Supreme Court No. 99764-1
(COA No. 80315-8-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

Damion Blevins

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

PETITION FOR REVIEW

KATE L. BENWARD
Attorney for Appellant

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

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Damion Blevins, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated April 12, 2021 pursuant to RAP 13.3 and RAP 13.4.

B. ISSUES PRESENTED FOR REVIEW

1. In *Det. of Stout*, this Court ruled that in RCW 71.09 proceedings, due process did not require confrontation where there was a prior opportunity for cross-examination about the predicate offense for commitment. 159 Wn.2d 357, 369, 150 P.3d 86 (2007). Justice Madsen's concurrence questioned where the majority's novel separation of confrontation from the cross-examination right "will ultimately take us," predicting, "at a minimum . . . deposition testimony, taken in the absence of the SVP defendant, will become the rule." *Id.* at 386 (Madsen J. concurring). Mr. Blevins's case demonstrates that the majority's reasoning leads to an even greater diminishment of the cross-examination right than anticipated. Based on the *Stout* majority, the Court of Appeals held it did not violate due process for the State to prove the predicate offense for commitment based on a sexual assault allegation that was never subject to adversarial testing at any time, in any form.

To avoid an application of *Stout* that all but does away with the right to confrontation and cross-examination in RCW 71.09 proceedings,

this Court should accept review and adopt the due process floor proposed by the *Stout* concurrence. Just as in other civil proceedings where a person's liberty is at stake, this Court should hold involuntary commitment in RCW 71.09 proceedings requires "the right to confrontation and cross-examination of adverse witnesses unless the trial court specifically finds good cause for not allowing confrontation." *Id.* at 386. RAP 13.4(b)(1) & (3).

2. When the State foregoes prosecuting a criminal charge as a sex offense in a criminal trial and instead seeks to prove the conduct was sexually motivated for the first time in RCW 71.09 commitment proceedings, the State's criminal charging decisions create two classes of commitment detainees: the first enjoys the panoply of rights afforded criminal defendants; the second is stripped of these rights when sexual motivation is proved for the first time in the civil commitment trial.

Lower court decisions have found this does not violate equal protection by misconstruing the relevant classes— comparing civil detainees to criminal defendants, rather than comparing the two classes of civil commitment detainees. This Court should accept review and hold that it violates equal protection for the State's charging decisions to determine the scope of the accused's constitutional protections in RCW 71.09 proceedings. RAP 13.4(b)(3).

3. In considering whether a person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the jury may consider "only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention." *In re West*, 171 Wn.2d 383, 399, 256 P.3d 302 (2011) (citing RCW 71.09.060(1)). In contravention of *West,* the State's expert was permitted to opine that Mr. Blevins's poverty, including his homelessness, lack of family and unemployment increased his risk for offending. This Court should accept review of the Court of Appeals decision that conflicts with *West* and violates due process by impermissibly allowing the jury to consider a person's wealth or poverty in determining whether they meet the criteria for involuntary commitment. RAP 13.4(b)(1) & (3).

4. The presumption of innocence and the State's burden of proof beyond a reasonable doubt are closely related. The trial court prohibited Mr. Blevins from arguing in closing that the analogous presumption of non-commitment applied where the State had the burden to prove he met the criteria for commitment beyond a reasonable doubt. The Court of Appeals agreed, finding that criminal constitutional protections do not apply, and so Mr. Blevins was not entitled to a presumption of non-commitment. This Court should accept review and hold the accused in

RCW 71.09 proceedings is permitted to argue this critical component of the State's burden of proof. RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

When Mr. Blevins was 26 years old, the State charged him with a rape and robbery. CP 4, 193. But the State did not prosecute the rape and amended the charges in exchange for Mr. Blevins's guilty plea to assault in the second degree. CP 193. Mr. Blevins had no prior convictions for a sexually violent offense, or any previous conviction that required him to register as a sex offender. CP 34, 36.

When Mr. Blevins was about to be released from serving a 20-month sentence for this conviction, the State initiated RCW 71.09 proceedings against him, alleging as a basis for commitment that Mr. Blevins's assault conviction was "sexually motivated."[1] CP 1. The State sought to prove this in the involuntary commitment proceeding, where the State asserted Mr. Blevins did not have the protections of the Fifth and Sixth Amendments. CP 220-21; 485-88.

At the commitment trial, the State did not believe it had any obligation to call Mr. Blevins's accuser for the dismissed rape charge,

[1] Commitment under RCW 71.09 requires proof the person "has been convicted of or charged with a crime of sexual violence." RCW 71.09.020(18). The definition of a "sexually violent offense" includes certain non-sex offenses such as assault in the second degree, which the State may prove at the civil commitment trial is "sexually motivated," as that term is defined in RCW 9.94A.030. RCW 71.09.020(17)(c).

Angela Davis, to be cross-examined about the rape allegation that the State elected not to prosecute. CP 213; CP 241-42. Instead, over Mr. Blevins's objection on confrontation grounds, the State sought to prove Ms. Davis's sexual assault allegation under various hearsay exceptions, in addition to documentary and physical evidence. CP 239-47; Ex. 1, 6, 11; 6/10/19 RP 278; 290-320; 333-57; 359-83; 385-94.

Mr. Blevins was required to submit to a deposition under penalty of perjury before trial. CP 561. In this deposition, the State questioned Mr. Blevins extensively about the 2016 rape allegation, and impeached him with the evidence presented at the trial. CP 623-39. This deposition was played for the jury. Ex. 44; 6/11/19 RP 498.

The additional element for commitment turned on expert testimony. The State hired Dr. Harry Goldberg, a psychologist trained in family therapy. 6/17/19 RP 849-50. A psychologist, unlike a psychiatrist, is not a medical doctor. 6/17/19 RP 848. Dr. Goldberg does not conduct research or provide sex offender therapy 6/17/19 RP 848, 842.

Mr. Blevins's expert, Dr. Fabian Saleh, is a forensic and adult psychiatrist. 6/18/19 RP 1017. After his medical, clinical and forensic training, he ran a sexual disorders clinic for about ten years, treating

people with sexual paraphilias[2] while also serving as faculty at University of Massachusetts and Harvard medical schools, where he instructed on diagnosis and treatment related to sexual violence and risk management. 6/18/19 RP 1024-29.

In addition to the 2016 rape allegation that was not prosecuted, the experts considered two allegations of rape from 2012 as described in police reports. The first allegation from 2012 involved a claim by Melanie Curry, who told police Mr. Blevins raped her when she sought to buy drugs from him. CP 257. The State did not charge Mr. Blevins with this conduct because they needed additional evidence to corroborate her claim. CP 55; 257. Another police report from 2012 contained Melanie Ager's allegation that Mr. Blevins sexually assaulted her when she followed him into a parking garage. CP 259.

Despite there being no conviction or fact finding to assess for the 2012 allegations, other than the State's decision not to prosecute the allegations, Dr. Goldberg still gave full credit to these 2012 allegations. He observed, "the amount of force and violence in these three crimes, especially the first one and the last one, were," were, in his opinion, "pretty extreme." CP 823. Dr. Goldberg believed this showed Mr. Blevins

[2] A "paraphilia" denotes "any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners." Ex. 30.

had "some attraction to coercive sexual behavior" which was the basis for his diagnosis of paraphilia non-consent—a diagnosis necessary for the State to establish Mr. Blevins had a "mental abnormality" required for involuntary commitment. CP 81, 85; 287, 826; 6/19/19 RP 1082-82, 1105.

By contrast, Dr. Saleh was trained to address clinical issues and look at them forensically; he did not act as judge or factfinder. 6/19/19 RP 1088. Due to poor reporting of Ms. Curry's allegation in 2012, there was not enough evidence about what occurred. 6/19/19 RP 1095. These allegations did not establish a pattern of behaviors sufficient to diagnose to "a reasonable degree of medical certainty" an "other specified paraphilic disorder" required for involuntary commitment. 6/19/19 RP 1088-89.

Over Mr. Blevins's objection, the State's expert, Dr. Goldberg, opined that Mr. Blevins's homelessness and lack of resources were a risk factor—going so far as to say that if Mr. Blevins came from a rich family who provided him support and could pay for his treatment in the community, this would factor into his analysis of whether Mr. Blevins met the criteria for commitment. 6/17/19 RP 829-35, 838-39; CP 131-32. The court also granted the State's motion to prohibit Mr. Blevins from arguing that he was entitled to a presumption of non-commitment. CP 226, 387-91; 5/6/19 RP 34-37. The jury committed Mr. Blevins. CP 900.

The Court of Appeals affirmed the order of commitment, finding Mr. Blevins was not entitled to cross-examine the person whose allegation the State relied on as the predicate for commitment. Instead, the Court held the procedural safeguards of a right to counsel and unanimous jury verdict were adequate to protect against the risk of erroneous deprivation under a *Mathews v. Eldridge* balancing. Op. at 4-8. The Court rejected Mr. Blevins's equal protection claim, repeating *State v. Abolafya's* mischaracterization of the two classes that ignores the constitutional deprivation as the distinguishing feature between the two classes. Op. at 10 (citing 114 Wn. App. 137, 147, 56 P.3d 608 (2002)).

The Court of Appeals sidestepped the harm of allowing the jury to consider factors well beyond what is permitted by *West* by misconstruing the record to make it seem as though Mr. Blevins introduced the very evidence he opposed but which the court admitted over his objection. CP 47; op. at 10-12; Reply Br. of App. at 15. Finally, the Court of Appeals held the accused in RCW 71.09 proceedings is not entitled to a presumption of non-commitment, even though this concept is integral to State's burden of proof beyond a reasonable doubt. Op. at 14.

D. ARGUMENT

1. This Court should grant review and hold that due process entitles a person facing lifetime involuntary commitment the opportunity to cross-examine his accuser in some form at some time when this sexual assault allegation is the predicate for RCW 71.09 commitment, absent good cause.

A person's right to cross-examination in civil commitment proceeding is analyzed under the Due Process Clause. *Stout,* 159 Wn.2d at 369. Due process requirements "depend on what is fair in a particular context," and courts use the *Mathews v. Eldridge* balancing factors to determine the scope of this right in involuntary commitment proceedings. *Id*. at 370 (citing *Mathews v. Eldridge,* 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976)).

a. Unlike in *Stout,* Mr. Blevins had no prior opportunity to cross-examine his accuser.

In *Stout,* prior to the commitment trial, the accused "had two separate opportunities to cross-examine" the complaining witness about the burglary charge the State sought to prove was sexually motivated. 159 Wn.2d at 368. Stout claimed due process also required the opportunity to confront his accuser at trial or the deposition. *Id.* at 368.

Applying the *Mathews v. Eldridge* balancing factors, this Court emphasized that a prior opportunity for cross-examination was critical: because the burglary victim was previously deposed under oath, "her

veracity is as guaranteed as if she had testified at trial." *Id.* at 371. Even though Stout was not personally present at the deposition, "he could have reviewed [the witness's] deposition with his attorney, allowing him to point out inconsistencies that could have been used to impeach her in any subsequent deposition." *Id.* "Finally, because the second deposition was successfully videotaped, the fact finder had an opportunity to observe [the witness's] demeanor during questioning." *Id.*

The balance of these factors, in light of the prior opportunity to cross-examine the witness led the Court to hold that "an SVP detainee does not have a due process right to confront a live witness at a commitment trial, nor does he have a due process right to be present at a deposition." *Id.* at 374. The Court questioned "whether any purpose is served in recognizing a *due process* right to confrontation where *cross-examination has been achieved." Id.* at 368 n.9 (citing *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L. Ed.2d 347 (1974)).

Unlike Stout, who was twice able to cross-examine the complaining witness through counsel at a sworn deposition prior to trial that was then played for the jury, Mr. Blevins's accuser was never cross-examined about her sexual assault allegation—either when Mr. Blevins pleaded guilty to assault in the second degree, or when the State initiated 71.09 proceedings against him.

Moreover, the constitutional safeguards that protected against erroneous deprivation in *Stout* where absent here. Mr. Blevins's right to counsel was hollow in this proceeding where his attorneys were never able to cross-examine or impeach Ms. Davis with a subsequent deposition. 159 Wn.2d at 371. Mr. Blevins was questioned about Ms. Davis's allegation in a psychological exam without counsel. CP 47. Absent a prior opportunity for cross-examination, Ms. Davis's "veracity" was never tested under oath. *Stout*. 159 Wn.2d at 371. The fact finder had no opportunity to observe Ms. Davis's "demeanor during questioning" at any time. *Id.* Furthermore, Ms. Davis's allegations were introduced as substantive evidence the State relied on to prove Mr. Blevins committed assault in the second degree with sexual motivation. 5/6/19 RP 160; *Compare In re Coe*, 175 Wn.2d 482, 511, 286 P.3d 29 (2012) (that evidence was never admitted substantively weighs against erroneous deprivation).

In addition to Ms. Davis's allegation, the State also elected not to prosecute the 2012 allegations that Dr. Goldberg relied on to opine that Mr. Blevins met the criteria for commitment. These allegations were never subject to the adversarial testing because the State either chose not to charge the offenses or dismissed them. 6/17/19 RP 663-64. The result is that Mr. Blevins was committed based on sexual assault allegations that were never subject to cross-examination.

b. Due process requires the opportunity to cross-examine one's accuser in some form at some time, unless the prosecutor can establish good cause.

The *Stout* concurrence analogized the due process requirements of RCW 71.09 proceedings to probation and parole revocation hearings, where due process entitles the accused to confront and cross-examine witnesses unless a hearing officer "specifically finds good cause for not allowing confrontation." 159 Wn.2d at 384 (Madsen J., concurring) (citing *Morrissey v. Brewer,* 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972)).

In *Stout*, the prosecutor made an effort to procure the witness for trial before seeking to admit her prior deposed statements. *Stout*, 159 Wn.2d at 385 (Madsen, J., concurring). However, where the witness was out of state and cross-examination was achieved through telephone and video, which was played for the jury, the Court concluded it would place an undue burden on the State to have to procure an unwilling, out-of-state witness for trial. *Id.* at 371-72. The same is not true here, where the prosecutor never intended to call or attempt to locate Ms. Davis for trial. CP 221, 241. The State made no record of any effort to make Ms. Davis available for cross-examination under oath at some time prior to trial, believing they had no obligation to do so. The Court of Appeals held that

under "well-settled law," the other procedural safeguards were "sufficient" to ensure due process. Op. at 8.

The critical right of cross-examination at some point in some form is necessary to ensure a sexual assault allegation the State elected not to prosecute is a sufficiently reliable predicate offense for involuntary commitment. This Court should grant review and hold, in accordance with Justice Madsen's concurrence in *Stout,* "that minimal due process in the context of an SVP proceeding requires the right to confrontation and cross-examination of adverse witnesses unless the trial court specifically finds good cause for not allowing confrontation." *Stout,* 159 Wn.2d at 386 (Madsen J., concurring). RAP 13.4(b)(1)&(3).

2. Allowing the State to choose to prove sexual motivation in the civil, rather than criminal proceeding, violates equal protection.

In a criminal trial, "sexual motivation" must be charged as a special allegation by the prosecutor if the facts support it. RCW 9.94A835(1) and (2). The accused enjoys the protections of the Fifth and Sixth Amendments in respect to this allegation. But RCW 71.09.020(17)(c) also permits the State to prove a criminal charge—here assault in the second degree— was sexually motivated in RCW 71.09 proceedings, where these constitutional protections do not apply.

This creates two classes of respondents: (1) those previously convicted of assault with sexual motivation proved when they had the protections of the Fifth and Sixth amendments; and (2) those convicted of assault against whom the State initiates SVP proceedings and seeks to prove the offense was sexually motivated for the first time without these constitutional protections. The conduct alleged in support of sexual motivation is the same—the only difference is the State's charging decision. This violates Equal Protection because the statute and State's charging decisions fail to ensure that "persons similarly situated with respect to the legitimate purposes of the laws receive like treatment." *In re Young* 122 Wn.2d 1, 45, 857 P.2d 989 (1993).

Mr. Blevins's case illustrates the disparity between the two classes. The State originally charged him with rape in the first degree and robbery based on Ms. Davis's allegation. CP 39. The prosecution offered to amend these charges to assault in the second degree in exchange for Mr. Blevins's guilty plea. CP 23. The State chose not to charge Mr. Blevins with sexual motivation under RCW 9.94A.835. CP 23. Mr. Blevins entered a guilty plea and the court entered judgment on this conviction for assault in the second degree without sexual motivation. CP 31.

The only reference to the sexual assault allegation is in Mr. Blevins's factual statement in his plea form, which was written by his

attorney. CP 17. It stated, "with intent to commit the felony of rape 2nd degree, I intentionally assaulted A.D . . . by raising my fist at her with the intent to have sexual intercourse with her." CP 17. This statement does not establish that Mr. Blevins stipulated that this offense was sexually motivated as required for a court to find the sexual motivation aggravator in a criminal case. *State v. Hagar,* 158 Wn.2d 369, 144 P.3d 298 (2006) (Hagar stipulated certain facts but did not stipulate that the crimes constitute a "major economic offense," a statutory aggravator)). To use this statement in a civil trial to prove sexual motivation where it is not sufficient in a criminal trial circumvents Mr. Blevins's constitutional rights based entirely on the State's charging decisions.

In the criminal trial, Mr. Blevins would not have been compelled to incriminate himself, and he would have had the right to confront and cross-examine his accuser— rights he was explicitly denied in these proceedings. When the State initiated 71.09 proceedings against Mr. Blevins, he submitted to a recorded psychological interview in which he was questioned about uncharged conduct that was used against him in the civil trial. CP 49-61. He did not have counsel present. CP 47. Afterwards, The State deposed Mr. Blevins, and his statements to Dr. Goldberg were used against him in this deposition, which was in turn played for the jury. CP 566-728. Thus, Mr. Blevins did not have the right against self-

incrimination or counsel when the State alleged his crime was sexually motivated as he would have had in a criminal proceeding.

The Court of Appeals in Mr. Blevins's case blindly followed *Abolafya v. State*, which failed to center its inquiry on the deprivation of constitutional rights as the distinguishing feature between the two classes of RCW 71.09 respondents. Op. at 9 (citing 114 Wn. App. 137, 145, 56 P.3d 608 (2002)). This Court should accept review and correctly consider the constitutional deprivation that distinguishes these two classes and hold that it violates equal protection to allow the State's charging decisions define the scope of a person's constitutional rights.

3. The court improperly allowed the jury to consider Mr. Blevins's poverty in determining his risk to reoffend.

The Court of Appeals opinion that allows the jury to consider evidence about Mr. Blevins's homelessness and lack of education and job skills in determining his risk to reoffend if not confined to a secure facility conflicts with this Court's decision in *West* and violates due process because it allows for commitment based on socioeconomic deprivation.

Due process permits civil commitment only upon a showing of (1) mental illness and (2) dangerousness. *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997). In *West*, this Court limited the evidence that is permitted to establish a person would be likely to

engage in predatory acts of sexual violence if not confined in a secure facility to include "only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention." *West,* 171 Wn.2d at 414. This limits the State's "evidence of the treatment and placement conditions that are necessary to mitigate the respondent's dangerousness, and the State may offer evidence that these components are lacking in the respondent's proposed arrangements for unconditional release." *Id*. at 399.

Over Mr. Blevins's pre-trial motion that such evidence must be limited to "treatment and placement conditions," not his lack of housing, job, or family support as narrowly permitted by *West*, the trial court allowed Dr. Goldberg to opine that Mr. Blevins's homelessness, lack of family, and unemployment increased his risk for offending. 5/6/19 RP 93-96; 101-02; 6/17/19 RP 831-33; CP 423-26; 473.

In response to cross-examination on this point, Dr. Goldberg even admitted that if Mr. Blevins had a rich family who could support him, this would factor into his risk assessment, even though such factors would "probably not" change his opinion about whether Mr. Blevins would "meet criteria" for commitment.[3] 6/17/19 RP 839.

[3] Based on the court's adverse ruling, Mr. Blevins called a witness to offer testimony about employment opportunities in the community and Mr. Blevins's incipient

This evidence of poverty and lack of resources far exceeds the permissible evidence of "placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention." *West*, 171 Wn.2d at 414. Allowing the jury to commit Mr. Blevins based on socioeconomic factors unrelated to mental illness, including his homelessness, lack of employment and dearth of family resources violated Mr. Blevins's due process right to be committed only based on proof of mental abnormality and dangerousness alone. *Hendricks*, 521 U.S. at 358; ER 401; 402.

This Court should accept review of the Court's decision that conflicts with *West* and violates due process. RAP 13.4(b)(1)&(3).

4. Where the presumption of innocence is integral to the State's burden of proof, the accused in RCW 71.09 proceedings must be able to argue the State's burden of proof carries the presumption of non-commitment.

Researchers have found there is a nearly "uniform commitment rate" in sexually violent predator proceedings. CP 411. Jurors not only engage in self-deception to facilitate a commitment verdict but "they also start their consideration of the case with a perception of recidivism that the respondent is more likely than not to recidivate." CP 417.

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attempts to create a resume. CP 474. The Court of Appeals wrongly characterized Mr. Blevins's inquiry based on the court's adverse ruling as a "trial strategy." Op. at 12.

In an effort to counteract the jury's presumption in favor of commitment, Mr. Blevins sought to argue in closing that the State's burden of proof entailed a presumption of non-commitment as to each of the elements.[4] CP 387; 5/6/19 RP 37-40. The State objected, and the court prohibited Mr. Blevins from arguing this to the jury. CP 226; CP 489; 5/6/19 RP 34; 40-41. The Court of Appeals affirmed, finding there is no presumption of non-commitment in SVP proceedings because the criminal constitutional protections do not apply. Op. at 13-15.

This ignores how the presumption of innocence and the State's burden of proof beyond a reasonable doubt are closely related. *Matter of Lile*, 100 Wn.2d 224, 227, 668 P.2d 581 (1983); *Taylor v. Kentucky*, 436 U.S. 478, 483, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (The two principles are not "logically separate and distinct"). Because the presumption of innocence is integral to the State's burden of proof beyond a reasonable doubt, the analogous presumption of non-commitment must also apply in RCW 71.09 hearings to ensure that the jury considers "nothing but the

[4] Mr. Blevins did not ask for the jury instruction that there is a presumption on "no commit." CP 390. In Washington, courts have found it is not an abuse of discretion to deny a jury instruction stating that the respondent is presumed not to meet the commitment criteria because the matter is civil. *In re Twining*, 77 Wn. App. 882, 895, 894 P.2d 1331 (1995) *abrogated by In re Pouncy*, 168 Wn.2d 382, 229 P.3d 678 (2010) ("this is not a criminal case, and criminal constitutional protections are not applicable beyond those supplied in the statute and those granted in *Young*"); *In re Aqui*, 84 Wn. App. 88, 101, 929 P.2d 436 (1996) (In a civil proceeding respondent is not entitled to such an instruction).

evidence," not surmises based "on the present situation of the accused" in accordance with the State's burden of proof beyond a reasonable doubt. *Taylor*,436 U.S. at 485.

Closing argument is the "last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *State v. Frost*, 160 Wn.2d 765, 778, 161 P.3d 361 (2007). Improper limits on closing argument infringe on the accused's right to due process. *State v. Osman*, 192 Wn. App. 355, 369, 366 P.3d 956 (2016) (citing *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970)).

Mr. Blevins's ability to address the jury's predisposition for commitment was critical to ensuring the jury held the State to its burden of proof. This Court should accept review and hold that because the presumption of innocence cannot be separated from the State's burden of proof beyond a reasonable doubt in RCW 71.09 proceedings, the accused must be able to argue this to the jury. RAP 13.4(b)(3).

E. CONCLUSION

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

DATED this 12th day of May, 2021.

Respectfully submitted,

s/ Kate Benward

Washington State Bar Number 43651
Washington Appellate Project
1511 Third Ave, Ste 610
Seattle, WA 98101
Telephone: (206) 587-2710
Fax: (206) 587-2711
E-mail: katebenward@washapp.org

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of	)	No. 80315-8-I
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DAMION BLEVINS	)	DIVISION ONE
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Appellant.	)	UNPUBLISHED OPINION
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HAZELRIGG, J. — Damion Blevins was found to be a sexually violent predator (SVP) following a jury trial. Blevins had earlier entered a guilty plea to assault in the second degree without a sexual motivation aggravator, so the State sought to prove sexual motivation at the SVP trial. Prior to the SVP trial, Blevins moved to bifurcate the determination of sexual motivation from the remainder of the proceeding, but the motion was denied. Blevins argues on appeal that his due process and equal protection rights were violated and that the court abused its discretion concerning multiple evidentiary rulings. Blevins' challenges are unsuccessful in light of well-settled case law. As such, we affirm.

FACTS

Damion Blevins pleaded guilty in 2017 to assault in the second degree for an attack on A.D. The original charges of robbery and rape were amended down pursuant to the plea agreement and the State did not seek a sexual motivation aggravator. However, the plea statement contained the following facts which

Blevins expressly admitted after colloquy: that he intentionally assaulted A.D. "with intent to commit the felony of rape 2nd degree." In 2018, as Blevins was nearing completion of his prison sentence, the State filed a petition to civilly commit him as a "sexually violent predator" (SVP) under chapter 71.09 RCW. The SVP petition provided notice of the State's intent to prove that the assault in the second degree was sexually motivated, which would render it a sexually violent offense as required by the SVP statute.

Blevins' civil commitment trial occurred in May and June of 2019. The parties engaged in extensive pretrial litigation on several motions, including whether the issue of sexual motivation should be bifurcated from the other portions of the trial. The trial court denied Blevins' motion to bifurcate. The State did not call A.D. at trial and instead sought to prove the sexual assault through various hearsay exceptions and documentary and physical evidence. Additionally, each party presented expert testimony as to Blevins' behavior and potential diagnoses relevant to the SVP proceeding.

The jury returned a unanimous verdict finding Blevins met the statutory criteria to be deemed a sexually violent predator. The verdict included a finding that the assault in the second degree to which he had previously admitted guilt was committed with sexual motivation. The trial court entered an order civilly committing Blevins to the custody of the Department of Social and Health Services "for control, care and treatment" in accordance with the SVP statute. Blevins now appeals.

ANALYSIS

I. Due Process and Cross-Examination of the Named Victim

A defendant in a criminal proceeding has a right to confront the witnesses at trial. U.S. CONST. amend VI; Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "It is well settled that civil commitment is a significant deprivation of liberty, and thus individuals facing SVP commitment are entitled to due process of law." In re Det. of Morgan, 180 Wn.2d 312, 320, 330 P.3d 774 (2014). "[A]lthough SVP commitment proceedings include many of the same protections as a criminal trial, SVP commitment proceedings are not criminal proceedings." In re Det. of Stout, 159 Wn.2d 357, 369, 150 P.3d 86 (2007) (emphasis in original). The SVP statute expressly provides for the respondent's right to cross-examine witnesses who testify against them at the probable cause hearing on the initial petition. RCW 71.09.040(3)(c). However, "[i]t is well-settled that the Sixth Amendment right to confrontation is available only to criminal defendants." Stout, 159 Wn.2d at 369. Like Stout, Blevins frames his confrontation challenge as a violation of due process and equal protection. Id.

Blevins argues he was deprived of the right to meaningfully cross-examine A.D. since he resolved his criminal case by entry of a guilty plea and neither party called her as a witness in the SVP commitment trial. In particular, A.D.'s allegations were utilized to prove that the assault in the second degree was sexually motivated, despite the fact that no such aggravator was pleaded or proved in the criminal proceeding. It is well-settled law that the State may establish the sexual motivation of a conviction at the time of the SVP trial. RCW 71.09.020(17);

In re Det. of Mines, 165 Wn. App. 112,120–21, 266 P.3d 242 (2011) (interpreting the plain language of RCW 17.09.020(17) as allowing the State to establish sexual motivation during SVP proceeding).

Blevins relies on Stout for the proposition that he was entitled to a prior opportunity to cross-examine A.D. if her live testimony would not be introduced at the SVP trial. However, Stout is unhelpful for Blevins. Like Blevins, Stout claimed that his due process right to confront and cross-examine a witness against him had been violated when a prior victim's deposition was admitted during the SVP trial. Stout, 159 Wn.2d at 362, 368. Stout had admitted guilt to a burglary charge without a sexual motivation aggravator. Id. at 362. The State later alleged the burglary was sexually motivated and constituted a sexually violent offense for purposes of its SVP petition. Id. The State offered as evidence Stout's guilty plea in which he admitted assaulting the victim. Id. The State also offered the victim's testimony about the incident through two deposition transcripts and a video recording of one of the depositions. Id. The victim refused to return to Washington for the SVP trial and could not be subpoenaed. Id. at 362, 376. The Supreme Court "entertain[ed] Stout's confrontation claim only as it relates to his claimed rights to due process and equal protection." Id. at 369.

The Stout court went on to engage in the test set out in Mathews v. Eldridge to determine whether the minimum requirement of due process had been provided. Id. at 370 (citing Mathews, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

> In determining what procedural due process requires in a given context, we employ the Mathews test, which balances: (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.

Id. The first factor was found to weigh in Stout's favor since a respondent to an SVP petition has a significant interest in their physical liberty. Id. The second factor, "the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards" was determined to weigh in the State's favor as it has in most other cases. Id. This is due to the comprehensive set of rights that exist for SVP detainees to protect against the risk of an erroneous deprivation of liberty. Id.; see also In re Det. of Coe, 175 Wn.2d 482, 510–11, 286 P.3d 29 (2012); Morgan, 180 Wn.2d at 321–22.

In particular, the Stout court noted "there would be little value in adding a confrontation right to the procedural safeguards available to an SVP detainee." 159 Wn.2d at 371. The court reinforced that the victim's deposition was under oath and that Stout could have reviewed the depositions for inconsistencies and impeached her at any subsequent deposition. Id. The final factor, governmental interest, including costs and administrative burdens of additional procedures, was found, and consistently continues to be found, to weigh in the State's favor. Id.; see also Coe, 175 Wn.2d at 511–12; Morgan, 180 Wn.2d at 322. The Stout court recognized that:

> If an SVP commitment takes place several years after the predicate convictions and if a determination of sexual motivation was not made at the time of sentencing, it is unduly burdensome to require the State to build its case around a right to confrontation that adds only marginal protection for an SVP against liberty deprivation.

159 Wn.2d at 372. Because confrontation would only add marginal protection in an SVP trial, our supreme court has expressly declined to include that right in the list of those already held by the respondent in this context.

Here, Blevins argues that while he,

> adopted a factual statement in his plea form that stated that he committed the assault with intent to commit rape in the second degree,[] he in no way admitted to the sexual assault allegation that was present at trial[,] which formed the basis of the experts' opinions.

However, in Abolafya v. State, this division squarely rejected the assertion that a violation of the plea agreement occurs when a defendant pleads to a lesser crime without a sexual motivator and the plea is later utilized to prove the crime was sexually motivated in a civil SVP proceeding.[1] 114 Wn. App. 137, 147, 56 P.3d 608 (2002).

Further, Coe addressed the question of whether an expert could rely on thirty-six unadjudicated offenses that included rape and indecent exposure incidents in forming their opinion that Coe met the statutory definition of a sexually violent predator. 175 Wn.2d at 509–13. Our state's supreme court held an expert's reliance on reports of five assaults in which the victims were unavailable to testify did not violate due process. Id. The court reiterated, "that a defendant in an SVP proceeding has no right to confront witnesses, either in trial or in deposition." Id. at 509 (citing Stout, 159 Wn.2d at 368–74). The Coe court went through the Mathews factors in a matter nearly identical to the court in Stout. Id. at 510–12.

[1] While this is not precisely Blevins' argument, it is clear that the use of his plea agreement to prove sexual motivation at the SVP trial was not improper.

But in Coe, the Supreme Court went even further as to the second factor. It determined that, despite an absence of facts like those in Stout where the jury was able to assess the victim's testimony through depositions, Coe had been provided significant safeguards such that there was little concern that jurors could not evaluate the accusers upon which the expert had relied in forming their opinion. Id. at 510. The court reinforced that Coe received the same statutory safeguards as those in Stout, such as right to counsel, a jury trial, and a unanimous verdict with the State carrying the burden of proof beyond a reasonable doubt. Id. at 511.

Here, Blevins' claim is unsuccessful as nothing in the facts of this case suggest that the Mathews factors do not weigh out as they have in previous SVP due process challenges in our state. See Stout, 159 Wn.2d at 370–74; Coe, 175 Wn.2d at 509-12; Morgan, 180 Wn.2d at 320–23. The first factor, the private interest affected, clearly weighs in Blevins' favor, as it would in all SVP proceedings since something in which he has a strong interest, his physical liberty, is at stake.

The most contentious is the second factor; the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards. Blevins argues that this factor weighs in his favor and the situation is distinct from the respondents in Coe and Stout since depositions were taken in Stout and, in Coe, the unadjudicated allegations were only utilized in the formation of the expert's opinion. While this may be factually correct, as to the analysis relied upon in each case, the statutory safeguards for Blevins were identical, particularly as to the analysis and holding in Coe. Blevins was represented by counsel, had a jury trial which required a unanimous verdict,

and the State carried the burden of proving the allegations in its petition beyond a reasonable doubt. Importantly, at oral argument before this court, Blevins admitted to not having attempted to depose A.D. As in Coe, the second factor weighs in the State's favor because of the statutory safeguards present in Blevins's SVP trial.

The third factor, the governmental interest, including costs and administrative burdens of additional procedures, should be weighed the same as in the prior cases. The State has a significant interest in preventing individuals from committing further sex offenses. See Stout, 159 Wn.2d at 371; Coe, 175 Wn.2d at 511–12. The State has an interest in streamlining procedures to avoid the financial burden of live testimony and such a burden would be difficult to justify given the marginal protection confrontation would provide to the respondent's liberty interest. Therefore, the factor weighs in the State's favor, as does the overall balancing of the Mathews factors.

Ultimately, Blevins fails to establish why we should depart from the well-settled law as to what due process is owed to a respondent in an SVP proceeding. Both this court and the Supreme Court have repeatedly indicated that the procedural safeguards provided by statute are sufficient. We find no violation of Blevins' due process rights.

II. Equal Protection Challenge to SVP Trial

Blevins argues that allowing the State to prove sexual motivation in the civil, rather than the criminal, proceeding violates his right to equal protection. "The Washington Constitution article I, section 12, and the Fourteenth Amendment to the United States Constitution ensure that persons similarly situated as to the

legitimate purposes of a law receive equal treatment." State v. McClinton, 10 Wn. App. 2d 236, 242, 448 P.3d 101 (2019). We construe both our state and the federal equal protection clause identically. Id. In the context of reviewing involuntary commitment statutes we utilize a rational basis standard. Abolafya, 114 Wn. App. at 146. "Rational basis applies when a statutory classification does not involve a suspect or semisuspect class." McClinton, 10 Wn. App. 2d at 243. It is the party making the challenge that has the burden to establish that the classification is purely arbitrary. Id. "Under rational basis review, the challenged law must reflect a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective." Id.

This court's analysis in Abolafya is directly on point in addressing this challenge by Blevins and clearly indicates that no such violation occurs when the State seeks to establish sexual motivation in the SVP proceeding. Blevins' claim is nearly identical to Abolafya's, which was:

> that by allowing sexual motivation to be proved at the civil commitment proceeding two classes of people are created with no legitimate purpose for treating them differently. The first class consists of respondents who received the full procedural protections of a criminal trial on the predicate offense and special allegation of sexual motivation. The second class consists of respondents who are forced to defend against a special allegation of sexual motivation at a civil trial during which they have no right to remain silent and during which there will be presentation of evidence that would have been inadmissible at the criminal trial.

114 Wn. App. at 145. Blevins makes essentially the same facial challenge to RCW 71.09.020 as Abolafya, which was rejected by this division. In Abolafya, we explained that this sort of challenge does not even establish two similarly situated classes of individuals.

> Abolafya argues that he is similarly situated to people who have already faced criminal sanctions for a special allegation of sexual motivation and who are now facing civil commitment as a result of that criminal conviction. This is incorrect. Abolafya is now facing only civil commitment, not criminal sanctions. Criminal defendants face increased prison sentences or periods of probation for findings of sexual motivation. Constitutionally they are afforded greater protections than civil respondents. Abolafya is not similarly situated to criminal defendants facing an allegation of sexual motivation.

Id. at 146. This opinion has not been called into doubt by subsequent case law in its nearly twenty years of existence. We are disinclined to accept Blevins' invitation to depart from the analysis in Abolafya. As such, Blevins has failed to establish the first step of an equal protection challenge: demonstrating differing treatment between similarly situated classes.

III. Evidentiary Rulings

Finally, Blevins challenges three specific evidentiary rulings by the trial court. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. In re Det. of West, 171 Wn.2d 383, 396, 256 P.3d 302 (2011). A trial court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable. Id. at 397.

A. Evidence of Poverty and Lack of Resources

Though Blevins attempts to frame this as a due process violation, the assignment of error is more properly understood as a challenge to an evidentiary ruling which does not rise to the level of substantive due process. Blevins asserts the court erred in ruling that his lack of community support could be discussed; particularly its conclusion that it was relevant to the jury's determination of his risk

to reoffend if not confined to a secure facility. See RCW 71.09.060(1). The trial court weighed the proffered evidence and concluded admission was proper. In addition, the record suggests that it was Blevins who extensively discussed his poverty and tumultuous background at trial.

During the pretrial hearing on motions in limine, Blevins argued that any information about his release plan was not relevant to the commitment proceeding. However, the trial court pointed out that it went to the jury's assessment of whether he was likely to reoffend if not confined in a secure facility, which is a necessary element to be determined by the jury. RCW 71.09.060(1). The court did agree with Blevins that the proper test was one of general admissibility; to weigh the probative value against the potential prejudice that might come from the evidence. See ER 402, 403. The trial court relied on In re Detention of West in making its determination that the evidence was generally proper and then specifically considered whether information related to Blevins' release plan had a probative value which outweighed any prejudicial effect. 171 Wn.2d 383.

The State correctly points out that the only testimony elicited about Blevins' poverty was by his own counsel when questioning the State's expert, Dr. Harry Goldberg, about whether his assessment would have changed if Blevins' family was wealthy. One example of a question posed by Blevins' counsel was:

> Q: For somebody who has been raised like, you know, Damion Blevins, from a single mother, in a poverty, joins gangs, I mean, it would be a miracle for that person not to be diagnosed with ASPD[2]; correct?

[2] Antisocial personality disorder.

This question followed Blevins' earlier focus in cross-examination on his upbringing by a "single mother," in "poverty," and "involved [with] gangs." The State did briefly explore how Blevins' inability to maintain employment impacted Goldberg's risk assessment, however questioning was not particularly focused on Blevins' upbringing or lack of resources. Blevins emphasized those issues and framed questions in terms of his resources and background, which appears to have been part of his trial strategy. The trial court did not abuse its discretion in allowing evidence of Blevins' lack of community support.

B. Evidence of Potential Future Proceedings

Blevins next argues that the trial court erroneously deprived him of the opportunity to demonstrate that he could be subject to involuntary commitment in the future based on commission of a recent overt act. The posture by which Blevins presents this issue is directly addressed by In re Detention of Post. 170 Wn.2d 302, 316–17, 241 P.3d 1234 (2010). The Post court determined evidence that a respondent could be subject to further SVP proceedings if they committed a recent overt act might be properly admitted if the evidence was indicative that the respondent understood that they were so subject and that understanding had "some tendency to diminish the likelihood of his committing another predatory act of sexual violence." Id. Here, the trial court determined such evidence was not relevant because Blevins did not admit to having any issues or urges that needed to be addressed and further denied that any of the sexual assault allegations had merit. The trial court interpreted this information to mean that potential future filings would not act as a deterrent for Blevins.

On appeal, Blevins frames the issue by asserting that the court should not have relied upon his statements because he was not an accurate self-reporter. This argument is not well taken, nor does it appear that it was presented to the trial court. The trial court properly weighed the evidence. It determined that since Blevins did not appear to be concerned with such consequences, and went so far as saying that his risk of "future violent hands-on sexual offenses against a woman" is zero, evidence of the potential for future filings by the State based on a recent overt act was properly excluded. This ruling by the trial court does not constitute an abuse of discretion.

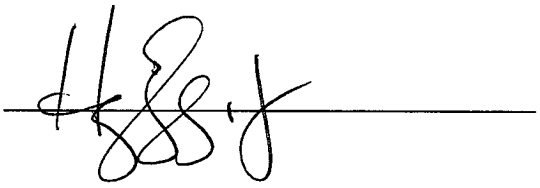
C. Presumption of Non-commitment

Blevins' final challenge assigns error to the trial court's refusal to allow him to argue in closing that he was presumed not to be a sexually violent predator. Blevins attempts to distinguish his circumstances from current case law, arguing the prior cases have addressed a respondent's request for a jury instruction on a presumption of non-commitment, as opposed to merely allowing such argument in closing. It is difficult to reconcile this distinction with the case law in our state. Division Three of this court put it quite bluntly in In re Detention of Twining: "The short answer is that this is not a criminal case, and criminal constitutional protections are not applicable beyond those supplied in the statute and those granted in [In re Detention of Young, 112 Wn.2d 1, 857 P.2d 989 (1993)]." 77 Wn. App. 882, 895, 894 P.2d 1331 (1995), overruled on other grounds, In re Det. Of Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010) (citing Young, 112 Wn.2d at 47–51). Though these cases have been overturned or superseded on other grounds,

In re Detention of Law reinforced that Young and Twining are still good law as far as the proposition that neither the presumption of innocence, nor a presumption of non-commitment, apply to an SVP proceeding. 146 Wn. App. 28, 48–49, 204 P.3d 230 (2008).

Again, Blevins initially frames this challenge as a due process violation in briefing, but later characterizes the denial of his request as an abuse of discretion by the trial court. Though Blevins focuses on the ability to argue presumption of non-commitment to the jury in closing and attempts to distinguish the precedent as focused on jury instructions, this is a ruling on a motion in limine which is reviewed under an abuse of discretion standard. In light of the controlling case law, the trial court did not abuse its discretion.

Affirmed.



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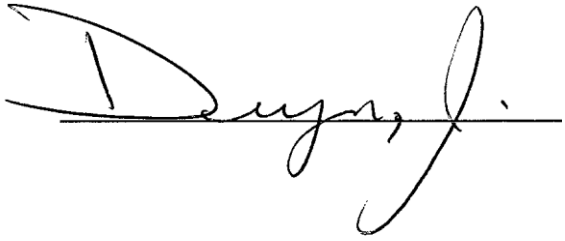

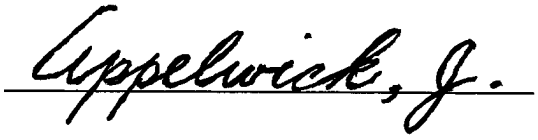

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☒ respondent Andrea Vitalich, DPA
[Andrea.Vitalich@kingcounty.gov]
[PAOAppellateUnitMail@kingcounty.gov]
[paosvpstaff@kingcounty.gov]
King County Prosecutor's Office-SVP/Detention Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 12, 2021
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