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STATE OF WASHINGTON
BY DEPUTY

NO. 41937-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

TROY BELCHER,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. ISSUE PRESENTED

A. Whether there was sufficient evidence at trial that Mr. Belcher suffers from a mental abnormality that makes him likely to commit future acts of predatory sexual violence if not confined in a secure facility when an expert using generally accepted methods (1) opined Mr. Belcher suffered from a mental abnormality; (2) linked the mental abnormality to his dangerousness; (3) conducted a risk assessment indicating Mr. Belcher was at high risk for reoffense; and (4) provided a basis for each of his opinions.

B. Whether the trial court abused its discretion in allowing Mr. Belcher's victims to testify at trial when (1) the testimony was highly probative of Mr. Belcher's mental abnormality and dangerousness; and (2) well-established precedent allows such testimony.

II. STATEMENT OF THE CASE

A. Procedural History

On December 6, 2007, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of Troy Belcher pursuant to RCW 71.09. CP at 1. When the petition was filed, Mr. Belcher was in the custody of the Department of Corrections (DOC), and was scheduled to be released into the community on December 7, 2007. CP at 9. On June 25, 2008, the trial court entered an order determining that probable cause existed to believe Mr. Belcher was an SVP. CP at 84. Pursuant to this order, Mr. Belcher was transported to the Special Commitment Center (SCC) on McNeil Island. CP at 85.

A jury trial on the petition was held from January 24, 2011 through February 3, 2011. RP 199-1881. On February 3, 2011, the jury returned a verdict finding that Mr. Belcher was an SVP. CP at 1850, RP at 1876. On the same day, the trial court entered an Order of Commitment. CP 1850. On March 2, 2011, Mr. Belcher filed a Notice of Appeal. CP 2032.

B. Sexually Violent Predator Trial

1. Mr. Belcher's Sex Offense History

Troy Belcher, has a proclivity toward coercive sexual activity. RP 929. This tendency has manifested itself despite availability of consensual sexual partners, community supervision, criminal convictions, and confinement. RP 860-869, 930; Ex. 2, 3, 6.

At age 12, he was expelled from sixth grade when 8 to 9 female classmates reported inappropriate touching from Mr. Belcher. Ex. 15d at 51:13, 52:13, 58:16. The girls also reported that Mr. Belcher made gestures imitating masturbation toward them. Ex. 15d at 58:19. He testified that this behavior was a "sport" to him, where he would see "how many girls he could get at the time." Ex. 15d at 53:6.

Months later, Mr. Belcher approached L.C., a 13-year-old girl, as she was babysitting two young children at a park. RP 489. Because Mr. Belcher was "creepy," L.C. raced with the kids back to their house. RP 493. Mr. Belcher followed. RP 493.

Once L.C. and the children were inside the house, Mr. Belcher knocked on the front door. RP 495. L.C. answered the door, and Mr. Belcher forced his way inside the home. RP 496. He pushed L.C. upstairs into a bedroom despite her struggling. *Id.* Inside the room, he pushed L.C. to the ground, removed her pants, and vaginally raped her. RP 498-500. After about a minute of being raped, L.C. was able to push Mr. Belcher off of her. RP 501. Mr. Belcher left the house; and, L.C. phoned for help. RP 503.

On July 30, 1998, Mr. Belcher was charged with Rape in the First Degree by forcible compulsion and Burglary in the First Degree for sexually assaulting L.C. Ex. 1. After a trial, Mr. Belcher was convicted of Rape in the Second Degree by forcible compulsion. Ex. 2. The court also entered a Finding of Manifest Injustice, finding Mr. Belcher to be impulsive and lacking self-control. Ex. 3. Mr. Belcher was sentenced to 65 weeks at a Juvenile Rehabilitation Administration (JRA) facility for this conviction. Ex. 4.

Mr. Belcher served his time at the Echo Glen JRA facility where he acknowledges, at times, he was "a problem." Ex. 15f at 107:6. He was released from Echo Glen to community supervision. Ex. 15f at 113:19; RP 563. Mr. Belcher violated supervision conditions on four occasions, and was detained at a JRA facility after each violation. RP 575-580;

Ex 15f at 119:10. While under supervision, Mr. Belcher was also revoked from sex offender treatment and involved in an assault against his step-father. RP 567; Ex. 15f at 121:8.

While under supervision, Mr. Belcher also committed another sex offense. Ex. 15h at 127:19. While walking to a friend's house, 13-year-old J.A. encountered Mr. Belcher on the road. RP 543-546. She recognized Mr. Belcher from the bus she took to school. RP 543. He offered to show her a shortcut to her friend's house through the woods. RP 546. They followed the trail into the woods until it stopped. RP 547. Mr. Belcher began kissing J.A., then pushed her to the ground, undid her pants, and removed her underwear. *Id.* He climbed on top of her and said that he would not hurt her if she didn't scream. *Id.* Afraid, J.A. pushed Mr. Belcher off of her and ran back to the road. RP 549.

Once J.A. reached the road, Mr. Belcher caught up to her. RP 550-551. He picked her up from behind, swung her around, then told her that she should not allow people to do what he had just tried to do with her. *Id.* He also told her that if she told anybody about what had just happened that she would be sorry. *Id.* Once he put her down, J.A. resumed running away from Mr. Belcher. RP 551.

On October 17, 2000, Mr. Belcher was charged with Attempted Rape in the Second Degree with forcible compulsion for his assault of J.A.

Ex. 5. After a trial, Mr. Belcher was convicted for this crime and sentenced to 256 weeks at a JRA facility. Ex. 6. This court also made a finding of manifest injustice as to this crime based on Mr. Belcher's sexually aggressive behavior while on parole. *Id.*

Mr. Belcher was accused of other sex offenses during his time under supervision. Ex. 15h at 130:21. In addition to J.A., two other girls reported sexual assaults against Mr. Belcher. *Id.* At the SVP trial, J.A. testified about one instance where she walked into a room and saw Mr. Belcher on top of one of her friends who was trying to push him off. RP 554.

After his attempted rape conviction, Mr. Belcher was detained at the Green Hill School JRA facility. RP 591. Here, Mr. Belcher's problematic behaviors continued. Ex. 15 j at 161:10. He exposed himself, incited other detainees to misbehave, and verbally victimized other residents in the facility. RP 603. The manager of the Intensive Management Unit where Mr. Belcher was housed had to implement a program where her staff would interact with Mr. Belcher on a rotating basis to prevent him from manipulating staff members. RP 606, 599.

On October 8, 2004, Mr. Belcher was charged with Solicitation to Commit Murder in the First Degree and Intimidating a Witness. Ex. 7. During the summer of 2004, Mr. Belcher approached another JRA resident

and inquired about having L.C., his 1998 victim, hurt, killed or put into a coma. RP 745-748. On November 19, 2004, Mr. Belcher pleaded guilty to Intimidating a Witness for this offense. Ex. 8. He was sentenced to 27 months incarceration. Ex. 9. He remained at Green Hill School to serve this sentence until February 2005. RP 607. At this time, Mr. Belcher was transferred to the DOC because JRA staff felt it was not safe to return him to a juvenile population. *Id.*

Mr. Belcher was transferred from the DOC to the SCC in December 2007. RP 764. At the SCC, Mr. Belcher was unable to follow facility rules. RP 784. He received 15 Category 1 Behavior Management Reports (BMR), and over 30 Category 2 BMR. RP 787. Mr. Belcher's problematic behavior included making sexually harassing calls to women outside of the facility, manipulating special needs residents at SCC, and verbally abusing staff members. RP 781-783, 788, 1507, 1527. At the time of trial, Mr. Belcher was not participating in any sex offender treatment at the SCC. Ex. 15a at 10:2.

2. Dr. Judd's Testimony at Trial

At trial, the State presented expert testimony from licensed psychologist Dr. Brian Judd. RP 807. Dr. Judd specializes in the risk assessment and treatment of sex offenders. RP 820. He has conducted

approximately 120 SVP evaluations since 1995 for both the State and Respondents. RP 825.

Dr. Judd is a member of the Joint Forensic Unit (JFU), a panel of experts who are tasked with determining if certain individuals meet SVP criteria. RP 827. Mr. Belcher's case was referred to Dr. Judd by the JFU in 2007. RP 828. Dr. Judd reviewed extensive records related to Mr. Belcher. RP 831, 878. They included criminal history, institutional, community custody, school, and mental health records, all of which are of the type commonly relied upon by experts who evaluate SVPs. RP 829-831. Dr. Judd also interviewed Mr. Belcher on two occasions for his evaluation. RP 835.

Dr. Judd diagnosed Mr. Belcher with Paraphilia Not Otherwise Specified (PNOS), non-consent, and Antisocial Personality Disorder (ASPD).[1] RP 849. He held his diagnostic impressions to a reasonable degree of psychological certainty. RP 852. A Paraphilia is a disorder where a person is sexually aroused to deviant themes, such as children or non-consenting persons. RP 852. Individuals who suffer from ASPD find it difficult to conform to rules, and tend to be reckless and irresponsible. RP 873.

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[1] Dr. Judd also diagnosed Mr. Belcher with Attention Deficit Hyperactivity Disorder (ADHD). RP 869.

Dr. Judd found that Mr. Belcher's PNOS predisposed him to be sexually aroused by non-consensual sexual behavior, and his ASPD reduced any inhibitions Mr. Belcher might have to prevent him from engaging in such behavior. RP 929-930. Dr. Judd opined, also to a reasonable degree of psychological certainty, that these disorders qualify as a mental abnormality for Mr. Belcher and cause him serious difficulty controlling his sexually violent behavior. RP 929-931.

Dr. Judd also opined to a reasonable degree of psychological certainty, that Mr. Belcher's mental abnormality makes him likely to engage in predatory acts of sexual violence if released into the community. RP 1005. His opinion was based on a risk assessment he conducted, utilizing actuarial instruments and researched factors that aggravate or mitigate against an offenders recidivism risk. RP 937.

Actuarial instruments are tools that assess an offender's recidivism risk compared to other offenders with similar characteristics. RP 934, 941. Actuarial information underestimates an offender's risk because not all re-offenses are detected and measured by actuarial instruments. RP 942-943. Actuarial tools give an evaluator a baseline of an offender's risk. RP 942.

Dr. Judd utilized the Sex Offender Risk Appraisal Guide (SORAG) in his assessment of Mr. Belcher, after consulting with the authors of the

instrument. RP 943. The SORAG is an actuarial instrument generally used in SVP cases that measures risk of new criminal charges for violent crimes, including sex offenses. RP 944-945. Mr. Belcher's score from the SORAG placed him in the 99th percentile of offenders in the instrument's standardization sample. RP 967. All offenders with similar scores recidivated within seven years of release from confinement. *Id.*

Dr. Judd also measured Mr. Belchers psychopathy using the PCL-R instrument.[2] RP 964. Psychopathy is manifested by a person's lack of remorse and empathy, irresponsibility, and impulsive behavior. RP 937. Offenders with higher levels of psychopathy have higher rates of recidivism. RP 940. Mr. Belcher's score from the PCL-R placed him in the 88th percentile of North American male offenders and the 93rd percentile of North American male forensic psychiatric patients. RP 983. This indicates that Mr. Belcher has a high degree of psychopathy. *Id.*

Sexually deviant individuals with high levels of psychopathy have a higher risk for reoffending. RP 988. Dr. Judd opined that Mr. Belcher is at high risk for offending because of his sexual deviance and high degree of psychopathy. RP 989. He cited a 2003 study finding 70 percent of offenders with these characteristics were returned to custody within 15

[2] The PCL-R is commonly used by evaluators in SVP cases. RP 973.

years of release. RP 987; Ex. 31. This finding has been replicated in other studies. RP 989.

Finally, Dr. Judd examined protective factors that might reduce Mr. Belcher's risk. RP 998. These factors include an offender's advancing age and any participation in sex offender treatment. RP 998-1003. Dr. Judd opined that these factors did not mitigate Mr. Belcher's risk to reoffend. *Id.*

3. Dr. Wollert's Testimony at Trial

Mr. Belcher presented testimony from his expert, Dr. Richard Wollert. RP 1132. Dr. Wollert testified that he normally testifies on behalf of respondents in SVP cases. RP 1139. He relied on the same documents Dr. Judd relied on when conducting his evaluation. RP 1142. He made no diagnoses of Mr. Belcher in his evaluation. RP 1258. Dr. Wollert opined that Mr. Belcher did not suffer from a mental abnormality or personality disorder. RP 1168, 1172, 1181. He also opined that Mr. Belcher's risk of reoffense was 7 percent. RP 1234. During cross examination on his approach to SVP cases compared to other experts in the field, Dr. Wollert conceded, "I'm not aware of people who do things exactly the same way I do." RP 1285.

III. ARGUMENT

Mr. Belcher argues that the trial court erred when it committed Mr. Belcher as an SVP because the State failed to prove he was an SVP beyond a reasonable doubt and the trial court admitted victim testimony into evidence. These arguments are without merit. Substantial evidence presented at trial proves Mr. Belcher is an SVP. The trial court was following well-established precedent in allowing Mr. Belcher's victims to testify. Mr. Belcher's civil commitment as an SVP must be affirmed.

A. The State Presented Sufficient Evidence to Support Mr. Belcher's Civil Commitment.

Mr. Belcher argues that the State did not prove beyond a reasonable doubt that he (1) suffers from a mental abnormality or personality disorder; and (2) is likely to engage in predatory acts of sexual violence if not confined to secure facility. Brief of Appellant at 22. Substantial evidence for each of these elements was presented at trial. Because of the vast amounts of evidence presented at trial regarding Mr. Belcher's mental abnormality and high risk of reoffense, his commitment as an SVP should be affirmed.

1. Standard of Review

The criminal standard of review applies to sufficiency of the evidence challenges under the SVP statute. *In re the Detention of Thorell,*

149 Wn.2d 724, 744, 72 P.3d 708 (2003). "Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

In reviewing the sufficiency of the evidence, the reviewing court does not determine whether *it* believes the evidence at trial was proven beyond a reasonable doubt. *State v. Hughes,* 154 Wn.2d 118, 152, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco,* 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). This Court must look at the evidence in the light most favorable to the State and the commitment must be upheld if any rational trier of fact could have found the essential elements beyond a reasonable doubt. *In re the Detention of Audett*, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006).

In this sufficiency challenge, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against Mr. Belcher. *See Id.* at 727. An appellate court should not second guess the credibility determinations of the fact-finder. *In re the Detention of Halgren,* 156 Wn.2d 795, 811, 132 P.3d 714 (2006); *see also In re the Detention of Davis,* 152 Wn.2d 647, 680, 101 P.3d 1 (2004) ("A trial court's credibility determinations cannot be reviewed on appeal, even to the extent there may be other reasonable interpretations of the

evidence.") Appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re the Detention of Broten,* 130 Wn. App. 326, 335, 122 P.3d 942 (2005). "Determinations of credibility are for the fact finder and are not reviewable on appeal." *Hughes,* 154 Wn.2d at 152.

2. The State Presented Substantial Evidence That Belcher Meets the Definition of a Sexually Violent Predator.

A review of the trial record indicates that sufficient evidence was presented by the State for the trial court to find, beyond a reasonable doubt, that Belcher meets criteria as an SVP. Taken in the light most favorable to the State, the evidence strongly supported a finding that Belcher's mental abnormality causes him serious difficulty controlling his behavior and makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

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[3] or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure

[3] "Mental abnormality" means "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

facility."[4] RCW 71.09.020(18). Additionally, the "mental abnormality" or "personality disorder" coupled with the person's history of sexually predatory acts, must support the conclusion that the person has serious difficulty controlling his behavior. *In re the Detention of Thorell*, 149 Wn.2d 724, 742, 72 P.3d 708 (2003).

The definition of mental abnormality is tied directly to present dangerousness. *In re the Detention of Henrickson*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000). Due process requires that an individual be both mentally ill and presently dangerous before he may be civilly committed. *See In re the Detention of Young,* 122 Wn.2d 1, 27, 857 P.2d 989 (1993).

When a person is incarcerated prior to the civil commitment trial, the State may rely on the offender's offense history, mental condition, expert testimony, and other relevant, probative evidence to establish the offender's current dangerousness. *See Froats v. State,* 134 Wn. App. 420, 438-39, 140 P.3d 622 (2006). "The point of *Young* is that an individual's conduct during incarceration is not necessarily probative of current dangerousness given the relative difficulty, if not impossibility, of committing an offense during incarceration." *Id.* at 439. The Washington

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[4] "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 unconditionally released. RCW 71.09.020(7). A mental abnormality is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

Supreme Court has held that by properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact-finder impliedly finds that the person is currently dangerous. *In re the Detention of Moore,* 167 Wn.2d 113, 124-25, 216 P.3d 1015 (2009). Unchallenged findings are verities on appeal. *In re Estate of Jones,* 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *In re Detention of Anderson,* 166 Wn.2d 543, 549, 211 P.3d 994 (2009).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences must be drawn in favor of the State. *Audett,* 158 Wn.2d at 727. Dr. Judd testified in detail about how Mr. Belcher suffered from a mental abnormality. RP 843-931. Dr. Judd also testified at length about how he assessed Mr. Belcher's risk. RP 931-1009. Dr. Judd opined, to a reasonable degree of psychological certainty, Mr. Belcher: (1) suffers form a mental abnormality; and, (2) is likely to commit predatory acts of sexual violence if not confined in a secure facility. RP 929, 1006. Viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, a rational trier of fact would have easily found that both of these elements are satisfied in Mr. Belcher's case.

a. Substantial Evidence Was Presented Regarding Mr. Belcher's Mental Abnormality.

Evidence at trial established that Mr. Belcher suffers from a mental abnormality. Mr. Belcher argues that because his expert, Dr. Wollert, did not agree with the PNOS (paraphilia not otherwise specified) diagnosis made by Dr. Judd, this element was not proven beyond a reasonable doubt. Brief of Appellant at 22. In rejecting Dr. Wollert's opinions, the jury relied on Dr. Judd's testimony in finding Mr. Belcher suffered from a mental abnormality. Other evidence at trial, including victim testimony, supported this conclusion.

A paraphilia involves recurrent, intense sexually arousing fantasies, sexual urges, or behaviors that involve non-human objects, suffering or humiliation to oneself or one's partner, children, or other non-consenting persons. RP 852. Paraphilic disorders are regarded as chronic disorders, onset in adolescence and persisting throughout a person's lifetime. RP 867. The criteria to diagnose a paraphilia are found in the Diagnostic and Statistical Manual of Mental Disorders IV-TR, the standardized diagnostic manual used by psychologists in the United States. RP 845, 847. Dr. Judd used these criteria when diagnosing Mr. Belcher with PNOS. RP 850.

PNOS, non-consent, is a paraphilia where an individual's fantasies, urges, or behaviors involve, non-consenting persons, such as Mr. Belcher's victims. RP 856, 862. These fantasies, urges, or behaviors must span at least 6 months to be diagnosable. RP 853. This diagnosis is commonly used in SVP evaluations. RP 857.

Dr. Judd cited a study finding individuals who had been convicted of rape had a much higher sexual arousal to use of force or coercion than individuals without such a conviction. RP 996. Offenders with rape convictions were six times more likely to register arousal to rape scenarios on a penile plethysmograph test than non-offenders. *Id.* This study is indicative that Mr. Belcher likely was acting on an arousal to force or coercion when committing his offenses. RP 998.

Because offenders are not inclined to discuss coercive sexual fantasies with others, this diagnosis may be assigned based on a person's behavioral patterns. RP 866, 1042, 1052, 1100. In making this diagnosis, Dr. Judd referenced Mr. Belcher's sex offenses involving non-consenting victims. RP 862. Mr. Belcher's victims, L.C. and J.A. testified about their non-consensual sexual encounters with Mr. Belcher. RP 487-508; 542-555. Mr. Belcher also acknowledged other non-adjudicated reports of non-consenting sexual behavior. Ex. 15d, 15h. Each of these offenses

were perpetrated despite the availability of consensual sexual partners for Mr. Belcher. RP 868.

Dr. Judd also found that this sexually coercive behavior had persisted over time. RP 865. While in JRA, Mr. Belcher was reported for engaging in non-consensual sexual activities with other residents. RP 863. Dr. Judd found that the persistence of this behavior in Mr. Belcher from age 13 though age 20 well exceeded the criterion that the sexual fantasies, urges, or behaviors span at least a 6-month period. RP 865.

Mr. Belcher's PNOS affects his volitional capacity and predisposes him to the commission of future sex offenses. Dr. Judd opined that Mr. Belcher's PNOS affects his volitional controls because it persisted despite incarceration and treatment attempts. RP 927. This strong arousal to non-consensual activities predisposes him to continue his pattern of sexual offending. RP 928. Mr. Belcher's diagnosis of ASPD compounds his problems, because it reduces any inhibitions he might have to committing further rapes. RP 928, 930.

Based on this evidence, a rational jury could have easily found that Mr. Belcher suffers from a mental abnormality.

b. Overwhelming Evidence Regarding Mr. Belcher's Likelihood to Commit Future Sexually Violent Crimes Was Presented at Trial.

Substantial evidence was presented at trial to prove that Mr. Belcher is more likely than not to commit predatory acts of sexual violence unless confined in a secure facility. Mr. Belcher argues that because Dr. Wollert did not agree with the results of Dr. Judd's risk assessment, this element was not proven beyond a reasonable doubt. Brief of Appellant at 22. He specifically takes issue with Dr. Judd's use of the SORAG actuarial instrument. *Id.* Based on the evidence, the jury found Dr. Judd's use of the SORAG to be credible and appropriate. Further, other evidence presented at trial aside from the SORAG established Mr. Belcher's high risk for reoffense.

(1) The Sex Offender Risk Appraisal Guide Placed Mr. Belcher's Recidivism Risk at 100%.

Actuarial tools give an evaluator a baseline of an offender's risk. RP 942. A small percentage of sex offenders commit another sex offense. RP 939. This is also true for offenders who committed their crimes as juveniles. RP 1075. However, not all sex offenders recidivate at the same rate. RP 939. Factors associated with reoffense for both adults and juveniles are the same. RP 1071. Actuarial instruments use these factors

to assess an offender's recidivism risk compared to other offenders with similar characteristics. RP 934, 941, 947.

The SORAG is an actuarial instrument generally used in SVP cases that measures risk of new criminal charges for violent crimes, including sex offenses. RP 944-945. Dr. Judd chose this instrument because it has been cross validated multiple times and aligns best with the RCW 71.09 definitions of sexually violent offenses. RP 946, 950, 1104. Dr. Judd cited a study finding the SORAG to be a better predictor of sex offense recidivism than other popular actuarials used in SVP cases. RP 1106.

Dr. Judd also consulted with the authors of the SORAG to ensure that a sufficient number of offenders who committed their last offense as juveniles were included in the standardization sample. RP 944, 1064. In fact, the juvenile offenders in the SORAG standardization sample that had the same score as Mr. Belcher recidivated at the same rate as the whole sample of offenders. RP 1106.

Mr. Belcher's score from the SORAG placed him in the 99th percentile of offenders in the instruments standardization sample. RP 967. All offenders with similar scores recidivated within seven years of release from confinement. *Id.* Dr. Judd opined that Mr. Belcher's risk was more

similar to these offenders than the lower recidivism rates for sex offenders in general. RP 968.

(2) Other Risk Factors Corroborated Mr. Belcher's Exceedingly High Risk.

In addition to the SORAG, Dr. Judd relied on other scientific studies indicating Mr. Belcher is likely to reoffend. Studies on psychopathy and its correlation with sexual deviance indicate that Mr. Belcher is at particularly high risk for reoffense. Examining these factors in addition to actuarial information is a generally accepted method of risk assessment on SVP cases. RP 936.

Psychopathy is characterized by a person's lack of remorse and empathy, irresponsibility, and impulsive behavior. RP 937. Offenders with higher levels of psychopathy have higher rates of recidivism. RP 940. Psychopathy is measured using the PCL-R instrument, a test commonly used by SVP evaluators. RP 964, 973.

Mr. Belcher received a score of "31" on the PCL-R. RP 966. This indicates that Mr. Belcher has a high degree of psychopathy. RP 983. This score places him in the 88th percentile of North American male offenders and the 93rd percentile of North American male forensic psychiatric patients. *Id.*

When an individual with a high degree of psychopathy is also characterized by sexual deviance, risk of recidivism is particularly high. RP 986. Individuals with these traits recidivate at a much higher rate than offenders who have one or neither of these traits. *Id.* Mr. Belcher is sexually deviant and has a high degree of psychopathy. RP 989.

To illustrate this point, Dr. Judd cited a 2003 study of convicted rapists who were tracked to detect recidivism. RP 983. The offenders were placed into four groups: individuals with high psychopathy and sexual deviance, psychopathic individuals without sexual deviance, sexually deviant individuals who were not psychopaths, and individuals who were neither psychopathic nor sexually deviant. RP 986. Of rapists like Mr. Belcher, who were sexually deviant and had a high degree of psychopathy, 70 percent were returned to custody within 15 years of release. RP 987, Ex. 31. The findings of this study have been replicated in other studies. RP 989.

These studies indicate that Mr. Belcher is at high risk for reoffending. RP 989. They also corroborate with the results of Mr. Belcher's scoring on the SORAG. *Id.* These indicators of high risk were not mitigated by any factors known to reduce an offender's risk. RP 998-1003. Based on this risk assessment, Dr. Judd opined that

Mr. Belcher was likely to engage in predatory acts of sexual violence if released into the community. RP 1005.

Based on this evidence, a rational jury could have easily found that Mr. Belcher is more likely than not to commit predatory acts of sexual violence unless confined in a secure facility.

B. The Court Properly Allowed Mr. Belcher's Victims to Testify.

Mr. Belcher argues that the trial court abused its discretion by allowing two of Mr. Belcher's victims to testify. Specifically, he argues that this testimony was only marginally relevant and substantially outweighed by unfair prejudice to Mr. Belcher.[5] Brief of Appellant at 16. This argument is without merit. Case law establishes the highly probative value of victim testimony in SVP trials.

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even relevant

[5] Mr. Belcher assigns constitutional significance to his arguments pertaining to victim testimony at his trial. Brief of Appellant at 13. He specifies no reasons, authority, or argument for a constitutional claim on appeal. Any constitutional claims made by Mr. Belcher must be rejected, because "naked castings into the constitutional sea are insufficient to command judicial consideration and discussion." *State v. Johnson,* 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

evidence will be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403.

The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent manifest abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991). An abuse of discretion exists when the trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Mr. Belcher's claim of abuse of discretion fails to meet this standard.

1. Well-settled Precedent Establishes the Highly Probative Value of Victim Testimony.

In assessing whether an individual is an SVP, prior sexual history is highly probative of his propensity for future violence. *In re Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993). Further, the manner in which previous crimes were committed has some bearing on the motivations and mental states of the individual. *Id.* For these reasons, the Supreme Court in *Young* upheld the practice of admitting testimony from prior victims of an individual's sex crimes, rather than admitting only the fact of the Judgment, in SVP trials. *See In re Turay*, 139 Wn.2d 379, 400, 986 P.2d

790 (1999). The victim testimony in Mr. Belcher's case was relevant for all of these purposes.

For example, testimony from L.C. and J.A. provided the jury with evidence of Mr. Belcher's mental state during the offenses and the nature of his sexual deviancy. L.C. testified that Mr. Belcher raped her despite her attempts to fight back and pleas for him to stop the assault. RP 497-500. J.A. testified that she he recently moved to the area and was lured into to the woods by Mr. Belcher prior to her assault. RP 543-547. This is substantive evidence of his arousal to the non-consensual nature of each encounter, and highly probative of a mental abnormality predisposing Mr. Belcher to future sexually violent offenses.

2. The Court Properly Determined That Mr. Belcher's Victim Testimony Outweighed Any Potential Unfair Prejudice.

Any prejudice to Mr. Belcher from victim testimony does not substantially outweigh the highly probative value of such evidence. Mr. Belcher argues that victim testimony in his case was unfairly prejudicial, and cites *Acosta* to support this claim.[6] Brief of Appellant at 15-16. Precedent belies this argument and distinguishes SVP cases from criminal cases such as *Acosta*.

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[6] *State v. Acosta*, 123 Wn. App 424, 98 P.3d 503 (2004).

In *Young*, the Supreme Court rejected the same argument Mr. Belcher makes. *Young*, 122 Wn.2d at 53. Mr. Young argued that victim testimony at his trial was unfairly prejudicial, but the Court found that, "Although we agree that the testimony by the victims was compelling, and, therefore, had a substantial effect on the jury, we do not believe its prejudicial effect outweighed its probative value." *Id.*

The Supreme Court reaffirmed this finding in the *Turay* case. *Turay*, 139 Wn.2d at 402. At his trial, Mr. Turay offered to stipulate to the existence of his prior rape convictions in order to prevent "prejudicing the jury by garnering overwhelming sympathy for [the victims]." *Id.* at 400. The State did not agree to the stipulation, and the trial court admitted the evidence. *Id.* In affirming the admission of victim testimony, the Supreme Court cited *Young* and distinguished the SVP case from *Old Chief*, a criminal case cited by Mr. Turay.[7] *Id.* at 401.

Acosta is a criminal case like *Old Chief*, and is distinguishable from an SVP proceeding. At issue in *Acosta* and *Old Chief* was whether prior criminal behavior constituted improper "bad character" evidence to show conformity with the pending criminal charges.[8] *See Old Chief*,

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[7] Mr. Turay cited the Old Chief case to support his argument that victim testimony at his SVP trial was unfairly prejudicial. *See Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

[8] *Old Chief* and *Acosta* are also limited in their scope. The holding in *Old Chief* was "limited to cases involving proof of felon status." *Old Chief*, 519 U.S. at 183 n.7.

519 U.S. at 180, *Acosta*, 123 Wn. App. at 437. *Turay* distinguished SVP cases from criminal cases:

> "The trier of fact is not attempting to determine whether the alleged SVP committed the 'bad act now charged,' but is rather trying to determine whether the person suffers from a mental abnormality or personality disorder which makes them likely to engage in predatory acts of sexual violence if not confined to a secure facility."

Turay, 139 Wn.2d at 402. Because the purpose of victim testimony in Mr. Belcher's trial was offered to prove he suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence, the evidence was not unfairly prejudicial.

3. Evidence of juvenile offenses is admissible in SVP proceedings.

Mr. Belcher argues that because his offenses against J.A. and L.C. are over ten years old and were committed as a juvenile, evidence of these crimes is marginally relevant to the issues before the jury. Brief of Appellant at 17. The Supreme Court rejected a similar argument in *Young*, where a petitioner argued that evidence of a juvenile conviction should have been excluded. *Young*, 122 Wn.2d at 53. The Court found

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The *Acosta* court found that the previous charges and convictions, "do not assist the jury in determining any consequential fact in *this* case." *Acosta*, 123 Wn. App at 426 (emphasis added). Mr. Acosta was on trial for robbery, theft, taking a motor vehicle, and possession of methamphetamine. SVP commitment proceedings are held to determine whether an individual fits within the definition of SVP. RCW 71.09.060(1).

that in drafting RCW 71.09, the Legislature indicated intent to include prior juvenile adjudications within the scope of permissible proof at SVP proceedings.[9] *Id.* at 54. Indeed, the Court found that, "A person's history of sexually violent offenses is relevant to the sex predator determination." *Id* at 53. Because his offenses against J.A. and L.C. constitute a portion of Mr. Belcher's sexually violent history, the trial court was within its discretion to admit their testimony.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Mr. Belcher's civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 22nd day of March, 2012.

JAMES BUDER, WSBA #36659
Assistant Attorney General
Attorney for Respondent

[9] An SVP petition may be filed against "a person found to have committed a sexually violent offense as a juvenile." RCW 71.09.030(1)(b).

NO. 41937-8 II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: TROY BELCHER, Respondent.	DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On March 22, 2012, I sent via Federal Express true and correct copies of Brief of Respondent; Respondent's Motion on the Merits to Affirm the Decision of the Trial Court; and Declaration of Service, postage affixed, addressed as follows:

John Hays
1402 Broadway
Longview, WA 98632-3714

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

DATED this 22nd day of March, 2012, at Seattle, Washington.

Elizabeth Jackson
ELIZABETH JACKSON

ORIGINAL