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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of:

GARY ALLEN SHAW,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

When viewed in a light most favorable to the State, did the State present sufficient evidence at trial to persuade a fair-minded rational person beyond a reasonable doubt that Mr. Shaw is a sexually violent predator?

II. STATEMENT OF THE CASE

A. Procedural History

This Sexually Violent Predator (SVP) civil commitment proceeding was initiated on December 14, 2006. CP at 1-2. On that date, Gary Allen Shaw was serving a prison sentence after having been convicted in 1985 of two counts of Murder in the First Degree while attempting to commit Rape in the Second Degree. *Id.* Shortly before Shaw was scheduled to be released, the State filed an SVP Petition. On January 25, 2010, Shaw's trial began and resulted in a jury finding that Shaw is an SVP. CP at 109.

At trial, the State presented the testimony of Robert Wheeler, PhD, and the videotaped deposition testimony of Mr. Shaw. Shaw also testified on his own behalf, and presented the testimony of some lay witnesses who supported his release into the community, as well as Dr. Theodore Donaldson, PhD, who opined that Shaw did not meet SVP criteria. RP at 246-248; 397; 422-436.

B. Substantive History

1. Shaw's Criminal Sexual History

At 2:00 a.m. on March 7, 1985, Vera D. called her husband to tell him she would be home on time from work at 2:30 a.m. She was never heard from again. RP at 43. At approximately 6:00 a.m. later that same morning, two county road workers saw Mr. Shaw sitting in Vera D.'s car, parked sixty feet from where her deceased body was later found. Mr. Shaw left the car and approached the road workers to ask for a cigarette. The workers noted that Mr. Shaw smelled strongly of alcohol and had dried blood on his hands and sleeves. Mr. Shaw told the road workers that the blood was the result of a bar fight.

On March 14, 1985, law enforcement located Vera D.'s deceased body on a wooded embankment. Vera D. was found face down with her legs spread apart, and was naked from the waist down. RP at 43-44. The autopsy described the cause of her death as a cerebral concussion caused by blunt force trauma to the head and strangulation. RP at 44. Specifically, Vera D. was struck at least three times in the head with a blunt object, lost consciousness, and was then strangled. Shaw has said that he continued to beat Vera even after she was deceased. RP at 48.

Sixteen days after raping and murdering Vera D., Mr. Shaw raped and murdered Linda H. Linda H. went bowling with her brother and some

friends on the night of March 22, 1985. At approximately 2:00 a.m. on March 23, 1985, Linda H. left the bowling alley with Mr. Shaw. She had offered to give Mr. Shaw a ride home. Linda H. was not heard from again. RP at 48.

Linda H. was found on her back with her legs spread apart, and was dressed only in her bra and blouse, both of which were pushed up around her neck. There were signs of blunt force trauma to Linda H.'s head. Two puncture wounds were found at the base of her neck made by a small, single-edged knife. While the puncture wounds did not sever any veins or arteries, one of the wounds partially severed her spinal cord, resulting in paralysis. However, Linda H. did not die from the knife wounds. Instead, the medical examiner described her cause of death as most likely resulting from hypothermia and exposure. RP at 49-50.

On June 11, 1985, Mr. Shaw was charged in an Amended Information with two counts of Murder in the First Degree pursuant to RCW 9A.32.030(1)(c) for the deaths of Vera D. and Linda H. CP at 5. The Amended Information charged Mr. Shaw with the murders while "committing or attempting to commit the crime of Rape in the Second Degree." Mr. Shaw pled guilty to the charges on June 13, 1985, and received a sentence of 32 years, 4 months on each count, to be served concurrently. CP at 3, 5, 10.

In addition to the above sexually violent offense, Shaw has also been implicated in other acts of a sexually deviant nature. On July 1, 1978, 15-year-old Mr. Shaw forcefully grabbed and threatened to kill an eight-year-old girl who walked in on him while he was masturbating. Shaw was charged with Indecent Liberties, but the charge was ultimately dismissed. RP at 40; CP at 5. On July 3, 1978, 15-year-old Mr. Shaw performed oral sex on six-year-old boy. On July 10, 1978, Mr. Shaw was charged with one count of Statutory Rape in the First Degree. CP at 5. On August 4, 1978, he pled guilty to the charge. He was sentenced to thirteen to sixteen weeks detention. He was also given four months of parole supervision. *Id.*

2. Expert Testimony of Robert Wheeler, Ph.D.

At trial, the State presented the testimony of Dr. Robert Wheeler, a licensed psychologist and certified sex offender treatment provider. RP at 15. Since 1988, Dr. Wheeler's practice has largely focused on the assessment and treatment of persons who have committed acts of sexual violence. RP at 23. He has conducted in-person forensic psychological evaluations of over 1,500 such individuals for both the prosecution and the defense. RP at 25-27. In addition, he has conducted over 60 evaluations specific to RCW 71.09, and has testified as an expert witness in approximately 20 SVP cases. RP at 28-29. Of the 60 SVP evaluations

Dr. Wheeler has conducted, he found the person to meet SVP criteria approximately 47 percent of the time. RP at 28.

Dr. Wheeler is also a member of numerous professional organizations such as the Association for Psychological Science, the Association for the Treatment of Sexual Abusers, and the American Psychology Law Society. RP at 16. He has been published in professional journals, and asked to peer review articles submitted for publication by others. RP at 21-22. He is routinely retained as a consultant by agencies such as the Department of Social and Health Services, which requested his input on their sexually aggressive youth group home program. RP at 26.

As part of his evaluation in this case, Dr. Wheeler interviewed Mr. Shaw for over ten hours. RP at 32. He also reviewed approximately 1,883 pages of discovery pertaining to Mr. Shaw, 725 of which were generated between the commencement of the evaluation in 2006 and the trial in 2010. RP at 31-32. Those records included police reports, institutional records, medical records, and court documents. RP at 31. Mr. Shaw was deposed by the State in 2009, and Dr. Wheeler reviewed that testimony, and the report and testimony of Mr. Shaw's retained expert, Dr. Theodore Donaldson. RP at 30-31.

Dr. Wheeler concluded that Mr. Shaw suffered from several

mental disorders, including Antisocial Personality Disorder (APD), Alcohol Dependence in a controlled environment, and Cannabis Dependence in a controlled environment. RP at 66. The descriptor “in a controlled environment” is meant to indicate that the disorder is present despite limited or restricted access to drugs or alcohol. *Id.* However, despite being housed in a controlled environment, Shaw continued to abuse drugs. RP at 64; 98. Dr. Wheeler also diagnosed Mr. Shaw with Intermittent Explosive Disorder which means the person displays episodes of aggressive outbursts that result in assault or property destruction that is grossly out of proportion to any precipitating event or psychosocial stressor. RP at 67; RP 102-103. Ultimately, Dr. Wheeler concluded that Mr. Shaw’s APD, especially when aggravated by substance abuse, causes Shaw serious difficulty controlling his sexually violent behavior. RP at 108.

Next, Dr. Wheeler testified that he conducted a risk assessment to determine whether Shaw’s mental condition makes him likely to engage in predatory acts of sexual violence if not confined. *Id.* The assessment included using actuarially developed instruments designed to measure risk to commit future sexual violence. RP at 109. Those instruments provided Dr. Wheeler with “a foundational assessment” of Mr. Shaw’s risk, which Dr. Wheeler then supplemented by examining other researched risk factors

associated with increased or decreased risk for sexual violence. *Id.* Finally, Dr. Wheeler applied his own professional experience and judgment to Mr. Shaw's case to determine whether unique evidence existed to warrant departure from the information provided by the actuarial instruments or other risk factors. RP at 109-110.

Regarding the actuarial instruments, the results indicated to Dr. Wheeler that Mr. Shaw was more likely than not to commit a new sexually violent offense during his lifetime. One of the instruments Dr. Wheeler used even indicated that 100 percent of people who scored like Mr. Shaw reoffended within seven years after release. RP at 120. On the other hand, other instruments used indicated a 36 percent or 48 percent likelihood of re-conviction within ten years of release, respectively. *Id.* Dr. Wheeler noted that research has shown most sexually violent crime goes unreported, and thus does not lead to arrest or conviction. RP at 121. Thus, the actuarial instruments are believed to underestimate a person's true risk level. RP at 123.

The supplemental risk factors considered by Dr. Wheeler were antisocial orientation, substance abuse, intimacy deficits, hostility, negative emotionality, and inadequate self-assessment of risk. RP at 137. These factors, coupled with Shaw's refusal to participate in sex offender treatment or establish a release plan, all required Dr. Wheeler to conclude

that Shaw's personality disorder causes him serious difficulty controlling behavior, and that makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility. RP 145-148.

III. ARGUMENT

Shaw essentially makes three arguments on appeal, all of which appear to attack the sufficiency of the evidence presented to the trial court. His arguments are without merit. First, sufficient evidence was presented at trial to prove that Mr. Shaw suffers from a combination of mental disorders that currently cause him serious difficulty controlling his sexually violent behavior. Second, at trial, the State established that Mr. Shaw's mental disorders make him likely to commit predatory acts of sexual violence if not confined. Finally, the risk assessment performed by Dr. Wheeler was professionally sound, and established that Mr. Shaw is likely to sexually reoffend. Therefore, this Court should deny Shaw's appeal, and affirm his civil commitment as a sexually violent predator.

A. Substantial Evidence was Presented at Trial to Support a Finding that Mr. Shaw is a Sexually Violent Predator

Shaw argues that there was insufficient evidence presented at trial that his risk of reoffense stems from his personality disorders. Appellant's Opening Brief at 10 (hereafter "AOB"). Specifically, Mr. Shaw argues on appeal that insufficient evidence was presented at trial to support the jury

verdict that he is a sexually violent predator. He focuses on alleged insufficiencies in the testimony of Dr. Robert Wheeler, a forensic psychologist who evaluated Mr. Shaw and testified for the State at trial. Mr. Shaw's argument is without merit because Dr. Wheeler's psychological evaluation of Mr. Shaw was current, and conducted according to valid professional standards. Dr. Wheeler's qualifications as an expert are not in dispute. Thus, Mr. Shaw's argument is without merit, and his appeal should be denied.

1. Standard of Review

An SVP is an individual "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(16). Proof is sufficient in an SVP case if, when "viewed in a light most favorable to the State, is sufficient to persuade a fair minded rational person that the State has proven beyond a reasonable doubt that [Respondent] is a sexually violent predator." *In re the Detention of Thorell*, 149 Wn.2d 724, 744-45, 72 P.3d 708 (2003).

"A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that the trier of fact could draw from the evidence.' We must defer to the trial court on the credibility of expert

witnesses and the persuasiveness of the evidence.” *In re the Detention of Stout*, 128 Wn. App. 21, 32-33, 114 P.3d 658, 663-64 (2005) (internal citations omitted), *aff’d*. 159 Wn.2d 357, 150 P.3d 86 (2007).

2. Sufficient Evidence was Presented at Trial to Support a Finding that Shaw’s Personality Disorders Cause him Serious Difficulty Controlling his Sexually Violent Behavior

Shaw first argues that the State did not sufficiently prove that Shaw’s risk of reoffense is linked to his personality disorders. Citing *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002), he argues that the State “failed to establish that Shaw is currently **unable to control his behavior** due to a personality disorder.” App. Brief at 19 (emphasis added). This argument flatly misstates the *Crane* Court’s holding, and the State’s burden of proof in an SVP case:

[*Kansas v.*] *Hendricks* [521 U.S., at 358, 117 S.Ct. 2072] set forth no requirement of *total* or *complete* lack of control. *Hendricks* referred to the Kansas Act as requiring a “mental abnormality” or “personality disorder” that makes it “*difficult*, if not impossible, for the [dangerous] person to control his dangerous behavior.” (emphasis added). The word “difficult” indicates that the lack of control to which this Court referred was not absolute. Indeed, as different *amici* on opposite sides of this case agree, an absolutist approach is unworkable. ... Moreover, most severely ill people - even those commonly termed “psychopaths”- retain some ability to control their behavior. Insistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities.

Crane, at 411-12, 870 (2002) (internal citations omitted).

The Court further recognized “that in cases where lack of control is at issue, ‘inability to control behavior’ will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior.” *Crane* at 413, 122 S. Ct. at 870. Viewing the State’s evidence in the context of this standard, Dr. Wheeler’s testimony clearly established that Shaw’s mental condition causes him serious difficulty controlling his sexually violent behavior. Here, Dr. Wheeler answered the question of behavioral control with certainty:

My opinion is that his antisocial personality disorder is associated with serious difficulty controlling his behavior, as evidenced by the pattern of aggressive behavior that I have testified about throughout today. And it exemplifies serious difficulty controlling his behavior, including his sexually violent behavior, and as a manifestation of his antisocial personality disorder.

RP at 108.

Dr. Wheeler also provided a detailed explanation of *how* he concluded that Mr. Shaw continues to have serious difficulty controlling his behavior despite having been incarcerated for many years. He explained that, first of all, personality disorders such as Shaw’s tend to be chronic. RP at 97. In addition, in Mr. Shaw’s case, there was no significant evidence of change in his antisocial attitudes that are reflective of antisociality. *Id.* On the contrary, even in a controlled, institutional

setting, Mr. Shaw continued to violate some significant rules with respect to substance abuse. RP at 98.

Dr. Wheeler also noted the significance of the results of the psychological testing he administered to Mr. Shaw during the evaluation. For example, Minnesota Multiphasic Personality Inventory (MMPI) is a test that is specifically designed to provide a current picture of the tested person's personality. With regard to Mr. Shaw, his score on the MMPI was highest on a scale labeled "psychopathic deviant." RP at 101. "His score on that scale was statistically quite high. And it was significantly substantially higher than his scores on any other scales." *Id.* In addition, Shaw's score on a different psychological test, the Psychopathy Checklist – Revised, indicated that he had high levels of psychopathy in his personality makeup. RP at 148. People with such traits have been shown not to decline in risk as much as other antisocial people who are less high on that measure of psychopathy. *Id.*

Finally, the difficulty Shaw has controlling his sexually violent behavior is aggravated by his other diagnosed conditions. His Intermittent Explosive Disorder reflects "the grossly disproportionate level of his violence in the context of these sexually motivated murders. ... violence that's out of proportion to even his own stated objectives." RP at 105-106. In addition, Shaw's dependence on drugs and alcohol lowers the threshold

for Shaw act out behaviorally on his antisocial thoughts. RP at 105. “And when you are predisposed to act out behaviorally aggressively and/or sexually, you are more likely to do that when you are disinhibited. The low level of inhibitions that antisocial people often have in the first place are even lower when they're under the influence of intoxicants.” RP at 105.

In all, Mr. Shaw presents as a man whose personality disorder causes him difficulty in controlling his urges. The involvement of drugs or alcohol aggravate his lack of volitional control. Viewing the evidence in the State’s favor, a rational person could conclude beyond a reasonable doubt that Shaw’s mental abnormality causes him serious difficulty in controlling his behavior. Therefore, Shaw’s appeal should be denied.

3. Sufficient Evidence was Presented at Trial to Support a Finding that Shaw’s Personality Disorders Make Him Likely to Commit Predatory Acts of Sexual Violence

Here, Shaw first attempts to convince this Court that a diagnosis of Antisocial Personality Disorder (APD), alone, cannot justify civil commitment as an SVP. His arguments misinterpret court precedent, and contradict the plain language of RCW 71.09. From there, Shaw simply states, without citation to the record, that the State failed to show that his APD “may lead to sexually violent criminal conduct.” AOB at 25. Because both arguments are without merit, Shaw’s appeal should be

denied.

a. Antisocial Personality Disorder is a Constitutionally Sufficient Basis for Shaw's Civil Commitment

Shaw argues that the mental disorder with which Dr. Wheeler diagnosed him, Antisocial Personality Disorder (APD) is too imprecise to provide a basis for his commitment. He contends that *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992), strongly implies that civil commitment cannot be based on APD, and that *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) and *Crane* suggest this as well. Shaw is incorrect because he reads these cases far too broadly.

The question of whether an “antisocial personality” or an Antisocial Personality Disorder constitutes a form of mental illness was not before the court in *Foucha*. Nor did the court attempt to define what *did* constitute a mental illness. Neither issue was addressed because neither issue was necessary to the disposition of the case.

Foucha addressed the constitutionality of a Louisiana statute that allowed the indefinite detention of persons who, although no longer mentally ill or insane, were dangerous to themselves or others. Discharge after the initial commitment was dependant not upon a restoration of sanity or mental health, but upon the defendant's ability to demonstrate

that he presented no danger to himself or others. The defendant bore the burden of showing he was no longer dangerous.

Foucha, who had been found not guilty by reason of insanity, was later found to be no longer suffering from a “mental disease or illness.” *Id.* at 447. A doctor testified, however, that Foucha had an “antisocial personality, a condition which is not a mental disease and is not treatable” and that he would not “feel comfortable in certifying that [Foucha] would not be a danger to himself or other people.” *Foucha*, at 445.

The *Foucha* court, therefore, began with the premise that Foucha, although suffering from an “antisocial personality,” was *not* mentally ill. This was a premise that all parties agreed upon and that both the trial court and the Supreme Court appear to have adopted. Because all parties agreed, it was not necessary at any point for the court to 1) consider whether an antisocial personality was in fact a form of mental illness or 2) indicate what, in the court’s view, constituted a mental illness. Accordingly, it cannot fairly be said that the Court decided this question, or that the Court held that, as a matter of law, an Antisocial Personality Disorder does not constitute a form of mental disorder, or mental illness.

Nor should it be inferred from *Foucha* that an antisocial personality cannot, when combined with a showing of dangerousness, form the basis for civil commitment. This question was not before the

Court. See *Adams v. Bartow*, 330 F.3d 957, 961 (7th Cir. 2003) (*Foucha* does not preclude civil commitments based on a diagnosis of APD); *Hubbart v. Superior Court*, 19 Cal.4th 1138, 969 P.2d 584 (1999). Indeed, the California Supreme Court flatly rejected the same argument Shaw raises here:

Nothing in . . . *Foucha* as a whole, purports to limit the range of mental impairments that may lead to the “permissible” confinement of dangerous and disturbed individuals. (504 U.S. at p. 83, 112 S.Ct. 1780.) Nor did *Foucha* state or imply that antisocial personality conditions and past criminal conduct play no proper role in the commitment determination. The high court concluded only that *Foucha*’s due process rights were violated because the State had sought to continue his confinement as an insanity acquittee without proving that he was *either* mentally ill *or* dangerous.

969 P.2d at 599 (emphasis in original).

Shaw also relies on *Hendricks*. But *Hendricks* does not support Shaw’s argument, as it appears to in Shaw’s brief. Shaw paraphrases the concurring opinion by Justice Kennedy to imply that the Justice found APD an insufficient basis for civil commitment. AOB at 21-22. Citing *Hendricks*, Shaw implies that APD is “too imprecise to distinguish the truly mentally ill from typical recidivists.” *Id.* The passage of Justice Kennedy’s concurrence actually reads as follows:

On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence,

or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

Hendricks, 521 U.S. at 373 (emphasis added). *Hendricks* does not hold that APD is too imprecise to be the basis for civil commitment.

On the contrary, several SVP commitment cases with respondents lacking a paraphilia diagnosis have been before this state's Supreme and appellate courts. See *In re Thorell*, 149 (upholding commitment of Ken Gordon, who was diagnosed with Schizophrenia, ASPD, and Polysubstance abuse, but not a paraphilia); *In re the Detention of Sease*, 149 Wn. App. 66, 201 P.3d 1078 (2009) (upholding commitment of Michael Sease, who was diagnosed with ASPD and Borderline Personality Disorder, but not a paraphilia); and *In re the Detention of McGary*, 128 Wn. App. 467, 116 P.3d 415 (2005) (upholding commitment of Darnell McGary, who was diagnosed with ASPD and Schizophrenia, but not a paraphilia).

Additionally, Shaw relies on transcripts of oral argument in *Crane*, estimates about the high percentage of antisocial inmates in prison populations, and APA and academic opposition to APD as a basis for commitment. AOB at 34-38. Shaw uses these sources to construct a fallacious, straw man argument. Because a parking ticket scofflaw could

potentially be diagnosed with APD, goes his reasoning, APD is overbroad and too imprecise to warrant civil commitment.

Nonetheless, the issue is not whether APD, in general, provides a sufficient basis for commitment, but whether it does in this particular case. And it does in this particular case because the State proved beyond a reasonable doubt that Shaw' APD: (1) Causes him serious difficulty controlling his sexually violent behavior; and (2) that Shaw' APD, independently and in combination with his Paraphilia NOS (hebephilia) disorder, makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility. CP at 75, CL 5-6. The parking ticket scofflaw is safe from civil commitment unless his condition can be shown beyond a reasonable doubt to also render him a sexual predator with seriously impaired control over his sexually violent behavior:

[A] diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for a jury to find a serious lack of control. Such a diagnosis, however, when coupled with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a jury to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP.

In re the Detention of Thorell, at 761-62.

The SVPA, by requiring evidence beyond a reasonable doubt of a condition that causes serious difficulty controlling sexually violent

behavior, and which makes the person likely to commit future violent offenses, provided Shaw with full due process protections against an erroneous or arbitrary commitment.

The Supreme Court of North Dakota has rejected a similar argument to that raised in this appeal. *In re G.R.H.*, 711 N.W.2d 587, 595 (N.D. 2006). In *G.R.H.*, the appellant claimed that commitment based on his sole diagnosis of APD violated his due process rights under the state and federal constitutions. 711 N.W.2d at 591. The court analyzed both *Hendricks* and *Crane* and found that sufficient evidence in the record established a nexus between G.R.H.'s APD and his difficulty controlling his sexually violent behavior. *Id.* at 594-95. The court concluded that commitment based on G.R.H.'s APD satisfied the due process requirements of *Crane*. *Id.* at 595.

Nothing prevents a civil commitment based on APD, where these due process protections are in place. This Court has affirmed a civil commitment based on diagnoses of APD and at least one other personality disorder, where each constituted an alternative means for establishing a mental disorder. See *In re Detention of Sease*, 149 Wn App. 66, 201 P.3d 1078, 1085 (2009). Other courts have found APD a sufficient basis for SVP civil commitment, as well. See, e.g. *In re Commitment of Adams*, 588 N.W.2d 336, 341 (Wis. Ct. App. 1998); *In re Shafer*, 171 S.W.3d 768,

771 (Mo. Ct. App. 2005); *Murrell v. State*, 215 S.W.3d 96, 108 (Mo. Ct. App. 2007); *In re Detention of Barnes*, 689 N.W.2d 455, 459-60 (Iowa 2004).

In affirming a commitment based on APD, the *Barnes* court concluded that neither *Hendricks* nor *Crane* precluded commitments based on that diagnosis. Regarding *Hendricks*, the opinion noted that “the Court did not hold that due process requires a diagnosis of a condition that generally correlates with sex offending, such as pedophilia.” *Barnes* at 460 n.2. Regarding *Crane*, the court said:

However, as in *Hendricks*, the Court in *Crane* did not limit the scope of mental abnormalities for which due process may allow civil commitment to those generally correlated with sex offending.

Id. at n.3.

Mr. Shaw’s argument that APD cannot be the sole basis for civil commitment fails. Because APD can be a sufficient basis, and because the trial court in the instant case found it to be so, Shaw’s appeal fails.

b. The Evidence Linked Shaw’s Personality Disorder to His Risk to Sexually Reoffend

While testifying, Dr. Wheeler was specifically asked how a seemingly asexual diagnosis of APD could cause a person such as Mr. Shaw to commit future sexual offenses. Dr. Wheeler explained,

[I]t is not the diagnosis that commits the assaults, it's the person who commits the assaults. And the fact that it does not explicitly require sexual behaviors as the means by which the antisociality is expressed does not, in my opinion at least, mean that it cannot be one way that the antisociality is reflected.

In my view, Mr. Shaw's -- the combination of his these broad characteristics of antisociality, which is this tendency to be -- to violate rules, to manipulate people, to use other people for your own purposes, to fail to profit from experience, to get into trouble repeatedly, to abuse substances, all of which are frequent correlates of this, provide the foundation for his sexually assaultive behavior. But the focus of the sexually assaultive behavior derives from his anger towards females and the resentment he holds towards them. And ultimately I think the sexual assaultive behavior arises from those factors fueled additionally possibly by drugs and alcohol, primarily alcohol.

RP at 94-96.

In addition, Dr. Wheeler understood the prevalence of APD among the prison population, and took care to consider that fact during his evaluation of Mr. Shaw.

The obvious fact that a substantial fraction of people who are in DOC have antisocial personality disorder is something that I would take into account, and obviously in most of those people are not going to be at the level of risk for sexual violence that Mr. Shaw -- ultimately that I concluded Mr. Shaw is. So I would evaluate him with respect to the person that he is and the risk that he presents.

As I testified earlier it's not the diagnosis that poses the risk, potential risk, to the community, it is the person. And so I looked at this person and just simply determined

separately the fact that he clearly has antisocial personality disorder, the specific nature, by the way, it is expressed in the person that he is through the various attributes and "character butes" I testified about are what produced the -- caused the difficulties in controlling his behavior and are associated statistically with the risk of sexual recidivism.

RP at 237-238.

Clearly, the focus of Dr. Wheeler's opinion was that Mr. Shaw continues to suffer from a personality disorder, and that disorder causes him to meet the SVP criteria. Dr. Wheeler said as much numerous times throughout his testimony, and thoroughly explained why a disorder that may impact different people in different ways places Shaw at substantial risk to sexually offend. Therefore, Dr. Wheeler sufficiently linked Shaw's personality disorder to the SVP criteria, thus, his civil commitment should be upheld.

4. Dr. Wheeler's Risk Assessment of Mr. Shaw Employed Scientifically Valid Methodology

Finally, Mr. Shaw argues that Dr. Wheeler's risk assessment of Mr. Shaw considered only "irrelevant" or "unreliable" information. His argument ignores well established court precedent, and scientific research. Because Dr. Wheeler's assessment was sufficient to persuade a fair minded, rational person that the State has proven beyond a reasonable doubt that Mr. Shaw is likely to sexually reoffend if not confined, Shaw's appeal should be denied.

a. Actuarial Instruments are Generally Accepted Tools for Assessing Risk in SVP Cases

Shaw claims that sex offender actuarial risk assessment tools are unreliable as applied to him because, he argues, they are not case specific to the facts of his mental disorder or offense history. BOA at 26. “The actuarial approach evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense which may be adjusted (or not) by expert evaluators considering potentially important factors not included in the actuarial measure.” *In re the Detention of Thorell*, at 753. “[T]he methods and procedures used to construct actuarial instruments are well accepted in the scientific community.” *In re the Detention of Robinson*, 135 Wn. App. 772, 786, 146 P.3d 451, 458 (2006) (citing *Thorell*, 149 Wn.2d at 754). Opposition to the evidence of actuarial instruments goes to the weight of the evidence rather than its admissibility. *Id.*

Here, Dr. Wheeler used several actuarial tools “to provide a foundational assessment of the severity of Mr. Shaw's risk.” RP at 109. He then went on to consider the results of those tests in light of the specific facts of Mr. Shaw’s case. The tests used were described as “[u]niversally used in significant sexual violence risk assessment cases

and certainly with sexually violent predator cases. RP at 110. Thus, Dr. Wheeler's use of actuarial tests to assist his assessment of Mr. Shaw was obviously proper given his task was to evaluate Shaw's risk to commit acts of sexual violence. In addition, Shaw did not object to Dr. Wheeler's testimony or raise a *Frye* issue below. Accordingly, he has waived the issue on appeal. *In re Detention of Taylor*, 132 Wn. App. 827, 836, 134 P.3d 254, 258 (2006). Furthermore, even if Shaw had raised a *Frye* issue below, it would have failed on the merits. *Id.*

In the alternative, Shaw argues that his scores on the actuarial tests weren't high enough to justify Dr. Wheeler's conclusions. This argument ignores the bulk of Dr. Wheeler's risk assessment testimony, including discussion of the actuarials themselves. For example, one of the instruments Dr. Wheeler used even indicated that 100 percent of people who scored like Mr. Shaw reoffended within seven years after release. RP at 120. On the other hand, other instruments used indicated a 36 percent or 48 percent likelihood of re-conviction within ten years of release, respectively. *Id.* Dr. Wheeler noted that research has shown most sexually violent crime goes unreported, and thus does not lead to arrest or conviction. RP at 121. They also attempt to estimate risk over a fixed period of time (e.g. five to ten years) while the question in SVP cases is whether the person is likely to commit another predatory sexually violent

act over his lifetime. RP at 123. Thus, the actuarial instruments are believed to underestimate a person's true risk level. RP at 123.

Dr. Wheeler used the actuarial instruments to give him relevant and important information about Mr. Shaw's risk level. He is a well qualified expert, whose qualifications are not argued by Shaw on appeal. The test results gave him a starting point from which to assess Shaw using the other researched factors discussed below, and his experienced professional judgment. All of which is appropriate, and sufficient to validate Shaw's civil commitment. Thus, his appeal should be denied.

b. Dr. Wheeler's Use of Researched Risk Factors Associated with Sexual Recidivism Does Not Entitle Shaw to Reversal of His Civil Commitment

The developers of the actuarial instruments also developed a list of dynamic risk factors that add incremental validity above and beyond the results of the actuarial assessment. RP at 226. Dr. Wheeler considered these factors, along with such considerations as the fact that Shaw has never participated in sex offender treatment, and will not be subject to any period of probation if released. RP at 238-240. He also connected these factors to the unique circumstances presented by Shaw's case, noting that a future predatory offense "would be consistent with [Shaw's] diagnoses and his past behavior." RP at 144.

Dr. Wheeler's approach, which is essentially a clinical approach that incorporates actuarial data as one of its factors, is consistent with practices approved by the Supreme Court. *State v. Hoisington*, 123 Wn. App. 138, 149, 94 P.3d 318, 323 (2004) (citing *Thorell*, 149 Wn.2d at 756, 72 P.3d 708 ("Based on our established precedent, we reiterate that the *Frye* standard has been satisfied by both clinical and actuarial determinations of future dangerousness.")). Consequently, the trial court was permitted to rely upon Dr. Wheeler's testimony when making its determination that Shaw met the SVP definition. Here, the trial court's determination was supported by admissible evidence that, when viewed in the light most favorable to the State, establishes beyond a reasonable doubt that Shaw is an SVP. Thus, his arguments are without merit, and his appeal should be denied a rational trier of fact could have found those elements beyond a reasonable doubt.

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IV. CONCLUSION

For the foregoing reasons, the State requests that this Court deny Mr. Shaw's appeal, and affirm his civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 30 day of November, 2010.



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NO. 40723-0-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,
Respondent,

DECLARATION OF
SERVICE

vs.

GARY ALLEN SHAW,
Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY ELIZABETH JACKSON
DEPUTY

I, Elizabeth Jackson, declare as follows:

On this 30th day of November 2010, I deposited in the United States mail true and correct copies of Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

Stephanie Cunningham
4616 25th Avenue NE, #552
Seattle, WA 98105

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of November 2010, at Seattle, Washington.

Elizabeth Jackson
ELIZABETH JACKSON

ORIGINAL.