SUPREME COURT NO. _____

NO. 72306-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Detention of Calvin Malone,

STATE OF WASHINGTON,

Respondent,

v.

CALVIN MALONE,

Petitioner.

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

The Honorable Michael T. Downes, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Calvin Malone asks this Court to grant review of the court of appeals' unpublished decision in In re Detention of Malone, No. 72306-5-I, filed May 30, 2017 (Appendix A). The court of appeals denied Malone's motion for reconsideration on June 23, 2017 (Appendix B).

B. ISSUE PRESENTED FOR REVIEW

1. Before trial, Malone moved to preclude the State's expert from testifying to her diagnosis of other specified paraphilic disorder, nonconsent, which she admitted was a diagnosis of hebephilia (sexual attraction to pubescent and postpubescent youth).

a. Malone argued hebephilia was "not currently accepted as a legitimate diagnosis in the scientific community." Is review warranted under RAP 13.4(b)(1) where the court of appeals held this was insufficient to preserve a Frye objection, in direct conflict with this Court's decision in State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987)?

b. Is review warranted under RAP 13.4(b)(4) so this Court may definitively decide whether the diagnosis of hebephilia meets the Frye standard?

c. Is review warranted under RAP 13.4(b)(3) to determine whether Malone's counsel was ineffective for failing to expressly request a Frye hearing?

d. Was the diagnosis also inadmissible under ER 702 because it was misleading, unreliable, and not helpful to the jury?

2. Malone requested a jury instruction on the possibility of a recent overt act petition—a condition of his release. The trial court denied the instruction, believing it would be a comment on the evidence.

a. Is review warranted under RAP 13.4(b)(3) and (b)(4) to determine whether an instruction on the possibility of a recent over act petition is appropriate, given this Court's decision In re Detention of Post, 170 Wn.2d 302, 241 P.3d 1234 (2010)?

b. Is review warranted under RAP 13.4(b)(3) to determine whether the State committed prejudicial misconduct by arguing in rebuttal Malone would only be subject to the conditions in his judgment and sentence, contrary to Post?

3. Is review warranted under RAP 13.4(b)(3) to determine whether the State's egregious disparagement of defense counsel in rebuttal prejudiced Malone, combined with the above errors?

C. STATEMENT OF THE CASE

On September 29, 2012, the State filed a petition to involuntarily commit Calvin Malone as a sexually violent predator (SVP) under chapter 71.09 RCW. CP 960-61. The State alleged Malone was convicted of sexually violent offenses—first degree child rape and two counts of first

degree child molestation—on January 26, 1993 in Snohomish County. CP 960. In its certification of probable cause, the State recounted several other adjudicated and alleged sex offenses against boys ages 11 to 15. CP 962-69.

The case was first tried in February and March of 2014. The jury could not reach a unanimous verdict. CP 322. The trial court declared a mistrial, and the case proceeded to a new trial in July 2014. 5RP 14. The trial lasted two weeks. Fourteen witnesses testified or provided depositions in support of Malone's release. 15RP 868; 16RP 1046-1157. They included several Buddhist leaders, the chaplain at the Special Commitment Center (SCC), and a clinical psychologist at the SCC, among others. 16RP 1075, 1100-02, 1112-13; CP 1186, 1214, 1250-57, 1270. Malone's opening brief recounts these witnesses' testimony in detail, as well as Malone's own testimony. Br. of Appellant, at 4-9, 18-21.

1. State's Expert: Amy Phenix

Dr. Matthew Logan testified as the State's expert in the first trial. CP 553; 3RP 1. He diagnosed Malone with pedophilic disorder, sexually attracted to males, nonexclusive type; polysubstance dependence (including alcohol), in remission through a controlled environment; and adult antisocial behavior. CP 554; 3RP 33, 41-43, 70-75. Of these diagnoses, Logan testified pedophilia alone was a mental abnormality that diminished Malone's ability to control his sexually violent behavior. 3RP 89-94.

In between the first and second trial, Logan retired, so the State retained Dr. Amy Phenix as its expert in the second trial. 12RP 224-25; 14RP 773. Phenix conducted a document review of Malone's records, but never interviewed or asked to interview Malone, contrary to the American Psychological Association's ethical guidelines. 12RP 240-42; 13RP 432-35. Based on this review, Phenix diagnosed Malone with two sexual abnormalities or "paraphilias": pedophilic disorder, sexually attracted to males, nonexclusive type, and a new diagnosis of other specified paraphilic disorder, nonconsent. 12RP 249, 266-68. Phenix also diagnosed Malone with opioid use disorder based on his past heroin use. 12RP 249, 271. Phenix testified all three constituted mental abnormalities. 12RP 291.

Phenix explained pedophilic disorder means sexual arousal to prepubescent children, which is defined by the DSM-5 generally as children 13 years or younger. 12RP 252, 257-58. Nonexclusive pedophilia means the individual is not attracted to only children, but also teenagers and adults. 12RP 255. Phenix believed Malone met the criteria for pedophilia because he had a "clear sexual preference for boys from age 11 to about age 16," even though this includes pubescent and postpubescent boys. 12RP 263.

Phenix testified her diagnosis of "other specified paraphilic disorder" also comes from the DSM-5. 12RP 265-68. She claimed:

> Every individual with abnormal sexual arousal doesn't fit neatly into the specific categories under a paraphilia in the DSM-5. So when there is an individual with an abnormal sexual arousal pattern over at least a six-month period of time and there's no specific descriptor in the paraphilia chapter, you would use this category, other specified paraphilic disorder, which allowed you to essentially describe the disorder that is not listed in the DSM-5 category of paraphilias.

12RP 266-67. Phenix diagnosed Malone with other specified paraphilic disorder, nonconsent because "he engages in and is aroused to sexual activity with boys who are essentially going through puberty and just postpuberty." 12RP 367. She explained she added the descriptor of nonconsent because the boys were legally incapable of consenting based on their ages. 12RP 267-68; 14RP 787.

On cross, Phenix admitted her diagnosis of other specified paraphilic disorder, nonconsent was really a diagnosis of hebephilia. 13RP 497-99. Hebephilia is loosely defined as sexual attraction to pubescent or postpubescent youth. 13RP 495-96. The American Psychiatric Association rejected it for inclusion in the DSM-5 "both for conceptual and practical reasons." 13RP 497-99. Phenix agreed the DSM-5 editors do not consider hebephilia to be a legitimate paraphilia because the sexual arousal pattern is not inherently deviant. 13RP 539-40. Phenix also agreed there is significant criticism of hebephilia in the scientific community. 13RP 498-501.

Phenix believed Malone's pedophilia, hebephilia, and opioid use disorder each made him likely to engage in acts of sexual violence if not confined in a secure facility. 12RP 291-92, 370-71. Phenix acknowledged, though, that older individuals like Malone are less likely to reoffend. 12RP 353. She further acknowledged the five-year recidivism rate for sex offenders over 60 is only two percent. 13RP 595.

2. Malone's Expert: Joseph Plaud

Dr. Joseph Plaud again testified as Malone's expert, as he did in the first trial. 15RP 868. He is a licensed psychologist with 27 years of experience evaluating and treating sex offenders. 15RP 868-69. During his career, Plaud has been published over 100 times in peer reviewed journals, treated over 1,000 sex offenders, and testified more than 600 times in civil commitment proceedings. 15RP 873, 878, 885-86.

In 2012, Dr. Plaud began reviewing Malone's records, including his criminal history, institutional history, disciplinary reports, police reports, as well as Malone's developmental and sexual history. 15RP 886-87. Plaud received updated records throughout the case. 15RP 887. He also conducted two clinical interviews with Malone at the SCC: one after his initial records review and one in June 2014 just before the second trial. 15RP 887.

Using objective personality testing, Plaud concluded there were no indications Malone suffered from any personality disorder. 15RP 889-91.

Plaud also concluded Malone did not have any mental abnormalities. 15RP 892. Plaud explained the hallmark feature of pedophilic disorder is recurrent and intense sexually arousing fantasies, urges, or behaviors involving prepubescent children over a period of at least six months. 15RP 894-95. Malone did not meet these criteria. 15RP 895.

Plaud explained the only way to determine whether an individual is a pedophile is not based on the victims' ages, but on their sexual development, which is measured by the Tanner Stages. 15RP 907-08. Pedophilia encompasses only Tanner Stage 1, which for boys means no pubic hair or enlargement of the testes or penis. 12RP 257-58; 15RP 1009. Tanner Stage 2 for boys means some pubic hair and enlarged penis and testicles. 13RP 470. At 11 years old, nearly 72 percent of white males have entered puberty, or Tanner Stage 2. 13RP 470. By age 12, 83 percent have started puberty. 13RP 473. The mean age for boys entering Tanner Stage 2 is 10.3 years old. 15RP 908. Though the DSM-5 classifies prepubescence as 13 years old or younger, Plaud explained, the "vast majority" of 11 to 13 years olds are in puberty. 15RP 906. Moreover, most of Malone's victims were 13, 14, and 15 years old or older, which is pubescent and postpubescent. 15RP 897.

Plaud testified he did not diagnose Malone with hebephilia because it is not a valid diagnosis. 15RP 913-21. He explained the "other specified

paraphilic disorder" designation in the DSM is reserved "for low frequency types of disorders." 15RP 914. Plaud opined:

> But if you're referring to sexual behavior or sexual interest, sexual fantasies, urges with pubescents, postpubescents who are not legally able to give consent, it's a legal term and it varies significantly in the states and in the world. Some places it's 12 years old. For example, Spain, the country of Spain, 12 is the age of consent for sexual behavior. In Massachusetts where I'm from it's 16. The federal is 18. So it varies significantly.

15RP 914. And therein lies the problem with hebephilia, Plaud explained. Hebephilia was considered and ultimately rejected from the DSM-5 because it is not deviant "from a physiological sexual arousal perspective." 15RP 915. Plaud testified the diagnosis was "nonsense" and has "not been empirically validated." 15RP 917.

Plaud further testified Malone's offenses were not the product of any mental abnormality, but rather that he was actively engaged in cognitive distortions during the offending period. 15RP 901. Cognitive distortions "generally refer to strategies, conscious or not, that relate to offenders giving themselves permission to engage in sexual[ly] abusive behavior such that it doesn't really have the consequences that it does . . . Minimizing, denying problems." 15RP 901. During his offense period, Malone "was not thinking about the consequences of the victims." 15RP 901. This, combined with his very heavy substance abuse, contributed to Malone's offense cycle. 15RP

902. In addition, Malone struggled with his own sexual identity and being molested as a child. 15RP 900-02.

The jury found the State proved beyond a reasonable doubt that Malone is an SVP. CP 100; 18RP 1481. The trial court ordered Malone committed to the SCC. CP 99. Malone timely appealed. CP 96-98. The court of appeals affirmed Malone's commitment. Notably, the court of appeals never once mentioned Dr. Plaud or any of Malone's 14 other witnesses in reviewing Malone's claims and conducting prejudice analyses. The details of the court of appeals' decision are discussed in detail below.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW IS NECESSARY TO PROVIDE GUIDANCE TO THE COURTS OF WASHINGTON STATE AS TO WHETHER HEBEPHILIA MEETS THE FRYE STANDARD.

a. The court of appeals' decision conflicts with this Court's decision in *Black*, warranting review under RAP 13.4(b)(1).

On appeal, Malone argued Phenix's hebephilia diagnosis should have been excluded under Frye or the trial court should have held a Frye hearing to determine its admissibility. Br. of Appellant, at 22-33. Under Frye, novel scientific evidence is admissible only where (1) the scientific theory upon which the evidence is based has gained general acceptance in the relevant scientific community; and (2) there are generally accepted

methods of applying the theory in a manner capable of producing reliable results. State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). While unanimity is not required, scientific evidence is inadmissible "[i]f there is a significant dispute among qualified scientists in the relevant scientific community." State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001), overruled on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

Before trial, Malone argued the diagnosis was inadmissible under ER 702 and 703. CP 191-201. In doing so, Malone presented extensive scholarly research showing "how highly contested and soundly rejected this diagnosis is within the scientific community." 9RP 84; CP 193-98. Malone asserted hebephilia "has never been and is not currently accepted as a legitimate diagnosis in the scientific community." CP 191; see also CP 198 (asserting "the validity of this diagnosis and the criteria for this diagnosis has been widely disputed in the psychological community"); 9RP 83 (arguing hebephilia "has actually been rejected in the scientific community"). Though Malone did not utter the magic word "Frye," he was clearly arguing the diagnosis did not meet the Frye standard.

The court of appeals, however, declined to reach the merits of Malone's Frye challenge, holding it was not preserved:

> Malone's challenge to this diagnosis was under ER 702 and 703. He did not object on the basis of Frye. He did not request a Frye hearing. The trial court ruled on this issue under ER 702 and 703.[1] Making an ER 702 challenge does not preserve a Frye challenge for appeal. We conclude that Malone did not preserve for appeal the issue of whether Dr. Phenix's diagnosis satisfies Frye.

Opinion, at 8 (citing In re Det. of Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006)).

The court of appeals' decision elevates form over substance and is inconsistent with the rules of evidence. Under ER 103(a)(1), objection to an evidentiary error is preserved where "the specific basis for the objection is 'apparent from the context.'" State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (quoting State v. Pittman, 54 Wn. App. 58, 66, 772 P.2d 516 (1989)). Malone's Frye objection was apparent from the context, where he presented significant scholarly research challenging the hebephilia diagnosis and repeatedly stated the Frye standard.

The court of appeals' decision also conflicts with this Court's long-standing decision in Black. There, the State introduced expert testimony that the alleged rape victim suffered from rape trauma syndrome, which purports to describe symptoms commonly experienced by rape victims.

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[1] This is incorrect. The trial court ruled: "Well, I understand Mr. Malone's argument, but the [In re Personal Restraint of Young, 122 Wn.2d 1, 28, 857 P.2d 989 (1993)] and the [In re Detention of Berry, 160 Wn. App. 374, 380-81, 248 P.3d 592 (2011)] case seem to indicate that this type of diagnosis [of paraphilia not otherwise specified] is allowable. The witness is expected to testify that this is in fact her diagnosis." 9RP 88-89.

Black, 109 Wn.2d at 342, 349. At trial, defense counsel objected to the expert's testimony "based on the foundation laid." Id. at 339. On cross, defense counsel asked the expert whether the symptoms manifested by rape victims could also manifest based on some other reason. Id.

On appeal, Black challenged rape trauma syndrome under Frye. Id. at 339-40, 342. This Court acknowledged defense counsel did not specifically object to the reliability or acceptance of rape trauma syndrome in the relevant scientific community. Id. at 340. Nevertheless, the Frye objection was "readily apparent from the circumstances," given defense counsel's objection to foundation and cross-examination of the expert about whether the syndrome was unique to rape. Id. This Court concluded "[d]efense counsel's questions were more than adequate to apprise the trial court of his objection to the use of rape trauma syndrome as a fact-finding method in a rape case." Id. This Court therefore reached the merits of the Frye issue and held rape trauma syndrome is not a scientifically reliable means of proving rape. Id. at 348.

Defense counsel's Frye objection to the hebephilia diagnosis in Malone's case is even more readily apparent from the circumstances than in Black. It is inconsistent with Washington law to conclude that arguing a diagnosis is not generally accepted in the scientific community does not preserve a Frye objection. Washington law does not require defense

counsel to recite the magic words in order to preserve an objection that is apparent from the context.

Taylor, relied on by the court of appeals, provides no support for a finding of waiver. Opinion, at 8. There, Taylor did not object to the expert's testimony at all. Taylor, 132 Wn. App. at 836. Furthermore, Taylor's own expert used the same actuarial tests Taylor later challenged under Frye on appeal. Id. By contrast, Malone raised an obvious and strenuous objection to Phenix's hebephilia diagnosis, and then repeatedly challenged that diagnosis on cross-examination and during Dr. Plaud's testimony. See Opinion, at 7 ("Malone cross-examined Dr. Phenix extensively about this diagnosis.").

The court of appeals' decision finding waiver plainly conflicts with this Court's decision in Black. The court of appeals' attempt to avoid the Frye issue resulted in an obvious error of law, warranting this Court's review under RAP 13.4(b)(1).

b. Definitive guidance from this Court is needed as to whether hebephilia meets the *Frye* standard.

Hebephilia was the subject of a fairly recent proposal to be included in the DSM–5 based on the research of Dr. Ray Blanchard and his colleagues. Ray Blanchard et al., Pedophilia, Hebephilia, and the *DSM-V*, 38 ARCHIVES OF SEXUAL BEHAV. 335 (2009). They defined the condition as

an erotic preference for pubescent children, "roughly, ages 11 or 12 – 14." Id. at 335. The proposal sought to include hebephilia as a listed category of paraphilic disorder in the DSM, or as an extension of pedophilic disorder. Id. The authors argued studies have "demonstrated the utility of specifying a hebephilic group, at least for research purposes." Id. at 336. They acknowledged, however, the term "has not come into widespread use, even among professionals who work with sex offenders." Id.

The proposal set off a firestorm of criticism. Opponents contended the diagnosis would dramatically expand the DSM diagnostic categories of mental disorders "without any evidence or reasoning that those who would be newly included under the mental disorder rubric can be properly categorized as mentally disordered."[2] Philip Tromovitch, Manufacturing Mental Disorder by Pathologizing Erotic Age Orientation: A Comment on Blanchard et al. (2008), 38 ARCHIVES OF SEXUAL BEHAV. 328 (2009).

The consensus of this criticism was that hebephilia is not a valid diagnosis and is not generally accepted in the relevant scientific community. See, e.g., John Matthew Fabian, Diagnosing and Litigating Hebephilia in Sexually Violent Predator Civil Commitment Proceedings, 39 J. AM. ACAD. PSYCHIATRY & L. 496, 501 (2011) ("To this date, there appears to be no clear

[2] Significantly more scholarly research is presented in Malone's opening brief, which is limited here given the length of the petition. Br. of Appellant, at 22-33.

professional consensus as to the clinical application of hebephilia."); Thomas K. Zander, Adult Sexual Attraction to Early-Stage Adolescents: Phallometry Doesn't Equal Pathology, 38 ARCHIVES ON SEXUAL BEHAV. 329, 330 (2008) ("[T]here is neither a professional consensus nor a convincing body of research to support such pathologization [of attraction to adolescents].").

Ultimately, hebephilia was rejected by the American Psychiatric Association for inclusion in the DSM-5. In re Det. of New, 386 Ill. Dec. 643, 651, 21 N.E.3d 406 (Ill. 2014) (citing DSM-5, supra note 1, at 685-705). Though the absence of a diagnosis from the DSM is not dispositive on the Frye issue, it is a significant consideration. Berry, 160 Wn. App. at 380-81. This is especially true where Phenix purported to rely on the DSM-5 as legitimizing authority for her hebephilia diagnosis, despite its rejection from the DSM-5. 12RP 266-67; 13RP 498.

Further, the DSM is an "authoritative source," New, 386 Ill. Dec. at 652, that "'reflect[s] a consensus of current formulations of evolving knowledge' in the mental health field." State v. Greene, 139 Wn.2d 64, 71, 984 P.2d 1024 (1999) (quoting State v. Greene, 92 Wn. App. 80, 98, 960 P.2d 980 (1998)). The lack of inclusion in the DSM further indicates a current lack of consensus in the scientific field.

Most importantly, there is significant, ongoing debate about the validity of a diagnosis that pathologizes attraction to adolescents.[3] Hebephilia's lack of inclusion in the DSM is the product of this reality. "The DSM diagnostic criteria and classification of mental disorders are applied by experts to legitimize a diagnosis as being grounded at some level in sound scientific principles." New, 386 Ill. Dec. at 651. That a paraphilic condition grounded in attraction to adolescents was rejected for inclusion after vigorous opposition in the scientific community should be dispositive.

Washington courts have not yet answered the question of whether hebephilia is admissible under Frye. In In re Detention of Black, 189 Wn. App. 641, 658, 357 P.3d 91 (2015), rev'd on other grounds, 187 Wn.2d 148, 385 P.3d 765 (2016), the court of appeals declined to decide "on this record, whether hebephilia is excludable on the basis of Frye," citing this Court's decision in In re Pers. Restraint of Meirhofer, 182 Wn.2d 632, 645, 343 P.3d 731 (2015).

The Meirhofer court, too, avoided the issue: "But regardless of whether hebephilia is an accepted diagnosis in the relevant scientific community (a question we need not decide), the State presented sufficient

[3] See, e.g., Allen Frances & Michael B. First, Hebephilia Is Not a Mental Disorder in the DSM–IV–TR and Should Not Become One in DSM–5, 39 J. AM. ACAD. PSYCHIATRY & L. 78, 84 (2011) ("Hebephilia is not a paraphilia, because the sexual arousal pattern that would define it is not inherently deviant. Normal men have fantasies and urges in response to pubescent targets; acting on such attractions is a serious crime, not a mental disorder.").

prima facie evidence that Meirhofer has consistently suffered from paraphilia NOS nonconsent and a personality disorder." 182 Wn.2d at 645; but see id. at 657 (Wiggins, J., dissenting) ("When neither the American psychiatric community nor the international medical community recognizes a disorder, we should not do so either.").

This case squarely presents the issue that was avoidable in both in Black and Meirhofer. Phenix agreed her diagnosis of other specified paraphilic disorder, nonconsent, was the same as a hebephilia diagnosis. 13RP 495-99. Malone has established there is significant dispute among psychologists and psychiatrists as to whether hebephilia is a valid diagnosis. This Court should therefore grant review under RAP 13.4(b)(4) to decide whether hebephilia meets the Frye standard, which would provide definitive guidance to the lower courts and put this issue to rest.

c. Alternatively, Malone's counsel was ineffective for failing to expressly request a *Frye* hearing on Phenix's hebephilia diagnosis.

Below, Malone argued to the extent the court considered the Frye issue waived, his counsel was ineffective for failing to expressly request a Frye hearing. Br. of Appellant, at 33-35. Malone's counsel clearly sought to exclude Phenix's hebephilia diagnosis, writing a lengthy trial memorandum that included extensive scholarly research. CP 185-201. Counsel asserted the diagnosis was not generally accepted in the relevant scientific

community. CP 191, 198; 9RP 83. This is precisely what a Frye hearing examines. As such, there was no legitimate strategic reason for failing to expressly request a Frye hearing on the hebephilia diagnosis.

As discussed, the court of appeals held the Frye issue to be waived. Opinion, at 8. The court then rejected Malone's ineffective assistance claim, holding "Malone cannot show that he was prejudiced by the failure to request a Frye hearing." Opinion, at 9. But, in conducting the prejudice analysis, the court of appeals recited only evidence presented by the State at trial, never once discussing the evidence presented by Malone. Opinion, at 11-12. Such analysis is contrary to the law, which Malone brought to the court's attention in his motion for reconsideration. See, e.g., Strickland v. Washington, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." (Emphasis added)); Motion for Reconsideration, at 1-3.

The court of appeals' prejudice analysis is further in conflict with this Court's decision in Post. At Malone's first commitment trial, Dr. Logan diagnosed Malone solely with the mental abnormality of pedophilic disorder. 3RP 89-94. The jury hung. CP 322. At Malone's second trial, Phenix diagnosed Malone with both pedophilic disorder and hebephilia, which she couched as other specified paraphilic disorder, nonconsent. 12RP 249, 266-

68. She testified both of these mental abnormalities made Malone likely to engage in predatory acts of sexual violence if not confined. 12RP 291-92, 370-71. The jury found Malone to be an SVP. CP 100; 18RP 1481.

The difference between the first trial, which resulted in a hung jury, and the second trial, which resulted in commitment, was Phenix's hebephilia diagnosis. This makes sense, because hebephilia encompassed the vast majority of Malone's victims: pubescent and postpubescent boys who fall outside the scope of pedophilia.

Similarly, Post's first trial resulted in a hung jury. Post, 170 Wn.2d at 315. In Post's second trial, the court erroneously admitted irrelevant evidence of the treatment that would be available to Post at the SCC if he were committed. Id. at 306-07, 311. This evidence was not introduced in the first trial. Id. at 314-15. The jury found Post was an SVP in the second trial. Id. at 308. In holding the error was not harmless, the supreme court explained "[t]his is persuasive evidence that the introduction of the evidence may have impacted the outcome." Id. at 315. The same is true here.

The court of appeals nevertheless concluded Malone failed to demonstrate prejudice, relying heavily in Meirhofer. Opinion, at 9-10. The court acknowledged "the procedural posture of [Malone's case] differs from Meirhofer," but still found it controlling. Opinion, at 10. In doing so, the

court of appeals distorted this Meirhofer decision, further warranting this Court's review under RAP 13.4(b)(1).

Meirhofer was committed under chapter 71.09 RCW in 2000. Meirhofer, 182 Wn.2d at 636. Several years later, Meirhofer sought a full evidentiary hearing on whether he still met the criteria for commitment. Id. Before granting such a hearing, the trial court must hold an initial show cause hearing to determine whether the State has presented prima facie evidence that continued commitment is appropriate. Id. at 636-38. At issue on appeal was whether the State had met this burden and whether the trial court correctly denied an evidentiary hearing. Id. at 636.

The State presented evidence that Meirhofer was currently diagnosed with paraphilia NOS (nonconsent), personality disorder NOS with antisocial and borderline features, as well as hebephilia. Id. at 644-45. On appeal, Meirhofer argued hebephilia was not a qualifying mental abnormality or personality disorder because it did not meet the Frye standard. Id. at 644-45. This Court declined to decide the issue, because "the State presented sufficient prima facie evidence that Meirhofer has consistently suffered from paraphilia NOS nonconsent and a personality disorder." Id. at 645. The State had therefore met its minimal burden of showing continued committed was appropriate—a very different standard than whether an attorney's deficient performance prejudiced the accused.

The court of appeals' decision demonstrates the erroneous reasoning currently being applied by some Washington courts: where there is sufficient evidence to support one or more of the diagnoses, reversal is not warranted based on ineffective assistance or evidentiary error. See, e.g., Opinion, at 10 ("Here, the State presented abundant evidence that Malone suffered from pedophilia, which is a basis to make an SVP finding."); Opinion, at 12 (rejecting Malone's ER 702 argument on the same basis); In re Det. of Black, noted at 198 Wn. App. 1023, 2017 WL 1137114, at *4 (March 27, 2017) (concluding evidentiary error was harmless "given the evidence that Black suffered from sexual sadism and a personality disorder, each of which was sufficient to cause Black serious difficulty in controlling his behavior").

In other words, the court of appeals is applying the sufficiency standard in conducting prejudice analyses. Sufficiency of the evidence is not relevant to a claim of ineffective assistance of counsel or evidentiary error. This erroneous line of reasoning is plainly contrary to the law, also warranting this Court's review under RAP 13.4(b)(1) and (b)(2). See, e.g., State v. Gunderson, 181 Wn.2d 916, 919-20, 927, 337 P.3d 1090 (2014) (reversing based on evidentiary error despite the fact there was sufficient evidence to sustain the verdict).

d. Alternatively, Phenix's "other specified paraphilic disorder" diagnosis should have been excluded under ER 702 as misleading, unreliable, and not helpful to the jury.

On appeal, Malone also challenged Phenix's hebephilia diagnosis under ER 702. Br. of Appellant, at 36-41. Specifically, Malone argued the diagnosis was misleading and unreliable because Phenix used the DSM to legitimize the diagnosis, even though it was expressly rejected from the DSM. Br. of Appellant, at 36-38. Malone also asserted the "nonconsent" descriptor was misleading and unreliable, because "nonconsent" typically signifies the individual is pathologically drive by rape and the victim's lack of consent. Young, 122 Wn.2d at 28; Br. of Appellant, at 39-40. But, here, it signifies only that the boys were deemed legally incapable of consent. The hebephilia diagnosis therefore depends on the jurisdiction in which the individual committed the offenses, as the age of consent varies from jurisdiction to jurisdiction. Malone includes this brief discussion of ER 702 here in order to preserve the issue should this Court grant review.

2. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER AN INSTRUCTION ON THE POSSIBILITY OF A RECENT OVERT ACT PETITION IS APPROPRIATE, GIVEN THIS COURT'S DECISION IN POST.

If a person is not incarcerated when the State files the commitment petition, the State must prove present dangerousness with evidence of a

recent overt act. In re Det. of Leck, 180 Wn. App. 492, 508, 334 P.3d 1109 (2014); RCW 71.09.020(7).

> "Recent overt act" means any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

RCW 71.09.020(12). Malone was in custody when the State petitioned for commitment, so the State did not need to prove he committed a recent overt act. In re Det. of Hendrickson, 140 Wn.2d 686, 692, 2 P.3d 473 (2000).

a. An instruction is appropriate under *Post* because a recent overt act petition is a condition to which Malone would be subject if released.

In determining whether a person is likely to engage in predatory acts of sexual violence if not confined in a secure facility, the jury "may consider all evidence that bears on the issue," including "placement conditions or voluntary treatment options." CP 111. In Post, this Court held "[e]vidence that a respondent in an SVP proceeding who is subsequently released could be subject to another SVP proceeding if he commits a recent overt act is relevant and is a condition that would exist upon placement in the community." 170 Wn.2d at 316.

The State petitioned to commit Post under chapter 71.09 RCW while Post was still in custody. Id. at 306. Therefore, like Malone, the State did

not need to prove Post committed a recent overt act. A major component of Post's defense was he had a voluntary treatment plan that would reduce the likelihood he would commit another sexually violent act if released. Id. However, the trial court prohibited Post from introducing evidence that, if released, he also could be subject to a new commitment petition if he committed a recent over act. Id. at 307.

The court of appeals affirmed, reasoning "such 'hypothetical evidence' was not evidence of conditions that would exist upon the respondent's release." Id. at 316 (quoting State v. Harris, 141 Wn. App. 673, 680, 174 P.3d 1171 (2007)). This Court corrected this "misapprehension" and held "the evidence is relevant and does not violate RCW 71.09.060(1)." Id. at 317. The court did not decide whether the evidence was admissible in Post's case, reasoning ER 403 issues of unfair prejudice and jury confusion were best addressed by the trial court. Id.

In correcting the court of appeals, this Court explained an SVP petition may be filed when "'a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.'" Id. at 316 (quoting RCW 71.09.030(1)(e)). "By its plain terms, this would apply to Post if he were released and committed a recent overt act." Id. The evidence was therefore relevant in two ways.

First, Post's knowledge of the consequences for engaging in an overt act "may well serve as a deterrent to such conduct and, therefore, has some tendency to diminish the likelihood of his committing another predatory act of sexual violence." Id. at 317. This likelihood is an element the jury must consider. Id. Second, the possibility of a recent overt act petition "is, in a literal sense, a condition to which Post would be subject if released." Id.

At trial, Malone explained that, if released, he would go to his community corrections officer (CCO) and "make sure that I know what the conditions are for my community placement." 11RP 179. Malone also acknowledged that if he started using substances or offending again, he "would go back to prison." 11RP 185.

CCO Christopher Ervin supervises released sex offenders and testified at trial. 17RP 1213-14. He explained Malone could be subject to full confinement again if he committed a recent overt act. 17RP 1251. He acknowledged a recent overt act was "anything that created an apprehension of harm based on someone knowing what he's done in the past" and "can result in him being civilly committed again." 17RP 1252. Ervin further agreed if Malone "were released after this trial" and, for instance, went to a youth center near the Malone's planned residence, "he could potentially have a new petition filed on him." 17RP 1251-52.

Based on this testimony and pursuant to Post, Malone proposed the following jury instruction:

> Placement conditions that do exist in the community is the fact the state may file a new Petition charging Calvin Malone as a sexually violent predator if it learns he has committed a "recent overt act."
>
> A "recent overt act" means any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.[]

CP 172.

The trial court acknowledged evidence of the possibility of a recent overt act petition was admissible under Post. 17RP 1366. The court further acknowledged it was "certainly . . . something that came up during the course of the trial." 17RP 1366. However, the court refused to give the requested instructions, stating "I'm concerned, amongst other things, it's a comment on the evidence for me to say." 17RP 1366.

The court was mistaken that the proposed instruction would comment on the evidence. A judge impermissibly comments on the evidence by instructing the jury "that matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). For instance, the trial court commented on the evidence in Becker where

language in a special verdict form resolved a factual dispute about whether a youth program constituted a school. Id. at 64-65.

By contrast, whether Malone could be subject to a recent overt act petition if released is not a question of fact; it is a matter of law. The State is authorized by statute to file a commitment petition if a person previously convicted of a sexually violent offense has been released from total confinement and commits a recent overt act. RCW 71.09.050(1). "By its plain terms," this would apply to Malone if he were released and committed a recent overt act. Post, 170 Wn.2d at 316. To instruct the jury Malone would be subject to such a petition does not remove a factual decision from the jury—it properly informs the jury of applicable law.

Instead of applying the de novo standard of review to the trial court's decision, the court of appeals reviewed it for abuse of discretion. The court of appeals claimed the trial court "denied the instruction based on a factual dispute, not an interpretation of law." Opinion, at 14 n.2. This ignored the trial court's finding that there was a factual basis for the instruction. Denying the instruction because it was a comment on the evidence was a legal conclusion, not a factual conclusion, necessitating de novo review. State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). Under the incorrect standard, the court of appeals rejected Malone's argument, holding

"Malone presented no evidence of the possibility of a new petition for civil commitment," which is plainly contrary to the record. Opinion, at 14.

Given Malone's due process right to present a defense, this Court's review is warranted under RAP 13.4(b)(3) and (b)(4) to determine whether Post permits an instruction on the possibility of a recent overt act petition in a commitment trial where the individual is currently in custody.

b. Malone was denied a fair trial because the State misrepresented the law in rebuttal by arguing Malone would be subject to no other conditions than those specified in his 1992 judgment and sentence.

Absent an instruction on the recent overt act petition, Malone's counsel was left attempting to argue it to the jury without proper guidance. State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987) (the defense "is entitled to a correct statement of the law and should not have to convince the jury what the law is."). In closing, Malone's counsel pointed to the conditions of Malone's two-year community custody. 18RP 1434. Counsel explained "it's not like in two years, the supervision, he will suddenly be in no man's land." 18RP 1433. Instead, counsel emphasized,

> [F]or the rest of his life he will be subject to the recent overt act. And Mr. Ervin explained to you a little bit what that is. He said you don't even have to attempt a sex crime. If you are in the neighborhood and loitering around the Lambert House, that's a recent overt act. He'd go back.

18RP 1434. Malone's counsel had to define "recent overt act" for the jury, again emphasizing "hanging outside the Lambert House where the teens go, recent overt act." 18RP 1438-39.

In rebuttal, however, the State claimed Malone would be subject only to the community custody conditions enumerated in his 1992 judgment and sentence: "Nothing else other than what's written on here can happen." 18RP 1449. Malone's counsel objected, but the trial court overruled and said, "I've instructed the jury on the law." 18RP 1449. In fact, the court had not. The deficient jury instructions did nothing to correct the State's misrepresentation.

"A prosecuting attorney commits misconduct by misstating the law." State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). There can be no dispute the State misstated the law in making the discussed argument, because the Post court held the possibility of a recent overt act petition "is, in a literal sense, a condition to which Post would be subject if released." 170 Wn.2d at 317. Malone would not be subject only to the conditions in his judgment and sentence, but also the possibility of a recent over act petition. Even if it was not error to refuse Malone's recent over act petition instruction, it was misconduct for the State to argue Malone would be subject to no other conditions.

The misconduct prejudiced Malone. The court of appeals acknowledged Malone's first trial resulted in a hung jury, and "when asked why it could not reach a verdict," the jury "focused on Malone's release plan." Opinion, at 11. "In response, during the second trial, the State spent greater effort to show that Malone's proposed release plan was inadequate." Opinion, at 11. Thus, the court recognized it was essential to the State's case to show the deficiencies in Malone's release plan. But the State did so by misrepresenting the law, as described.

The State further undermined Malone's release plan by fearmongering. The State incorrectly made the jury believe Malone would be simply be released to the wind once his two years of community custody expired. Of course, this was not true, given the possibility of a recent overt act petition. But the jurors might fear that if Malone reoffended, it would be on their hands, because there would be nothing to prevent him from reoffending after his community custody was over—no one would be watching him. The State played into this fear in its misrepresentation of the law.

Below, Malone pointed to the State's improper argument in the context of prejudice resulting from the lack of instruction on the recent overt act petition. Br. of Appellant, at 50. Malone acknowledges he did

not raise the alternative misconduct argument in his opening brief, though he did raise it in his motion for reconsideration.

However, prosecutorial misconduct is constitutional error. This Court has permitted parties to raise a constitutional issue for the first time when seeking review. State v. McCullum, 98 Wn.2d 848, 487-88, 656 P.2d 1064 (1983), rev'd on other grounds by State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989); Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (considering an issue raised for the first time on a motion for reconsideration); see also RAP 1.2(a) (specifying the rules "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits"). This Court should therefore grant review under RAP 13.4(b)(3) on this additional constitutional issue.

3. MALONE WAS DENIED A FAIR TRIAL BECAUSE THE STATE PURPOSEFULLY DISPARAGED THE DEFENSE IN REBUTTAL.

"[A] prosecutor must not impugn the role or integrity of defense counsel. Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014) (citations omitted). It is likewise impermissible "for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant." Id. at 437.

Disparagement of the defense began in closing argument when the State impugned Malone's counsel by name, "And while Ms. Forde tried to say these aren't changeable factors for Mr. Malone --." 18RP 1389. Defense counsel objected, but the trial court overruled. 18RP 1389.

Disparagement then became the theme of the State's rebuttal. The assistant attorney general (AAG) began:

> So Mr. Malone's presentation of evidence and his closing argument consist of little more than misdirection, idle truths, half truths, and lots of evidence of selective listening as to what happened during the last two and a half weeks. And until I heard the argument I thought it was just limited to Mr. Malone and Dr. Plaud that those two things were true.

18RP 1444. This blatant disparagement is remarkably similar to and just as offensive as this Court's decision in Lindsay. With "presentation of evidence" and "closing argument," the AAG was plainly referring to Malone's attorneys. The second sentence purposefully targets "misdirection, idle truths, half truths," and "selective listening" at Malone's attorneys, with the intent to make them seem deceitful. The statement also expresses a personal opinion on Malone's and Dr. Plaud's credibility, like in Lindsay.

Disparagement of the defense and personal opinions on the credibility of defense witnesses did not end there. The AAG referred to defense counsel's "misdirection" in her closing argument that older individuals reoffend less often and argued she "misrepresented" data on

closing slides. 18RP 1446-47. Similarly, referring to Dr. Plaud's testimony, the AAG argued, "So that's another example of misdirection." 18RP 1450.

Then, near the end of rebuttal, the AAG stated:

> [T]his is a quote that I happen to like. It says, one of the saddest lessons of history is this. If we've been bamboozled long enough we tend to reject any evidence of the bamboozle. We're no longer interested in finding out the truth. The bamboozle has captured us. It's simply too painful to acknowledge even to ourselves that we've been had. Once you give a charlatan power over you, you almost never get it back.

18RP 1462. The State claimed this quote "accurately describes Mr. Malone's life," but it was also clearly aimed at defense counsel, given the theme of the State's rebuttal. 18RP 1462.

Malone challenged this disparagement on appeal. Br. of Appellant, at 51-57. The court of appeals acknowledged:

> Like in Lindsay and [State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011)], the AAG's comments here suggested that defense counsel herself was dishonest . . . Rather than simply comparing and contrasting Malone's interpretation of the evidence with the State's, the AAG repeatedly suggested that defense counsel was misdirecting the jury and misrepresenting the evidence. This called counsel's integrity into question, and was likely improper.

Opinion, at 20. The court nevertheless concluded the State's disparagement was not prejudicial, given the "wealth of evidence against Malone."

Opinion, at 20. Again, however, the court did not discuss or acknowledge Malone's extensive defense case. See Opinion, at 16-20.

Given all the errors described above, this Court's review is warranted under RAP 13.4(b)(3) to determine whether this egregious disparagement of Malone and his attorneys prejudiced the outcome of his trial.

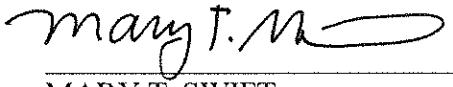
E. CONCLUSION

For the aforementioned reasons, Malone respectfully asks this Court to grant review, reverse the court of appeals, and remand for a new commitment trial.

DATED this 24th day of July, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of: CALVIN MALONE, Appellant.	No. 72306-5-I DIVISION ONE UNPUBLISHED OPINION FILED: May 30, 2017

APPELWICK, J. — Malone appeals his order of commitment after a jury found that he is a sexually violent predator. He challenges the admission of an expert's diagnosis of other specified paraphilic disorder, nonconsent. Malone argues that the trial court erred in denying a jury instruction on the possibility of a new civil commitment petition if he is released. He contends that the prosecutor committed misconduct during closing argument and that the trial court failed to investigate potential juror misconduct. Malone asks that costs not be imposed if the State prevails. We affirm.

FACTS

On September 20, 2012, the State petitioned to involuntarily commit Calvin Malone as a sexually violent predator (SVP) under chapter 71.09 RCW. The State alleged that in 1993, Malone was convicted of three sexually violent offenses: rape of a child in the first degree and two counts of child molestation in the first degree.

And, the State alleged that Malone suffered from pedophilia, which qualifies as a mental abnormality for purposes of RCW 71.09.020(8).

Malone's first civil commitment trial ended in a mistrial. The jury was unable to reach a unanimous verdict. The case proceeded to trial again in July 2014.

The State presented evidence of Malone's lengthy history of molesting young boys. The jury watched Malone's own videotaped deposition, in which he admitted to molesting boys for nearly his entire adult life, when not incarcerated. In 1970, when Malone was 19, he got a job in California with the Boy Scouts of America. There, Malone first molested a young boy, who was 13 or 14.

Malone joined the army in 1971 and was stationed in Germany. Malone began a Boy Scout troop there, and molested six or seven of the boys in the troop. He molested one particular boy for around two years, from the time that the boy was about 12 to 14 years old.

In 1974, Malone moved to Portland, Oregon and started a Boy Scout troop at an elementary school. He molested about six or seven boys there. In 1976, Malone moved to Monterey, California and became associated with a nearby Boy Scout troop. That year, Malone fondled a 12 year old boy in Yosemite National Park, and the boy reported him to the rangers. But, the rangers let Malone go when he denied the allegations. Malone moved to Alabama in 1977, where he established another Boy Scout troop and continued molesting young boys.

Malone moved to Montana about two years later and started another Boy Scout troop. He admitted to molesting about three boys in Montana. D.L. and T.E. both testified that Malone was their Boy Scout troop leader in Montana in 1979.

D.L. was around 12 years old while T.E. was around 10 or 11. D.L. recounted several instances when Malone touched him and made him perform oral sex on Malone. T.E. testified that he once spent the night at Malone's house and woke up to Malone touching his genitals. And, T.E. described his Boy Scout troop's overnight skiing trip. Malone molested five of the boys on the trip, including T.E.

From 1981 to 1982, Malone worked at a program for delinquent youth. He molested two boys who were around 13 years old there. Then, he became a counselor at the Gina House, a home for troubled boys in Portland. He molested at least seven boys there, who ranged in age from 13 to 15. The mother of one of these boys offered to pay Malone to take her son to Europe to travel. So, from November 1984 to September 1985, Malone traveled Europe with 13 year old B.M., where he molested the boy. B.M.'s deposition was also read into the record. B.M. believed that the sexual abuse was a condition of his continued freedom in Europe. When he resisted the sexual abuse, Malone made physical threats.

Malone was first arrested on a charge of molestation in 1986. He pleaded guilty to battery for fondling an 11 year old boy in California years earlier. Around the same time, Malone pleaded guilty to lewd and lascivious acts for molesting a 13 year old boy. Upon his release in 1987, Malone was extradited to Oregon to face charges related to the boys at the Gina House. He pleaded guilty to one count of sodomy in the third degree and one count of sexual abuse in the second degree. He was released in 1989. Malone was sent back to prison in 1990 for violating his probation.

In 1991, Malone was released and came to Washington. Here, Malone began working as a caregiver for the terminally ill. A neighbor of his client had an 11 or 12 year old son. Malone molested that boy until September 1992, when he was arrested. He pleaded guilty to one count of rape of a child in the first degree and two counts of child molestation in the first degree. Malone has not been in the community since that arrest. The State filed this petition to commit Malone while he was still incarcerated.

Dr. Amy Phenix testified on behalf of the State. Dr. Phenix diagnosed Malone with three psychological disorders, two of which are paraphilias, or sexual abnormalities. She diagnosed Malone with pedophilic disorder, sexually attracted to males, nonexclusive type. Dr. Phenix relied on the Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM-5) to form her opinion. She testified that for pedophilia, the DSM-5 suggests that there be a period of at least six months of recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child. It generally defines a prepubescent child as a child that is 13 years old or younger. Dr. Phenix noted that Malone's victims often depended on the age of boys available, but he displayed a clear sexual preference for boys from about age 11 to age 16.

Dr. Phenix also diagnosed Malone with a more general category called other specified paraphilic disorder, which also comes from the DSM-5. She explained that the other specified paraphilic disorder category is used when an individual has an abnormal sexual arousal pattern over at least a six month period and there is no other paraphilia diagnosis that describes the disorder. Dr. Phenix

described this diagnosis as a disorder where Malone engages in and is aroused by sexual activity with boys who are going through puberty and just postpuberty. She added a descriptor of nonconsent, to indicate that this arousal pattern applied to nonconsenting victims. This was both because Malone's victims could not legally consent and because they did not choose to willingly engage in sexual activity with Malone.

Lastly, Dr. Phenix diagnosed Malone with opioid use disorder, because Malone has used many substances, and heroin has caused him distress and impairment. Dr. Phenix believed that the driving force behind Malone's sex offending was his paraphilic disorders, but his use of substances disinhibited him and made it easier to act on his urges.

The jury returned a verdict that the State had proved beyond a reasonable doubt that Malone is an SVP. Accordingly, the trial court ordered Malone to be civilly committed. Malone appeals.

DISCUSSION

Malone argues that the trial court erroneously admitted Dr. Phenix's diagnosis of other specified paraphilic disorder, nonconsent. He asserts that this disorder was actually a "hebephilia" diagnosis and should have been excluded under Frye[1] or ER 702. Malone further contends that the trial court erred in rejecting his requested jury instruction on the possibility of a new petition for civil commitment if he is released. He alleges that the State committed prosecutorial misconduct during closing argument. He argues that the court should remand for

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

an evidentiary hearing on potential juror misconduct. And, he contends that cumulative error deprived him of a fair trial.

Under chapter 71.09 RCW, the State may civilly commit an individual who is determined to be a sexually violent predator (SVP). In re Det. of Post, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). At an SVP determination trial, the question for the finder of fact is whether the State has proved beyond a reasonable doubt that the respondent is an SVP. Id.; RCW 71.09.060(1). To answer this question, the jury must find three elements: (1) the respondent has been convicted or charged with a crime of sexual violence, (2) the respondent suffers from a mental abnormality or personality disorder, and (3) that the abnormality or disorder makes the person likely to engage in predatory acts of sexual violence if not confined. Post, 170 Wn.2d at 309-10; RCW 71.09.020(18).

I. Other Specified Paraphilic Disorder, Nonconsent Diagnosis

Malone contends that Dr. Phenix's diagnosis of "other specified paraphilic disorder, nonconsent" was actually a diagnosis of hebephilia. Malone argues that the trial court erred in admitting this diagnosis. First, he argues that the trial court erred in deciding that a Frye hearing was not needed to resolve this issue. He asserts that to the extent his trial counsel failed to request a Frye hearing, he received ineffective assistance of counsel. Second, Malone argues that the trial court abused its discretion in admitting this diagnosis under ER 702.

Pretrial, Malone moved to exclude evidence that Dr. Phenix diagnosed him with other specified paraphilic disorder, nonconsent. He argued that this diagnosis was inadmissible under ER 702 and 703. He asserted that the diagnosis was

unreliable, because it is not widely recognized or accepted in the scientific community and was rejected by the DSM-5.

The trial court denied this motion. It noted that case law indicates that this type of diagnosis is permitted. As a result, Dr. Phenix testified that she diagnosed Malone with a disorder characterized by engaging in and being aroused by sexual activity with boys who are pubescent and postpubescent. Malone cross-examined Dr. Phenix extensively about this diagnosis. Counsel noted that the diagnosis described by Dr. Phenix is generally called hebephilia or pedohebephilia, which has been rejected for inclusion in the DSM-5. Dr. Phenix confirmed that her diagnosis was really a hebephilia or pedohebephilia diagnosis.

Under Frye, evidence based on novel scientific procedures is admissible only if the theory or principle has achieved general acceptance in the relevant scientific community. In re Det. of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003). The core concern is whether the evidence is based upon established scientific methodology. Id.

ER 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." For scientific testimony, the expert (1) must qualify as an expert, (2) the expert's opinion must be based on a theory generally accepted in the relevant scientific community, and (3) the testimony must be helpful to the trier of fact. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

We review the admissibility of evidence under Frye de novo and under ER 702 for abuse of discretion. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). An evidentiary error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected if the error had not occurred. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

Here, Malone's challenge to this diagnosis was under ER 702 and 703. He did not object on the basis of Frye. He did not request a Frye hearing. The trial court ruled on this issue under ER 702 and 703. Making an ER 702 challenge does not preserve a Frye challenge for appeal. We conclude that Malone did not preserve for appeal the issue of whether Dr. Phenix's diagnosis satisfies Frye. See In re Det. of Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006) ("When a party fails to raise a Frye argument below, a reviewing court need not consider it on appeal."). We decline to address the merits of this issue.

Malone asserts that his counsel's failure to request a Frye hearing constituted ineffective assistance of counsel. To succeed on an ineffective assistance claim, the defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). Courts strongly presume counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To show deficient representation, the defendant must show that the performance fell below an objective standard of reasonableness, based on all the circumstances. Nichols, 161 Wn.2d at 8. To show prejudice, the defendant must

show that there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. Id.

Malone cannot show that he was prejudiced by the failure to request a Frye hearing. Dr. Phenix's pedophilia diagnosis provided an independent basis to sustain the SVP finding. Malone has not challenged that diagnosis. Dr. Phenix testified that she diagnosed Malone with three psychological disorders: pedophilic disorder, sexually attracted to males, nonexclusive type; other specified paraphilic disorder, nonconsent; and opioid use disorder. She found that Malone "easily" fit the criteria for pedophilia. While many of Malone's victims were over the age of 13, he also had victims who were 13 and under, falling under the definition of prepubescent. Two of those victims testified at trial, and the deposition of a third was read into evidence. Malone admitted to molesting boys who were 13 and under in his videotaped deposition, which the jury watched at trial.

This case is analogous to In re Personal Restraint of Meirhofer, 182 Wn.2d 632, 343 P.3d 731 (2015). Meirhofer was found to be an SVP in 2000. Id. at 637. At his civil commitment trial, the State presented evidence that he suffered from pedophilia, paraphilia not otherwise specified (NOS) nonconsent, a personality disorder with antisocial features, and alcohol and amphetamine dependence. Id. In the 2010 report on Meirhofer's condition, the State's expert stated that there was insufficient evidence to diagnose Meirhofer with pedophilia. Id. at 639. The expert diagnosed Meirhofer with paraphilia NOS hebephilia, paraphilia NOS nonconsent, and personality disorder NOS with antisocial and borderline traits. Id. at 640. The

trial court found that the State had met its prima facie burden of showing that Meirhofer continued to meet the definition of an SVP. Id. at 642.

On appeal, Meirhofer argued that because the State's expert did not diagnose him with pedophilia, the State could not show that he continued to meet the definition of an SVP. Id. at 643. Meirhofer contended that hebephilia could not serve as a qualifying mental abnormality or personality disorder. Id. at 644. But, the Supreme Court declined to reach this issue. Id. at 645. It noted, "But regardless of whether hebephilia is an accepted diagnosis in the relevant scientific community (a question we need not decide), the State presented sufficient prima facie evidence that Meirhofer has consistently suffered from paraphilia NOS nonconsent and a personality disorder." Id. These diagnoses showed that Meirhofer suffers from a mental abnormality or personality disorder, so the State met its prima facie burden. Id.

While the procedural posture of this case differs from Meirhofer, we consider it instructive. Here, the State presented abundant evidence that Malone suffered from pedophilia, which is a basis to make an SVP finding. Malone was not prejudiced by counsel's failure to request a Frye hearing, because even without Dr. Phenix's other specified paraphilic disorder, nonconsent diagnosis, the jury could have found that Malone was an SVP.

Yet, Malone argues that the jury would not have done so. He contends that the primary difference between his first SVP trial, where the jury could not reach a verdict, and the second, where it did, was the other specified paraphilic disorder, nonconsent diagnosis. Malone relies on Post to support this argument. Post's first

SVP trial ended in a mistrial, because the jury was unable to reach a verdict. 170 Wn.2d at 306. At the second trial, the State introduced evidence about the treatment that would be available to Post if he were committed. Id. at 306-07. The Supreme Court held that the trial court abused its discretion by permitting the State to present this evidence. Id. at 314. It further held the admission of this evidence was not harmless error, because there was a reasonable probability that it affected the outcome. Id. at 314-15. The court found that the fact that the jury deadlocked in the first trial, but found that Post was an SVP at the second trial, where this evidence was presented, was persuasive evidence that the evidence affected the outcome. Id. It also noted that this evidence was not merely presented in passing, but was thorough, systematic, and repeated. Id. at 315. And, the court pointed to the fact that the jury submitted multiple questions to witnesses about treatment options that would be available to Post if he were committed. Id.

Here, Dr. Phenix's diagnosis of other specified paraphilic disorder, nonconsent was not the only difference between the trials. The jury in the first trial, when asked why it could not reach a verdict, focused on Malone's release plan. In response, during the second trial, the State spent greater effort to show that Malone's proposed release plan was inadequate. Also, the experts were different. Their credentials and experience was different, and their diagnoses were different. Dr. Matthew Logan testified at the first trial. He diagnosed Malone with nonexclusive pedophilia, polysubstance dependence, and adult antisocial behavior. Dr. Phenix's diagnosis was pedophilic disorder, sexually attracted to males, non-exclusive type, other specified paraphilic disorder, nonconsent; and

opioid use disorder. Which of these differences was significant to the jury's decision is not discernable from the record.

Unlike in Post, we cannot say that the second jury would not have found Malone to be an SVP but for Dr. Phenix's additional diagnosis. Malone has not established that any error in admitting this evidence was prejudicial. Therefore, we hold that counsel's failure to request a Frye hearing did not constitute ineffective assistance.

Any error in admitting this evidence was not prejudicial. Because we conclude that admission of this diagnosis did not prejudice Malone, we need not decide whether the court abused its discretion in admitting it under ER 702.

II. Jury Instruction

Malone asserts that the trial court erred in refusing to give his requested jury instruction regarding the State's ability to file a new petition to civilly commit Malone if he commits a recent overt act upon his release. Malone contends that the evidence supported this instruction.

The standard of review on this issue depends on whether the trial court's refusal to give the jury instruction was based on law or fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 863 (1998). This court reviews a denial of a jury instruction for abuse of discretion if based on a factual dispute, but de novo if based on a ruling of law. Id.

The trial court has discretion in determining how many instructions are necessary to present a party's theories. State v. Long, 19 Wn. App. 900, 902, 578 P.2d 871 (1978). Jury instructions are sufficient if: "(1) they permit the party to

argue his or her theory of the case; (2) they are not misleading, and (3) when read as a whole they properly inform the trier of the fact on the applicable law." Id.

Malone proposed a jury instruction that provided in part:

> Placement conditions that do exist in the community is the fact the state may file a new Petition charging Calvin Malone as a sexually violent predator if it learns he has committed a 'recent overt act.'
>
> A 'recent overt act' means any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

The trial court denied this proposed language. Malone asserts that this was an error of law, because the instruction was consistent with Washington case law. He points to Post as support for this argument. In Post, the trial court prohibited Post from introducing evidence that he could be subject to a new SVP commitment petition if he committed a recent overt act after being released into the community. 170 Wn.2d at 307.

On appeal, the Supreme Court ruled that such evidence is relevant and does not violate RCW 71.09.060(1). Id. at 317. It noted that if released, Post would be subject to RCW 71.09.030(1)(e), which permits the State to bring a petition to civilly commit a person who has previously been convicted of a sexually violent offense and has committed a recent overt act since being released. Id. at 316. The court acknowledged, "Post's knowledge of the consequences for engaging in such conduct may well serve as a deterrent to such conduct and, therefore, has some tendency to diminish the likelihood of his committing another

predatory act of sexual violence." Id. at 316-17. Because Post's likelihood of committing another predatory act of sexual violence was an element before the jury, this evidence was relevant to determining whether Post was an SVP. Id. at 317. But, the court declined to answer whether the evidence was admissible, noting that ER 403 issues of unfair prejudice and confusion are best addressed by the trial court. Id.

The trial court does not abuse its discretion in refusing to give a jury instruction that is unsupported by substantial evidence.[2] See State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336 (1998). Here, evidence that the possibility of a new petition for civil commitment would serve as a condition on Malone's release could have been relevant. But, Malone did not present any such evidence. During his testimony, Malone did not suggest that he knows about the consequences of committing a recent overt act. He did not suggest that he would be less likely to reoffend because of this possibility. In fact, Malone presented no evidence of the possibility of a new petition for civil commitment.

The only evidence of the possibility of a new petition for civil commitment came up during the State's rebuttal case. The State called Christopher Ervin, a community corrections officer. Ervin testified about the conditions that would be imposed on Malone if he were released. On cross-examination, Malone elicited

[2] We review the court's denial of Malone's requested instruction for an abuse of discretion. In denying the instruction, the trial court focused on Post and the evidence that arose during trial. Because the court denied the instruction based on a factual dispute, not an interpretation of law, abuse of discretion is the proper standard.

information about recent overt acts. Ervin stated that he was familiar with the concept. Malone continued,

> And a recent overt act means that someone who is a sex offender, if someone commits an act or threat or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in that act or behavior, that if that happens someone can be confined, correct?

Ervin responded, "It depends." Malone clarified, asking if a petition for civil commitment could be filed, and Ervin responded that potentially, a petition could be filed. Malone summarized: "So even if someone is released for example, if Mr. Malone were released after this trial and he went, for example, to the Lambert House [an organization for lesbian, gay, bisexual, and transgender youth], he could potentially have a new petition filed on him, correct?" Ervin answered yes.

Without proffered evidence that Malone knew of this provision, understood what it meant, and believed that it would make him less likely to reoffend, the trial court could not consider admitting evidence on this issue. Because whether a new petition for civil commitment would make Malone less likely to reoffend was not factually at issue, an instruction on the law was not necessary. The trial court did not abuse its discretion by refusing to give the instruction.

Moreover, Malone was not prevented from arguing to the jury that the possibility of a new petition for civil commitment would function as a condition upon

his release. During closing argument, Malone's counsel emphasized the conditions to which Malone would be subject upon his release. Counsel said,

> So what we know is that he will have these things for two years, but for the rest of his life he will be subject to the recent overt act. And Mr. Ervin explained to you a little bit what that is. He said you don't even have to attempt a crime. If you are in the neighborhood and loitering around the Lambert House, that's a recent overt act. He'd go back.

And, the jury instructions that were given provided that the jury could consider placement conditions or voluntary treatment options that would exist if Malone were unconditionally released from detention. Thus, the argument was not inconsistent with the jury instructions, and counsel was not prevented in making this argument to the jury. We conclude that the trial court did not err in refusing to give the instruction on the possibility of a new civil commitment petition if he were released.

III. Prosecutorial Misconduct

Malone argues that the State purposefully disparaged the defense, thereby depriving him of a fair trial. He contends that the Assistant Attorney General (AAG) called defense counsel's integrity into question during closing argument.

Prosecutorial misconduct warrants reversal where actual misconduct occurs and there is a substantial likelihood that the misconduct affected the verdict. In re Det. of Law, 146 Wn. App. 28, 50, 204 P.3d 230 (2008). The defendant bears the burden of proving both elements. Id. We view alleged prosecutorial misconduct in light of the entire argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Id. When the defendant did

not object to the argument at trial, we will not reverse a verdict on the basis of prosecutorial misconduct unless the prosecutor's conduct was so flagrant and ill-intentioned that no curative instruction could have removed the prejudice. Id. at 50-51.

The State's rebuttal closing argument focused almost entirely on statements made during Malone's closing argument. The State began,

> So Mr. Malone's presentation of evidence and his closing argument consist of little more than misdirections, idle threats, half truths, and lots of evidence of selective listening as to what happened during the last two and a half weeks. And until I heard the argument I thought it was just limited to Mr. Malone and [Malone's expert] that those two things were true. But let's just talk about a little bit of the selective listening and selective readings that was just described for you for the last hour and 20 minutes.

The AAG proceeded to identify certain aspects of Malone's closing argument that misdirected the jury. First, the AAG pointed to counsel's argument that Dr. Phenix admitted to using unstructured methodology during her testimony. The AAG said, "That is objectively not true" and "that is one piece of selective listening." Then, the AAG pointed to counsel's comments that Dr. Phenix did not interview Malone in person. The State called this "misdirection." Next, the AAG pointed to counsel's chart about the possibility of re-offending, and called that chart "misdirection." The AAG said that the data was "misrepresented" on the slides that counsel used. The AAG also addressed counsel's comment about Malone's jail time, saying, "Something that was also objectively false is the slap on the wrist. So they said that the only time he's ever been to jail was a year in Oregon. That is not what happened." The AAG commented that the "last one that I am bothering to talk

about is how these young boys in prison looked," calling that "another piece of misdirection."

Then, in wrapping up closing argument, the AAG addressed Malone's theme of the case. Malone's counsel began closing with a song: "I don't want the world to see me because I don't think that they'd understand. When everything has broken I just want you to know who I am." Defense counsel suggested that this song was an appropriate anthem for Malone's case and his life, because he has done terrible things and is afraid people will not understand who he is today. The AAG ended her rebuttal closing argument by suggesting a more appropriate anthem for this case, a quote:

> It says, one of the saddest lessons of history is this. If we've been bamboozled long enough we tend to reject any evidence of the bamboozle. We're no longer interested in finding out the truth. The bamboozle has captured us. It's simply too painful to acknowledge even to ourselves that we've been had. Once you give a charlatan power over you, you almost never get it back.

Malone did not object to any of the above statements during closing argument.[3] Therefore, we must decide whether the comments were improper and if so, whether they were so flagrant and ill-intentioned that an instruction could not have cured the prejudice. State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).

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[3] Malone did make one objection on the basis of prosecutorial misconduct. But, this was to an entirely different portion of the State's rebuttal closing argument, and the objection was on the basis that the State was stating things that were not true. This objection was not sufficient to preserve the issues discussed in Malone's brief for appeal.

Washington courts have previously recognized that the prosecutor severely damages a defendant's opportunity to present his or her case by making statements that impugn the role or integrity of defense counsel. State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). In Lindsay, the Supreme Court held that the prosecutor committed misconduct by responding to defense counsel's closing argument: " 'This is a crock. What you've been pitched for the last four hours is a crock.' " Id. at 433. The court reasoned that the term "crock" implies deception and dishonesty. Id.

Similarly, in State v. Thorgerson, 172 Wn.2d 438, 450-51, 258 P.3d 43 (2011), the prosecutor's theme during closing argument was that the defense engaged in "sleight of hand." The prosecutor argued, " 'The entire defense is sl[e]ight of hand. Look over here, but don't pay attention to there.' " Id. at 451 (alteration in original). And, the prosecutor used words like "bogus" and "desperation" in describing the defense. Id. at 450. The Supreme Court reasoned that insofar as these comments focused on the evidence before the jury, there was no misconduct. Id. at 451. But, it determined that the prosecutor went too far by disparaging defense counsel's integrity, suggesting that he presented a bogus, sleight of hand case. Id. at 451-52. These phrases implied wrongful deception or even dishonesty. Id. at 452. Even so, the court concluded that the statements were not prejudicial, because they essentially told the jury to disregard what the prosecutor believed to be irrelevant evidence, and could not be construed as having had a significant likelihood of altering the jury's verdict. Id.

Like in Lindsay and Thorgerson, the AAG's comments here suggested that defense counsel herself was dishonest. The AAG's theme of rebuttal was that defense counsel's closing argument was comprised of "selective listening" and "misdirection." After listing multiple examples of defense counsel's misrepresentations, the AAG ended with a quote about being bamboozled. Rather than simply comparing and contrasting Malone's interpretation of the evidence with the State's, the AAG repeatedly suggested that defense counsel was misdirecting the jury and misrepresenting the evidence. This called counsel's integrity into question, and was likely improper.

However, these statements were not prejudicial. The AAG's "misdirection" and "selective listening" comments do not rise to the same level as calling defense counsel's argument a "crock" or "bogus." These comments did not suggest that counsel's entire case was a sham. And, given the wealth of evidence against Malone—Dr. Phenix's multiple diagnoses, Malone's own admitted history of child molestation, and the testimony of several of his victims, we cannot conclude that these comments affected the verdict. Had Malone objected, an instruction could have cured any potential prejudice. We conclude that Malone is not entitled to a new trial on the basis of prosecutorial misconduct.

IV. Juror Misconduct

Malone contends that the trial court failed to properly investigate allegations of juror misconduct that came to light after his trial. He points to three alleged instances of juror misconduct: a sleeping juror, jurors who announced that they had made up their minds on the third day of trial, and deliberations that proceeded

without all jurors present. Malone asks us to remand for an evidentiary hearing to determine the extent and prejudice of this potential misconduct.

A juror, Shirley Mukhar, responded to the jury exit questionnaire with comments that she believed would make the jury process better. These comments included "NO SLEEPING DURING TESTIMONY or maybe the question could be asked in Voir Dire if anyone has a problem staying awake during the day." She stated that a particular juror worked nights and "had trouble staying awake." Mukhar mentioned that the same juror admitted that he had done outside research during the trial. She said that a couple of the jurors commented that their minds were made up by the third day of trial. And, she stated that a juror had to use the bathroom in the middle of a discussion during deliberation, but the discussion continued.

Both Malone and the State submitted proposed questions to ask Mukhar about her questionnaire. Malone's questions focused on several topics: the other juror's outside research, jurors' comments that their minds were made up, and jury deliberations when some jurors were absent. Malone later submitted supplemental proposed questions on the jurors' knowledge of Malone's book. The trial court ruled on which series of questions would be appropriate. It ruled that Malone's questions about whether jurors did outside research were appropriate, but the other lines of questioning were not. At a hearing, both Mukhar and Thomas Reilly, the juror Mukhar identified as having conducted outside research, testified.

A. Sleeping Juror

Malone asserts that his right to a fair trial might have been compromised by a sleeping juror. He argues that Mukhar's allegation that a juror was having trouble staying awake obligated the trial court to investigate this allegation.

Unlike the other instances of potential juror misconduct, Malone never raised concern about a possible sleeping juror in the court below. This issue was not included in Malone's proposed questions for Mukhar or his motion for a new trial. Because Malone raises this issue for the first time on appeal, we need not address it. See RAP 2.51(a).

Moreover, the cases upon which Malone relies do not support his position. He cites State v. Jorden, 103 Wn. App. 221, 11 P.3d 866 (2000) and United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983). In Jorden, the State moved multiple times to disqualify a juror who was sleeping during trial. 103 Wn. App. at 224-25. Ultimately, the court excused the juror. Id. at 226. In doing so, the judge relied on his own observations of the juror as yawning, dozing, and sitting with her eyes closed during witness testimony. Id. On appeal, Jorden argued that the trial court was required to question the juror to determine if misconduct had occurred. Id.

In Barrett, a juror asked to be removed prior to deliberations, because he had been sleeping during the trial. 703 F.2d at 1082. Barrett moved to dismiss the juror, but the trial court denied the motion. Id. The jury found Barrett guilty. Id. Barrett then sought to interview the juror, but the trial court denied the motion, stating that there was no juror asleep during trial. Id. at 1082-83. The Ninth Circuit held that the trial court abused its discretion by failing to conduct a hearing or

investigate the potential sleeping juror issue. Id. at 1083. It remanded for a hearing to determine whether the juror was sleeping, and if so, whether Barrett was prejudiced. Id.

This case differs significantly from both Jorden and Barrett. In those cases, the parties and the court were aware of the potential sleeping juror before a verdict was entered. Jorden, 103 Wn. App. at 224-25; Barrett, 703 F.2d at 1082. Thus, the court had an obligation to inquire into the possibility that a juror was sleeping. We decline to extend Jorden and Barrett to apply to this kind of allegation when it is first raised after a verdict.

B. Jurors Absent During Deliberations

Malone contends that jury deliberations took place when fewer than 12 jurors were present. He points to Mukhar's comment in the exit questionnaire that a juror had to use the bathroom during deliberations. In response, the State contends that the trial court was not authorized to inquire into any possible 11 juror deliberations. It suggests that such internal processes inhere in the verdict.

Under RCW 71.09.060(1), when a jury determines that a person is a sexually violent predator, the verdict must be unanimous. Even though SVP proceedings are civil, principles regarding the right to unanimous jury verdicts in criminal proceedings apply equally. In re Det. of Pouncy, 144 Wn. App. 609, 617, 184 P.3d 651 (2008), aff'd, 168 Wn.2d 382, 229 P.3d 678 (2010); In re Det. of Halgren, 156 Wn.2d 795, 807-09, 132 P.3d 714 (2006). A unanimous verdict means that the "12 jurors must reach their consensus through deliberations which

are the common experience of all of them." State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389 (1979).

A jury's decision is contained entirely within the verdict. State v. Young, 48 Wn. App. 406, 414, 739 P.2d 1170 (1987). Thus, courts must not impeach a verdict based on the details of the jury's deliberations. Long v. Brusco Tug & Barge, Inc., 185 Wn.2d 127, 131, 368 P.3d 478 (2016). Facts connected to the juror's motive, intent, or belief inhere in the verdict. Id. So, a court cannot consider facts about the mental processes through which individual jurors reached the verdict, the effect of the evidence on the jurors, or the weight that particular jurors may have given to particular evidence. Id. at 131-32.

Malone relies on State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014) to argue that his right to a unanimous verdict was violated where deliberations took place without all 12 jurors present. In Lamar, the jury began deliberating on Friday afternoon. Id. at 580. On Monday, the court replaced a juror who had become ill. Id. The court instructed the jury to spend some time reviewing the discussions from Friday with the alternate. Id. The Supreme Court held that the trial court erred in affirmatively instructing the jury not to revisit and deliberate together anything discussed on Friday. Id. at 587. In reaching this conclusion, the court specifically noted, "Of course we do not know what actually occurred on Friday and so do not know what was addressed. And a court must not intrude into the jury deliberations to determine what the jury has decided or why, or how the jury viewed the evidence." Id.

Here, Malone does not contend that erroneous jury instructions invited the jury to reach a verdict that was not unanimous. Instead, he argues that the trial court should have looked into the internal processes of the jury to examine how many jurors were in the room at what time, when jury deliberations occurred, and whether deliberations continued during bathroom breaks. Lamar does not permit this type of inquiry. In fact, it explicitly prohibits it. Therefore, we conclude that an evidentiary hearing on this issue is not warranted.

C. Jurors Made up Their Minds

Malone further argues that the trial court erroneously refused to investigate Mukhar's comments that a couple of jurors had made up their minds by the third day of trial. Malone contends that these jurors demonstrated that they could not follow the court's instructions. He asserts that this error does not inhere in the verdict.

This court has previously addressed the issue of whether courts may consider the time that jurors made up their minds. State v. Hatley, 41 Wn. App. 789, 793, 706 P.2d 1083 (1985). Hatley moved for a new trial after a juror's alleged misconduct came to light. Id. at 792. The trial court held an evidentiary hearing. Id. At the hearing, the juror admitted that he had talked to an acquaintance about the trial during the second week of the three week trial. Id. He denied stating an opinion about Hatley's guilt to that acquaintance, but admitted that he made up his mind before the jury began to deliberate. Id. The trial court found that the juror made his final decision about Hatley's guilt before the jury deliberated, and that this misconduct prejudiced Hatley's right to a fair trial. Id.

The Court of Appeals reversed the order granting Hatley a new trial. Id. at 795. It determined that the trial court improperly considered the juror's testimony as well of that of the juror's acquaintance, because the facts in this testimony were linked to the juror's motive, intent, or belief. Id. at 794. Such evidence of jurors' mental processes, including their expressed opinions and when they made up their minds, inheres in the verdict. Id. at 793-94. And, the court noted that even if the juror made up his mind before deliberations began, this misconduct was not prejudicial. Id. at 794. It reasoned that if a new trial were required every time a juror revealed his private opinion during trial, it would open the door to widespread interrogation of jurors after trial. Id. at 795.

Malone contends that the facts alleged here did not inhere in the verdict, because if jurors announced their private opinions in front of the rest of the jury, they indicated their inability to follow instructions. But, this argument is at odds with Hatley. Evidence of when any particular juror made up their mind or expressed their opinions to the rest of the jury is linked to that juror's motive, intent, or belief. Id. at 793-94. It inheres in the verdict. Id. We conclude that the trial court did not err in refusing to investigate this alleged juror misconduct.

V. Cumulative Error

Malone asserts that the alleged errors resulted in cumulative error. The cumulative error doctrine applies where multiple trial errors combine to deny the accused a fair trial, even if the errors individually would not warrant reversal. In re Det. of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012). We conclude that cumulative error did not deprive Malone of a fair trial.

VI. Appellate Costs

Lastly, Malone asserts that appellate costs should not be imposed. He contends that the reasoning of State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016), should apply here. The State responds that since SVP proceedings are civil, not criminal, Sinclair does not apply.

In Sinclair, this court recognized that RCW 10.73.160(1) and RAP 14.2 give the appellate court discretion to deny the State's request for appellate costs when a criminal defendant is unsuccessful on appeal. 192 Wn. App. at 385-86, 388. The court exercised its discretion to rule that an award of appellate costs was not appropriate where the criminal defendant was found to be indigent for purposes of appeal, and there was no realistic possibility that his financial condition would improve. Id. at 393.

Sinclair was limited to the context of an indigent criminal defendant. It relied largely on RCW 10.73.160(1), which provides that the Court of Appeals may require an adult offender convicted of an offense to pay appellate costs. Id. at 385, 388.

An SVP proceeding is a civil proceeding, not a criminal trial. See In re Det. of Strand, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009). Malone appeals his order of commitment, not a conviction. We decline to extend the logic of Sinclair

to civil proceedings involving indigent individuals. An award of appellate costs to the State is appropriate.

We affirm.

WE CONCUR:

Appendix B

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

In the Matter of the Detention of:	)	
	)	No. 72306-5-I
CALVIN MALONE,	)	
	)	ORDER DENYING MOTION
Appellant.	)	FOR RECONSIDERATION
	)	

The appellant, Calvin Malone, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 23rd day of June, 2017.

Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

July 24, 2017 - 1:38 PM

Transmittal Information

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Appellate Court Case Title:	In re the Detention of: Calvin E. Malone
Superior Court Case Number:	12-2-08035-4

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