Supreme Court No.: 96748-2
Court of Appeals No.: 49881-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF

JOEL REIMER,

Petitioner.

PETITION FOR REVIEW

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

MARLA L. ZINK
The Law Office of Marla Zink, PLLC
1037 NE 65th Street #80840
Seattle, WA 98115
(360) 726-3130

Gregory C. Link
WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

Attorneys for Petitioner

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Joel Reimer, petitioner here and appellant below, has been indefinitely committed at McNeil Island for over 25 years. At his 2016 jury trial, the former superintendent of the Special Commitment Center opined Mr. Reimer can no longer be held in total confinement. Nevertheless, Mr. Reimer was indefinitely committed after the trial at which he was denied his right to testify, the prosecutor bolstered its expert's opinion with inadmissible opinion testimony from nontestifying witnesses, and an unconstitutionally low burden of proof was applied. Mr. Reimer asks this Court to grant review pursuant to RAP 13.4(b) of the Court of Appeals opinion that affirmed the jury verdict. *In re Det. of Reimer*, No. 49881-2-II, Slip Op. (Dec. 18, 2018). A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. This Court has held waiver of the constitutional right to testify can be presumed from silence if the accused is present. Should the Court accept review where the Court of Appeals presumed waiver from silence of an absent accused? RAP 13.4(b)(1), (3), (4).

2. Should the Court accept review where the opinion from Division Two conflicts with an opinion from Division One regarding the admission of diagnoses from nontestifying witnesses? RAP 13.4(b)(2).

3. Should the Court accept review to determine whether RCW 71.09.020 violates due process by allowing for the involuntary commitment of a person who is merely "likely" to reoffend where due process requires proof that a person is mentally ill and dangerous by at least clear and convincing evidence? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

Joel Reimer has been totally confined at the Special Commitment Center (SCC) on McNeil Island since its inception over 25 years ago. RP 509, 701-05. In 2014, the State could not sustain its prima facie burden, and he earned a full evidentiary hearing to determine whether he still met the criteria for commitment. CP 617.

The superintendent of the SCC from 2004 to 2009, licensed psychologist Henry Richards, testified in support of Mr. Reimer's release. RP 920, 933-34. Dr. Richards has known Mr. Reimer since 2004 and testified to his positive change over time. RP 969-72, 976-85, 1012-36, 1129-34, 1169. Evaluating Mr. Reimer specifically for this case, Dr. Richards diagnosed Mr. Reimer with narcissistic personality disorder and cyclothymic disorder, which is an affective disorder that is milder than bipolar disorder. RP 1095-96, 1169. Dr. Richards concluded Mr. Reimer did not satisfy the criteria for commitment—he does not suffer from a mental abnormality or personality disorder that makes him likely to

commit sexually predatory acts unless confined. RP 1095-96, 1114-15, 1192. Mr. Reimer's case was the only time Dr. Richards had testified for the defense since leaving his work at the SCC. RP 958-59. On other hand, Dr. Richards had testified for the State in dozens of cases. *Id*.

The State presented only two witnesses: licensed psychologist Harry Hoberman and Joel Reimer. RP 464-66, 773, 919.[1] Dr. Hoberman opined that Mr. Reimer is characterized by sexual sadism, antisocial personality disorder and high psychopathy, and alcohol use disorder. RP 556-59. He testified that these diagnoses rendered Mr. Reimer likely to reoffend unless totally confined. RP 654. Dr. Hoberman conceded Mr. Reimer had engaged in no sexually-related incidents for the last 25 years. RP 707-08.

Mr. Reimer moved pretrial to preclude the State from eliciting testimony about diagnoses made by nontestifying experts and which were not current. CP 983-85 (motions in limine 3 and 4). There is no basis for admission under the evidence rules and the testimony would impermissibly vouch for the State's expert diagnosis, by indicating to the jury that Dr. Hoberman's opinion is reliable because it is supported by a long line of evaluations. *Id*.; RP 127-31. The trial court agreed that the

[1] The State also presented deposition testimony from two witnesses, the complaining witnesses from prior criminal trials. RP 748-56, 764-71.

evidence was inadmissible, ruling that while the experts could base their opinions on facts set out for them by nontestifying witnesses, the experts could not testify to opinions of nontestifying witnesses. RP 131.

Despite the pretrial ruling, the prosecutor questioned Dr. Richards about prior evaluations by nontestifying witnesses that purported to support Dr. Hoberman. RP 1176-79, 1186-90. Mr. Reimer moved for a mistrial, but the trial court denied the motion. RP 1185-90; CP 1270-77 (renewing motion post-trial). The court instructed the jury not to consider evaluations by nontestifying experts. RP 1190-91.

Mr. Reimer waived his right to be present at trial, but agreed to be called during the State's case. CP 1227-31; RP 41-49, 55-59. In the written waiver form, he explicitly did not waive his right to testify during his own case-in-chief:

> **Right To Testify**
>
> I understand that I have a constitutional right to testify. I understand that if I choose to testify, the Petitioner has a right to cross-examination [sic] me.
>
> I hereby waive my right to testify and be present to testify. Initial: _____. [**line left blank**]

CP 1229 (footnote omitted). Mr. Reimer explicitly preserved his right to testify in his own case. *Id*. This preservation was separate and apart from his willingness to testify during the State's case. *Compare* CP 1228-29

(waiving right to be present during state's case-in-chief with exception if called by state to testify) *with* CP 1229 (preserving right to testify in respondent's own case-in-chief). The trial court also stated Mr. Reimer could revisit his waivers at any point during trial by notifying his attorney. RP 78-79.

Mr. Reimer waived his right to be present for portions of the trial because he wanted to stay at the SCC rather than be held in jail. He could more reliably receive his medication at the SCC, and he had back and neck pain that made sleeping at the SCC more comfortable for him. CP 1227-31; RP 41-49, 55-59; *see* CP 1144-55. However, Mr. Reimer was not returned to the SCC; rather, he remained in jail during the trial. RP 904, 1050, 1395-1401, 1405-06.

Mr. Reimer was present when called by the State to testify. RP 773. He was otherwise absented from trial. *E.g.*, RP 904, 1050, 1395-1401, 1405-06. During presentation of his case on October 19, Mr. Reimer sent a message from jail through the court that he wanted to talk his attorneys. RP 1050. But his attorneys apparently did not contact him, and they rested his case.

In addition to the testimony of former superintendent Dr. Richards, Mr. Reimer proved he had rented an apartment in Tacoma, Washington and had interviewed with a service provider who would help him find

employment if released. RP 1201-07, 1216-17, 1220-21. Mr. Reimer also presented testimony about his change in temperament and positive work ethic from the custodial maintenance supervisor, who supervises Mr. Reimer's employment, and the swing-shift supervisor. RP 1235-40, 1241-47.

The jury returned deadlocked, and the presiding juror reported the discourse had been deep and rich but votes had not changed since the prior afternoon. RP 1390-92. The court called the jury into the courtroom and proposed trying further deliberations. RP 1393-94. After lunch, the jury returned a verdict, committing Mr. Reimer indefinitely to the SCC. RP 1396; CP 1268.

D. ARGUMENT

1. The Court should grant review of the novel question whether knowing, intelligent, and voluntary waiver of the right to testify can be presumed from a respondent's absence from trial where he had previously explicitly declined to waive his right to testify.

a. This Court has delineated very limited circumstances where waiver of the right to testify will be presumed from the defendant's conduct.

The right to testify is "so crucial to the accused's fate" that only he can decide whether to waive it. *State v. Humphries*, 181 Wn.2d 708, 725, 336 P.3d 1121 (2014) (internal quotation marks omitted); U.S. Const.

amends. V, VI, XIV. The right is also explicitly protected under our state constitution. Const. art. I, § 22; *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999).

The fundamental right to testify can only be waived if the waiver is made knowingly, intelligently, and voluntarily. *State v. Thomas*, 128 Wn.2d 553, 558-59, 910 P.2d 475 (1996). The decision whether to testify ultimately lies with the client. *Robinson*, 138 Wn.2d at 763. An accused's constitutionally protected right to testify is violated if the final decision not to testify is made against his will. *Id*.

Our courts indulge every reasonable presumption against waiver of the right to testify. *E.g. State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). And, the prosecution bears the burden of establishing a valid waiver. *Frawley*, 181 Wn.2d at 461; *see Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

If the respondent is present, this Court has held the waiver of his right to testify can be presumed. *Robinson*, 138 Wn.2d at 759, 763. However, this Court has never held waiver can be presumed from an absent defendant's silence. Indeed, *Robinson* suggests it cannot. *Id*.

b. The opinion below deviates from this Court's careful delineation by holding, without citation, waiver can be presumed from the accused's absence.

Mr. Reimer was not in the courtroom during his case-in-chief. And he had explicitly excluded waiver of his right to testify from the rights he waived prior to trial. CP 1229. Despite Mr. Reimer's *explicit* exclusion of this waiver and despite his absence, the Court of Appeals held Mr. Reimer *implicitly* waived his right to testify by waiving his right to be present. Slip Op. at 8. This holding contradicts *Robinson*, 138 Wn.2d at 759. Yet, the Court of Appeals so held without any citation:

> Here, Reimer affirmatively waived his right to be present at his trial. Reimer did not expressly waive his right to testify; however, he waived his right to be present which implicitly waived his right to testify because a person must be present in court to testify in court. At any point, he could have affirmatively asserted that he wanted to exercise his right to testify. He could have communicated his desire to testify to either the trial court or his attorneys. The trial court also expressly informed Reimer that he should inform the trial court or his attorneys if he changed his mind about being present in court. Reimer failed to do so.

Id. This Court should grant review of this novel constitutional holding. RAP 13.4(b)(1), (3), (4).

2. The Court should accept review because Division Two's opinion conflicts with an opinion from Division One regarding admissibility of opinions from nontestifying witnesses.

The Court should also grant review because the Court of Appeals opinion conflicts with Division One's holding in *State v. Hamilton*, 196 Wn. App. 461, 383 P.3d 1062 (2016), *review denied* 187 Wn.2d 1026 (2017). RAP 13.4(b)(2).

The rules of evidence preclude admission of diagnoses from nontestifying witnesses. ER 401, 402, 703, 705, 801(c).

In *Hamilton*, Division One held, "Cross-examination that attempts to impeach by slipping in unrelied on opinions and conclusions without calling the experts to testify is improper." 196 Wn. App. at 464 (quoting Robert H. Aronson & Maureen Howard, The Law of Evidence in Washington § 8.03[8][b], at 8-67 (5th ed. 2016)). Because the expert did not rely on the opinion, ER 703 does not justify the admission of such testimony. *Id*. at 464. It is also not admissible as facts and data subject to ER 705. *Id*. To the extent it is impeachment evidence in an effort to show the testifying witness should have relied on the opinion, it is elicited for its truth and therefore inadmissible hearsay under ER 801(c). *Id*.

In *Hamilton*, the accused relied on a diminished capacity defense at his trial for second degree assault while confined at the Monroe

Correctional Complex. 196 Wn. App. at 465. He presented a single expert witness, psychiatrist Dr. Stuart Grassian, to testify to Hamilton's mental illnesses at the time of the assault and the effect of incarceration on his mental health. *Id*. at 465-67. Over Hamilton's objections, the prosecutor attempted to impeach Hamilton's expert with the opinions of nontestifying experts that—generally speaking—Hamilton did not suffer from mental illness, which were contained in Hamilton's voluminous medical records. *Id*. at 466, 468-73. Grassian did not rely on the opinions elicited, the records were not admitted into evidence, and none of the authors of the opinions testified. *Id*. at 474.

Division One reversed the ensuing conviction, finding Hamilton's right to a fair trial had been violated by the evidentiary violations. 196 Wn. App. at 474-85. The evidence was inadmissible hearsay if the State relied on the opinions for the truth of the matter asserted. *Id*. at 474-75. If the State did not rely on the opinions for their truth, the entries were irrelevant as Hamilton's expert had not relied upon them in formulating his opinion. *Id*. at 475, 483-84. The evidence was also not admissible under ER 703 or 705 because it was not facts or data and was not relied upon by the testifying expert. *Id*. at 477-81.

The inadmissible evidence concerned the central issue in Hamilton's case: his mental state at the time of the assault. 196 Wn. App.

at 485. The prosecutor's elicitation of opinions of nontestifying experts undermined Hamilton's sole expert and, consequently, his ability to assert his diminished capacity defense. *Id*. Accordingly, Division One held the trial was unfair. *Id*.

As in *Hamilton*, here the State questioned an expert witness about the opinions of nontestifying witnesses. RP 1179-91. The cross-examination caused the admission of years of diagnoses from non-testifying witnesses, which vouched for the State's expert's conclusion.

Beyond *Hamilton*, two additional bases compound the error and compel reversal. First, the elicitation of the inadmissible evidence was misconduct because it violated the court's pretrial ruling. *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (prosecutor commits misconduct that is flagrant and ill-intentioned if it violates the rules established to govern the parties' conduct at trial); RP 131 (pretrial ruling). Despite the pretrial prohibition on the opinions of nontestifying expert's, the State deliberately questioned Dr. Richards, as it had done at his deposition, about the diagnoses of prior evaluators. RP 1179-80, 1186-87. The trial court disapproved of the State's conduct on this basis:

> THE COURT: Well, Counsel, let me ask, in light of the prior ruling -- and you've got this in a deposition, you know you're going to use it, why on earth did it not come up outside the presence of the jury?

> MR. TALEBI: What?
>
> THE COURT: The fact that you're going to run dead into that prior ruling on the motions in limine.

RP 1188.

Second, the violation of the pretrial ruling was flagrant and ill-intentioned misconduct that vouched for the State's expert, as Dr. Hoberman diagnosed Mr. Reimer with sexual sadism, antisocial personality disorder and high psychopathy—the same opinions the State "offered" on cross-examination through the nontestifying experts. Beyond the admission of inadmissible evidence on a central issue, here the evidence of years of opinions of nontestifying experts vouched for the State's own expert's testimony. Thus, the prejudice here extends beyond that at stake in *Hamilton*.

The admission of this testimony jeopardized Mr. Reimer's right to a fair trial and requires reversal under *Hamilton*, 196 Wn. App. at 485. This Court should grant review to resolve the conflict among divisions of the Court of Appeals.

3. The Court should grant review to reexamine *Brooks* and the constitutionally insufficient statutory standard that allows indefinite civil commitment upon a mere preponderance of the evidence.

Our legislature mandated, a person may not be committed indefinitely unless the State proves beyond a reasonable doubt he is a

sexually violent predator. RCW 71.09.060. This standard exceeds the constitutionally-required standard of proof in civil commitment proceedings, which requires proof of present dangerousness by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 427, 433, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

However, a lesser standard—lower than clear and convincing evidence and lower than beyond a reasonable doubt—has been used in court proceedings and forms the basis of Mr. Reimer's commitment.

A "sexually violent predator" is a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). "'Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released unconditionally from detention." RCW 71.09.020(7) (emphasis added). This is the preponderance of the evidence standard.

This standard conflicts with the constitutionally-required clear and convincing evidence standard from *Addington*, 441 U.S. at 427. And it fails to satisfy our statute's beyond a reasonable doubt requirement. RCW 71.09.060.

"Clear and convincing evidence" means the fact in issue must be shown to be "highly probable." *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). Thus, civil commitment is unconstitutional absent a finding that it is "highly probable" the person will reoffend. The "more probable than not" standard of RCW Ch. 71.09 violates due process.

Though this Court rejected the argument in *In re Det. of Brooks*, that opinion should be reexamined in light of subsequent caselaw. 145 Wn.2d 275, 36 P.3d 1034 (2001). The Court of Appeals noted it was not its role to overrule *Brooks*. Slip Op. at 12. Only this Court can do so. *See id*.

Since *Brooks* was decided, both the U.S. Supreme Court and this Court have held that involuntary commitment is unconstitutional absent a showing that a defendant has "serious difficulty" controlling dangerous, sexually predatory behavior. *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002); *In re Det. of Thorell*, 149 Wn.2d 724, 735, 72 P.3d 708 (2003). The evidence must be sufficient to distinguish a sexually violent predator "from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413; *Thorell*, 149 Wn.2d at 731.

The "serious difficulty" standard of *Crane* and *Thorell* is akin to the "highly probable" standard, not the "more likely than not" standard

outlined in the statute.[2] The elevated standard of proof is necessary to support the "requirement that an SVP statute substantially and adequately narrows the class of individuals subject to involuntary civil commitment." *Thorell*, 149 Wn.2d at 737 (internal citation omitted). The State must "demonstrate[] the cause and effect relationship between the alleged SVP's mental disorder and a high probability the individual will commit future acts of violence." *Id*. at 737 (emphasis added).

Chapter 71.09 RCW violates due process because it requires only that the risk of danger be "likely" or "probable"—not substantial. This Court should grant review and hold that the "likely" and "more probably than not" standards of RCW 71.09.020 are unconstitutional. RAP 13.4(b)(3), (4); Slip Op. at 12.

E. CONCLUSION

The Court should grant review of three issues. First, the Court of Appeals opinion conflicts with this Court's decision in *Robinson* by holding waiver of the constitutional right to testify can be presumed in the accused's absence. Second, the opinion conflicts with Division One's

[2] *See Thorell*, 149 Wn.2d at 742 (the State must prove the person "has serious difficulty controlling behavior"); *see also In re Commitment of Laxton*, 647 N.W.2d 784 (Wis. 2002) (upholding Wisconsin's civil-commitment statute with "substantially probable" standard because it means "much more likely than not").

2016 opinion enforcing the exclusion of opinions from nontestifying experts. Third, the Court should reexamine the adequacy of the preponderance standard, which was upheld almost twenty years ago in *Brooks*.

DATED this 16th day of January, 2019.

Respectfully submitted,

Marla L. Zink, WSBA 39042
The Law Office of Marla Zink, PLLC
1037 NE 65th St #80840
Seattle, WA 98115
(360) 726-3130
marla@marlazink.com

s/ Gregory Link
Gregory Link, WSBA #25228
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
T: (206) 587-2711
F: (206) 587-2710
greg@washapp.org

APPENDIX

Filed
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Detention of: JOEL REIMER, Appellant.	No. 49881-2-II UNPUBLISHED OPINION

SUTTON, J. — Joel Reimer appeals the trial court's order committing him to the Special Commitment Center (SCC) as a sexually violent predator (SVP). Reimer argues that (1) his right to testify was violated, (2) the trial court erred by denying his motion for a mistrial after the State impeached his expert with Reimer's prior diagnoses, (3) the prosecutor committed misconduct in his cross-examination of Reimer's expert witness, and (4) the SVP statute is unconstitutional. We affirm.

FACTS

In 1992, Reimer was found to be an SVP and was committed to the SCC. After 22 years, Reimer was granted an unconditional discharge trial under RCW 71.09.090(2)(c)(ii)(A). At trial, the State relied on the expert opinion of Dr. Harry Hoberman to argue that Reimer continued to meet the statutory definition of an SVP. Reimer relied on the expert testimony of Dr. Henry Richards to argue that he no longer met the definition of an SVP.[1] The jury found that the State

[1] "'Sexually violent predator' means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engaged in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

proved beyond a reasonable doubt that Reimer continued to be an SVP. Based on the jury's verdict, the trial court entered an order of commitment which ordered that Reimer remain committed at the SCC.

I. REIMER'S TRIAL PARTICIPATION

Before trial, Reimer expressly waived his presence for the majority of the trial. However, Reimer did not waive his right to testify. And Reimer agreed to come to court to testify if the State called him as a witness during the State's case-in-chief. Reimer's testimony was scheduled for October 19, 2016, and the trial court made arrangements to have him transported from the SCC on October 18. The trial court also informed Reimer to notify his attorneys if he changed his mind and wanted to be present.

On October 18, the State called Reimer to testify. The next day, the trial court informed Reimer's attorneys that Reimer wanted to speak with them before he returned to the SCC. After the verdict, the trial court held a hearing on Reimer's attorneys' motion to withdraw. At the hearing, Reimer stated that his relationship with his attorneys had broken down, he was dissatisfied with their representation, and he wanted to proceed pro se. After some discussion, Reimer decided to allow the trial court to appoint new counsel rather than to proceed pro se. However, Reimer requested that copies of his pro se "[p]ost-[v]erdict [m]otions," previously rejected by the trial court, be filed. IX Verbatim Report of Proceedings (VRP) at 1411-12. The trial court agreed to file Reimer's pro se motions "for posterity." IX VRP at 1411. However, based on the record before this court, the trial court did not consider or rule on the motions.

Reimer's post-verdict CR 59[2] motion for a new trial was based in part on the denial of his right to testify in his defense. In his declaration supporting the motion, Reimer stated that, while in jail on October 19, he sent messages to his attorneys requesting to attend court on any of the days he was still being held in jail prior to being transported back to the SCC. Reimer also stated that, despite knowing that he was being held in the jail, his attorneys did not contact him to determine whether he wanted to testify.

Reimer also asserted that his attorneys left him in jail and prevented him from testifying because they did not agree with his position that spiritual Native American healing practices constituted treatment for an SVP. Reimer also set out his proposed testimony regarding his Native American heritage, which he had intended to present on his own behalf.

II. EXPERT TESTIMONY

Reimer filed a pretrial motion in limine to prevent the State from impeaching expert witnesses with contradicting opinions of non-testifying experts as prohibited by ER 705.[3] After hearing arguments by both parties, the trial court ruled,

[2] CR 59(a) states, "On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted." CR 59(a) provides nine specific grounds on which a motion for a new trial may be granted.

[3] ER 705 states,

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

> The best explanation I've ever been able to give on this particular issue, the 704/705 thing, is the experts can testify to facts other people have. The experts can't testify to opinions other people have, and that's going to be our starting point.
>
> Again, this is one where the field can really change as we're going along, depending on the questions that are asked. So I guess I would just use that as my beginning point.
>
> If anybody thinks that it's really opened up, my preference would be that we get the high sign and can talk about it outside the presence of the jury.

II VRP at 131.

The State's expert, Dr. Hoberman, testified that he diagnosed Reimer with sexual sadism, antisocial personality disorder, and high psychopathy. Dr. Hoberman also testified that, based on his diagnosis, Reimer continued to meet the definition of an SVP.

Reimer's expert, Dr. Richards, was the superintendent of the SCC from 2004 to 2007. Dr. Richards diagnosed Reimer with narcissistic personality disorder and a mild mood disorder. Dr. Richards testified that Reimer did not meet the criteria for a sexual sadism diagnosis.

During cross-examination, Dr. Richards testified that when he was superintendent of the SCC, he would review SVP evaluations and, if he disagreed with a particular evaluation, he would send the evaluator a letter. If the evaluator addressed the issues Dr. Richards identified and Dr. Richards continued to disagree with the recommendation in the report, he would allow the evaluator to submit the report, but he would send the court a letter indicating his disagreements with the evaluator's report. Then the following exchange took place:

> [STATE]: And so, Dr. Richards, while you were there for several years there was [sic] several evaluations at that time on Mr. Reimer, and, in fact, each of those evaluations diagnosed him with several paraphilias --
>
> [DEFENSE]: Objection --
>
> [STATE]: -- antisocial --
>
> [DEFENSE]: -- pretrial motions.

> [COURT]: I'll allow it.
>
> [DEFENSE]: Your Honor --
>
> [COURT]: I'll allow it.
>
> [STATE]: He was diagnosed with multiple paraphilias, including sexual sadism. He was diagnosed with antisocial personality and high psychopathy by all of them. So you never wrote a letter to them in regards to Mr. Reimer in terms of those cases; is that right?
>
> [RICHARDS]: That's correct. Because it doesn't fit the scenario that I told you. They didn't write a report that undermined the basis of his commitment which would have brought it to my attention. They didn't write a report saying he now has so much control he has changed. If they had done that, I would have gotten involved because of the history, and I would have had to decide, do I have enough problem [sic] with this to ask the psychologist to revisit the issues.
>
> So I think that explains why, and I do believe I would have followed my routine with Mr. Reimer like anyone else, but . . . it was on an exception basis because the superintendent's job is to decide is an exception needed.

VIII VRP 1179-80.

Reimer then moved for a mistrial based on the State's reference to Reimer's prior SVP evaluations during cross-examination. The trial court denied the motion for a mistrial, but did agree that the testimony was improper. Therefore, the trial court agreed to give the jury an oral curative instruction:

> Ladies and gentlemen, previously, there was a ruling that we were not going to discuss or consider prior evaluations of Mr. Reimer by people who were not brought in here as witnesses for a variety of reasons, including the fact that they're not subject to cross-examination. It wouldn't be proper to consider that evidence in this case.
>
> To the extent that there's any discussion about that, I'm asking you now or ordering you now to disregard that evidence and not consider it in your deliberations.

VIII VRP 1190-91. The trial court also agreed to include a written curative instruction in the jury instructions. The written curative instruction stated,

> You have heard testimony about the diagnostic opinions of forensic evaluators at the Special Commitment Center who have offered their opinions in prior reports. This evidence is not admissible. You must not consider it for any reason in your deliberations.

Clerks Papers at 1249.

After the jury returned its verdict finding that the State proved beyond a reasonable doubt that Reimer continued to meet the definition of an SVP, Reimer filed a CR 59 motion for reconsideration of the trial court's ruling on the motion for a mistrial, again based on the State's cross-examination of Dr. Richards. The trial court denied the motion for reconsideration.

Based on the jury's verdict, the trial court entered an order of commitment which ordered that Reimer remain committed at the SCC. Reimer appeals.

ANALYSIS

I. RIGHT TO TESTIFY

Reimer argues that he is entitled to a new trial because he was denied his constitutional right to testify in his own defense. We disagree.

As explained below, because Reimer is arguing that his attorneys, not the trial court, interfered with his right to testify, we address his argument as an ineffective assistance of counsel claim. *Compare State v. Thomas*, 128 Wn.2d 553, 910 P.2d 475 (1996) (trial counsel allegedly prevented the disruptive defendant from testifying by removing the defendant from the courtroom until the court obtained assurances that the defendant would conduct himself appropriately) with *State v. Robinson*, 138 Wn.2d 753, 982 P.2d 590 (1999) (defense counsel interfered with the right to testify by refusing to make a motion to the court to reopen the defendant's case to allow the

defendant to testify). Because Reimer fails to establish that his attorneys' performance was deficient, based on the record here, his ineffective assistance of counsel claim fails.

"In Washington, a criminal defendant's right to testify is explicitly protected under [the] state constitution." *Robinson*, 138 Wn.2d at 758. This right is extended to defendants facing commitment under the SVP statute. RCW 71.09.060(2); *In re Det. of Haga*, 87 Wn. App. 937, 943 P.2d 395 (1997), *abrogated on other grounds by Robinson*, 138 Wn.2d at 768.

The right to testify is fundamental and "cannot be abrogated by defense counsel or by the court." *Robinson*, 138 Wn.2d at 758. Only the defendant may decide to waive the right to testify. *Robinson*, 138 Wn.2d at 758. Although the defendant's waiver of the right to testify need not be obtained on the record, the waiver must be made knowingly, voluntarily, and intelligently. *Robinson*, 138 Wn.2d at 758-59.

When an appellant alleges that his right to testify was interfered with by defense counsel, we address that claim as a claim of ineffective assistance of counsel. *Robinson*, 138 Wn.2d at 765-66. Therefore, we apply the *Strickland* test to determine whether the appellant has met his burden to establish an ineffective assistance of counsel claim. *Robinson*, 138 Wn.2d at 765-66 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Under the *Strickland* test, the appellant must prove both that the attorney's performance "'fell below the objective standard of reasonableness' and that he was prejudiced by the attorney's deficient performance." *Robinson*, 138 Wn.2d at 766 (quoting *Strickland*, 466 U.S. at 694). Prejudice is met by showing that there is "'a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.'" *Robinson*, 138 Wn.2d at 766 (quoting *Strickland*, 466 U.S. at 694).[4]

An appellant who is able to prove that his attorney actually prevented him from testifying has shown that his attorney's performance fell below the objective standard of reasonableness. *Robinson*, 138 Wn.2d at 766. An attorney may actually prevent his client from testifying by using misrepresentation or coercion. *Robinson*, 138 Wn.2d at 762-63. An attorney can also prevent a client from testifying "by refusing to call the defendant as a witness even though the attorney knows that the defendant wants to testify." *Robinson*, 138 Wn.2d at 763. "If the decision to testify is made against the will of the defendant, it is axiomatic that the defendant has not made a knowing, voluntary, and intelligent waiver of his right to testify." *Robinson*, 138 Wn.2d at 763.

Here, Reimer affirmatively waived his right to be present at his trial. Reimer did not expressly waive his right to testify; however, he waived his right to be present which implicitly waived his right to testify because a person must be present in court to testify in court. At any point, he could have affirmatively asserted that he wanted to exercise his right to testify. He could have communicated his desire to testify to either the trial court or his attorneys. The trial court also expressly informed Reimer that he should inform the trial court or his attorneys if he changed his mind about being present in court. Reimer failed to do so.

The record before us establishes only that Reimer requested to speak to his attorneys before he was transported back to the SCC. The substance of what Reimer wished to discuss with his

[4] Reimer asserts that violation of the right to testify is per se prejudicial and, therefore, should be treated as structural error subject to automatic reversal. However, this argument was explicitly rejected by our Supreme Court. *Robinson*, 138 Wn.2d at 767.

attorneys is not in the record before this court. Because the contents of the discussion are not before us, Reimer has failed to establish that he affirmatively asserted to his attorneys his desire to testify after previously waiving his right to attend trial. The burden shifted to him only because he waived his right to be present. Therefore, the record before us does not establish that Reimer's attorneys actually prevented him from testifying.

We hold that Reimer has not established deficient performance on behalf of his attorneys. Accordingly, Reimer's ineffective assistance of counsel claim must fail.

II. MOTION FOR A MISTRIAL

Reimer argues that the trial court abused its discretion by denying his motion for a mistrial and admitting Dr. Richards's testimony regarding non-testifying experts at the SCC over the defense's objection, and in violation of the court's pretrial ruling. Dr. Richards testified that "[Reimer] was diagnosed with multiple paraphilias, including sexual sadism. He was diagnosed with antisocial personality and high psychopathy by all of them," referring to prior evaluators at the SCC who did not testify. VIII VRP 11780. Because the trial court gave multiple instructions, oral and written, to disregard the improper testimony, the trial court did not abuse its discretion in denying Reimer's motion for a mistrial.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court abuses its discretion when no reasonable judge would have reached the same conclusion. *Emery*, 174 Wn.2d at 765. We determine whether a mistrial should have been granted by considering (1) the seriousness of the trial irregularity, (2) whether the trial irregularity involved cumulative evidence, and (3) whether a proper instruction to disregard the evidence cured the prejudice against the defendant. *Emery*,

174 Wn.2d at 765. We give deference to the trial court because the trial court is in the best position to discern any prejudice. *State v. Garcia*, 177 Wn. App. 769, 776-77, 313 P.3d 422 (2013).

The first factor, the seriousness of the trial irregularity, does not necessarily weigh in favor of granting a mistrial. The questions and answers regarding the opinions of non-testifying experts arguably were improper, as the trial court found. However, the jury knew that Reimer had been classified as an SVP and had been detained for 22 years at the SCC. The fact that prior evaluators had diagnosed Reimer with conditions that supported a finding that he was an SVP would not have been surprising. Therefore, the irregularity was not so serious as to weigh in favor of granting a mistrial..

As to the second factor, even assuming the evidence of Reimer's prior diagnosis by non-testifying experts was cumulative, the operative question here is whether the trial court abused its discretion by determining that the curative instructions were sufficient to cure the prejudice. The jury was given two specific instructions to disregard the opinions of the non-testifying experts. We presume that the jury follows the trial court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009). Here, the improperly admitted evidence was the result of a single question to Dr. Richards that did not go into specific details about the prior evaluations. Therefore, we presume that the jury followed the trial court's instruction to disregard the improper evidence.

Because the trial court is in the best position to determine prejudice, the trial court did not abuse its discretion by determining that curative instructions were sufficient to cure the prejudice caused by the improper testimony.

III. PROSECUTORIAL MISCONDUCT

Reimer also argues that the prosecutor committed misconduct by violating the trial court's ruling on motions in limine. The State argues that the prosecutor did not violate the motion in limine because the trial court deferred a specific ruling until specific questions were asked. We agree with the State because the prosecutor did not directly violate the trial court's ruling on the motions in limine.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *Emery*, 174 Wn.2d at 756. First, we determine whether the prosecutor's conduct was improper. *Emery*, 174 Wn.2d at 759. If the prosecutor's conduct was improper, the question turns to whether the prosecutor's improper conduct resulted in prejudice. *Emery*, 174 Wn.2d at 760-61. Prejudice is established by showing a substantial likelihood that the prosecutor's misconduct affected the verdict. *Emery*, 174 Wn.2d at 760.

When ruling on the motion in limine, the trial court noted the general rule regarding ER 705, but noted that specific issues would have to be dealt with by objection to specific questions. Here, the prosecutor was not impeaching Dr. Richards's testimony based on the opinions in reports that he relied on. Therefore, the prosecutor's question did not fall squarely within the trial court's ruling on the motion in limine.

Because the prosecutor did not directly violate the trial court's motion in limine, the prosecutor's conduct was not improper. Accordingly, Reimer's prosecutorial misconduct claim fails.

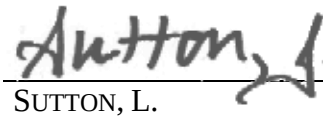
IV. CONSTITUTIONALITY OF RCW 70.09.020

Reimer argues that the statutory definition of an SVP is unconstitutional because it reduces the State's burden to a constitutionally impermissible preponderance of the evidence standard. Reimer recognizes that his argument has been explicitly rejected by our Supreme Court in *In re Det. of Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001). However, Reimer argues that we should reexamine the holding in *Brooks* in light of subsequent holdings in *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002), and *In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003).

"[O]nce [the Supreme Court] has decided an issue of state law, that interpretation is binding on all lower courts until [the Supreme Court overrules] it." *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Here, neither *Crane* nor *Thorell* overrules the holding in *Brooks* because those cases address a different section of the SVP statute. *Crane*, 534 U.S. at 413 (addressing whether mental abnormality or personality disorder must be related to a lack of ability to control behavior); *Thorell*, 149 Wn.2d at 735-36 (same). Because the Supreme Court's holding in *Brooks* is still good law and it is not our role to overrule established Supreme Court precedent, we reject Reimer's argument that RCW 71.09.020 is unconstitutional.

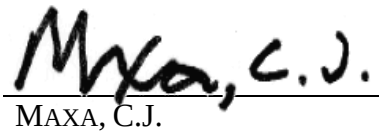
We affirm the trial court's order committing Reimer to the SCC.

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

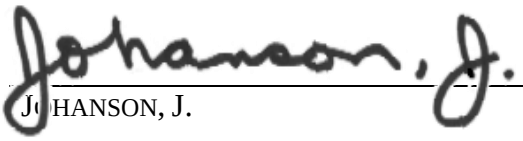


SUTTON, L.

We concur:



MAXA, C.J.



JOHANSON, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 49881-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Kristie Barham, AAG
[crjsvpef@atg.wa.gov] [kristieb@atg.wa.gov]
Office of the Attorney General – Criminal Justice Division

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 16, 2019

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