities and are chronic conditions. The antisocial personality disorder diagnosis was based on Mr. Halvorson's pervasive disregard for and violation of the rights of others, deceitfulness, impulsivity, irritability and aggressiveness, reckless disregard for the safety of self and others, repeated failure to adhere to responsibilities under court supervision, and lack of remorse.

Dr. Judd opined that Mr. Halvorson's mental abnormalities of pedophilia and paraphilia are what predispose Mr. Halvorson to commit sexually violent offenses. Dr. Judd explained that while an antisocial personality disorder, standing alone, would not predispose a person to commit sexually violent offenses, it can operate as a contributing factor, increasing the risk of re-offense. Because of the interplay between antisocial personality disorder and Mr. Halvorson's mental abnormalities, Dr. Judd integrated Mr. Halvorson's diagnosis for antisocial personality disorder into his overall risk assessment.

While Mr. Halvorson's antisocial personality disorder was relevant to his risk assessment, Dr. Judd explained Mr. Halvorson's history of alcohol dependence and

marijuana use were not. According to Dr. Judd, a treatment program could address any risk posed by Mr. Halvorson's drug and alcohol problems.

The last pretrial motion relevant to this appeal was Mr. Halvorson's objection to the admission of Structured Risk Assessment-Forensic Version (SRA-FV) evidence under *Frye*.[2] The trial court admitted the testimony.

The jury ultimately found Mr. Halvorson to be an SVP, and the trial court entered an order committing him to the custody of the Department of Social and Health Services. Mr. Halvorson appeals.

ANALYSIS

Evidence of personality disorder, alcohol dependence, and marijuana abuse

In order to be admissible, evidence must be relevant. ER 402. In the current context, evidence is relevant if it bears on the elements the jury must consider in determining whether the respondent to an SVP petition is an SVP. *In re Det. of West*, 171 Wn.2d 383, 397, 256 P.3d 302 (2011) (citing ER 401). Those elements are: "(1) that the respondent has been convicted of or charged with a crime of sexual violence, (2) that the respondent suffers from a mental abnormality or personality disorder, and (3) that such abnormality or disorder makes the person likely to engage in predatory acts of sexual

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

violence if not confined in a secure facility."[3] *West*, 171 Wn.2d at 397 (citation and internal quotation marks omitted) (quoting *In re Det. of Post*, 170 Wn.2d 302, 310, 241 P.3d 1234 (2010)). "Even if relevant, however, evidence may still be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury." *State v. Luvene*, 127 Wn.2d 690, 706, 903 P.2d 960 (1995) (citing ER 403).

We first address Mr. Halvorson's objection to the personality disorder evidence. In general, "mental abnormality" and "personality disorder" are alternative means by which the State can prove a person meets criteria as an SVP. *In re Det. of Halgren*, 156 Wn.2d 795, 809-11, 132 P.3d 714 (2006). If both mental abnormality and personality disorder are charged, care must be taken to ensure jury unanimity. *See id.*

The State originally petitioned to have Mr. Halvorson committed as an SVP on the basis of both alternative means. But after Dr. Judd testified Mr. Halvorson's antisocial personality disorder would not, by itself, pose a risk of recidivism, the final jury instructions were amended. Under the final instructions, a finding of commitment could only be based on the jury's determination that Mr. Halvorson had an applicable mental abnormality.

---

[3] These elements are derived from the definition of SVP at RCW 71.09.020(18).

Given the final charge to the jury, Mr. Halvorson argues his personality disorder became irrelevant and it was overly prejudicial to allow the jury to consider this evidence. We disagree. The court's instructions protected Mr. Halvorson against the risk the jury would improperly convict him on the personality disorder prong of the SVP statute. Although the instructions provided this protection, they did not render the personality disorder evidence irrelevant. The State was entitled to draw upon Mr. Halvorson's general personality and history to place his mental abnormality in context and meet its burden to prove future risk of recidivism. *See In re Det. of Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006) (State presented sufficient evidence when respondent's alcoholism combined with his pedophilia to create a risk of recidivism); *In re Det. of Sease*, 149 Wn. App. 66, 201 P.3d 1078 (2009) (combination of a variety of risk factors relevant to proving risk of recidivism).

The manner in which the State presented its case reduced any risk of juror confusion about the probative nature of the personality disorder evidence. The State clarified in closing argument that Mr. Halvorson's mental abnormality was the basis for commitment but that the personality disorder folded into the risk assessment. This was consistent with Dr. Judd's testimony and the court's instructions. The State's presentation was appropriate and there is no basis for reversal.

Our analysis of the alcohol and marijuana abuse evidence is different, but the end result is the same. Dr. Judd did not find Mr. Halvorson's substance abuse relevant to the recidivism risk. Given this circumstance, the court probably should have granted Mr. Halvorson's motion for pretrial exclusion. But once trial began, things changed. Mr. Halvorson introduced evidence of his substance abuse before the State ever got to Dr. Judd's testimony. Mr. Halvorson testified about his struggles with alcohol and use of marijuana. He explained he was drunk or blacked out during most of his past offenses. If anything, Dr. Judd's testimony that Mr. Halvorson's substance dependence was treatable and did not create a risk of recidivism reduced the prejudice of the drug and alcohol evidence volunteered by Mr. Halvorson. Admission of Dr. Judd's testimony did not constitute reversible error.

Evidence of alleged consent to asphyxiation

Mr. Halvorson contests the trial court's decision to exclude evidence suggesting D.S. consented to sexual asphyxiation on a previous occasion with another man. He argues exclusion of this evidence violated ER 412 and his due process right to present a complete defense.

ER 412(c) provides that in a civil case, "evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise

admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." A trial court's ruling on evidentiary matters is reviewed for manifest abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Mr. Halvorson's proffered ER 412 evidence was testimony from a witness who once heard D.S. say, "Choke me. Choke me," while engaged in an act of prostitution with an unknown client. Br. of Resp't at 21-22. According to Mr. Halvorson, this evidence suggested D.S. found strangulation arousing, thereby corroborating his claim that D.S. had consented to sex with him and wanted to be choked. Although Mr. Halvorson raised a consent defense at his original rape trial, he apparently did not seek to introduce the prior "Choke me. Choke me," statements at that time. So although D.S. testified at the original trial, she was never given the opportunity to respond to the allegation that she had made these prior statements. By the time of Mr. Halvorson's SVP trial, D.S. had died.

When ruling on Mr. Halvorson's motion to present the "Choke me. Choke me," evidence, the trial court stated the incident was "somewhat remote" and "also kind of speculative." 2 VRP (Aug. 19, 2014) at 315. The court added, "And I am not impressed with that testimony as it being specifically relevant to the question of the underlying

motivation for the sex, which was a trade for drugs, allegedly." *Id.* No further explanation, written or oral, was provided.

The superior court did not abuse its discretion in excluding the proffered testimony as speculative. What D.S. might have meant by "Choke me. Choke me," is unclear. Was D.S. expressing a statement of desire? If so, her statements would appear to be inadmissible hearsay because they would be offered for the truth of the assertion that D.S. wanted to be choked. Was D.S. issuing a command? If so, then without further explanation, the statements would not appear to be relevant. D.S. was purportedly engaged in prostitution at the time of her prior statements. Given this context, it is far from certain that any commands issued by D.S. would have been a result of her own desires or preferences. Had D.S. still been alive and able to respond to the allegation that she had previously said, "Choke me. Choke me," our analysis might well be different. Under the current circumstances, we agree the trial court's order of exclusion was appropriate.

Admissibility of SRA-FV evidence

Mr. Halvorson argues the trial court improperly admitted SRA-FV evidence because it is not sufficiently reliable to meet the standard for admissibility under *Frye*. Subsequent to the briefing in this case, this Division joined Division Two in holding that

it is. *In re Det. of Ritter*, 192 Wn. App. 493, 372 P.3d 122 (2016), *review denied by* 185 Wn.2d 1039, ___ P.3d ___ (2016). Consistent with our analysis in *Ritter*, we reject Mr. Halvorson's challenge to the admission of SRA-FV testimony in his case.

CONCLUSION

Mr. Halvorson's order of commitment is affirmed.

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

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Korsmo, J.

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI

State V. Scott Halvorson

No. 32762-1-III

Certificate of Service

On September 12, 2016 I filed and e-served or mailed the Petition for Review directed to:

Kristie Barham
Washington Attorney General's Office
Via Email per agreement
KristieB@ATG.WA.GOV
CRJSVPEF@ATG.WA.GOV

Scott Halvorson
Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388-0646

Re: Scott Halvorson
Cause No., 32762-1-III in the Court of Appeals, Division III, for the State of Washington.

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

John Sloane
Office Manager
Nielsen, Broman & Koch

09-12-2016
Date
Done in Seattle, Washington

NIELSEN, BROMAN & KOCH, PLLC

September 12, 2016 - 2:09 PM

Transmittal Letter

Document Uploaded: 327621-PFR 32762-1-III.pdf

Case Name: Scott Halverson

Court of Appeals Case Number: 32762-1

Party Respresented:

Is This a Personal Restraint Petition? ☐ Yes ☑ No

Trial Court County: Spokane - Superior Court # ____

Type of Document being Filed:

☐ Designation of Clerk's Papers / ☐ Statement of Arrangements

☐ Motion for Discretionary Review

☐ Motion: ____

☐ Response/Reply to Motion: ____

☐ Brief

☐ Statement of Additional Authorities

☐ Affidavit of Attorney Fees

☐ Cost Bill / ☐ Objection to Cost Bill

☐ Affidavit

☐ Letter

☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

☐ Personal Restraint Petition (PRP)

☐ Response to Personal Restraint Petition / ☐ Reply to Response to Personal Restraint Petition

☑ Petition for Review (PRV)

☐ Other: _____

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to KristieB@ATG.WA.GOV, CRJSVPEF@ATG.WA.GOV, and grannisc@nwattorney.net.

Sender Name: John P Sloane - Email: sloanej@nwattorney.net