Supreme Court No. 93953.5
(COA No. 73223-4-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LOUGH,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robert Lough, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Lough seeks review of the Court of Appeals decision dated November 7, 2016, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Mr. Lough's statutory and constitutional rights to a speedy trial were violated by the nearly four year stay of his trial.

2. Whether due process is satisfied by proof Mr. Lough suffered from post-traumatic stress disorder and substance abuse disorder.

3. Whether the State's evidence that Mr. Lough suffered from an anti-social personality disorder and other disorders which do not cause a person to lack the control to commit a sexually violent act justifies commitment under RCW 71.09.

4. Whether due process requires the State to prove Mr. Lough was likely to commit a sexually violent act rather than merely a violent act if released from custody.

5. Whether Mr. Lough's right to a fair trial was violated where the State introduced actuarial evidence without proof it has been generally accepted in the scientific community.

6. Whether Mr. Lough's right to a fair trial was violated by the State's use of irrelevant and prejudicial actuarial evidence which established Mr. Lough's likelihood to commit a future violent offense.

7. Whether Mr. Lough's right to a present a defense was violated when the trial court prohibited Mr. Lough from consulting with his expert during trial.

D. STATEMENT OF THE CASE

In 1986, Mr. Lough raped and attempted to murder R.I.[1] CP 12.[2]. Mr. Lough was convicted of those charges and sentenced to 30 years in prison. CP 3, 2/10/15 RP 132.

The State moved to commit Mr. Lough under RCW 71.09 prior to the completion of his sentence. CP 1. Before Mr. Lough could be brought to trial, he was charged with an assault. 1/26/15 RP 50. Over

[1] Because R.I. is a victim of rape and attempted murder, this brief will only refer to her by initials.

[2] The transcript consists of multiple volumes which are not labelled except by date. The pages are not sequential and every volume begins at page one. This brief will refer to the transcript by the date of the volume and then the referenced page number. *E.g.* "1/8/15 RP 41." For days where multiple volumes were created, the volume will also be designated by AM or PM to indicate which volume is being referred to. *E.g.* "1/12/15 AM RP 27."

Mr. Lough's objection, the court stayed Mr. Lough's commitment trial during both the pendency of his criminal case and for the nearly four years he spent completing his sentence after pleading guilty. CP 300, 323, 326. When the stay was lifted, Mr. Lough moved to dismiss the commitment based upon the speedy trial violation.

Mr. Lough's behavior improved after he returned to the special commitment center. 2/3/15 RP 13, 28; 2/4/15 RP 10, 21. Security officers recognized Mr. Lough was "trying to find a better way to handle things." 2/4/15 RP 10. He lived in a less restricted ward. 2/3/15 RP 12. He engaged with his case manager. 2/3/15 RP 28. He participated in Native American rituals and found better ways to deal with his anger. 2/5/15 RP 15, 48; 2/4/15 RP 5-6.

Although the State's expert was unable to diagnose Mr. Lough with a paraphilic disorder when he reevaluated Mr. Lough after Mr. Lough's return from prison. CP 1029. Instead, Dr. Richard Packard found Mr. Lough suffered from an anti-personality disorder. 1/27/15 AM RP 41; CP 1029. Importantly, the doctor found Mr. Lough was "willing" to commit sexually violent crimes. 1/15/15 RP 143, *see also id.* at 109, 112, 147-48, 153, 1/26/15 RP 43, 1/27/15 AM RP 32. Dr. Packard also found Mr. Lough suffered from post-traumatic stress

disorder and multiple substance abuse disorders. 1/27/15 AM RP 65; CP 1029.

Dr. Packard also testified that there was no scientifically derived tool available which could answer the question of whether Mr. Lough was likely to commit a sexually violent offense if released from custody. 1/29/15 RP 96. Even so, Dr. Packard opined on Mr. Lough's likelihood to commit a sexually violent offense based upon his interpretation of the Static 99-R and the Violence Risk Appraisal Guide-R (VRAG-R). 1/27/15 PM RP 16.

Dr. Packard agreed these tools could not establish Mr. Lough was likely to commit a sexually violent offense if released from custody. 1/29/15 RP 96. The Static 99-R determined Mr. Lough was only 37 percent likely to commit a sexual offense in the next ten years if not in custody. 1/27/15 PM RP 20. The VRAG-R only established Mr. Lough was likely to commit a violent offense if released from custody. 1/27/15 PM RP 25.

Likewise, the State's expert agreed clinical judgment is not a reliable measure for determining future likelihood to commit a crime. 2/2/15 RP 28. The defense expert described clinical judgment as no better than a coin toss. 2/2/15 RP 95. Dr. Packard nevertheless asserted

it was his belief Mr. Lough was likely to commit a sexually violent offense if released from custody. 1/26/15 RP 76.

A jury found Mr. Lough met the definition of RCW 71.09.020(18) and he was ordered committed indefinitely. CP 1730.

E. ARGUMENT

1. The stay of Mr. Lough's civil commitment trial for nearly four years merits review by this Court.

The Court of Appeals found the trial court's order staying Mr. Lough's trial for nearly four years pending the completion of a criminal sentence did not violate his right to a speedy trial. Slip Op at 5. Mr. Lough asks this court to take review of the question of whether this stay violated his statutory and constitutional rights. This question satisfies RAP 13.4(b) because the Court of Appeals decision is in conflict with *King v. Olympic Pipeline*, 104 Wn. App. 338, 362, 16 P.3d 45 (2000), *review denied* 143 Wn.2d 1012 (2001). Review is also justified because this issue involves a significant question of law under the state and federal constitutions and is an issue of substantial public interest.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187,

14 L.Ed.2d 62 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914)). Extensive pretrial delay following the filing of a commitment petition creates a presumption of prejudice. *People v. Litmon*, 162 Cal. App. 4th 383, 405, 76 Cal. Rptr. 3d 122, 139 (2008). Due process requires the State to comply with speedy trial obligations and dismissal is remedy for the failure to comply. *State v. Goode*, 830 So.2d 817, 825-26 (Fla. 2002).

The Court of Appeals analyzed the stay of Mr. Lough's trial as a continuance. Slip Op. at 3. This is an improper analysis. Mr. Lough's matter was not simply continued to a future court date. Instead, the proceedings were stayed and no future date was set. CP 300, 326-27. Mr. Lough objected to this stay when it was granted and moved to dismiss within ten days of when the stay was lifted. CP 301.

No provisions exists within RCW 71.09 which authorize a trial court to stay a civil commitment trial. *King*, however, does analyze when a civil matter may be stayed because of a criminal case. Although a civil matter may be stayed, the mere pendency of related civil and criminal proceedings does not prevent the civil proceedings from going forward. King, 104 Wn. App. at 352. To determine when a civil matter may be stayed, *King* created a balancing test. This test requires the trial

court to conduct a case-by-case analysis "in light of the particular circumstances and competing interests involved in the case." *King*, 104 Wn. App. at 353 (citing *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 901 (9th Cir. 1989)). The moving party must establish a clear case of hardship or inequity in being required to go forward. *King*, 104 Wn.App. at 350.

While the Court of Appeals engaged in this balancing test to justify the initial stay while criminal proceedings were pending, it failed to do so with regard to the stay while Mr. Lough was returned to prison. Slip Op. at 4. After Mr. Lough had pled guilty, the justifications for his staying his case no longer existed. There was no justification for the continued stay and the trial court granted to stay in error. The failure to engage in this analysis is inconsistent with the balancing test established in *King*. This court should take review to resolve this inconsistency. RAP 13.4(b).

RAP 13.4(b) is also met because of the due process implications of allowing a trial court to stay a commitment trial for such an extended period of time. While this is a case of first impression in Washington, other courts that have addressed this issue have found due process to have been violated. *See, e.g. Litmon*, 162 Cal. App. 4th at 405; *Goode*,

830 So.2d at 825-26. Further, review may be granted because this is an issue of substantial public interest. RAP 13.4(b).

2. The Court of Appeals focus upon post-traumatic stress syndrome and substance abuse to find that the State had met its due process burdens justifies review.

The Court of Appeals found the State presented sufficient evidence of a mental abnormality to satisfy due process, focusing upon the expert's opinion that Mr. Lough suffers from post-traumatic stress disorder and substance abuse disorder. Slip Op. at 13. Not only are these insufficient reasons for continued confinement, but this analysis fails to address significant issues addressed at trial and on appeal. The reliance by the Court of Appeals upon only a portion of Mr. Lough's diagnosis and not the analysis presented to the trial court reduces the burden of proof required to satisfy due process. This opinion is in conflict with state and federal precedence, is a significant question of law under the state and federal constitutions, and involves an issue of substantial public interest. Review is warranted under RAP 13.4(b).

Due process requires the State to prove Mr. Lough has a mental abnormality which causes him to have difficulty controlling his sexually violent behavior. *In re Det. of Thorell*, 149 Wn.2d 724, 736, 740-41, 72 P.3d 708 (2003). In concluding there was sufficient

evidence, the Court of Appeals focuses upon only Mr. Lough's diagnosis of post-traumatic stress disorder and substance abuse disorder to find the State presented sufficient evidence to satisfy due process. Slip Op. at 13. The court does not address anti-social personality disorder. No case law exists which would suggest either of these disorders, separately or in combination, provide sufficient basis for finding Mr. Lough has serious difficulty controlling his sexually violent behavior. *See Kansas v. Crane*, 534 U.S. 407, 410, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) (Due process requires commitment be based upon "serious mental disorders").

Separately, or in combination, the diagnoses of post-traumatic stress disorder and substance abuse that the Court of Appeals relies upon fails to meet the requirements of due process. Civil commitment is limited to those who suffer from a "volitional impairment rendering them dangerous beyond their control." *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Neither post-traumatic stress disorder nor substance abuse disorder demonstrate a propensity for sexual violence. The Court of Appeals reliance upon these diagnoses to find Mr. Lough's due process rights were satisfied sets a dangerous standard, reducing Mr. Lough's due process rights and

those who might reference this case in the future.[3] It is in conflict with *Thorell*, *Hendricks* and their progency.

And although the Court of Appeals states that it does not hold that "a recidivist sex offender may be committed as a sexual predator solely on the basis of evidence that he has post-traumatic stress disorder or a substance abuse disorder," a ruling nonetheless upholding commitment upon such a finding cannot imply anything else. This Court should accept review to make clear that due process and the constitution requires more. RAP 13.4(b)

3. The Court of Appeals failure to address whether anti-social personality disorder may be a basis for continued confinement also warrants review.

Mr. Lough asks this Court to take review of the question of whether the expert's diagnosis that Mr. Lough suffered from an anti-social personality disorder and other disorders which do not cause a person to lack the control to commit a sexually violent act justifies commitment under RCW 71.09. Although this issue was briefed by the parties, the Court of Appeals did not reach it, instead relying upon Mr. Lough's diagnosis for post-traumatic stress disorder and substance

[3] Although GR 14.1 states unpublished opinions have no precedential value, current rules make clear they may be accorded such persuasive value as a court deems appropriate.

abuse disorder to find the State had satisfied its due process burden. Slip Op. at 13.

To satisfy due process, the State must demonstrate not only that Mr. Lough suffers from a personality disorder, but that that it is a mental abnormality which causes him to have difficulty controlling his sexually violent behavior. *Thorell*, 149 Wn.2d at 736. This required the State to prove that Mr. Lough had a serious mental disorder which causes him to have difficulty controlling his behavior. *Id.* at 740-41. While the Court of Appeals is correct in finding that continued confinement does not need to be justified based upon one personality disorder or mental abnormality. Slip Op. at 13. However, where the evidence establishes, at best, that a person who suffers from those disorders makes willful choices to commit violent acts, the evidence is insufficient. *See* 1/15/15 RP 143, *see also id.* at 109, 112, 147-48, 153, 1/26/15 RP 43, 1/27/15 AM RP 32.

While the Court of Appeals does not address it, Mr. Lough's primary diagnosis was for anti-social personality disorder. CP 1029, 1/1/5/15 RP 42; 1/27/15 RP 41. Justice Kennedy's caution that anti-social personality disorder is an insufficient basis for commitment rings true on the testimony presented against Mr. Lough. *See Hendricks*, 521

U.S. at 373 (Kennedy, J., concurring). The State was able to establish Mr. Lough had "an attitude" where he could "violate the boundaries and spaces of others". 1/27/15 AM RP 61. The State's expert concluded Mr. Lough had an inability to control his behavior, but his testimony demonstrated otherwise as he frequently stated Mr. Lough was willing the break the law. 1/15/15 RP 143, *see also id.* at 109, 112, 147-48, 153, 1/26/15 RP 43, 1/2/7 RP 32.

The Court of Appeals focuses upon the other disorders to find Mr. Lough could be confined. Slip Op. at 13. That Mr. Lough suffers from other disorders which do not cause a person to commit sexually violent acts does not change what should be the ultimate conclusion. None of the diagnoses the State identifies Mr. Lough suffers from meet the requirements of due process. This Court should grant review to address whether the diagnosis argued at trial and unaddressed in the Court of Appeals justifies continued confinement. RAP 13.4(b).

4. Due Process is violated when confinement is based upon proof a person is likely to commit a future violent offense and warrants review.

The Court of Appeals found the State presented sufficient evidence Mr. Lough was likely to engage in predatory acts of sexual violence if not confined to a secure facility. Slip Op. at 12. The State,

however, only proved Mr. Lough is likely to engage in future acts of violence if released from custody. Because the Court of Appeals decision is in conflict with Supreme Court precedence, raises a significant question under the state and federal constitutions and involves an issue of substantial public interest, review is warranted under RAP 13.4(b).

Due process requires the State to establish a mental abnormality which makes it "difficult, if not impossible, for the person to control his dangerous behavior." *Hendricks*, 521 U.S. at 358; *see also Thorell*, 149 Wn.2d at 732. This definition is further narrowed so that it is only the dangerous sexual offender who is confined and not merely dangerous persons who are more properly dealt with in criminal proceedings. *Crane*, 534 U.S. at 413. This distinction is necessary so that civil commitment does not become a mechanism for "retribution or general deterrence." *Id.; see also Foucha v. Louisiana*, 504 U.S. 71, 82-83, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

a. The actuarial evidence introduced only established a likelihood to commit a future violent offense.

Actuarial instruments may be admitted when they satisfy the requirements of ER 403, ER 702 and ER 703. *Thorell*, 149 Wn.2d at 757. Dr. Packard testified that the actuarial risk assessment instruments

he used could not answer the question of whether Mr. Lough met the definition of a sexually violent predator. 1/29/15 RP 96. He nonetheless testified extensively about his use of actuarial tables in coming to the conclusion Mr. Lough was likely to commit a future crime of sexual violence. 1/27/15 PM RP 16.

Dr. Packard employed two tests to assess Mr. Lough's likelihood to commit a future sexually violent offense. Dr. Packard employed a test known as the Static-99 which the doctor recognized is not used to determine the likelihood a person will commit a sexually violent offense in the future. 1/27/15 PM RP 20. Dr. Packard found the likelihood Mr. Lough would commit a new sexual offense, based upon the Static 99-R, was 20.5 percent within five years of release and 37.3 percent within 10 years of release. 1/27/15 RP 20.

He also employed the VRAG-R, a tool created in 2013 to assess the likelihood a person will commit a future violent offense. 1/27/15 RP 49. This tool does not distinguish between violent and sexually violent offenses. 1/28/15 RP 189. It was not designed to determine whether someone will commit a predatory act of sexual violence if released from custody. 1/28/15 RP 104. The VRAG-R established Mr. Lough was likely to commit a violent offense if released from custody.

1/27/15 PM RP 25. While Dr. Packard was careful to use the phrase "including sexually violent" when he testified, this distinction does not exist within the tool. 1/27/15 RP 49; 1/28/15 RP 189.

The lack of a satisfactory tool to assess Mr. Lough's likelihood to commit a future sexually violent offense should not allow the State to rely upon tools designed to measure other information. Due process is not satisfied when the State presents insufficient evidence of Mr. Lough's likelihood to commit a sexually violent act if released from custody. The finding by the Court of Appeals that this satisfied due process justified review under RAP 13.4(b).

b. Mr. Lough's behavior does not demonstrate a likelihood to commit a sexually violent offense.

The State presented significant evidence of Mr. Lough's dangerous behavior. Mr. Lough had a history of violence as a child. See, e.g. 1/8/15 RP 101. He committed an assault while in the army at age seventeen. 1/1/5/15 RP 105; CP 84. His rape of R.I. also resulted in his conviction for attempted murder. 1/15/15 RP 91. Mr. Lough admitted to having been involved in a great number of fights when he was in prison. 2/9/15 RP 76-77. He was convicted of another assault he committed when he first confined to McNeil Island. 1/1/4/15 RP 36.

The only evidence of Mr. Lough's sexual misconduct after his 1986 conviction was an incident which occurred in 1996, when Mr. Lough harassed and made sexually threatening remarks towards a prison guard. 1/12/15 RP 95. Despite being under constant watch since 1986, no other evidence of sexual compulsion was ever presented in either prison or the special commitment center.

In fact, while Mr. Lough received numerous infractions and reports over that time, there is no record of sexual misconduct and certainly no evidence of an attempt or threat by Mr. Lough to commit a sexually violent assault. Instead, the State focused on Mr. Lough's disrespect for women, within a lifetime of disrespect toward anyone in authority, presenting evidence of the way he treated an administrative assistant at a disciplinary hearing. 1/12/15 RP 65.

There is no link between Mr. Lough's anger and a lack of volitional control to not commit a sexually violent offense. This is a critical requirement for indefinite commitment. The failure of the State to establish this element requires dismissal. *Crane*, 534 U.S. at 413. RAP 13.4(b) is satisfied and review should be granted.

5. The improper use of the VRAG-R by the State justifies a new trial and review by this Court.

The Court of Appeals found that admission of actuarial results from the VRAG-G were properly admitted. Slip Op. at 16. This test, which only establishes a person is likely to commit a future violent offense, and which is not scientifically grounded should have been excluded by the trial court. The Court of Appeals decision holding otherwise merits review.

a. The VRAG-R fails to meet standards for scientific reliability.

The Court of Appeals found trial counsel did not raise scientific reliability before the trial court. Slip Op. at 14. To the contrary, Mr. Lough moved to exclude the use of the VRAG-R arguing it did not meet the standards for reliability, was not relevant, and had the potential to mislead the jury. CP 905. The court considered the issue and denied Mr. Lough's motion to exclude this testimony. CP 1291; 1/26/15 RP 57-58. While trial counsel only addressed this in a page of his trial brief, the trial court heard argument and had an opportunity to correct the error. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Because of the focus upon the VRAG-R's findings by the State at trial and because Mr. Lough raised the reliability of this test, the Court of Appeals erred in not addressing its reliability. As this is a tool

frequently relied upon by the State to establish the likelihood of a person to commit a future sexually violent offense, this Court should accept review of the reliability of this test.

b. The VRAG-R was not relevant and its prejudicial effect outweighed it probative value.

The VRAG-R should not have been admitted because it lacked relevance. ER 402. In a RCW 71.09 commitment trial, evidence is only relevant if it increases or decreases the likelihood that a fact exists that is consequential to the jury's determination of whether the respondent meets the definition of RCW 71.09.020(18). *In re Det. of West*, 171 Wn.2d 383, 397, 256 P.3d 302 (2011).

The VRAG-R is not designed to determine whether someone will commit a predatory act of sexual violence if released from custody. 1/28/15 RP 104. Although the State always included the phrase "including sexually violent," there is no evidence that VRAG-R distinguishes between violent and sexually violent offenses. 1/29/15 RP 96. Because the VRAG-R fails to provide any distinction between violent and sexually violent offenses, the VRAG-R fails to meet the test for minimal relevance.

The VRAG-R should have been excluded pursuant to ER 403. Actuarial tools which have been admitted have assessed the likelihood

a person would commit a future sexually violent offense. *See Thorell*, 149 Wn.2d at 758. The VRAG-R does not assess the likelihood a person will commit a future sexually violent offense, but rather the likelihood they will commit a future violent offense. 1/27/15 RP 24.

The results of the VRAG-R instead put squarely before the jury the likelihood that, if released, Mr. Lough is likely to commit a violent crime. The evidence created the likelihood the jury would find the State met its burden not because the State proved its case, but because Mr. Lough is a dangerous man. The failure of the trial court to restrict this testimony unfairly prejudiced the jury and resulted in a compromised verdict. Review is warranted under RAP 13.4(b).

6. Mr. Lough's right to present a defense was infringed when the trial court denied him the ability to consult with his expert during trial.

The Court of Appeals found the inability to communicate with defense experts during the course of the trial was not an abuse of discretion. Slip Op. at 4. The restriction regarding communication with the defense expert during trial is a due process violation which warrants review under RAP 13.4(b).

The Court of Appeals applied the wrong standard to this issue. Instead of determining whether the trial court abused its discretion in

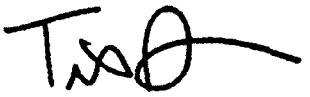
refusing to allow defense counsel to confer with their expert during trial, the question should have been whether Mr. Lough had a meaningful opportunity to present a defense. *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S. Ct. 1087, 1092, 84 L. Ed. 2d 53 (1985). This basic right includes the ability to cross examine witnesses and to offer testimony. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973)). It is only made meaningful where defense counsel is able to consult with their experts. The restriction was an unconstitutional restraint upon the right to present a defense. The decision by the Court of Appeals merits review. RAP 13.4(b).

F. CONCLUSION

Based on the foregoing, Mr. Lough respectfully requests this that review be granted pursuant to RAP 13.4 (b).

DATED this 8th day of December 2016.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of	)	No. 73223-4-I
	)	
ROBERT LOUGH,	)	DIVISION ONE
	)	
Petitioner.	)	UNPUBLISHED OPINION
	)	
	)	FILED: November 7, 2016

BECKER, J. — The State's evidence was sufficient to civilly commit the appellant as a sexually violent predator. The appellant's rights were not violated when his sexually violent predator trial was stayed pending the resolution of criminal proceedings against him and while he served the resulting criminal sentence. We affirm.

FACTS

In 1986, appellant Robert Lough was convicted of first degree rape and attempted murder of a young woman he picked up in a tavern and left to die on the side of the road after stabbing her repeatedly through her vagina. He was sentenced to 30 years in prison.

On August 5, 2009, two days before Lough's scheduled release from prison, the State filed a petition to commit him as a sexually violent predator. The court found that probable cause existed to believe Lough is a sexually

violent predator. The court ordered him remanded to the custody of the special commitment center.

Lough was detained at the special commitment center pending his trial. On May 22, 2010, while awaiting trial, Lough assaulted one of his fellow detainees at the special commitment center. Lough was charged with assault in the second degree in Pierce County and was transferred from the special commitment center to county jail. The court granted the State's motion to stay Lough's sexually violent predator proceedings pending the outcome of the criminal case in Pierce County.

In Pierce County, Lough pleaded guilty to assault in the third degree. He was returned to prison. On November 9, 2011, upon motion of the State, the court continued the stay of the sexually violent predator proceedings "until such time Lough is released from the Department of Corrections and appears before this court." Lough was released from prison and returned to the special commitment center on October 17, 2013.

On February 4, 2014, Lough moved to dismiss the sexually violent predator petition on the ground that the delay in his trial violated his statutory and constitutional rights to a speedy trial. The trial court denied the motion.

After a trial in January and February 2015, the jury unanimously found that Lough is a sexually violent predator. The court ordered him civilly committed. Lough appeals the order of commitment.

STAY OF PROCEEDINGS

Lough contends that his constitutional and statutory rights were violated when the court stayed the sexually violent predator proceedings while the criminal proceedings in Pierce County were pending and again while he was serving the resulting sentence.

Under Washington's sexually violent predator statute, the court shall, within 45 days after the probable cause hearing, conduct a trial to determine whether the person is a sexually violent predator. RCW 71.09.050(1). But the trial "may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced." RCW 71.09.050(1).

Because Lough is claiming his rights under RCW 71.09.050 were violated, we will analyze the "stays" as continuances under this statute. We can affirm the trial court on any basis supported by the record and the law. Bldg. Indus. Ass'n of Wash. v. McCarthy, 152 Wn. App. 720, 744, 218 P.3d 196 (2009).

An order granting a continuance of a sexually violent predator trial beyond the statutory 45-day period is reviewed for an abuse of discretion. In re Det. of Marshall, 122 Wn. App. 132, 140, 90 P.3d 1081 (2001), aff'd, 156 Wn.2d 150, 125 P.3d 111 (2005).

The court first stayed Lough's proceedings on August 26, 2010, pending resolution of the criminal proceedings against him in Pierce County. At the time, the State pointed out that Lough would have had a Fifth Amendment privilege not to answer questions about the assault in forensic interviews if the civil proceeding

had gone forward. This could have created problems for Lough if his refusal to answer was used as an adverse inference in the civil trial. Also, if Lough had been convicted of second degree assault as charged, he would have faced a sentence of life without parole, rendering the civil commitment proceedings moot. The State also pointed out that Lough was being held at the Pierce County jail until completion of his criminal case and that Pierce County had refused to comply with a recent transport order. Under these circumstances, the trial court did not abuse its discretion in finding good cause for the continuance.

Lough was convicted of third degree assault in Pierce County and was returned to prison. At that time, the trial court continued the stay of the sexually violent predator proceedings until Lough completed his sentence and was released from the Department of Corrections. This procedure is authorized by the pertinent statutes. A criminal defendant sentenced to over one year in custody must serve that sentence in a state prison facility. RCW 9.94A.190(1). On the other hand, a person facing civil commitment as a sexually violent predator must be held at the special commitment center in the custody of the Department of Social and Health Services pending trial. RCW 71.09.040(4). The sexually violent predator statute provides that "a person subject to court order under the provisions of this chapter who is thereafter convicted of a criminal offense remains under the jurisdiction of the department and shall be returned to the custody of the department following: (1) completion of the criminal sentence; or (2) release from confinement in a state, federal, or local correctional facility." RCW 71.09.112. Consistent with these statutes, Lough was properly

returned to the department's custody after he completed his sentence and was released from state prison.

Lough does not point to any prejudice that resulted from either stay of proceedings. In March 2014, Lough stated that he was not ready to proceed with the trial and asked for a continuance. We conclude Lough's statutory right to a prompt trial under RCW 71.09.050(1) was not violated.

The Washington Constitution provides that "justice in all cases shall be administered . . . without unnecessary delay." WASH. CONST. art. 1, § 10. To the extent that Lough argues this provision was violated, the stay in Lough's sexually violent proceedings was necessary, for the reasons detailed above. See, e.g., King v. Olympic Pipeline Co., 104 Wn. App. 338, 362, 16 P.3d 45 (2000) (emphasizing the word "*unnecessary*"), review denied, 143 Wn.2d 1012 (2001). Lough's constitutional rights were not violated when the court ordered that the sexually violent predator proceedings be stayed.

WITNESS EXCLUSION

The State moved in limine to exclude witnesses. Lough did not object, and the court granted the motion. Lough then asked the court for approval to "apprise our experts" of testimony given by Dr. Richard Packard, the State's expert witness, "so they can comment on things he may have raised." The court responded, "I don't think so. I don't think it is productive. At this point, I think Dr. Packard's opinions are out there. His reports are out there. His long, long, long deposition is out there. They can read those things. I don't think they need to be

[in] this court." Lough contends that the court's denial of his request to apprise his experts of Dr. Packard's testimony denied him his right to present a defense.

"At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses." ER 615. The exclusion of witnesses from the courtroom is a matter within the discretion of the trial court, and any decision to exclude witnesses will not be disturbed absent a manifest abuse of discretion. State v. Weaver, 60 Wn.2d 87, 90, 371 P.2d 1006 (1962). Specifically, the exemption of certain witnesses from the exclusion is a question within the discretion of the trial court. Weaver, 60 Wn.2d at 90.

Given that Dr. Packard's opinions had already been made available to Lough and his experts, Lough has not persuasively explained how the ruling denied him his right to present a defense. Lough's expert witnesses testified at length about Dr. Packard's opinions, including his diagnosis of Lough, his clinical judgment and the actuarial instruments that he used. The trial court did not abuse its discretion in denying Lough's request to apprise his experts of Dr. Packard's testimony.

DIFFICULTY CONTROLLING BEHAVIOR

A sexually violent predator is defined as "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). Lough contends the record contains insufficient evidence to support the various components of this definition.

As a matter of constitutional due process, a finding of dangerousness required by a sexually violent predator statute must be linked to the existence of a mental abnormality or personality disorder that makes it seriously difficult for the person with the abnormality or disorder to control his behavior. Kansas v. Crane, 534 U.S. 407, 410, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

To be consistent with Crane, the Washington Supreme Court holds that the fact finder in a sexually violent predator trial must determine that the person facing commitment has serious difficulty controlling behavior, although there need not be a separate finding to that effect. In re Det. of Thorell, 149 Wn.2d 724, 731, 742, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990 (2004).

> If the existence of this link is challenged on appeal, this case specific approach requires the reviewing court to analyze the evidence and determine whether sufficient evidence exists to establish a serious lack of control, as we do below.
>
> We base our conclusion on the Supreme Court's lengthy discussion of the impracticability of giving "lack of control" a narrow or technical meaning, and the Court's recognition of the need to proceed contextually.

Thorell, 149 Wn.2d at 736. Lough contends the diagnoses discussed by Dr. Packard—antisocial personality disorder, post-traumatic stress disorder, and a substance abuse disorder—are all constitutionally insufficient to support commitment because they do not cause a person to lose the ability to choose to commit sexually violent acts.

To determine the sufficiency of the evidence, the test in criminal cases is used: "when viewed in the light most favorable to the State, there must be sufficient evidence in the finding of mental illness to allow a rational trier of fact to conclude the person facing commitment has serious difficulty controlling

behavior." Thorell, 149 Wn.2d at 744-45. The evidence need not rise to the level of demonstrating the person is completely unable to control his behavior. Thorell, 149 Wn.2d at 742; see also In re Det. of Audett, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006).

Dr. Packard testified that Lough suffered from a personality disorder and a mental abnormality as defined in RCW 71.09.020(18). Dr. Packard diagnosed Lough with antisocial personality disorder with paranoid traits. He diagnosed Lough with post-traumatic stress disorder and several substance abuse disorders, including cannabis, alcohol, stimulant and opioid abuse.

Dr. Packard explained how antisocial personality disorder, when combined with the triggering that occurs with post-traumatic stress disorder and the disinhibition that occurs with substance abuse, can result in serious difficulty controlling sexually violent behavior:

> One of the characteristics of post-traumatic stress disorder is that people can get triggered and they have the reactions that result from that.
>
> One of those reactions can be an intense outpouring of emotion, and can be a rage directed towards the person who may have triggered that.
>
> With the substance abuse problems, that further results in disinhibiting his behavior. Even the controls he may have had are otherwise also influenced when the presence of substances are there.
>
> The role of the personality disorder is that even people who may have such experiences but are properly inhibited and are properly socialized, they will not act those out on other people.
>
> People with antisocial personality disorder don't have those barriers and inhibitions. Characterization of the disorder is the willingness to violate the boundaries of other people and to be irritable, hostile, and aggressive.

Dr. Packard testified that sex offenders with post-traumatic stress disorder "often report that it's uncontrolled; that the emotional response takes them over. One of the other phenomena with post-traumatic stress disorder is the tendency to dissociate. . . . so they then are engaging in the behavior sort of automatically, . . . and not necessarily being able to control it."

Dr. Packard testified that the brutal crime committed by Lough in 1986 and the assault Lough committed on another detainee in 2010 were, by Lough's own description, consistent with uncontrollable behavior triggered by post-traumatic stress disorder:

> If someone is stimulated, if they have associated a particular trigger or a set of triggers. Perhaps a person rejects them—and this is how Mr. Lough has talked about it—so maybe the trigger was when [the victim in the 1986 rape and attempted murder] rejected him and then that resulted in the anger and the outpouring of the emotion and the rage, and then that became expressed in the violent rape and assault of [the victim] and then the subsequent mutilation of [the victim] taking place in a way that was automatic as a result of the trigger.
>
> He describes himself at one point, in one of the instances with the person at SCC [special commitment center], that, "I was like on auto-pilot." That's a very common expression of people with post-traumatic stress disorder when they're engaging in behavior that they feel they have little control over. It's, "I was on auto-pilot. I can't explain why I did that."

Dr. Packard also explained the connection between substance abuse and lack of control. He testified that substance abuse results in disinhibition because the substances affect parts of the brain that otherwise would have prevented certain behaviors. He testified that "the effectiveness of the brain to stop it from happening is actually decreased."

According to Dr. Packard's testimony quoted above, these disorders affected Lough by making it seriously difficult for him to control his behavior. The jury was entitled to believe the testimony of the State's expert witness. In re Det. of Post, 145 Wn. App. 728, 757, 187 P.3d 803 (2008), aff'd, 170 Wn.2d 302, 241 P.3d 1234 (2010). To the extent that Lough's expert witnesses disagreed with Dr. Packard, this conflict was for the jury to resolve. See Thorell, 149 Wn.2d at 756 (differences in expert testimony go to the weight of the evidence).

Lough contends the evidence showed him to be a person who has the ability to control his sexually violent impulses and chooses not to. Viewed in the light most favorable to the State, the evidence was sufficient for the jury to find, beyond a reasonable doubt, that Lough has seriously difficulty controlling his behavior. We reject Lough's argument that the evidence shows only that he is a person who willingly chooses to violate social norms.

RISK ASSESSMENT

A sexually violent predator is defined, in relevant part, as a person who is "likely to engage in predatory acts of *sexual* violence if not confined in a secure facility." RCW 71.09.020(18) (emphasis added). Lough again challenges the sufficiency of the evidence. He argues that the State proved only that he was likely to engage in acts of general violence, not specifically acts of sexual violence as the statute requires.

Dr. Packard testified that Lough is likely to engage in predatory acts of sexual violence if not confined in a secure facility. He came to this opinion based

on actuarial assessments, dynamic risk factors, and a clinical assessment of Lough.

Regarding the actuarial assessments, the Static-99 predicted that Lough would have a 20.5 percent chance of being reconvicted for a new sexual offense within 5 years and 37.3 percent within 10 years. Results of the Violence Risk Appraisal Guide-Revised (VRAG-R) showed that 76 percent of the people who were in the same scoring bin as Lough were returned to a secure facility for a new violent offense, including sexual offenses, within 5 years, and 90 percent were returned within 15 years.

In assessing the risk, Dr. Packard also considered dynamic risk factors, which are not included in the actuarial assessments and are subject to change. Dr. Packard testified that the dynamic risk factors present in Lough's case include sexualized violence (in this case describing an interest or preference for coercive sex over consenting sex), a lack of emotionally intimate relationships with adults, lifestyle impulsiveness, poor problem solving, resistance to rules and supervision, and negative social interactions.

When asked directly how it can be known that Lough is likely to commit an act of sexual violence rather than just violence, Dr. Packard explained: "I don't see those as a mutually exclusive circumstance. I would—so his possibility of violence is certainly there. The possibility of sexual violence is also very likely there. It depends on the matter of what kind of stimuli, what kind of triggers may be present, and who would be around him at the time. If a male is doing that and

is there, it will probably be violence. If it's a female, it would more likely be manifested as sexual violence."

Lough argues that the actuarial assessments were insufficient to meet the State's burden. But the State did not rely on the actuarial instruments alone. Dr. Packard explained that no actuarial instrument is specifically designed to predict whether a person is likely to commit future predatory acts of sexual violence over a lifetime, so he could not rely solely on actuarial instruments. The State relied on the testimony of Dr. Packard, who, as described above, formed his clinical judgment based on the actuarial instruments along with consideration of the dynamic risk factors and a clinical evaluation.

Lough also argues that Dr. Packard's clinical judgment was insufficient. However, experts may resort to their clinical judgment when assessing the risk that a sexual offender will reoffend. See In re Pers. Restraint of Meirhofer, 182 Wn.2d 632, 645-46, 343 P.3d 731 (2015); Thorell, 149 Wn.2d at 755-56.

Viewed in the light most favorable to the State, the evidence was sufficient for the jury to find that Lough was likely to engage in predatory acts of sexual violence if not confined in a secure facility as required by RCW 71.09.020(18).

INSUFFICIENT DIAGNOSIS

Lough contends that the State failed to establish that he "suffered from a medically recognized disorder which justifies commitment." "Sexually violent predator" is defined, in relevant part, as a person "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).

Lough argues that any one of his diagnoses, standing alone, is insufficient to justify commitment, so the State should not be able to add them all together and commit him on that basis. He contends that neither post-traumatic stress disorder nor substance abuse may serve as a basis for commitment because they are not the kind of abnormality or disorder that causes sexual violence.

As detailed in the sections above, the State presented sufficient evidence that Lough's diagnosed mental abnormalities and personality disorder worked together to make him likely to engage in predatory acts of sexual violence if not confined in a secure facility and that he had serious difficulty controlling his behavior. He cites no authority for the proposition that an alleged sexually violent predator must be committed based on one personality disorder or mental abnormality alone. We agree with the State's assessment that sufficient evidence is found in Dr. Packard's testimony that it was "the combination of disorders and other psychological and neurological features that comprise Lough's mental abnormality." Dr. Packard's testimony does not imply, nor do we hold, that a recidivist sex offender may be committed as a sexual predator solely on the basis of evidence that he has post-traumatic stress disorder or a substance abuse disorder.

We conclude the evidence is sufficient to prove Lough suffers from a mental abnormality that justifies commitment.

ADMISSIBILITY OF VRAG-R

Lough unsuccessfully moved in limine to exclude the VRAG-R, arguing that its admission violated Evidence Rules 401, 403, and 702. Lough now contends that the trial court should have excluded the use of the VRAG-R actuarial instrument because it is inadmissible under Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923). When a party fails to raise a Frye argument below, a reviewing court need not consider it on appeal. In re Det. of Post, 145 Wn. App. at 755-56; In re Det. of Taylor, 132 Wn. App. 827, 134 P.3d 254 (2006), review denied, 159 Wn.2d 1006 (2007). Because Lough did not raise a Frye argument below, we decline to consider it.

Lough also contends that the VRAG-R is inadmissible under Evidence Rules 402 and 403. He takes issue with the fact that the VRAG-R includes all violent offenses, not just predatory acts of sexual violence as the sexually violent predator statute requires. For this reason, he argues, the VRAG-R is not relevant, and even if relevant, its probative value is outweighed by the danger of unfair prejudice or misleading the jury. This court reviews a trial court's evidentiary rulings for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

Evidence must be relevant to be admissible. ER 402. In a sexually violent predator civil commitment trial, evidence is relevant only if it increases or decreases the likelihood that a fact exists that is consequential to the jury's determination whether the respondent is a sexually violent predator. In re Det. of West, 171 Wn.2d 383, 397, 256 P.3d 302 (2011). This determination includes,

among other elements, whether the person is "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

According to Dr. Packard's testimony, the VRAG-R measures the risk that an offender will return to a secure facility for a new violent offense, including a sex offense. The risk that Lough would reoffend by committing a sexually violent offense is consequential to the jury's determination of whether Lough is likely to engage in predatory acts of sexual violence if not confined in a secure facility. It is therefore relevant. The fact that the VRAG-R also includes other violent offenses that are not sex offenses does not make it irrelevant, but rather potentially prejudicial or misleading to the jury, addressed by Evidence Rule 403.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of *unfair prejudice, confusion* of the issues, or misleading the jury." ER 403. Dr. Packard explained to the jury that the VRAG-R results measured the risk that an offender would return to a secured facility for a new violent offense, including sex offenses. Dr. Packard explicitly explained that the VRAG-R results were "limited, because they don't really address the question that the statute is asking. . . . The VRAG-R is giving an estimate or an actual count of something else, the violent, including sexual reoffending. And while that's related, it is not the same thing as what the statute is asking for." In addition, Lough cross-examined Dr. Packard at length about the fact that VRAG-R includes violent offenses that are not sex offenses. In view of Dr. Packard's thorough explanation of the limitations of the VRAG-R, Lough has not

demonstrated that the trial court abused its discretion in determining that the VRAG-R evidence need not be excluded under ER 403.

In denying Lough's motion to exclude the VRAG-R, the trial court stated, "The specific criticisms by the respondents to experts, of Dr. Packard's use of the VRAG-R, and of the VRAG-R itself, can be assessed by the jury, just like they assess this kind of attack on other actuarial instruments." This ruling was entirely proper. The trial court acted within its discretion in admitting the VRAG-R.

Affirmed.

Becker, J.

WE CONCUR:

Spearman, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73223-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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