Supreme Court No. 96944-2
Court of Appeals No. 50573-8-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Detention of

Michael Canty,

Appellant.

Clark County Superior Court Cause No. 16-2-01450-3
The Honorable Judge Derek Vanderwood

Amended PETITION FOR REVIEW

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DECISION BELOW AND ISSUES PRESENTED

Petitioner Michael Canty, the appellant in the court below, asks the Court to review the Court of Appeals Unpublished Opinion entered on February 13, 2019 (attached). This case presents four issues:

1. Does the possibility of future civil commitment based on a "recent overt act" reduce an offender's risk of recidivism?

2. Did the legislature intend different meanings when it differentiated between "crimes of sexual violence" and "sexually violent offenses" in Chapter 71.09 RCW?

3. Is the phrase "sexually violent predator" unfairly prejudicial because it may trigger unconscious emotional reactions in jurors, resulting in commitment even if a patient is not mentally ill and currently dangerous?

4. Does a person facing civil commitment have a due process right to cross examine adverse witnesses who provide substantive evidence?

STATEMENT OF THE CASE

Prior to Michael Canty's civil commitment trial under RCW 71.09, the state's attorney acknowledged the evidence presented a "pretty close case for an initial commitment." RP 5. At trial, Mr. Canty hoped to explain to jurors that his risk of recidivism in the community would be reduced by the possibility of civil commitment stemming from an overt act falling short of a new crime. He sought to introduce this testimony through his expert, Dr. Amy Phenix.[1] RP 779-796. The court excluded it. RP 796.

The State was required to prove that Mr. Canty had a predicate offense that qualified as a "crime of sexual violence." CP 467. The court

[1] Counsel told Dr. Phenix that Mr. Canty knew that a petition for civil commitment could be filed if he engaged in behavior that qualified as a "recent overt act" (ROA). RP 786.

instructed jurors to determine if Mr. Canty had been "convicted of a crime of sexual violence, namely Indecent Liberties with Forcible Compulsion and/or Burglary in the First Degree with Sexual motivation."[2] CP 467.

Mr. Canty proposed a jury instruction informing jurors of the availability of a "recent overt act" petition. CP 139, 213, 218. The court refused to instruct on the issue. CP 461-483.

Mr. Canty also asked the court to substitute the phrase "criteria for commitment" in place of "sexually violent predator" in its instructions to the jury. RP 54, 118-120. The defense cited a study showing that the inflammatory phrase "sexually violent predator" created bias unrelated to evidence of dangerousness. RP 119-120, 123. The court denied the motion and instructed jurors using the phrase "sexually violent predator." RP 118-124, 816; CP 140-143, 201, 326, 371, 466-467.

To establish Mr. Canty's predicate offense, the State introduced a 2002 judgment and sentence showing convictions for indecent liberties with forcible compulsion, burglary with sexual motivation, and unlawful imprisonment with sexual motivation. Ex. 13.

The State also offered evidence relating to a 1997 California conviction, although it did not rely on the conviction as a predicate offense.

[2] Mr. Canty had proposed an instruction that included the State's obligation to prove a "crime of sexual violence," but did not include language suggesting that his prior convictions automatically qualified as such crimes. CP 219, 226. The court did not give this instruction.

Ex. 3. Over objection, the court admitted the victim's 1996 testimony from a California preliminary hearing. RP 99-100, 606, 620-627; CP 362. The jury heard the prior testimony as substantive evidence, and the State relied on it in closing argument. RP 99-100, 606, 620-627, 960-962; CP 362.

The jury returned a verdict in favor of the State, and the court entered an order of commitment. CP 371-372. Mr. Canty timely appealed, and the Court of Appeals affirmed. CP 377; Opinion (OP) 1, 23.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE TRIAL COURT VIOLATED MR. CANTY'S RIGHT TO DUE PROCESS BY REFUSING TO INSTRUCT JURORS ON THE AVAILABILITY OF A "RECENT OVERT ACT" PETITION FOR CONDUCT THAT DID NOT AMOUNT TO A NEW CRIMINAL OFFENSE.

A. The possibility of a "recent overt act" petition diminished Mr. Canty's risk of reoffense following release.

The trial court should have instructed jurors that Mr. Canty could face indefinite detention in the future if he committed a "recent overt act"[3] falling short of a new crime. The possibility of such future commitment mitigates an offender's risk of committing predatory acts of sexual violence while in the community in two ways.

First, commitment based on a recent overt act (ROA) incapacitates the offender before he can commit a sexually violent offense in the community. Engaging in qualifying conduct can result in indefinite detention

[3] The phrase "recent overt act" is defined to include, *inter alia*, "any act, threat, or combination thereof that… creates a reasonable apprehension [of] harm of a sexually violent nature" RCW 71.09.020 (12); *see also* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 365.15 (6th ed.) ("Sexually Violent Predators—Recent Overt Act—Definition").

in total confinement, eliminating any risk to the community.[4] RCW 71.09.020(12); RCW 71.09.030; RCW 71.09.060. The incapacitating effect arises even if the patient does not know that civil commitment can rest on conduct falling short of a new crime. A person who commits a qualifying act will face commitment, regardless of his knowledge that non-criminal behavior can result in detention. This mitigates the risk of reoffense.

Second, the possibility of commitment based on a recent overt act has a deterrent effect. *In re Det. of Post*, 170 Wn.2d 302, 316–17, 241 P.3d 1234 (2010). Although the deterrent effect arises from the person's knowledge, Mr. Canty should not have been required to prove that he acquired such knowledge prior to trial. The deterrent effect arises regardless of when the patient learns of "the consequences for engaging in such conduct,"[5] even if the patient first hears about it in trial or from the court's instructions. Here, Mr. Canty knew that he could face commitment based on a recent overt act.[6] RP 786.

The court should have instructed jurors on the availability of an ROA petition.[7] The instruction would have allowed Mr. Canty to argue his

[4] This is akin to revocation of an offender's term of community supervision. The effect is even greater in the civil commitment context, since patients are confined until treatment reduces their risk of reoffense, while prisoners are released at the expiration of their sentence, regardless of their risk of reoffense.
[5] *Post*, 170 Wn.2d at 316–17.
[6] Counsel told Dr. Phenix that Mr. Canty knew he could be committed for a recent overt act. RP 786. Dr. Phenix's opinion on the effect such knowledge might have on Mr. Canty's risk and should have been admitted. Such communications from counsel are "reasonably relied upon by experts" in the field. *See* ER 703. But even if he had not known "the consequences for engaging"[6] in qualifying non-criminal conduct prior to trial, he would have learned of it through Dr. Phenix's testimony. RP 779-796.
[7] Contrary to the Court of Appeals' reasoning, the appropriate standard of review of this issue is *de novo.* OP 16. Because evidence in support of the proposed instruction must be

theory: that the incapacitating and deterrent effects arising from the availability of an ROA petition would have reduced his risk of reoffense.[8]

B. The Supreme Court should accept review because this case presents a significant constitutional issue that is of substantial public interest. RAP 13.4(b)(3) and (4).

The Court of Appeals failed to recognize that Mr. Canty knew he could be committed following a "recent overt act," and that any lack of knowledge would be remedied by the evidence at trial and the court's instruction on the subject. OP 17-18. Nor did the Court of Appeals credit the reduction in risk stemming from the incapacitating effect. OP 17-18.

The proposed instruction was a correct statement of the law, was not misleading, and would have allowed Mr. Canty to argue his theory of the case. *State v. Erhardt,* 167 Wn.App. 934, 939, 276 P.3d 332 (2012). In its absence, the court's instructions relieved the State of its burden to prove current dangerousness and violated Mr. Canty's right to due process. U.S. Const. Amend. XIV; *Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

II. THE TRIAL COURT'S INSTRUCTIONS INCLUDED AN UNCONSTITUTIONAL AND ERRONEOUS COMMENT ON THE EVIDENCE.

Mr. Canty could only be committed if the jury found that he'd been convicted of a "crime of sexual violence." RCW 71.09.020 (18);

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taken in a light most favorable to Mr. Canty, the sufficiency of that evidence is an issue of law requiring d*e novo* review. *State v. Fisher,* 185 Wn.2d 836, 849, 374 P.3d 1185 (2016).

[8] Mr. Canty did not in fact withdraw his proposed instruction. OP 17. But further, the trial court's refusal to give the instruction violated due process since it relieved the State of its burden. It may be raised for the first time on appeal. RAP 2.5(a)(3). In addition, the Court of Appeals addressed the issue on the merits; it is thus properly before the Supreme Court. *State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

RCW 71.09.060 (1); CP 467. The court instructed jurors that Mr. Canty's predicate offense were "crime[s] of sexual violence" as a matter of law. CP 467, 471. This comment on the evidence was "tantamount to a directed verdict," violating Wash. Const. art. IV, §16. *State v. Becker*, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997). It also erroneously conflated two different terms: "sexually violent offenses" and "crime of sexual violence."

A. The legislature has differentiated between "sexually violent offenses" and "crimes of sexual violence."

Where the legislature uses different language in the same statute, different meanings are intended. *State v. Costich*, 152 Wn.2d 463, 475-476, 98 P.3d 795 (2004). RCW 71.09.020 uses two different phrases to describe a sexual crime: "sexually violent offense" and "crime of sexual violence." *See* RCW 71.09.020(17) *and* RCW 71.09.020(18). The two terms perform different functions.

The phrase "sexually violent offense" is found in provisions directed toward government officials. These guide the actions of various state agencies, prosecutors and any judicial officer hearing civil commitment proceedings.[9] RCW 7109.025(1)(a); RCW 71.09.030; RCW 71.09.060; RCW 71.09.140. In contrast, the phrase "crime of sexual violence" appears only once in the Chapter 71.09 RCW. RCW 71.09.020(18). It describes an essential element required for civil commitment.

The factfinder must determine if the detainee has been convicted of

[9] The provisions referring to "sexually violent offense" trigger the initial referral to prosecuting agencies, grant authority for filing a civil commitment petition, determine the county with jurisdiction to hold commitment proceedings, and establish requirements for notice upon escape or release. RCW 7109.025(1)(a); RCW 71.09.030; RCW 71.09.140.

or charged with a "crime of sexual violence." RCW 71.09.020(18); RCW 71.09.060 (1). Whether a prior offense qualifies as a "crime of sexual violence" is an issue for the factfinder at trial.

Because the legislature used two different phrases within the same statute, it necessarily intended different meanings. *Costich*, 152 Wn.2d at 475-476; *see also Durland v. San Juan Cty.*, 182 Wn.2d 55, 79, 340 P.3d 191 (2014). The two phrases are not interchangeable.

B. The trial judge improperly directed jurors to find that Mr. Canty's predicate offense automatically qualified as a "crime of sexual violence," removing the issue from the jury.

The phrase "crime of sexual violence" is not defined in Chapter 71.09 RCW. By contrast, "sexually violent offense" is defined with reference to a limited list of qualifying offenses. *See* RCW 71.09.020(17).

Where a term is undefined, courts must use its plain and ordinary meaning, derived from a standard dictionary. *Cornu-Labat v. Hosp. Dist. No. 2 Grant Cty.*, 177 Wn.2d 221, 231, 298 P.3d 741 (2013). The provisions of Chapter 71.09 RCW must be strictly construed. *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008). A court interpreting Chapter 71.09 RCW must choose a "narrow, restrictive construction" over a "broad, more liberal interpretation." *Id.* at 510.

Where a predicate offense qualifies as a "crime" that is "sexual," only the meaning of the word "violence" must be examined. The dictionary definitions of violence include "swift and intense force," or "rough or

injurious physical force." *Dictionary.com,* Random House, Inc. (2019).[10] A narrow restrictive construction of the phrase "crime of sexual violence" thus requires proof at trial of a sex offense accomplished through the application of "swift and intense force" or "rough and injurious physical force." *Dictionary.com.*

Whether an offense qualifies as a "crime of sexual violence" is an issue of fact. Before a person may be committed, the jury must be instructed to determine if the predicate offense qualifies as a "crime of sexual violence." RCW 71.09.020(18); RCW 71.09.060. So, the question for the jury in this case was whether Mr. Canty's predicate offenses qualified as "crime[s] of sexual violence." RCW 71.09.020 (18). This, in turn, should have required jurors to determine if either offense was violent "in fact". RCW 71.09.020(18); *Dictionary.com.* Instead, the court instructed jurors to determine if Mr. Canty "has been convicted of a crime of sexual violence, namely Indecent Liberties with Forcible Compulsion and/or Burglary in the First Degree with Sexual motivation."[11] CP 467.

This contrasted with the instruction proposed by Mr. Canty, which required proof that he'd been "convicted of a crime of sexual violence" but did not tell jurors that his prior offenses automatically qualified. CP 219, 226. The court did not give Mr. Canty's proposed instruction.

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[10] Available at http://www.dictionary.com/browse/violence (last accessed 3/5/19). This is consistent with the statute's purpose: to address the risks posed by the "small but extremely dangerous group of sexually violent predators"—those who are likely to engage in "repeat acts of predatory sexual violence"—and not the larger pool of sexual offenders who are not violent. *See* RCW 71.09.010.

[11] The court separately defined "sexual violence" to include the two offenses. CP 471.

The state constitution directs that "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, §16. A court may not "instruct the jury that matters of fact have been established as a matter of law." *Becker,* 132 Wn.2d at 64. But here, the court instructed jurors to determine if Mr. Canty had been charged with or convicted of "Indecent Liberties with Forcible Compulsion and/or Burglary in the First Degree with Sexual motivation," which it characterized as "crime[s] of sexual violence." CP 467, 471. The instructions effectively directed a verdict in favor of the State.

This was an unconstitutional comment on the evidence. *Becker*, 132 Wn.2d at 64; *see also State v. Brush*, 183 Wn.2d 550, 556-560, 353 P.3d 213 (2015). The jury question required a factual determination regarding the physical force used to accomplish the prior offenses. RCW 71.09.020 (18); *Dictionary.com.*

Under the court's instructions, the jury was not permitted to make that factual determination. Instead, the judge directed jurors to find that Mr. Canty's predicate offenses automatically qualified as crimes of sexual violence. CP 467, 471. The language used by the court was "tantamount to a directed verdict." *Becker*, 132 Wn.2d at 65.

C. The Court of Appeals decision conflicts with *Costich* and *Martin.* Furthermore, this case presents a significant question of constitutional law that is of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

The Court of Appeals did not conduct its own analysis of Mr. Canty's argument. OP 20-21. Instead, it relied on *In re Det. of Taylor-*

Rose, 199 Wn. App. 866, 876, 401 P.3d 357 (2017), *review denied*, 94900-0, --- Wn.2d --- (Wash. Feb. 7, 2018). OP 21 (citing *Taylor-Rose*).

The *Taylor-Rose* court in turn relied on *In re Det. of Coppin*, 157 Wn.App. 537, 553, 238 P.3d 1192 (2010). But the *Coppin* court ignored a basic principle of statutory interpretation: "where the legislature uses different language in the same statute, differing meanings are intended." *Costich*, 152 Wn.2d at 475–76; *Durland*, 182 Wn.2d at 79 (internal quotation marks and citation omitted).

The *Coppin* court made no effort to strictly construe the statute in favor of the detainee. *See Martin*, 163 Wn.2d at 508; *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). The lower court's decision in this case conflicts with *Costich, Durland, Martin,* and *Hawkins.* This Court should accept review under RAP 13.4(b)(1) and overturn *Coppin, Taylor-Rose*, and the lower court's decision here.

Further, the judicial comment is presumed to have prejudiced Mr. Canty. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136, 140 (2006), *as corrected* (Feb. 14, 2007). Reversal is required because the record does not affirmatively show that no prejudice could have resulted from the error.[12] *Id.; State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Even though the issue was not the focus at trial, "it is still conceivable that the jury could have determined that" Mr. Canty's prior offenses did not qualify as "crimes of sexual violence." *Jackman*, 156 Wn.2d at 745.

[12] Similarly, the due process violation requires reversal because the State cannot show that the error was harmless beyond a reasonable doubt. *See State v. Quaale*, 182 Wn.2d 191, 202, 340 P.3d 213 (2014) (outlining the constitutional harmless error standard).

The Supreme Court should accept review and recognize that the legislature intended different meanings when it differentiated between a "crime of sexual violence" and a "sexually violent offense" in RCW 71.09.020.

III. THE TRIAL COURT ERRED BY INCLUDING IN THE INSTRUCTIONS AN INFLAMMATORY PHRASE COINED BY THE LEGISLATURE TO DESCRIBE THOSE WHO MEET CRITERIA FOR CIVIL COMMITMENT.

Prior to trial, prospective jurors learned that Mr. Canty was facing civil commitment because he might be a "sexually violent predator." Research has shown that this phrase may create bias unrelated to evidence of a person's dangerousness. Mr. Canty sought to reduce the potential for unconscious emotional reactions by using the phrase "criteria for civil commitment" rather than the inflammatory phrase "sexually violent predator." The court's refusal to use an accurate but neutral phrase violated Mr. Canty's Fourteenth Amendment right to due process.

A. The court's instructions encouraged jurors to commit Mr. Canty even if the State failed to prove mental illness and current dangerousness.

Substantive due process prohibits indefinite civil commitment except in the narrowest of circumstances. U.S. Const. Amend. XIV; *see Kansas v. Hendricks*, 521 U.S. 346, 364, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). The State must prove that the person is both mentally ill and currently dangerous. *Addington v. Texas*, 441 U.S. 418, 426-433, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *Foucha*, 504 U.S. at 75-86. In civil commitment cases such as this one, the State must submit "proof 'sufficient to

distinguish [patients subject to commitment] from the dangerous but typical recidivist convicted in an ordinary criminal case.'" *In re Det. of Thorell*, 149 Wn.2d 724, 732, 72 P.3d 708 (2003) (quoting *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

The phrase "sexually violent predator" is neither a medical classification nor a phrase with inherent legal significance.[13] It is, however, likely to produce an emotional response in the average person, an effect which is undoubtedly magnified for those who have children. While such language has political benefits for legislators and other policy makers, it has little to do with the jury's "constitutional role" of determining the facts without passion or prejudice. *Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

Research has shown that the language itself is unfairly prejudicial, and its use affects juror decisions. *See* Scurich, Gongola, & Krauss, *The Biasing Effect of the "Sexually Violent Predator" Label on Legal Decisions*, 47 International Journal of Law and Psychiatry, 109 (2016) ("Scurich"). In the Scurich study,

> [Jurors] were asked to decide whether an individual who had been incarcerated for 16 years should be released on parole. The individual was either labeled as a) a sexually violent predator or b) a convicted felon, and all other information was identical between the conditions. Jurors were over twice as likely to deny parole to the SVP compared to the felon, even though they did not consider him any more dangerous or any more likely to reoffend.

Scurich, p. 109 (Abstract). The authors concluded that "jurors' decisions

[13] *See, e.g.* Deirdre M. Smith, *Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of "Sexually Violent Predator" Commitment*, 67 Okla. L. Rev. 619, 623 (2015).

in SVP hearings are driven by legally impermissible considerations, and that the mere label of 'sexually violent predator' [introduces] bias into the decision making process." Scurich, p. 109 (Abstract).

The phrase "sexually violent predator" itself has the potential to trigger unconscious emotional reactions unrelated to the evidence produced at trial. Scurich, pp. 109-114. Directives to decide based solely on the evidence may be insufficient to overcome the problem. *See, e.g., In re Glasmann*, 175 Wn.2d 696, 710, 286 P.3d 673 (2012).

In *Glasmann,* the Supreme Court noted that "'emotionally driven reactions… can unconsciously affect a decision-maker's thought process.'" *Id.,* at 710 n. 4 (quoting Lucille A. Jewel, *Through A Glass Darkly: Using Brain Science and Visual Rhetoric to Gain A Professional Perspective on Visual Advocacy,* 19 S. Cal. Interdisc. L.J. 237, 254 (2010)).

Mr. Canty sought to reduce the possibility of any unconscious emotional reactions by substituting the phrase "criteria for civil commitment" in place of "sexually violent predator." The trial court refused. RP 118-124, 816; CP 140-143, 201, 326, 371, 466-467.

Instructions that are clear "to the trained legal mind" may not adequately communicate an important legal standard to the average juror. *State v. Fischer*, 23 Wn. App. 756, 759, 598 P.2d 742, 744 (1979). Statutory language is not always adequate to convey the jury's task. *See State v. Watkins*, 136 Wn.App. 240, 243, 148 P.3d 1112 (2006).

Such is the case here. The inflammatory language used by the court could have triggered emotionally driven reactions that unconsciously

affected jurors' decision-making. This would result in a verdict that did not rest on proof that Mr. Canty is mentally ill and currently dangerous. This violated his right to due process. *Addington*, 441 U.S. at 426-433; *Foucha*, 504 U.S. at 75-86.

From the outset, jurors were instructed to view him as someone who might be a "sexually violent predator" rather than someone who might meet criteria for civil commitment. CP 326, 371, 466-467. The court repeatedly used the phrase "sexually violent predator" throughout the proceedings. CP 326, 371, 466-467.

As research shows, this language created a probability that jurors would ignore the evidence and vote in favor of commitment based on passion, prejudice, bias, or other unconscious emotional reactions. Scurich, p. 109. An instruction to do otherwise cannot impact unconscious prejudice.

A person facing civil commitment need not be labeled a potential "sexually violent predator." The proper standard is provided by the criteria outlined in RCW 71.09.020 (18). The court should have granted Mr. Canty's motion and substituted the "criteria for commitment" language in place of the inherently prejudicial language chosen by the Legislature.

The inflammatory language may serve a political purpose, but it has been shown to create distortions in the minds of average people. Scurich, p. 109. It has no place in a jury trial. The trial court should have adopted the neutral language proposed by Mr. Canty. The instructions should not have included the phrase "sexually violent predator;" its inclusion violated Mr. Canty's right to due process.

B. This case presents a significant question of constitutional law that is of substantial public interest. RAP 13.4 (b)(3) and (4).

The Court of Appeals failed to acknowledge that statutory language may be inappropriate for jury instructions. *See Fischer*, 23 Wn.App. at 759; *Watkins*, 136 Wn.App. at 243. Instead, the court concluded that the trial court did not err because it "correctly relied on the statutory language." OP 18. But inflammatory statutory language has no place in jury instructions. This is especially true where research shows that a particular phrase can trigger unconscious bias and produce a verdict driven by emotion rather than proof that a patient is mentally ill and currently dangerous. *See Addington*, 441 U.S. at 426-433; *Foucha*, 504 U.S. at 75-86.

IV. THE TRIAL COURT VIOLATED MR. CANTY'S DUE PROCESS RIGHT TO CROSS EXAMINE ADVERSE WITNESSES.

Over Mr. Canty's objection, the trial court admitted as substantive evidence statements made by an alleged victim at a 1996 California preliminary hearing. Mr. Canty's attorney did not have any opportunity to cross-examine the declarant. The improper admission of this hearsay violated Mr. Canty's due process right to cross examine adverse witnesses who provide substantive evidence.

A. Due process guarantees patients facing civil commitment the right to cross-examine adverse witnesses who provide substantive evidence.

1. The Supreme Court left this issue open in *Stout* and *Coe*.

The Supreme Court has reserved ruling on whether due process guarantees the right to cross-examine adverse witnesses in civil

commitment cases where the patient had no opportunity to cross-examine at some point in the proceeding. *In re Det. of Stout*, 159 Wn.2d 357, 368, 150 P.3d 86 (2007). In *Stout,* the patient's attorney participated in two telephonic depositions of the victim, one of which was videotaped. *Id.* Thus, as the Supreme Court noted, the patient "had two separate opportunities to cross-examine [the victim.]" *Id.* Accordingly, the court was presented with "[n]o controversy… as to cross-examination." *Id.* Because of this, the court "review[ed] only Stout's *confrontation* claim." *Id.* (emphasis added).

The *Stout* court premised its discussion "on whether any purpose is served in recognizing a *due process* right to confrontation *where cross-examination has been achieved.*" *Id.,* at 368 n. 9 (emphasis in original). The court balanced a patient's right to a face-to-face encounter—not the right to cross-examination—with the risk of error and the State's countervailing interests. *Id.,* at 370-374 (citing *Mathews v. Eldridge,* 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Following *Stout,* where cross-examination *has* been "achieved," there is no due process right to a face-to-face encounter with adverse witnesses. *Id.* However, as noted, this leaves open the question of a constitutional right to cross-examination: *Stout* did not determine if such a right exists. *Id.,* at 368.

Nor did the Supreme Court resolve the issue in *Detention of Coe,* 175 Wn.2d 482, 509, 286 P.3d 29 (2012). There, the court found no right to cross-examine where the victim's statements were not admitted as substantive evidence. *Id.,* at 509-512. In *Coe,* the substance of each victim's

statement was "admitted only to show the underlying basis for Dr. Phenix's opinion." *Id.* The court pointed out that this limitation "favors the State under the second [*Mathews*] prong," and "reduces the probable value of requiring an opportunity for confrontation." *Id.,* at 511. Furthermore, the transcripts of the victims' prior statements were *not* offered in *Coe*; instead, Dr. Phenix "testified that she relied on the reports of [the victims], which included the victims' statements." *Id.,* at 509.

Here, Del La Torre's statements were admitted as substantive evidence, and the transcript of her 1996 testimony was read to the jury. RP 620-627. The court imposed no limitation on the evidence, and jurors were permitted to consider it for any purpose. RP 620-627. Mr. Canty's case thus presents issues left unresolved by *Stout* and *Coe.*

2. Under *Mathews,* Mr. Canty had a due process right to cross-examine Del La Torre on issues relating to his civil commitment before her statements could be admitted as substantive evidence.

The federal and state constitutions prohibit the deprivation of liberty or property without due process of law. U.S. Const. Amend. XIV; Wash. Const. art. I §3. Civil commitment for any purpose is a significant deprivation of liberty that requires due process protections. *Addington,* 441 U.S. at 425; *In re Young,* 122 Wn.2d 1, 26, 857 P.2d 989 (1993). Cross-examination is integral to due process: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly,* 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Courts determine the constitutional requirements of procedural due process by balancing "(1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures." *Stout,* 159 Wn.2d at 370 (citing *Mathews,* 424 U.S. at 335). The *Mathews* balance weighs in favor of cross-examination when a witness provides substantive evidence supporting commitment.

Factor one. The Supreme Court has already determined that the first *Mathews* factor "weighs heavily in [Mr. Canty's] favor."[14] *Id*

Factor two. The second factor—the risk of error absent a right to cross-examine, and the value of allowing cross-examination—also weighs heavily in a patient's favor. Cross-examination has been characterized as "the greatest legal engine ever invented for the discovery of truth." *California v. Green,* 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (*Green* I) (internal quotation marks and citation omitted).

Where hearsay is admitted as substantive evidence without an opportunity for cross-examination, the risk of erroneous deprivation is elevated. The absence of cross-examination in this proceeding differentiates Mr. Canty's case from *Stout.* The admission of Del La Torre's statements as substantive evidence distinguishes his case from *Coe.*

[14] The possible length of the deprivation is an important consideration under *Mathews. Gourley v. Gourley*, 158 Wn.2d 460, 468, 145 P.3d 1185 (2006) (plurality); *Mathews,* 424 U.S. at 341-342. Because civil commitment is indefinite, it involves a "massive" deprivation of liberty deserving of the highest protection. *State v. McCuistion*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012) (addressing substantive due process).

The jury was permitted to rely on Del La Torre's 1996 statements, given at a preliminary hearing in California, even though Mr. Canty had no opportunity to pose questions relating to the basis for his impending civil commitment. Furthermore, Dr. North relied on Del La Torre's account in reaching his opinion. Jurors could not meaningfully evaluate his testimony without determining the truth of her prior statements.

Although Mr. Canty retains the "comprehensive set of rights," outlined in *Stout* and *Coe*, those rights do not provide adequate protection here, because cross-examination has not been "achieved" in this proceeding and because the out-of-court statements were admitted as substantive evidence.[15] *Stout*, 159 Wn.2d at 368 n. 9 (emphasis omitted), 370; *Coe*, 175 Wn.2d at 509-511.

Factor three. The third *Mathews* factor also weighs heavily in favor of cross-examination when statements are admitted as substantive evidence. The State has a "'compelling interest both in treating sex predators and protecting society from their actions.'" *In re Det. of Morgan*, 180 Wn.2d 312, 322, 330 P.3d 774 (2014) (quoting *Young*, 122 Wn.2d at 26.)

These compelling state interests are premised on an accurate identification of those who need treatment and pose a risk to the community. Thus, the State's interest is not to avoid cross-examination at all costs; rather it is to achieve community protection and to treat patients when civil

[15] The issues in a commitment trial are complex, and the Legislature has already signaled its sensitivity to the risk of erroneous deprivation of liberty by providing the right to a jury trial, a unanimous verdict, and proof beyond a reasonable doubt. RCW 71.09.060 (1); *Young*, 122 Wn.2d at 48.

commitment is warranted. These interests thus align with the patient's: cross-examination—the "greatest legal engine" for discovering the truth—ensures that commitment is limited to those patients who are mentally ill and currently dangerous. *Green* I, 399 U.S. at 158.

The State can have no interest in wrongful commitment. Ensuring cross-examination of witnesses who provide substantive evidence supports the State's interests in protecting the community and providing treatment. *Morgan*, 180 Wn.2d at 322.

B. The admission of testimony from a 1996 California preliminary hearing violated Mr. Canty's due process right to cross-examine adverse witnesses.

Hearsay is generally inadmissible. ER 802. Under limited circumstances, hearsay may be admitted as substantive evidence when the declarant is "unavailable." ER 804. A person is unavailable as a witness when, *inter alia*, she "[i]s absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance…by process or other reasonable means." ER 804(a)(5).

When a witness is legally unavailable, testimony is admissible if certain conditions are met. ER 804 (b)(1). Prior testimony is only admissible "if the party against whom the testimony is now offered…had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." ER 804(b)(1).

Here, the evidence should have been excluded because the State failed to prove the declarant's unavailability and the similarity of Mr.

Canty's "motive to develop the [former] testimony." ER 804 (b)(1).

Unavailability. Before a witness can be declared unavailable, the State must show reasonable efforts to secure their attendance at trial. ER 804 (a); *see, e.g., United States v. Yida*, 498 F.3d 945, 952 (9th Cir. 2007). [16] Washington courts have held that the confrontation clause imposes a higher "good faith" burden upon the government than that imposed by the rule. *State v. Beadle*, 173 Wn.2d 97, 115, 265 P.3d 863 (2011). Federal courts consider the constitutional standard "identical to the unavailability inquiry" under the rule. *United States v. Tirado-Tirado*, 563 F.3d 117, 123 n. 4 (5th Cir. 2009). Under any standard, the minimal efforts here failed to meet the State's burden.

The State tasked an investigator named Dwain Sparrowk with locating Del La Torre. He understood her name to be "Zenaida Banuelos (de la Torre)." CP 92. In Del la Torre's testimony (given through an interpreter), she explicitly provided two different spellings – "Banuelos" and "Banulos." CP 97. The State's attorney spelled her name "Del La Torre," and this spelling was used in the court's Order on Motions in Limine. CP 334, 362. The court reporter at the California hearing transcribed her alternate last name as "de la Torre," but no spelling was given. CP 97.[17]

To locate Banuelos/Banulos/de la Torre/Del La Torre, the State's investigator "sent correspondence" to her "last known Post Office Box

[16] It is "proper to look at federal law" where the federal rule of evidence is identical to the Washington rule. *State v. DeSantiago*, 149 Wn.2d 402, 414, 68 P.3d 1065 (2003).

[17] This was the spelling used in the California Information. CP 242-244.

address" and to "Rudy Banuelos possibly related and named as a witness on the 1996 police report." CP 91-92. Sparrowk did not say how he found this address, did not claim to search for the related physical address, nor did he explain how he attempted to locate "Rudy Banuelos." CP 91-92. The State provided no details regarding the "correspondence," nor did it say if or how Sparrowk instructed the recipient(s) to contact him or whether the letters were actually delivered. Social media searches were similar: the investigator provided no details on how he conducted these searches, what databases he consulted, or how he spelled her name in conducting each search. CP 91-92.

The evidence provided does not show an attempt to secure Del La Torre's attendance "by process or other reasonable means." ER 804 (a). Furthermore, the State should have provided additional information to support their claim of having made efforts to secure her attendance.

By any measure, the State's efforts were inadequate. It failed to show Del La Torre's unavailability. The former testimony should not have been admitted as substantive evidence. ER 802; ER 804; *State v. Aaron*, 49 Wn.App. 735, 741, 745 P.2d 1316 (1987).

Motive to develop the testimony. Former testimony is only admissible as substantive evidence if the opponent had "similar motive to develop the testimony" during a prior opportunity for examination. ER 804 (b)(1). An opportunity to cross examine is insufficient otherwise. Differences in purpose or in the burden of proof may be significant. *United*

States v. DiNapoli, 8 F.3d 909, 913 (2d Cir. 1993).[18]

Mr. Canty's motive to cross-examine at the preliminary hearing in California were not sufficiently similar to his motivation at this civil commitment proceeding. A preliminary hearing "is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Barber v. Page*, 390 U.S. 719, 725, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

The 1996 preliminary hearing had no issues in common with Mr. Canty's civil commitment trial; each hearing had its own purpose, different intensities of interest, and different burdens of proof. *DiNapoli*, 8 F.3d at 913; *United States v. Bartelho*, 129 F.3d 663, 672 (1st Cir. 1997). Mr. Canty's undoubtedly mixed motivations at the preliminary hearing (obtaining discovery, avoiding a trial) differ substantially from his motivation in developing Del La Torre's testimony at his civil commitment trial twenty years later.

The trial court did not scrutinize "the factual and procedural context of each proceeding to determine both the issue in dispute and the intensity of interest in developing the particular issue." *Id.* The evidence should not have been admitted as substantive evidence. *Id.* The trial court violated Mr. Canty's due process right to cross examine adverse witnesses. Its admission as substantive evidence requires reversal.

[18] See also *Bartelho*, 129 F.3d at 672; *DiNapoli*, 8 F.3d at 913; *United States v. Salerno*, 505 U.S. 317, 325, 112 S. Ct. 2503, 120 L. Ed. 2d 255 (1992); *United States v. Carson*, 455 F.3d 336, 380 (D.C. Cir. 2006).

C. The error was not harmless beyond a reasonable doubt.

When an evidentiary ruling violates constitutional rights, the State bears the burden of showing beyond a reasonable doubt that the error is harmless. *State v. DeLeon*, 185 Wn.2d 478, 487–88, 374 P.3d 95 (2016). The court must find "beyond a reasonable doubt—that *any reasonable jury* would have reached the same result, despite the error." *Id.* (emphasis in original; internal quotation marks and citation omitted).

The State cannot make this showing here. As the State noted:

> this is a pretty close case for an initial commitment in an SVP matter. And I mention that because I think this is a case where the jury is going to have to dig deep into the opinions and the evidence that they're presented with in order to make a decision in this case and it's hard to know what piece or pieces are going to tip a particular juror in one direction or the other.
> RP 5.

The state's attorney went on to describe how a single piece of evidence[19] could, by itself, sway jurors. RP 10.

The non-testifying declarant's prior statements provided graphic details of the offense from the victim's point of view. Mr. Canty's description of the offense in his deposition could not have had the same impact on the jury.[20] The victim's prior statements were not "cumulative of Canty's untainted deposition testimony about this sexual assault." OP 14. Mr. Canty had no opportunity to ask the declarant questions that pertained to his civil commitment trial. Under these circumstances, the State cannot

[19] Which was ultimately excluded by the judge. RP 45-49; CP 375-376.

[20] Although the State relied on a different incident as the predicate offense, it did not offer victim testimony or a comparable level of detail regarding that charge.

prove beyond a reasonable doubt, that the error here was harmless.

D. The Supreme Court should accept review and hold that a patient facing civil commitment has a due process right to cross examine adverse witnesses who provide substantive evidence. This case presents significant issues of constitutional law that are of substantial public interest. RAP 13.4(b)(3) and (4).

The Supreme Court has yet to determine if a person facing civil commitment has the right to cross examine adverse witnesses whose statements are admitted as substantive evidence. *Stout*, 159 Wn.2d at 368; *Coe*, 175 Wn.2d at 509-512. The trial court's admission of the contested evidence denied Mr. Canty's due process. *DeLeon*, 185 Wn.2d at 487–488.

CONCLUSION

For the foregoing reasons, the Supreme Court should accept review, reverse the commitment order, and remand for dismissal. In the alternative, the case should be set for a new trial. Each of the issues raised case presents a significant constitutional issue of substantial public interest. RAP 13.4(b)(3) and (4).

Respectfully submitted March 21, 2019.

BACKLUND AND MISTRY

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Amended Petition for Review, postage pre-paid, to:

Michael Canty
McNeil Special Commitment Center
PO Box 88600
Steilacoom, WA 98388

and I sent an electronic copy to:

Office of the Attorney General
crjsvpef@atg.wa.gov
kellyp@atg.wa.gov

through the Court's online filing system, with the permission of the recipient(s).

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 21, 2019.

_____

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

Court of Appeals Unpublished Opinion, filed on February 13, 2019.

Filed
Washington State
Court of Appeals
Division Two

February 13, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Detention of MICHAEL CANTY, Respondent.	No. 50573-8-II UNPUBLISHED OPINION

JOHANSON, J. — Michael James Canty appeals from a sexually violent predator (SVP) civil commitment order following a jury verdict. Canty argues that (1) the trial court committed constitutional error by admitting a witness's prior testimony, (2) the trial court erred by refusing to instruct the jury on the possibility of a recent overt act (ROA) petition and by declining to use the term "criteria for civil commitment" instead of "sexually violent predator" in the jury instructions, (3) there was insufficient evidence that he was likely to engage in predatory acts of sexual violence if released, and (4) one jury instruction was an improper judicial comment on the evidence. Canty's arguments fail. Accordingly, we affirm.

FACTS

On August 2, 2016, the State filed a petition alleging that Canty was an SVP. The petition alleged that Canty had prior convictions for sexually violent offenses,[1] that he had a personality disorder causing him serious difficulty in controlling his behavior, and that it was likely Canty would commit future predatory acts of sexual violence as a result.

I. MOTIONS IN LIMINE

A. WITNESS'S UNAVAILABILITY AND PRIOR TESTIMONY

The State moved in limine to admit the prior sworn testimony of ZB[2] from a preliminary hearing in a California case leading to Canty's prior convictions in 1997 for sexual battery, attempted kidnapping, and false imprisonment. The State argued that ZB was unavailable under ER 804 to testify at the SVP proceedings. The State's investigator, Dwain Sparrowk, declared that he tried to locate ZB for trial by (1) sending correspondence to her last known address, (2) sending correspondence to a potential relative of ZB named as a witness in the police report for the 1996 attack, (3) using social media, and (4) using law enforcement databases. Sparrowk declared that he "exhausted all available resources," but was nevertheless unable to locate ZB. Clerk's Papers (CP) at 92. The State also argued that there is no right to cross-examine a witness in a civil SVP proceeding.

[1] The State also moved to add the 1997 California conviction for sexual battery to the SVP petition as a prior sexually violent offense. Canty objected to the proposed amendment. The trial court found the prior conviction for sexual battery in California comparable to the Washington offense of indecent liberties with forcible compulsion, but denied the motion as untimely.

[2] We refer to ZB by her initials because she is a sexual assault victim.

Canty objected to the admission of ZB's testimony, arguing that the State had not shown her unavailability. Canty also argued that the purpose of the 1996 preliminary hearing differed from the purpose of a civil commitment trial. He emphasized that he had no opportunity to cross-examine ZB on issues relating to the current civil commitment trial—specifically he did not cross-examine ZB on Canty's mental state while committing the 1996 offenses against her. However, Canty acknowledged "there might not be a right to confront the witness." 1 Report of Proceedings (RP) at 98-99. Canty also noted that the jury acquitted Canty of assault with the intent to rape ZB and convicted him of the lesser crime of sexual battery.

The trial court found that the State's effort to locate ZB was sufficient to establish her unavailability under ER 804. To determine admissibility of ZB's prior testimony under ER 804(b)(1), the trial court considered the types of proceedings involved, the nature of the testimony, and the fact that ZB gave the prior testimony under oath and subject to cross-examination. The trial court ruled that the former testimony was admissible.

B. Relevance of Recent Overt Acts

Canty moved in limine to allow testimony on the possibility of the State filing another petition against Canty if he were to commit ROAs after release and Canty proposed a jury instruction on ROAs. Canty argued that expert testimony on the relationship between a potential ROA petition and the experts' evaluation of Canty's risk of recidivism was relevant. The State objected, arguing that the proffered evidence would only be relevant if Canty testified that he knew that he could face another commitment proceeding if he committed a ROA upon release. The trial court granted the motion on the condition that Canty must first lay a foundation showing that he had knowledge of the potential for a ROA petition. Canty did not lay this foundation.

C. JURY INSTRUCTION – REPLACING "SEXUALLY VIOLENT PREDATOR" WITH "CRITERIA FOR CIVIL COMMITMENT"

Canty moved in limine to replace the term "'sexually violent predator'" with "'criteria for civil commitment'" throughout the jury instructions. 1 RP at 118. Canty argued that the term "'sexually violent predator'" was irrelevant to whether his alleged personality disorder causes him difficulty in controlling his behavior, leading to predatory acts of sexual violence. 1 RP at 119. Instead, Canty contended that the term was "emotionally charged" and prejudicial. 1 RP at 119. He relied on studies finding that jurors were more likely to commit a person if the trial court permitted use of the term "'sexually violent predator.'" 1 RP at 120.

The State objected, arguing that the term was relevant because the chapter the petition was filed under is titled "Sexually Violent Predator Law" and because the *Washington Practice: Washington Pattern Jury Instructions: Civil* (WPIs) use the term. 1 RP at 122. The State contended that no existing case law supported the motion. The State also noted that the jury would receive an instruction to decide the case on the evidence before them and not on their passions and prejudices.

The trial court denied the motion. It noted that the petition alleged that Canty was a sexually violent predator, that chapter 71.09 RCW defines the term, and that the WPIs use the term extensively. The trial court concluded that the studies Canty relied on did not provide a sufficient basis on which to grant the motion.

II. TRIAL TESTIMONY

A. EXPERT TESTIMONY

1. CHRISTOPHER NORTH'S EXPERT TESTIMONY

The State's expert, North, a licensed psychologist with a Ph.D. in clinical psychology, evaluated Canty in 2015. North diagnosed Canty with a personality disorder with antisocial and narcissistic features. North updated his 2015 evaluation of Canty after meeting with Canty in May 2017 and reached the same diagnosis. North opined that Canty's personality disorder causes him serious difficulty controlling his behavior and makes it likely he will engage in predatory acts of sexual violence if not confined in a secure facility. North mentioned "sexual assault" of a stranger as an example of a "new predatory sex offense" that Canty was likely to commit if released. 4 RP at 520-21. North relied on the following facts about Canty's prior conduct to support his opinion.

a. CANTY'S CONDUCT IN CALIFORNIA

In 1996, police arrested Canty for attempted murder in California. The victim of the attack rejected a sexual advance from Canty, and Canty stabbed the victim in the neck with a knife and threatened to kill him. Canty was not charged with a crime based on the incident because the victim did not want to pursue the matter.

Approximately one month after the attempted murder arrest, Canty attacked ZB in California. He saw ZB working in her yard, grabbed her hair, pushed her onto the ground, and rubbed his crotch. ZB believed Canty was going to rape her. She distracted Canty and was able to escape. ZB called the police and they arrested Canty. A jury convicted Canty of sexual battery,[3]

[3] Canty was charged with assault with intent to rape, but the jury acquitted Canty of that charge and instead found Canty guilty of the lesser included offense of sexual battery.

attempted kidnapping with sexual motivation, and false imprisonment. The trial court in the subject SVP proceeding admitted an abstract of the judgment and sentence on these prior convictions into evidence.

In 1998, while out on parole from the attack on ZB, Canty exposed his penis to a woman who had paid him to help her with chores around the house. Once Canty exposed his penis, the woman told Canty to leave, and he threatened to kill her in response. The woman called the police, but charges for the exposure were not filed. Instead, Canty returned to prison for a year because this uncharged conduct violated his parole terms.

In 1999, police arrested Canty for grabbing the buttocks of two 17-year-old girls in California. Canty was charged and arraigned on two counts of annoying a minor and two counts of sexual battery, but the prosecutor later dismissed the charges. Instead, Canty returned to prison for a year because this conduct violated his parole terms.

b. CANTY'S CONDUCT IN WASHINGTON

Canty moved to Vancouver shortly after his release from custody in California on July 25, 2001. On August 9, while walking the streets of Battle Ground, Canty came across a small, frail woman with muscular dystrophy smoking a cigarette. They spoke briefly. Shortly thereafter, Canty knocked on the woman's door, pushed his way into her apartment, and sexually assaulted her. The woman called the police, who arrested Canty shortly after he left the woman's apartment. A jury convicted Canty of indecent liberties with forcible compulsion, burglary with sexual motivation, and second degree robbery. He served a 15-year prison sentence on those convictions. The trial court in this SVP proceeding admitted a certified copy of the judgment and sentence on these convictions into evidence.

c. CANTY'S PRISON INFRACTIONS

Canty received 80 infractions while serving his prison sentences in California and Washington. Six of the infractions occurred between 2008 and 2011 while Canty was in the custody of Washington's Department of Corrections (DOC). The 6 infractions related to sexual misconduct, including indecent exposure and sexual harassment of correctional officers. Washington's DOC transferred Canty out of a sex offender treatment program and to a different prison because of his behavior toward a female staff member. Canty also received 3 infractions related to aggressive or violent conduct while in custody in Washington. While serving his sentences in California, Canty had 2 infractions for openly masturbating. During counseling for the 2 infractions, Canty said he could not help himself and that he masturbated "'10 times or more per day.'" 3 RP at 313. Additionally, while discussing possible civil commitment with a correctional counselor, Canty said he thought he was a danger to society.

2. AMY PHENIX'S EXPERT TESTIMONY

Canty's expert, Phenix, a licensed psychologist with a Ph.D. in clinical psychology interviewed Canty in 2017. Phenix diagnosed Canty with a personality disorder with antisocial and narcissistic features. However, Phenix's conclusions on the impact of Canty's personality disorder on his behavior differed from North's conclusions. Unlike North, Phenix did not believe that Canty's personality disorder caused him serious difficulty in controlling his sexually violent behavior. Phenix also did not believe that it was likely Canty would commit another sexually violent offense if released.

Phenix testified to some of the details of Canty's prior conduct, including that Canty "very impulsively jumped over a fence and sexually assaulted" ZB, leading to convictions for sexual battery, attempted kidnapping, and false imprisonment. 5 RP at 684.

Canty's counsel asked Phenix if Canty would be deterred from committing new sexually violent offenses due to the possibility of civil commitment under a new petition if Canty committed a ROA. The State objected, arguing that the question violated the trial court's ruling on the motion in limine covering testimony about ROA petitions because there was no evidence that Canty knew about the ROA petitions. Canty argued that the testimony was proper because Phenix would lay a foundation by testifying that someone advised Canty about ROA petitions. However, during voir dire, Phenix testified that she did not discuss ROA petitions with Canty, and the only information she had about the issue was that Canty's counsel told her that Canty was aware of ROA petitions. Therefore, the trial court ruled that there was an insufficient basis for Phenix to testify about the deterrent effect of a possible ROA petition on Canty.

B. Admission of Canty's Videotaped Deposition

Canty did not testify at trial. However, the State played a redacted and shortened version of the State's videotaped deposition of Canty for the jury. In the videotaped deposition, Canty admitted to attacking ZB and to the 2001 attack in Washington.

Canty discussed the following relevant details about his attack on ZB in the video. Canty saw ZB and approached her in her yard thinking that he "would just jump the fence and grab her and . . . sexually offend against her, grope her." CP at 336 (alteration in original). He had the idea to attack ZB because he "didn't have any respect for her as a human being," and he "felt [he] needed to meet [his] immediate need of arousal." CP at 336. Canty "grabbed her by the hair,

threw her to the ground and then got behind her on her back and rode her." CP at 336. ZB said no, but Canty did not stop. He "picked her up off the ground and walked her . . . four steps, and then she broke loose and ran to her home." CP at 336. Shortly thereafter, the police arrested Canty.

C. ZB'S PRIOR TESTIMONY IN THE CALIFORNIA PRELIMINARY HEARING

During the trial, Canty renewed his objections to admission of ZB's prior testimony from the 1996 preliminary hearing in California. The trial court orally ruled that ZB's testimony was admissible under ER 804(b)(1).

The State read portions of ZB's prior testimony from the 1996 preliminary hearing establishing the following relevant facts. ZB testified how she spelled her name, but that she also used a different last name. ZB was watering her garden one morning in 1996 when she saw Canty, a stranger to her, walking by. Canty grabbed her hair, pulled her backwards onto her knees, and covered her mouth with his hand. He straddled ZB from behind, and she could feel that his penis was hard as he pressed it against her back. Canty indicated that he did not want ZB to scream and then pulled her by her hair to a standing position. Canty grabbed and rubbed his crotch area, which ZB took to indicate that he wanted to have sexual relations. ZB feigned surprise at something and when Canty was distracted, she pushed him, ran into her house, and called the police. The police arrived about 10 minutes later and they subsequently had ZB identify Canty as the perpetrator. ZB also identified Canty in court during the 1996 preliminary hearing.

III. JURY INSTRUCTIONS

After the close of testimony, Canty noted that the jury instructions he proposed in limine, on replacing the term "sexually violent predator" with "criteria for civil commitment" and on the

possibility of a ROA petition, were no longer relevant given the trial court's rulings and the trial testimony. 6 RP at 817. As relevant here, Canty objected to the State's proposed instructions 4 and 8. And he took no exceptions to the jury instructions.

A. JURY INSTRUCTION NO. 4 – SVP ELEMENTS

As given, jury instruction number 4 stated,

> To establish that Michael Canty is [an SVP], the State must prove each of the following elements beyond a reasonable doubt:
> (1) That Michael Canty has been convicted of a crime of sexual violence, namely Indecent Liberties with Forcible Compulsion and/or Burglary in the First Degree with Sexual Motivation;
> (2) That Michael Canty suffers from a personality disorder which causes serious difficulty in controlling his sexually violent behavior; and
> (3) That this personality disorder makes Michael Canty likely to engage in predatory acts of sexual violence if not confined to a secure facility.

CP at 467. Canty did not object to the first element of jury instruction 4. Canty did object to the wording of the second and third elements, arguing that they should include language about *a mental abnormality* or personality disorder based on 6A WPI 365.10, at 410 (Supp. 2017). The trial court ruled that the evidence did not support inclusion of the mental abnormality language.

B. JURY INSTRUCTION NO. 8 – DEFINITION OF CRIMES OF SEXUAL VIOLENCE

The State's proposed jury instruction number 8 defined "'[s]exual violence' or 'harm of a sexually violent nature'" to include 11 crimes[4] and attempts to commit those crimes. CP at 403. Canty objected, first arguing that the instruction should include all enumerated crimes of sexual

[4] Three of the crimes were first degree rape, second degree rape by forcible compulsion, and indecent liberties by forcible compulsion. The other eight crimes were the following offenses if committed with sexual motivation: second degree murder, first degree assault, second degree assault, first degree kidnapping, second degree kidnapping, first degree burglary, residential burglary, and unlawful imprisonment.

violence, but subsequently arguing that it should only include crimes related to Canty's sexually violent offense convictions. The State objected to Canty's proposed alternative, arguing that it properly chose the 11 listed crimes because the note on the corresponding WPI said to include all potential sexually violent offenses that the evidence indicated Canty might commit if released.

The trial court ruled that the purpose of the jury instruction was to cover sexually violent crimes the person facing commitment was either charged with or convicted of and sexually violent crimes that person was "likely to commit in the future" if supported by the evidence. 7 RP Vol. 897. The trial court narrowed the definition of crimes of sexual violence to include only indecent liberties by forcible compulsion, first degree burglary with sexual motivation, residential burglary with sexual motivation, unlawful imprisonment with sexual motivation, and attempts to commit those 4 crimes. The trial court determined that North's testimony about the types of crimes and conduct that Canty is likely to commit if released provided a basis for the crimes listed in the instruction.

IV. CLOSING ARGUMENT, VERDICT, AND COMMITMENT

During closing argument, the State elected the following crimes as the crimes of sexual violence for which Canty was convicted under chapter 71.09 RCW: indecent liberties with forcible compulsion and first degree burglary with sexual motivation. The State argued that the certified judgment and sentence for the 2001 convictions and testimony from both experts proved that Canty had prior convictions for indecent liberties with forcible compulsion and first degree burglary with sexual motivation. A unanimous jury found beyond a reasonable doubt that Canty was a SVP. The trial court committed Canty to the Department of Social and Health Services' custody for

control, care, and treatment pending a change in his personality justifying his release. Canty appealed.

ANALYSIS

I. ADMISSION OF ZB'S PRELIMINARY HEARING TESTIMONY

Canty argues that the trial court committed constitutional error by admitting ZB's prior testimony from an unrelated 1996 matter. He contends that the admission amounted to a constitutional error because the State did not prove that ZB was unavailable or that Canty had a sufficiently similar motive to cross-examine her at the prior preliminary hearing. He argues that the alleged constitutional error was not harmless. These arguments fail.

A. LEGAL PRINCIPLES

Both the confrontation clause of the Sixth Amendment and ER 804(b)(1) bar the admission of previous testimony of an unavailable witness unless the defendant had a prior opportunity and similar motive to cross-examine the unavailable witness. *State v. Benn*, 161 Wn.2d 256, 265, 165 P.3d 1232 (2007); *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We review challenges alleging that the admission of prior testimony violates ER 804(b)(1) for an abuse of discretion. *Benn*, 161 Wn.2d at 265; *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

A hearsay declarant is considered unavailable if he or she is absent from the current proceedings and the proponent was not able to procure his or her attendance. ER 804(a)(5). Even if the hearsay declarant is outside the subpoena power of the court, the proponent of the previous testimony must make a good faith effort to secure the voluntary attendance of the witness to

demonstrate that he or she is unavailable. *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987).

If the declarant is unavailable, the proponent must also show that the opposing party had an opportunity and similar motive to develop the declarant's testimony during the prior proceeding. ER 804(b)(1). However, "'similar motive' does not mean 'identical motive.'" *State v. DeSantiago*, 149 Wn.2d 402, 414, 68 P.3d 1065 (2003) (internal quotation marks omitted) (quoting *United States v. Salerno*, 505 U.S. 317, 326, 112 S. Ct. 2503, 120 L. Ed. 2d 255 (1992) (Blackmun, J., concurring)). The proponent meets its burden if it shows that the opposing party had "some motive to discredit" the testimony in both proceedings. *DeSantiago*, 149 Wn.2d at 415.

B. HARMLESS ERROR

The State argues that any error was harmless because ZB's prior testimony was cumulative given the testimony of Canty and both experts on Canty's attack of ZB. Canty argues that the alleged constitutional error was not harmless because ZB's prior testimony "was the only evidence offered describing an offense that might qualify as a predatory act of sexual violence." Appellant's Opening Br. at 24-25. Canty also argues that ZB's account of the attack provided prejudicial details and that he could have undermined her account if given an opportunity to cross-examine her in the SVP proceeding. However, even if we assume without deciding that admission of ZB's prior testimony was constitutional error, we hold any error was harmless beyond a reasonable doubt.

1. HARMLESS ERROR STANDARD OF REVIEW

Canty argues that the constitutional harmless error standard applies, and the State must show that the error was harmless beyond a reasonable doubt. Even if the constitutional harmless error standard applies, the State satisfies its burden of proof.

Constitutional error is harmless error if the reviewing court is convinced beyond a reasonable doubt that the error did not contribute to the verdict. *Benn*, 161 Wn.2d at 266; *State v. Thomas*, 150 Wn.2d 821, 845, 83 P.3d 970 (2004); *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). For constitutional errors, the court reviewing whether the error was harmless beyond a reasonable doubt asks "whether any reasonable jury would have reached the same result in the absence of the tainted evidence." *Benn*, 161 Wn.2d at 266.

2. ADMISSION OF ZB'S PRIOR TESTIMONY IS HARMLESS

Here, the details of Canty's attack from ZB's prior testimony were already before the jury through other untainted evidence, namely Canty's videotaped deposition testimony and North's expert testimony. Additionally, Phenix gave expert testimony on some of the details of Canty's sexual assault of ZB. While the trial court admitted the experts' testimony for the limited purpose of explaining the basis for their opinions of whether Canty was a SVP, Canty's videotaped deposition testimony was admissible as substantive, untainted evidence. Because Canty's description of the event mirrored ZB's, Canty's arguments are unpersuasive that the prior testimony provided prejudicial details or could have been undermined given the opportunity for cross-examination in the SVP proceeding. We hold that ZB's prior testimony was cumulative of Canty's untainted, videotaped deposition testimony about this sexual assault.

Moreover, the State elected Canty's 2001 convictions for indecent liberties with forcible compulsion and first degree burglary with sexual motivation as the sexually violent offense prior convictions satisfying the first prong of the to-convict instruction. The State argued that untainted evidence, namely the certified judgment and sentence for Canty's 2001 convictions for indecent liberties with forcible compulsion and first degree burglary with sexual motivation, proved the existence of those sexually violent prior convictions. Canty also admitted to some of the details of those 2001 convictions in his videotaped deposition testimony.

Therefore, Canty's argument that ZB's prior testimony was the only evidence of a prior sexually violent crime fails. We hold that a reasonable jury would have reached the same verdict in the absence of ZB's prior testimony. Accordingly, even if we assume without deciding that the trial court committed constitutional error, we hold that the State proved that the error was harmless beyond a reasonable doubt.

II. JURY INSTRUCTIONS

Canty argues that the trial court committed constitutional error by refusing to instruct the jury on the possibility of a new petition if Canty committed a ROA after release. Under RCW 71.09.030(1)(e), the State can file an SVP petition if a person who has previously been convicted of a sexually violent offense and later is released from confinement commits a ROA. Canty argues that the trial court erred by refusing to instruct the jury regarding the ROA because without the instruction, he was unable to argue that he was less likely to reoffend because certain acts could subject him to future confinement. This argument fails.

A. STANDARD OF REVIEW

Canty argues that this court reviews jury instructions de novo to determine whether the relevant legal standard would be manifestly apparent to the average juror reading the challenged instruction.[5] We reject Canty's argument.

The standard of review for a trial court's decision whether to give a jury instruction depends on the reason for the decision. *State v. Condon*, 182 Wn.2d 307, 315, 343 P.3d 357 (2015). "If the decision was based on a factual determination, it is reviewed for abuse of discretion." *Condon*, 182 Wn.2d at 315-16. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *In re Det. of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). If, however, the trial court's determination of whether to give a jury instruction "was based on a legal conclusion, it is reviewed de novo." *Condon*, 182 Wn.2d at 316.

B. ROA INSTRUCTION

Here, the trial court granted Canty's motion to allow testimony on ROAs on the condition that Canty must first lay a foundation showing that he had knowledge of the potential for a ROA petition. However, Canty failed to lay the proper foundation at trial, so the trial court ruled that there was an insufficient basis for testimony regarding the deterrent effect of a possible ROA petition. Because the trial court's decision not to give Canty's proposed instruction was due to insufficient evidence to support it, we review this alleged error for abuse of discretion. *Condon*, 182 Wn.2d at 315.

[5] *In re Detention of Urlacher* held that procedural and substantive due process do not require application of the "manifestly apparent" standard to review of jury instructions in SVP civil commitment trials. ___ Wn. App. ___, 427 P.3d 662, 669 (2018).

First, the record reveals that Canty likely failed to preserve this alleged error. Canty acknowledged on the record that his proposed jury instruction on ROAs was not relevant given the trial court's rulings and the trial testimony. As such, it appears that Canty withdrew his proposed ROA instruction based on a lack of supporting evidence at trial. Further, Canty took no exception to the failure to give his proposed instruction.

Even assuming Canty has preserved his objection to the failure to give his proposed ROA instruction, his argument fails.

The State argues that the trial court properly declined to give Canty's proposed ROA instruction and for support it relies on *In re Detention of Taylor-Rose*, 199 Wn. App. 866, 401 P.3d 357 (2017), *review denied*, 189 Wn.2d 1039 (2018). Canty replies that he had no burden to produce evidence supporting his proposed ROA instruction because the possibility of a ROA petition is an undisputed matter of law. We agree with the State.

"A trial court does not abuse its discretion when it refuses to give an instruction that is not supported by the evidence." *Taylor-Rose*, 199 Wn. App. at 886. *Taylor-Rose* is dispositive of the issue presented here. 199 Wn. App. at 886. In *Taylor-Rose*, we held that a trial court did not abuse its discretion by refusing to instruct the jury that the State could bring a new petition if Taylor-Rose committed a ROA following his release. 199 Wn. App. at 870, 885-86. The court based its holding, in part, on the fact that "there was no evidence presented at trial that Taylor-Rose would be less likely to reoffend because of the potential for new SVP petitions." *Taylor-Rose*, 199 Wn. App. at 886.

Similarly, Canty did not present any evidence at trial demonstrating that the potential for a new petition based on ROAs committed after release would deter him from committing new

sexually violent offenses. Moreover, Canty acknowledged that his proposed jury instruction on ROAs was not relevant given the trial court's rulings and the trial testimony. We hold that the trial court did not abuse its discretion.

C. "CRITERIA FOR CIVIL COMMITMENT" VS. "SEXUALLY VIOLENT PREDATOR"

Next Canty argues that the trial court erred when it declined to use the phrase "'criteria for civil commitment'" instead of "'sexually violent predator'" throughout the instructions. Appellant's Opening Br. at 34. We disagree.

The trial court denied Canty's motion in limine to replace the term "'sexually violent predator'" with "'criteria for civil commitment'" throughout the jury instructions. CP at 365. The trial court based that decision on the fact that the term "sexually violent predator" appears in the State's petition, chapter 71.09 RCW, and the WPI and on its determination that the studies Canty relied on to show that the term was unduly prejudicial did not provide a sufficient basis on which to grant the motion. 1 RP at 123. Therefore, the trial court's decision on Canty's proposed modification to the jury instructions is based on a legal determination, namely whether there was a sufficient legal basis for the proposed instruction. As such, we review the alleged error de novo. *Condon*, 182 Wn.2d at 315.

The trial court denied Canty's motion to use the phrase "criteria for civil commitment" because it concluded that the studies Canty relied on did not provide a sufficient basis on which to exclude the phrase "sexually violent predator." CP at 365. In reaching this conclusion, the trial court noted that the State's petition alleged that Canty was a SVP, that RCW 71.09.020(18) defines the term "sexually violent predator," and that the WPIs use the term extensively. The trial court correctly relied on the statutory language. Accordingly, we hold that the trial court did not err.

III. SUFFICIENT EVIDENCE

Canty argues that when measured against the jury instructions given, there was insufficient evidence that he was likely to engage in predatory acts of sexual violence if released. We disagree.

A. LEGAL PRINCIPLES

We review whether evidence is sufficient to support civil commitment as a SVP under the criminal law sufficiency standard in the light most favorable to the State. *In re Det. of Thorell*, 149 Wn.2d 724, 744-45, 72 P.3d 708 (2003). Evidence is sufficient if a rational trier of fact could conclude that the State proved beyond a reasonable doubt that the person facing commitment was a SVP. *Thorell*, 149 Wn.2d at 744-45. We defer to the trier of fact on determinations of witness credibility and evidentiary weight. *In re Det. of Sease*, 149 Wn. App. 66, 80, 201 P.3d 1078 (2009).

To civilly commit a person as a SVP, the State must prove that the person facing commitment (1) "has been convicted of or charged with a crime of sexual violence," (2) he or she "suffers from a mental abnormality or personality disorder," and (3) the mental abnormality or personality disorder "makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18); *In re Det. of Belcher*, 189 Wn.2d 280, 283, 287, 399 P.3d 1179 (2017). These three criteria are explicitly set forth in the statutory definition of a SVP. RCW 71.09.020(18).

B. LIKELIHOOD OF PREDATORY ACTS OF SEXUAL VIOLENCE

Canty argues that there was insufficient evidence to meet the third prong of the elements instruction because neither expert opined that Canty was likely to commit one of the offenses listed in jury instruction number 8. Canty bases that argument on his contention that jury instruction number 8 is the "law of the case." Appellant's Opening Br. at 35; Appellant's Reply Br. at 20.

We reject Canty's argument and hold that sufficient evidence supports the third prong of the elements instruction.

The elements instruction, jury instruction number 4, largely tracked the statutory definition. The third prong of the instruction required the State to prove, beyond a reasonable doubt, that Canty's personality disorder made him "likely to engage in predatory acts of sexual violence if not confined to a secure facility." CP at 467.

Here, both experts testified that Canty had a personality disorder with antisocial and narcissistic features. Additionally, North opined that Canty's personality disorder makes it likely that he will engage in predatory acts of sexual violence if not confined in a secure facility. North mentioned "sexual assault" of a stranger as an example of a "new predatory sex offense" that Canty was likely to commit if released. 4 RP at 520-21. While Phenix testified that she did not believe it was likely Canty would commit another predatory act of sexual violence if released, the jury was free to discredit that testimony and credit North's testimony instead. We therefore hold that there was sufficient evidence that Canty's personality disorder made him likely to engage in predatory acts of sexual violence if not committed to a secure facility.

IV. JUDICIAL COMMENT ON THE EVIDENCE AND BURDEN SHIFTING

Canty argues that the trial court violated his constitutional due process rights under the Fourteenth Amendment and article IV, section 16 of the Washington State Constitution. The first element that the State must prove to show a person is an SVP is that the respondent "has been convicted of or charged with a crime of sexual violence. RCW 71.09.020(18). Canty contends that jury instruction number 4 amounted to a judicial comment on the evidence that improperly shifted the burden of proof on whether Canty had a prior conviction for a crime of violence. He

argues that the instruction erroneously instructed jurors that his prior convictions automatically qualified as crimes of sexual violence. We disagree.

"We review the instructions de novo to determine if the trial court has improperly commented on the evidence." *Taylor-Rose*, 199 Wn. App. at 874. "Article IV, section 16 of the Washington Constitution states, 'Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.'" *Taylor-Rose*, 199 Wn. App. at 874. "A trial court makes an improper comment on the evidence if it gives an instruction that (1) conveys to the jury his or her personal attitude on the merits of the case or (2) instructs the jury that matters of fact have been established as a matter of law." *Taylor-Rose*, 199 Wn. App. at 874. Jury instructions do not amount to a judicial comment on the evidence if they accurately state the law. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015); *Taylor-Rose*, 199 Wn. App. at 874.

Taylor-Rose is dispositive. 199 Wn. App. at 874-76. In *Taylor-Rose*, we rejected the same argument Canty makes here. 199 Wn. App. at 874, 876. We held that "[a] crime that is expressly listed in the definition of 'sexually violent offense' in RCW 71.09.020(17) necessarily also qualifies as a 'crime of sexual violence.'" *Taylor-Rose*, 199 Wn. App. at 876. Therefore, the challenged jury instruction in *Taylor-Rose*, which defined crimes of sexual violence to include a specific crime enumerated under RCW 71.09.020(17), accurately stated the law and did not constitute a judicial comment on the evidence. 199 Wn. App. at 874, 876. Because the jury instruction did not amount to an improper judicial comment, it also did not relieve the State of its burden of proof. *See Taylor-Rose*, 199 Wn. App. at 876.

Here, jury instruction number 4 required that the State prove beyond a reasonable doubt that Canty had a prior conviction for "a crime of sexual violence, namely Indecent Liberties with Forcible Compulsion and/or Burglary in the First Degree with Sexual Motivation." CP at 467. Both offenses enumerated under the first prong of the elements instruction, "indecent liberties by forcible compulsion" and "sexually motivated" "burglary in the first degree," are enumerated under RCW 71.09.020(17). Accordingly, under *Taylor-Rose*, jury instruction number 4 accurately stated the law, did not constitute a judicial comment on the evidence, and did not relieve the State of its burden of proof. 199 Wn. App. at 874-76. We hold that the trial court did not err in giving instruction number 4.

V. CONCLUSION

We reject Canty's arguments. We hold that any error in admitting ZB's prior testimony was harmless because it was cumulative of Canty's videotaped deposition testimony. We also hold that the trial court properly declined to give Canty's proposed ROA instruction because no evidence supported it. Further, we hold that there is no legal basis on which to exclude the term "sexually violent predator" from the jury instructions. We also hold that North's testimony was sufficient evidence that Canty had a personality disorder making it likely that he would commit a

predatory act of sexual violence if released. Finally, we hold that the trial court did not make an improper comment on the evidence. Accordingly, we affirm.

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.

JOHANSON, J.

We concur:

MAXA, C.J.

LEE, J.

BACKLUND & MISTRY

March 21, 2019 - 4:52 PM

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