

SUPREME COURT NO. 97102-1

NO. 77287-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Detention of Kyle Hammond,

STATE OF WASHINGTON,

Respondent,

v.

KYLE HAMMOND,

Petitioner.

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

The Honorable Catherine Shaffer, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Kyle Hammond appeals from his initial commitment as a sexually violent predator (SVP) under chapter 71.09 RCW. Hammond asks this Court to grant review of the court of appeals' unpublished decision in In re Detention of Hammond, No. 77287-2-1, filed March 25, 2019 (attached as an appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted under RAP 13.4(b)(4), where the court of appeals agreed a Kent police report was erroneously admitted as a basis for an expert's opinion, but held the error did not prejudice the outcome Hammond's trial, even though it bolstered the State's case, while undercutting Hammond's defense and credibility?

2. Is this Court's review warranted under RAP 13.4(b)(1), (3), and (4) to provide definitive guidance as to whether the trial court should give a jury instruction, when requested, that "more probably than not" means "more than 50 percent?"

3. Is this Court's review warranted under all four RAP 13.4(b) criteria to determine whether expert testimony is required to establish a qualifying mental abnormality or personality disorder, necessary for involuntary commitment under chapter 71.09 RCW?

C. STATEMENT OF THE CASE

Kyle Hammond grew up in deplorable conditions, in which he and his siblings suffered severe sexual and physical abuse. RP 523. Hammond's father raped him when he was only two years old and later forced Hammond to molest his younger sister. RP 528, 749-52, 1474-75. When he was 13 years old, Hammond sexually abused his younger brother, ultimately pleading guilty to first degree child molestation. RP 896-98. This is Hammond's qualifying sexually violent offense and required him to register as a sex offender. RP 1232; CP 1191.

Hammond's struggles did not end when he turned 18. Hammond struggled with homelessness and depression, attempting suicide more than once. RP 968, 988, 1044, 1496-97. Between the ages of 18 and 20, Hammond committed and was later convicted of indecent liberties without forcible compulsion, voyeurism, and failure to register as a sex offender. RP 333-35, 1046, 1359-61. While in sex offender treatment at Monroe, Hammond admitted to an unadjudicated knifepoint rape of a stranger, committed sometime after he turned 18. RP 368, 1052-53.

At Hammond's commitment trial, Dr. Harry Goldberg testified as the State's expert. RP 1216. Goldberg testified he diagnosed Hammond with antisocial personality disorder (ASPD) and hypersexuality, the combination of which he believed was a mental abnormality that caused Hammond

serious difficulty controlling his sexually violent behavior. RP 1232-33, 1298-99. Using the Static-99R actuarial tool, Goldberg estimated the likelihood Hammond would reoffend in five years was 42.2 percent. RP 1347-49. No 10-year estimate was available, but the next lowest score estimated a 48.5 percent likelihood of reoffense. RP 1347-49. These estimates, however, measure the likelihood of any sexual reoffense, not just sexually violent offenses, as required for commitment. RP 543.

Dr. Amy Phenix, who testifies almost exclusively for the State, testified as the defense expert. RP 482-83, 489-90. Phenix explained she took Hammond's case because she "thought there were some very defensible issues about this particular case." RP 490.

Phenix concluded Hammond did not meet the commitment criteria. RP 490-91. Like Goldberg, Phenix diagnosed Hammond with ASPD. RP 500-51. She did not, however, believe Hammond suffered from any mental abnormality or paraphilic disorder. RP 500-03. She explained a paraphilic disorder is characterized by intense, recurrent, sexually arousing fantasies that are abnormal or deviant and persist throughout a person's lifetime. RP 503-04. Hammond demonstrated no such pattern. RP 504-05.

Phenix disagreed with Goldberg's hypersexuality diagnosis, emphasizing it was rejected from the DSM-5.¹ RP 525-29. Phenix attributed Hammond's early sexual behavior and only qualifying sexually violent offense—first degree child molestation when he was 13—to being sexualized from a very young age by his father. RP 523-24, 528. Beyond that, Phenix explained, Hammond was a typical teenage male with a high libido, who also acted in antisocial ways. RP 529. She emphasized Hammond exhibited no signs of hypersexuality whatsoever during his nine-year incarceration. RP 529-31.

The jury found the State proved beyond a reasonable doubt that Hammond is an SVP. CP 1220. The jury unanimously agreed Hammond has a qualifying personality disorder but could not reach a unanimous agreement as to whether he has a qualifying mental abnormality. CP 1218-19. Hammond appealed his committed, raising three issues, and the court of appeals affirmed. Opinion, 16.

¹ AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5TH ED., DSM-5 (2013).

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. ERRONEOUS ADMISSION OF THE KENT POLICE REPORT PREJUDICED HAMMOND'S TRIAL AND WARRANTS THIS COURT'S REVIEW.

Police reports are generally inadmissible hearsay unless an exception applies. In re Det. of Coe, 175 Wn.2d 482, 505, 286 P.3d 29 (2012). On appeal, Hammond challenged the trial court's admission of testimony regarding a Kent police report, from around the time of Hammond's unadjudicated rape, as a basis for Dr. Goldberg's opinion under ER 703 and ER 705. Br. of Appellant, 30-47. ER 703 is limited to the facts or data "in the particular case upon which an expert bases an opinion or inference." See also Wash. Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 689-90, 724 P.2d 997 (1986) (holding "unrelied upon" hearsay evidence is inadmissible under ER 703 and ER 705); State v. Hamilton, 196 Wn. App. 461, 476, 383 P.3d 1062 (2016), review denied, 187 Wn.2d 1026 (2017) (same).

On direct-examination, Goldberg explained he "review[ed]" the report, describing the similarities and differences between the rape described in the police report and Hammond's admitted rape. RP 1303-06. Goldberg emphasized, however, that he could not determine with any level of certainty that the report described Hammond's unadjudicated rape. RP 1307. He therefore opined that the police report did not change his ultimate opinion that Hammond had a qualifying mental abnormality or personality disorder.

RP 1307-08. On cross-examination, Goldberg reiterated the Kent police report “not part of [his] opinion in any of [his] court reports.” RP 1489.

The court of appeals agreed the trial court “abused its discretion by admitting inadmissible hearsay.” Opinion, 6-7. The court reasoned, “[b]ecause Dr. Goldberg could not rely on the report for information about Hammond’s admitted rape and the report’s accuracy had no bearing on his opinions, the State failed to establish Dr. Goldberg based his opinions on it.” Opinion, 6. The court therefore held ER 703 was “not an appropriate hearsay exception,” as it requires the expert actually rely on the hearsay evidence in forming his or her opinion. Opinion, 6-7.

But the court of appeals did not reverse Hammond’s commitment, holding the evidentiary error was harmless. Opinion, 7-8. The court acknowledged Goldberg’s harmful testimony that, if the police report described Hammond’s admitted rape, “then it showed Hammond had a ‘pervasive’ ‘desire for nonconsensual sex’ because the date of the police report was within three weeks of him taking indecent liberties with a stranger.” Opinion, 8 (quoting RP 1307); see also Br. of Appellant, 44. The court further acknowledged the State emphasized the Kent police report heavily in closing argument, contending it showed Hammond was aroused by nonconsensual sex. Opinion, 8 (citing RP 2085-86); see also Br. of Appellant, 45-46.

The court of appeals nevertheless concluded Hammond failed to show prejudice “[b]ecause the jury learned the harsh details of Hammond’s admitted rape from his own statements” and undermined Hammond’s credibility in other ways. Opinion, 9.

The court’s decision on this point warrants review under RAP 13.4(b)(4) as a substantial issue of public interest. Hammond demonstrated the Kent police report and the State’s emphasis on it in closing significantly undermined his credibility. Br. of Appellant, 43-47. Hammond’s credibility was critical to his defense, given his testimony that he had a zero percent chance of reoffending. RP 967-68. Dr. Phenix’s expert testimony also undercut the State’s case, calling into doubt Dr. Goldberg’s hypersexuality diagnosis. RP 523-31. The jury could not unanimously agree that Hammond suffered from a qualifying mental abnormality, despite Dr. Goldberg’s testimony to the contrary. CP 1218-19.

Under the circumstances, the clear evidentiary error was not harmless, where it allowed the State to prop up its case and undercut Hammond’s defense. The public has a vested interest in fair outcomes of civil commitment trials. This Court should grant review and reverse the court of appeals.

2. THIS COURT'S REVIEW IS WARRANTED TO DECIDE WHETHER AN INSTRUCTION SHOULD BE GIVEN, WHEN REQUESTED, THAT "MORE PROBABLY THAN NOT" MEANS "MORE THAN 50 PERCENT."

Due process requires that jury instructions "inform the jury of the applicable law." State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010). "Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). However, instructions "must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)).

Due process also requires that, before indefinitely committing a person to a secure facility, a jury must find beyond a reasonable doubt that he is both mentally ill and presently dangerous. In re Det. of Leck, 180 Wn. App. 492, 508, 334 P.3d 1109 (2014). The State must therefore prove the individual has a mental abnormality or personality disorder that makes him "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” is statutorily defined as “the person more probably than not will engage in such acts.” RCW 71.09.020(7).

At trial, the defense proposed a modified version of the pattern instruction, WPI 365.14,² to include the following emphasized language:

“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 in this proceeding.

“More probably than not” means that there is more than a 50% likelihood that the person will engage in such acts.

In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue. In considering placement conditions or voluntary treatment options, however, you may consider only placement conditions or voluntary treatment options that would exist if the respondent is unconditionally released from detention in this proceeding.

CP 1224 (emphasis added).

The proposed addition was based on In re Detention of Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001), overruled on other grounds In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003). CP 1224. This Court in Brooks emphasized, “[a]s set out in the statute, the fact to be determined is not whether the defendant will reoffend, but whether the probability of the

² 6A WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CIVIL 365.10 (6th ed. 2017) (WPI).

defendant's reoffending exceeds 50 percent." 145 Wn.2d at 298; id. at 295 (noting "more likely than not, that is, more than 50 percent"). This Court reiterated in In re Detention of Post, 170 Wn.2d 302, 310, 241 P.3d 1234 (2010), that the element "is a compound determination that requires finding both causation (i.e., the abnormality or disorder causes the likelihood of future acts), and that 'the probability of the defendant's reoffending exceeds 50 percent.'" (citation omitted) (quoting Brooks, 145 Wn.2d at 298)).

The trial court nevertheless refused to give Hammond's proposed instruction, noting, "I'm really, really loath to put in language that's not in the WPIs, even if it shows up in the case law." RP 435-46; see also RP 779-80; CP 1196 (final instruction). The court explained it would not give the instruction unless the defense "can give me some more authority that would tell me than an appellate court would actually want jurors to get the over 50 percent language in this instruction." RP 436. The court also expressed concern that the modified instruction would "confuse the standard of proof with statistics." RP 439. The court ultimately concluded, "I'm not happy with the 50 percent language," believing "it's actually inaccurate in context." RP 2044.

On appeal, Hammond argued the trial court erred as a matter of both law and fact in refusing his modified WPI 365.14 instruction including the "more than 50% likelihood" language taken from Brooks and Post. Br. of

Appellant, 51-52. The instruction was both a correct statement of the law, contrary to the trial court's assessment, and it was supported by Dr. Goldberg's and Dr. Phenix's testimony. Br. of Appellant, 51-52.

The court of appeals rejected Hammond's argument, applying only an abuse of discretion standard, contrary to this Court's case law and warranting review under RAP 13.4(b)(1).³ Opinion, 12; Br. of Appellant, 49 (discussing appropriate standard of review); Reply Br., 7-8 (same). The court of appeals reasoned, "[n]either the civil commitment statute nor the case law require Hammond's proposed language any more than they prohibit it." Opinion, 11. The court further concluded the jury was correctly instructed on the applicable law and Hammond was still able to argue his theory of the case. Opinion, 11.

The question presented in Hammond's case is one likely to recur: Should the trial court instruct the jury, when requested, that "more probably than not" means "more than 50 percent?" The trial court itself wondered whether "an appellate court would actually want jurors to get the over 50 percent language in this instruction," demonstrating the need for review. RP 436. Yes, an individual facing involuntary commitment under chapter 71.09

³ State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015) ("The standard of review applicable to jury instructions depends on the trial court decision under review. If the decision was based on a factual determination, it is reviewed for abuse of discretion. If it was based on a legal conclusion, it is reviewed de novo." (citations omitted)).

RCW may still be able to argue his case, but the question will remain without definitive guidance from this Court. And, Hammond's case is a good one to address the issue, where the estimated likelihood of reoffense neared 50 percent, making the instruction critical to Hammond's defense. Br. of Appellant, 52-58 (discussing why the lack of instruction was harmful to Hammond's defense).

Given the due process concerns at issue, as well as the public's interest in fair chapter 71.09 RCW proceedings, this Court's review is warranted under both RAP 13.4(b)(3) and (4).

3. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER EXPERT TESTIMONY MUST ESTABLISH A QUALIFYING MENTAL ABNORMALITY OR PERSONAL DISORDER.

The State must prove beyond a reasonable doubt that the respondent is a "sexually violent predator." RCW 71.09.060(1). The "to commit" instruction in Hammond's case required the jury to unanimously agree on three elements, consistent with the pattern instruction and the law:

(1) That Kyle Hammond has been convicted of a crime of sexual violence, namely Child Molestation in the First Degree;

(2) (a) That Kyle Hammond suffers from a mental abnormality which causes serious difficulty in controlling his sexually violent behavior, OR

(b) That Kyle Hammond suffers from a personality disorder which causes serious difficulty in controlling his sexually violent behavior; and

(3) That this mental abnormality or personality disorder makes Kyle Hammond likely to engage in predatory acts of sexual violence if not confined in a secure facility.

CP 1191-92; RCW 71.09.020(18), .060(1); Post, 170 Wn.2d at 309-10.

Mental abnormality and personality disorder are alternative means of establishing the mental illness element in SVP cases. In re Det. of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006). The State need not prove both a mental abnormality and a personality disorder. In re of Det. of Monroe, 198 Wn. App. 196, 202, 392 P.3d 1088 (2017). But, where the jury is instructed on both means, “there must be substantial evidence showing the presence of the mental abnormality and personality disorder and that each one alone makes re-offense likely.” Id. at 203 (emphasis added).

Hammond argued on appeal that insufficient evidence supported the jury’s verdict that he suffers from a qualifying personality disorder. Br. of Appellant, 19-29. As discussed, Hammond’s jury could not unanimously agree that he suffers from a qualifying mental abnormality—unanimously agreeing only that he suffers from a personality disorder. CP 1218-19. Sufficient evidence must therefore support the jury’s finding that Hammond has a qualifying personality disorder. Monroe, 198 Wn. App. at 203.

Goldberg testified the combination of Hammond's ASPD and hypersexuality constituted a mental abnormality that predisposes him to commit acts of sexual violence: "So, the combination of the two, where you have an individual who's antisocial, who is not—he was impulsive, irresponsible, callous, has this really strong sexual drive which he cannot gratify, those two in combination, in my opinion, were the driving forces between these—for these crimes." RP 1299. Goldberg opined Hammond's mental abnormality "impair[s] his emotional and volitional control," explaining that, "[w]hen Mr. Hammond needs to satisfy his sexual urges, he's unconcerned about the negative impact it would have on his potential victim." RP 1300.

Goldberg also diagnosed Hammond with a personality disorder, ASPD, but not a *qualifying* disorder. Goldberg emphasized "just the antisocial personality for Mr. Hammond would not necessarily cause him to act out sexually." RP 1299. Later, on cross-examination, Goldberg explained he sometimes diagnoses ASPD as a qualifying disorder, but did not do so in this case, instead diagnosing Hammond with a mental abnormality based on the combination of ASPD and hypersexuality. RP 1456. In other words, Hammond suffers from a mental abnormality but not a personality disorder that makes him likely to commit acts of sexual

violence. Goldberg believed Hammond's ASPD predisposes him to commit crimes, in general, but not sexually violent crimes. RP 1299.

Phenix did not diagnose Hammond with a mental abnormality, but did diagnose him with personality disorder. RP 500-01. But, like Goldberg, Phenix did not believe ASPD made Hammond more likely than not to commit acts of sexual violence in the future. RP 583-84. Again, ASPD made Hammond more likely to engage in general criminality, but not sexually violent crimes.

Expert testimony accordingly failed to establish that Hammond suffers from a qualifying personality disorder. Hammond argued on appeal that this failure of proof necessitated reversal. Essentially, Hammond contended, expert testimony is required to establish a qualifying mental abnormality or personality disorder—the jury cannot invent its own diagnosis. Br. of Appellant, 23-27.

RCW 71.09.020(9) specifies “[p]urported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.” The court of appeals has held that determining whether a particular person has a mental abnormality “is based upon the complicated science of human psychology and is beyond the ken of the average juror.” In re Det. of Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006). This Court has likewise held “[m]edical facts in particular must be proven by

expert testimony unless they are observable by a layperson's senses and describable without medical training." Harris v. Robert C. Groth, M.D., Inc., 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (internal quotation marks and brackets omitted); accord Berger v. Sonneland, 144 Wn.2d 91, 110, 26 P.3d 257 (2001).

The court of appeals correctly summarized Hammond's argument:

The core of Hammond's sufficiency argument is that "[j]uries are not permitted to fashion their own diagnosis in SVP cases—expert testimony is required." Hammond contends the jury took an unpermitted step because neither expert specifically testified he had a qualifying 'personality disorder,' only Dr. Goldberg testified Hammond had a qualifying mental abnormality, and the jury found Hammond had a qualifying personality disorder but not a mental abnormality.

Opinion, 12 (footnotes omitted).

But the court disagreed, holding experts may opine on ultimate legal issues, but those issues must be decided by the trier of fact. Opinion, 12. The court concluded, "[g]iven Dr. Goldberg's clinical diagnosis, Hammond's testimony, and the uncontested actuarial data, a rational factfinder could conclude beyond a reasonable doubt that Hammond has a statutory 'personality disorder' that makes him more likely to engage in predatory acts of sexual violence." Opinion, 16. The court, like Hammond's jury, essentially invented its own diagnosis that Hammond suffered from a qualifying personality disorder.

This Court's guidance is needed as to whether, in chapter 71.09 RCW commitment trials, the State must establish a qualifying mental abnormality or personality disorder through expert testimony, or whether the jury can fashion its own diagnosis. Given prior decisions from this Court and the court of appeals establishing medical testimony is necessary under such circumstances, this case meets the RAP 13.4(b)(1) and (2) criteria. Sufficiency of the evidence almost implicates constitutional concerns under RAP 13.4(b)(3), as well as issues of public importance and public confidence in civil commitment trials under RAP 13.4(b)(4).

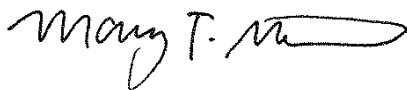
E. CONCLUSION

For the reasons discussed above, this Court should grant review, reverse the court of appeals, and remand for a new commitment trial.

DATED this 17th day of April, 2019.

Respectfully submitted,

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Appendix

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

In the Matter of the Detention of)	No. 77287-2-I
)	
)	
KYLE HAMMOND,)	UNPUBLISHED OPINION
)	
Respondent,)	FILED: March 25, 2019
_____)	

VERELLEN, J. — Hearsay that does not form the basis of an expert witness’s opinion may not be admitted under ER 703. If an expert has no confidence that an otherwise inadmissible police report has anything to do with a crime admitted by a person who is the subject of a sexually violent predator (SVP) petition and the expert’s opinion is the same with or without the police report, the report is not a basis for the expert’s opinion for purposes of ER 703. But the improper admission of hearsay is not reversible error where, within reasonable probabilities, the outcome of the trial was not impacted. Kyle Hammond fails to establish that the improper admission of a police report impacted the outcome of his SVP trial.

Hammond also fails to establish that the refusal to give a clarifying instruction that “more probably than not” means “more than a 50 percent likelihood” precluded him from arguing his theory of the case under legally accurate instructions given by the trial court.

And sufficient evidence supports the jury verdict that Hammond is an SVP because his admissions are consistent with expert testimony connecting the manifestations of his antisocial personality disorder (ASPD), his dysfunctional coping skills, and his hypersexuality.

Therefore, we affirm.

FACTS

Hammond grew up in “deplorable conditions” in which he and his siblings suffered “severe sexual abuse [and] physical abuse.”¹ His father raped him when he was two. When Hammond was 10, his father encouraged him to have sex with his nine-year-old half-sister. Around that time, Hammond had his first arrest and conviction for breaking a teacher’s wrist. When Hammond was 13, he molested his brother and sister. At 14, he was arrested for first degree child molestation, pleaded guilty, and registered as a sex offender.

Between 18 and 20, Hammond committed and was convicted of indecent liberties, voyeurism, and failing to register as a sex offender. He was sentenced to 84 months incarceration. While in the sex offender treatment and assessment program at Monroe Correctional Complex, Hammond admitted he had committed a previously unknown and unadjudicated crime: raping a stranger at knifepoint. The State petitioned to involuntarily commit Hammond to the Special Commitment Center as a sexually violent predator (SVP) pursuant to chapter 71.09 RCW.

¹ Report of Proceedings (RP) (July 17, 2017) at 523.

Two psychological experts testified during Hammond's civil commitment trial. Dr. Harry Goldberg testified for the State, and Dr. Amy Phenix testified for Hammond. Both experts diagnosed Hammond with a clinical personality disorder. But they disagreed about whether Hammond's particular diagnosis met the legal definition for "mental abnormality" or "personality disorder" and whether he was likely to commit violent sexual acts in the future. During his testimony, Dr. Goldberg was asked to comment on an unadjudicated police report from Kent, Washington, in which a rape victim said an unknown assailant attacked her. The State asked Dr. Goldberg to assume the police report was about Hammond's rape, even though Dr. Goldberg lacked any certainty that the police report involved Hammond. Dr. Goldberg commented about the police report's significance to his opinion. But his opinion was the same with or without the police report. Although the jury did not unanimously agree he had a qualifying mental abnormality, it found that Hammond had a personality disorder and that he was an SVP. The court ordered Hammond committed into State custody.

Hammond appeals.

ANALYSIS

The State may petition under chapter 71.09 RCW to commit someone indefinitely to a secure facility if it can prove beyond a reasonable doubt that person is an SVP.² An SVP is "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or

² RCW 71.09.030, .060(1).

personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.”³

Hammond requests vacation of the court’s commitment order and remand for a new trial because he contends the court erroneously admitted the Kent police report, the court improperly instructed the jury, and the jury found him to be an SVP despite an absence of substantial evidence.

I. The Kent Police Report

We review decisions to admit evidence for abuse of discretion.⁴ A court abuses its discretion where it acts for untenable reasons or bases its decision on untenable grounds.⁵ A court abuses its discretion where it fails to follow an evidentiary rule’s requirements.⁶

Before trial, the State moved to permit testimony from Dr. Goldberg about a police report describing an unsolved rape by an unknown assailant that occurred in Kent while Hammond lived there. Hammond objected and argued the report described a different rape than his and was hearsay not admissible by any exception. The court granted the motion for the limited purpose of informing or supporting Dr. Goldberg’s opinion.

³ RCW 71.09.020(18).

⁴ In re Det. of Coe, 175 Wn.2d 482, 492, 286 P.3d 29 (2012) (citing State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)).

⁵ Id. (quoting Foxhoven, 161 Wn.2d at 174).

⁶ Foxhoven, 161 Wn.2d at 174 (citing State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001)).

Hearsay is inadmissible unless subject to an exception.⁷ Police reports are generally hearsay because an officer subjectively recounts her investigation.⁸ ER 703 permits testimony about otherwise inadmissible information where “an expert bases an opinion or inference” on a type of information reasonably relied upon by experts in that field.⁹ But “[e]xperts should not act as funnels to allow lawyers to get into evidence through their expert opinion what is otherwise inadmissible.”¹⁰

The parties do not dispute that psychological experts in SVP trials reasonably rely on criminal history and police reports,¹¹ so the issue is whether Dr. Goldberg’s opinions at trial were genuinely based on the police report. The party seeking to introduce the expert testimony must show it complies with ER 703.¹²

In State v. Hamilton, the State sought to impeach an expert defense witness on cross-examination by asking questions about the defendant’s medical

⁷ ER 802.

⁸ Coe, 175 Wn.2d at 505.

⁹ Matter of Det. of Marshall, 156 Wn.2d 150, 161, 162, 125 P.3d 111 (2005); ER 703.

¹⁰ Coe, 175 Wn.2d at 516 (Chambers, J. concurring); see Marshall, 156 Wn.2d at 162-63 (“However, ‘it does not follow that such a witness may simply report such matters to the trier of fact: The Rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence.’”) (internal quotation marks omitted) (quoting State v. DeVries, 149 Wn.2d 842, 848 n.2, 72 P.3d 748 (2003)).

¹¹ Appellant’s Br. at 38; Resp’t’s Br. at 28.

¹² See State v. Hamilton, 196 Wn. App. 461, 478, 481, 383 P.3d 1062 (2016) (“[T]he party seeking to impeach an expert witness pursuant to ER 703 and ER 705 has the burden of demonstrating that the expert, in formulating his or her opinion, relied on the facts or data proffered by the impeaching party.”).

records and the information in them.¹³ The expert testified he had reviewed the records but had not relied on them because his ultimate opinion was not based on them.¹⁴ As a result, this court held the information from the medical records was inadmissible under ER 703.¹⁵

Similarly, here, the State never established that Dr. Goldberg relied on the police report to form the basis of his opinion.¹⁶ Dr. Goldberg testified the Kent police report impacted his opinion only if Hammond actually committed the crime described in it. But the report was unadjudicated, and the victim described an assailant with “some similarities [and] some differences” from Hammond, so Dr. Goldberg had no level of certainty that the report had anything to do with Hammond.¹⁷ Dr. Goldberg also testified his opinions about Hammond would be unaffected if the police report was about someone else.¹⁸ Because Dr. Goldberg could not rely on the report for information about Hammond’s admitted rape and the report’s accuracy had no bearing on his opinions, the State failed to establish Dr. Goldberg based his opinions on it. ER 703 was not an appropriate hearsay

¹³ 196 Wn. App. 461, 467, 481, 383 P.3d 1062 (2016).

¹⁴ Id.

¹⁵ Id. at 474-75.

¹⁶ The State seeks to distinguish Hamilton from the instant case because Dr. Goldberg testified on direct rather than being cross-examined. Resp’t’s Br. at 33-34. But the State offers no authority or explanation for the significance of this distinction, and none is apparent.

¹⁷ RP (July 24, 2017) at 1307.

¹⁸ Id. at 1308.

exception. Accordingly, the court abused its discretion by admitting inadmissible hearsay.¹⁹

“[E]videntiary error will not be reversed absent a showing that the error prejudiced the defendant.”²⁰ Errors are prejudicial if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”²¹ This analysis is unrelated to whether sufficient evidence exists to find the person on trial is an SVP absent the inadmissible evidence.²²

In Hamilton, this court concluded the defendant was prejudiced by the admission of inadmissible information and improper impeachment of his expert witness.²³ Because the jury would have had a duty to acquit had it believed the defense expert and the improper impeachment also undermined the defendant's affirmative defense, prejudice to the defendant resulted.²⁴ By contrast, in In re Detention of Mines, the court concluded an SVP was not prejudiced by the court's admission of evidence showing prior bad acts, even if erroneously admitted.²⁵ The Mines court concluded that admitting an information containing unproven

¹⁹ Foxhoven, 161 Wn.2d at 174.

²⁰ Hamilton, 196 Wn. App. at 484 (alteration in original) (quoting Aubin v. Barton, 123 Wn. App. 592, 608, 98 P.3d 126 (2004)).

²¹ Neal, 144 Wn.2d at 611 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

²² State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

²³ 96 Wn. App. at 484-85.

²⁴ Id.

²⁵ 165 Wn. App. 112, 128, 266 P.3d 242 (2011).

charges against the SVP could not have prejudiced him because the SVP admitted to committing the crimes charged.²⁶

Hammond argues the erroneous admission of the police report prejudiced him by undermining his credibility. According to Dr. Goldberg, if the police report describes Hammond's admitted rape, then it showed Hammond had a "pervasive" "desire for nonconsensual sex" because the date of the police report was within three weeks of him taking indecent liberties with a stranger.²⁷ In addition, the State used the Kent police report in conjunction with Hammond's admitted rape to contend he was aroused by nonconsensual sex, contrary to Hammond's testimony.²⁸

However, Hammond admitted to committing a rape strikingly similar to the rape described in the Kent police report.²⁹ And Hammond's testimony allows that his admitted rape could have occurred in the same time period as the rape in the police report; within three weeks of him groping a stranger he followed off the bus.³⁰ Moreover, the State extensively impeached Hammond's credibility during

²⁶ Id.

²⁷ RP (July 24, 2017) at 1307.

²⁸ RP (Aug. 1, 2017) at 2085-86.

²⁹ Compare RP (July 24, 2017) at 1304-05 (Dr. Goldberg's account of the rape), with RP (July 26, 2017) at 1614-18 (Hammond testifying about his rape).

³⁰ RP (July 20, 2017) at 1047, 1052 (Hammond testifying he took indecent liberties while living in the community before going to North Dakota).

his testimony without relying on the police report.³¹ Unlike Hamilton, the court's error neither undermined Hammond's expert nor restricted his ability to present his theory of the case. Because the jury learned the harsh details of Hammond's admitted rape from his own statements, as in Mines, and the State undermined his credibility apart from the erroneously admitted evidence, Hammond does not show prejudice resulted from improper admission of the police report.

II. The Court Properly Instructed the Jury

We review jury instructions de novo for any errors of law and review a court's choice of jury instructions for abuse of discretion.³²

"Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law."³³ Jury instructions must be "manifestly clear" because the jury is not allowed to resolve ambiguous wording through interpretive tools.³⁴

³¹ E.g., RP (July 19, 2017) at 956-960; RP (July 26, 2017) at 1638 (asking Hammond about his history of lying to treatment providers and confronting him about past lies in his treatment records).

³² State v. Stacy, 181 Wn. App. 553, 569, 326 P.3d 136 (2014); In re Det. of Alsteen, 159 Wn. App. 93, 99, 244 P.3d 991 (2010).

³³ Id. (internal quotation marks omitted) (quoting Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)).

³⁴ State v. Irons, 101 Wn. App. 544, 550, 4 P.3d 174 (2000) (quoting State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996)).

Hammond took exception to a jury instruction restating the entirety of Washington pattern jury instruction 365.14.³⁵ The instruction interprets the statutory third element for finding a person is an SVP, that the person is “likely to engage in predatory acts of sexual violence if not confined in a secure facility,” as meaning “that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding.”³⁶ Hammond proposed additional language defining “more probably than not” as “that there is more than a 50 [percent] likelihood that the person will engage in such acts.”³⁷

Hammond argues the court erred by rejecting his proposed clarifying language because it correctly stated the applicable law. He does not argue, however, that the trial court’s instructions incorrectly stated the applicable law.

RCW 71.09.060(1) requires a jury to determine “whether or not the person [accused of being an SVP] would be likely to engage in predatory acts of sexual violence if not confined in a secure facility.”³⁸ This third element to prove a person is an SVP “is ‘a compound determination’” requiring the jury to find “both causation (i.e., the abnormality or disorder causes the likelihood of future acts), and that the probability of the defendant’s reoffending exceeds 50 percent.”³⁹ In

³⁵ 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 365.14, at 578 (2012).

³⁶ Id.

³⁷ Clerk’s Papers at 1224.

³⁸ See RCW 71.09.020(18) (defining “sexually violent predator”).

³⁹ Matter of Det. of Harell, 5 Wn. App. 2d 357, 370, 426 P.3d 260 (2018) (internal quotation marks omitted) (quoting In re Det. of Post, 170 Wn.2d 302, 310, 241 P.3d 1234 (2010)).

other words, “[t]he State must prove not only that a crime occurred, but that the SVP continues to suffer from a mental abnormality [or personality disorder] and that he or she would likely reoffend if released from confinement.”⁴⁰

Neither the civil commitment statute nor the case law require Hammond’s proposed language any more than they prohibit it. And Hammond still argued his defense, despite the rejection.⁴¹ The court correctly instructed the jury on the applicable law and both parties argued their theory of the case.

The court rejected Hammond’s proposal because it did not “want to confuse the standard of proof with statistics” in a “case [that] is much more number-driven than most.”⁴² Using several actuarial tools, both experts testified at length about the statistical likelihood of Hammond reoffending if released. For example, Dr. Goldberg testified that Hammond had a 42.2 percent chance of reoffense in five years, which meant he was more likely to reoffend than 99 percent of all sex offenders.⁴³ The court was concerned jurors in King County “are extremely mathematical, and they tend to translate almost any argument like this into the math that’s familiar to them, which is usually not the math you’re talking about[;] some of the jurors simply go amiss on what these measurements mean.”⁴⁴

⁴⁰ Matter of Det. of Belcher, 189 Wn.2d 280, 290, 399 P.3d 1179 (2017).

⁴¹ RP (Aug. 1, 2017) at 2143-44 (arguing during closing, “So we have to find that Mr. Hammond is more likely than not to reoffend, and that’s over the 50 percent mark. Most sex offenders reoffend at a rate of about 10 percent.”).

⁴² RP (July 13, 2017) at 439, 442.

⁴³ RP (July 25, 2017) at 1348-50.

⁴⁴ RP (July 5, 2017) at 116.

Because the court properly instructed the jury on the law and rejected Hammond's proposed instruction based on reasonable concerns, the court did not abuse its discretion.

III. Sufficient Evidence Supported the Jury's Verdict

Sufficient evidence supports a jury finding that a person is an SVP where a rational trier of fact could, when viewing the evidence in a light most favorable to the State, find the essential elements were met beyond a reasonable doubt.⁴⁵

The core of Hammond's sufficiency argument is that "[j]uries are not permitted to fashion their own diagnosis in SVP cases—expert testimony is required."⁴⁶ Hammond contends the jury took an unpermitted step because neither expert specifically testified he had a qualifying "personality disorder," only Dr. Goldberg testified Hammond had a qualifying mental abnormality, and the jury found Hammond had a qualifying personality disorder but not a mental abnormality.⁴⁷ But Hammond's argument misconstrues the roles of the jury and the experts.

Experts testify to "assist the trier of fact to understand the evidence or to determine a fact in issue."⁴⁸ Although an expert may opine on the ultimate legal issues in the case, those issues must "be decided by the trier of fact."⁴⁹ In an SVP

⁴⁵ In re Det. of Thorell, 149 Wn.2d 724, 744, 72 P.3d 708 (2003).

⁴⁶ Appellant's Br. at 20.

⁴⁷ Id. at 19-20.

⁴⁸ ER 702.

⁴⁹ ER 704.

trial, the jury must determine whether a person has a qualifying, statutory “mental abnormality” or a qualifying, statutory “personality disorder.”⁵⁰ This legal determination is distinct from the expert’s clinical diagnosis, and the latter does not mandate the former.⁵¹ Unlike this court, the jury is free to evaluate the credibility of the experts and determine which portions of their testimony are most reliable.⁵²

Here, the jury did not find Hammond has a “mental abnormality,” so the question is whether sufficient evidence supported its finding that he has a “personality disorder.”

A statutory “personality disorder” is “an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment.”⁵³ Unlike “mental abnormality,” this statutory definition happens to be the same as the clinical definition in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition

⁵⁰ RCW 71.09.020(18).

⁵¹ See ER 704; see, e.g., RP (July 17, 2017) at 495-96 (Dr. Phenix testifying “mental abnormality” “doesn’t really come from psychological or psychiatric writings or definitions”).

⁵² See State v. Cardenas-Flores, 189 Wn.2d 243, 266, 401 P.3d 19 (2017) (“Credibility determinations are for the trier of fact’ and are not subject to review.”) (quoting State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

⁵³ RCW 71.09.020(9).

(DSM-V).⁵⁴ The DSM-V outlines a number of different personality disorders, including ASPD.⁵⁵

Both experts diagnosed Hammond with ASPD.⁵⁶ Dr. Phenix described ASPD as “generally always associated with some type of criminality, violating the rights of others, being incarcerated, . . . a person who kind of ignores the rights of others and kind of takes and does what they want to do.”⁵⁷ An ASPD diagnosis alone is “[a]bsolutely not” an indicator that a person would qualify as an SVP.⁵⁸

Dr. Goldberg opined that Hammond satisfied the legal criteria for a mental abnormality or personality disorder because he experiences “a combination of [ASPD] and hypersexuality.”⁵⁹ Hypersexuality presents as “a high degree of sexual drive which causes distress and dysfunction.”⁶⁰ Dr. Goldberg explained that Hammond is “not concerned about violating others if he needs to be sexually gratified. . . . [H]is [ASPD] predisposes him to commit criminal sexual acts.”⁶¹

Hammond’s own testimony aligns with Dr. Goldberg’s, and both are sufficient to support a legal finding that Hammond has a statutory “personality disorder.” For Hammond, feelings of boredom, loneliness, or anger can trigger

⁵⁴ RP (July 17, 2017) at 509 (testimony of Dr. Phenix).

⁵⁵ Id.

⁵⁶ RP (July 17, 2017) at 500-01; RP (July 24, 2017) at 1274-75.

⁵⁷ RP (July 17, 2017) at 509.

⁵⁸ RP (July 24, 2017) at 1276 (testimony of Dr. Goldberg).

⁵⁹ Id. at 1233.

⁶⁰ Id. at 1287.

⁶¹ Id. at 1277.

sexual behavior. Hammond said he felt “frustration” due to loneliness before “decid[ing] on the spot” to rape a stranger.⁶² Until he saw his victim, Hammond “wasn’t thinking about actually having sex with anybody or raping anybody.”⁶³ Hammond thinks “something is wrong with me” because he “tend[s] to want to use sex as a coping skill,” reacts impulsively to situations, struggles to control his anger, and has an overall lack of emotional control that “played a factor” in committing rape and indecent liberties.⁶⁴ Dr. Phenix also testified that Hammond “still [has] issues with anger management”⁶⁵ and dysfunctional coping skills that impair his ability to identify and solve problems.⁶⁶ Overall, the testimony from Hammond, Dr. Phenix, and Dr. Goldberg established that Hammond’s ASPD diagnosis and strong sex drive resulted in his ongoing struggle to cope with ordinary feelings like boredom, anger, and loneliness, which could result in future acts of sexual violence.

Additionally, both experts testified about scientifically valid actuarial data from the Static-99R⁶⁷ showing with “moderate predictive accuracy” that Hammond has an absolute chance of 42.2 percent of reoffending within five years if

⁶² RP (July 26, 2017) at 1617.

⁶³ Id.

⁶⁴ Id. at 1658-59.

⁶⁵ RP (July 17, 2017) at 597.

⁶⁶ Id. at 563.


⁶⁷ The Static-99R is a scientifically valid tool used to measure the statistical likelihood of future sex offenses, both violent and nonviolent, by convicted sex offenders. Id. at 543, 548-49 (testimony of Dr. Phenix).

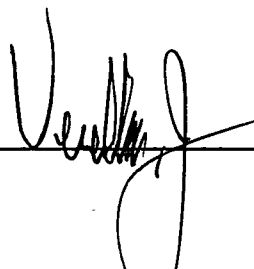
released.⁶⁸ But Hammond has a 99 percent chance of reoffense following release when compared to other sex offenders.⁶⁹

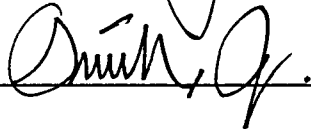
Given Dr. Goldberg's clinical diagnosis, Hammond's testimony, and the uncontested actuarial data, a rational fact-finder could conclude beyond a reasonable doubt that Hammond has a statutory "personality disorder" that makes him more likely to engage in predatory acts of sexual violence. The State demonstrated he had a pervasive and "enduring pattern of inner experience and behavior that deviates markedly from the expectations of [his] culture," which initially manifested when Hammond molested his siblings at 13, continued for years thereafter as evinced by him committing rape around age 18 and voyeurism at 21, and continues to impair Hammond's ability to function typically. Consequently, substantial evidence supports the jury's finding that Hammond has a statutory personality disorder that makes it likely he will engage in predatory acts of sexual violence if not confined.

Therefore, we affirm:

WE CONCUR:







⁶⁸ *Id.* at 550 (testimony of Dr. Phenix); RP (July 25, 2017) at 1348 (testimony of Dr. Goldberg).

⁶⁹ RP (July 25, 2017) at 1350 (testimony of Dr. Goldberg).

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

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