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NO. 55572-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

IN RE THE DETENTION OF

CHARLES POST,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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A. INTRODUCTION

Appellant Charles Post was committed by unanimous jury as a sexually violent predator pursuant to RCW 71.09. His numerous claims are not supported by the record, and many were not raised below. His claims should be rejected, and his commitment as a sexually violent predator should be affirmed.

B. RELEVANT FACTS

Appellant Charles Post is an untreated sexually violent offender who has a lengthy history of raping women. He was convicted of two counts Rape in the First Degree in 1974 involving two different women, and one count of Rape in the First Degree and Burglary in the First Degree in 1988. (19RP 40). One other rape charge was dismissed pursuant to plea agreement in 1974 and another one wasn't charged in exchange for the plea; he has admitted to committing this second rape. (19RP 53-54). Three other sexually violent offenses, committed while he was released on bail, were dismissed at his sentencing. (29RP 55).

His first known rape occurred on April 26, 1974, when he raped 42-year-old R. M. in a parking lot. Using a knife, Post forced R.M. into her car. He made her cover her face, and then raped her

vaginally. After raping her, he took \$30.00 from her. (19RP 40-42). He later reported that on the morning of the rape he was thinking to himself "what it would be like to force a woman to have sex with me." He claimed that his "primary motivation toward committing the instant offenses was a fantasy, a problem which necessitated psychiatric help." (CP 3-4;19RP 42-43). On May 30, 1974, appellant raped N.M, who was also in her forties. Using a knife, Post forced N. M. into her hotel room. He raped her repeatedly over the next eight hours. He then left, stealing \$80.00 from her. He later admitted that he went to the hotel with the intent of assaulting another woman. (CP 3-4).

Appellant was also identified as the perpetrator for two other rapes committed during this time period. On May 6, 1974, Post raped I. S. in the laundry room of her apartment. As with the above rapes, he used a knife to force his victim's compliance. On the same day, Post raped C. P. at knifepoint in the parking lot of a hotel while a friend waited for him in the car. Following the rape, Post robbed C. P. of \$210 and several other items. (CP 4). Post was apprehended, identified and charged with three counts of rape involving the crimes against R.M., N. M. and I. S. He was never charged with the offense against C. P. On July 30, 1974, Post pled

guilty to two counts of Rape in the first Degree for the crimes involving R. M. and N.M., and the crime against I.S. was dismissed pursuant to plea agreement. (19RP 53-54). He remained free pending sentencing. (19RP 55).

Several weeks later, on August 26, 1974, Post attempted to rape a 14-year-old girl and a 16-year-old girl while holding a rifle to their heads. He was attempting to rape the 16-year-old when the other girl successfully ran for help. Appellant fled the scene, and subsequently attempted to escape prosecution by fleeing to Canada. He was arrested and was positively identified by both girls. He was sentenced to serve a term in the Department of Corrections (CP 4).

He ultimately spent 13 years in prison and was finally released into the community in 1987. At that time his release plan appeared to be solid -- with a few minor differences, it was the exact same release plan that appellant put forward at his commitment trial. He had support from numerous friends and family members (19RP 71, 105), many of whom sent letters to the court saying he was a changed man (19RP 105-06; 20RP 80). He was engaged to marry a woman he met while in prison. (19RP 70). He was living in his mother's home. (19RP 70). He had a job with

Barbara Primo, (19RP 70) and he was going to AA with his brother-in-law. (19RP 71). Appellant participated in and completed a DOC substance abuse program in 1978 and was sober for six years before his release in 1987. (19RP 65-66, 69). He had undergone a religious conversion in prison (19RP 104) and then had the support of religious ministry upon his release in 1987. (20RP 79-80).

Yet despite all these precautions, appellant raped a 15-year-old girl in her bedroom less than five months after his release from prison while he was on active parole. (19RP 91). During the early morning hours of February 20, 1988, he broke into the home of 15-year-old M. F. wearing a ski mask and carrying a knife. (19RP 71-72). The girl was awakened by him standing over her bed. He put his hand over her mouth and shoved his thumb down her throat. She bit him and he withdrew the thumb. (19RP 72). The girl started to scream so appellant grabbed her throat and began choking her while holding the knife to her throat. He stated, "Shut up, or I'll kill you." (CP 5). He then repeatedly raped the girl in various positions over the next hour, despite her crying and pleading with him not to. (19RP 72). He raped her until he was able to ejaculate, and then sneered as he was leaving, "That wasn't so bad, was it?" (19RP 84).

After he was arrested, appellant and his family called witnesses and told them not to talk to or cooperate with the police. (19RP 85). Appellant's mother, Shirley Post, one of the lynch-pins of his new release plan, admitted under oath that she herself had tampered with witnesses. (19RP 86).

Appellant and his family wanted the jury in his commitment trial to believe he could be safe, and pointed towards his behavior during his recent incarceration. But, according to the institutional records, appellant generally behaves well when he is in prison. He has taken part in educational programs every time he was incarcerated. (19RP 64) He earned several Associate degrees in his first term. (19RP 65). He did well in school while he was detained in a juvenile facility. He has a history of getting involved in serious relationships while in prison, and was engaged to be married twice (20RP 80-81).

In his fact statement and at trial, appellant claimed alcohol made him rape the women, yet not one of the victims claimed he was under the influence or smelled of alcohol when he raped them. (22RP 94-95). He also insisted that these were not sexually motivated rapes, that he raped the women as an after thought. This claim is belied by the victims' statements - for example, R.M.

offered him money, but he said he wasn't interested in her money. (19RP 41).

Appellant also now denies he has ever had a rape fantasy, despite documentation of his admissions dating from the 1970's to the present date, including a 2004 statement given under oath. (19RP 42, 43, 45- 48). He told the pre-sentence investigator in 1974 that he committed the rapes because he had been fantasizing about committing a rape and that he "wondered what it would be like to force a woman to have sex with me." (25RP 38; 30RP 153). He told the sentencing court that the primary motivation for committing the offenses was a fantasy, a problem that necessitated psychiatric help. (30RP 154). He told his lawyer he was having sexual fantasies about raping a woman. (30RP 154). In 1999 he explained the 1989 rape by saying "the same thinking took over; hard to understand; power and control." (19RP 50). In a Department of Corrections ("DOC") forensic evaluation in 1980, he told Dr. Messiah that he had rape fantasies. (30RP 155). During his brief stint in the Sex Offender Treatment Program ("SOTP") in 2001 he admitted that he "masturbated to these sexual offenses, getting off on the sexualized violence and the power and control I had over the victims." (25RP 44-45; 30RP 156). Appellant admitted

he had a rape fantasy to Robin Murphy while he was in SOTP in 2001. (25RP 177). In a 2001 assessment, he admitted that 5-10% of his fantasies involved rape. (19RP 48). He admitted to rape fantasies in his sexual autobiography at the Special Commitment Center ("SCC"). (19RP 47). He has admitted that he was attracted to raping women despite having sexual partners available to him. (19RP 49). In 2003, speaking of his rapes, he wrote "I liked the rush; I liked the power and control I had." (30RP 157-158). "Like the previous rape, I experienced a rush to the violence and power/control." Under oath in a deposition taken in 2004, he admitted that he had masturbated to thoughts of the rape of N.M. afterwards. (30RP 160). At the commitment trial, he acknowledged that throughout the years he had admitted to having rape fantasies. (30RP 152).

1. THE STATE'S TRIAL TESTIMONY.

a. Dr. Les Rawlings.

Dr. Leslie Rawlings is an unbiased evaluator who testified for the State. In 40% of the cases he reviews, he finds the person does not meet RCW 71.09 criteria. (19RP 32). He testified at length about appellant's records he reviewed, and that those are

records reasonably relied on by experts in his files when conducting evaluations pursuant to RCW 71.09. (19RP 37). In conducting an evaluation pursuant to RCW 71.09, Dr. Rawlings looks for "trends in a person's functioning. I want to see how they have changed or remain stable over a long period of time." (19RP 38).

Dr. Rawlings testified that appellant suffers from the mental abnormality of paraphilia, NOS (non-consent, or rape). (19RP 109, 120).¹ Rawlings described evidence of "scripting" - what appellant does when he rapes. (20RP 92-95). These are elements that tended to be repeated during the rapes, (20RP 95-96) such as movement of the victims; his use of a knife in the rapes; comments he makes to the victims while he is raping them; he takes souvenirs from the victims (20RP 96). Dr. Rawlings also found it significant that appellant raped women even though he had consenting sexual partners available to him. (22RP 133-34). Additional evidence of the presence of a paraphilia is the documented presence of rape fantasies from the 1970s to the present. (20RP 169). Further, appellant had sex with his 6-year-old sister when he was 8 years

¹ Despite the first Assignment of Error in the Opening Brief, this diagnosis was conceded at trial. The defense called an expert witness, Dr. Sally Wing whose opinion it was that appellant suffered from paraphilia, NOS (non-consent, or rape). 26RP 175, 183) . See Section C. I, *infra*.

old, which Dr. Rawlings testified was extremely unusual. (19RP 131-32).

Dr. Rawlings opined that appellant has severe difficulty controlling his sexually violent behavior unless he is in a confined setting. (20RP 24, 28-29). As an example, Dr. Rawlings cited to the fact that appellant raped C.P. while a friend waited for him in car. Dr. Rawlings noted that the social control of having another person present is "simply ineffective" in causing appellant to control his behavior. (20RP 27). Dr. Rawlings further opined that appellant had the opportunity to stop himself from raping M.F., but did not. (19RP 88). He raped M.F. after being out of prison for only a few months. (20RP 25). This also shows that the "thinking process that led to the earlier rapes had maintained itself during the extended incarceration. ... [his] emotional functioning and sexual interest in rape had maintained itself." (19RP 90-91). In other words, appellant's mental abnormality has persisted over the years.

At trial and in his Opening Brief, appellant stressed his educational accomplishments. However, the research shows that education is unrelated to recidivism. (22RP 30). None of his educational accomplishments reduce his risk of sexual re-

offending. Dr. Rawlings summed up appellant's disregard for the nature of his disorders:

[W]hile these on the one hand are positive accomplishments: Involvement in pursuing educational opportunities; obtaining degrees, learning skills; the concern I have is that they detract, and I think they have served to some degree to detract him from more focused kind of dealing with the problems that brought him into the prison; paraphilic rape behavior.

(20RP 127).

Dr. Rawlings also testified that appellant suffers from a high degree of psychopathy, as measured by the Psychopathy Checklist-Revised ("PCL-R"), which correlates with sexual recidivism, and increased risk when coupled with sexual deviance.

(20RP 9-13). Psychopathy is a lifetime rating. (20RP 14).

Dr. Rawlings recited a long list of recent evidence that confirmed his assessment. Another factor that the research shows increases appellant's risk is the presence of Anti Social Personality Disorder.

(20RP 85).²

Dr. Rawlings opined to a reasonable degree of psychological certainty that appellant was more likely than not to re-offend if not

² These diagnoses were also undisputed at trial. One of the defense experts, Dr. Donaldson, testified that appellant was "anti-social and psychopathic as hell." (23RP 176; 24RP 16).

confined in a secure facility. (20RP 29, 65). He used the most widely accepted actuarial instruments in reaching that conclusion: the Static-99, the MnSOST-R and the SORAG. (20RP 35). All of these instruments have been cross-validated numerous times. (20RP 38), and all take the age of the offender into account when assessing risk. (20RP 39). Appellant's risk on all three actuarials was exceptionally high, by any measure well above the "more likely than not" standard. The MnSOST-R score was 19, with a corresponding recidivism rate of 78%. (20RP 48) Appellant's score placed him in the 96th percentile of sex offenders. (20RP 53). Appellant's score on the SORAG put him in the high-risk category, with a recidivism rate of 89% and placed him in the 97th percentile. (20RP 56). The Static-99 placed him in the highest possible risk group, with a 52% recidivism rate and ranked him in the 94th percentile. (20RP 59). Dr. Rawlings testified that appellant had scored higher than the vast majority of sexual offenders on all three tests. (22RP 84).

In addition to appellant's high risk as scored by all three of the actuarial instruments, Dr. Rawlings considered many other factors when assessing appellant's likelihood for sexual re-offense. The factors he reviewed have been shown by empirical research to

be correlated with sexual recidivism. (20RP 69). He looked at several studies which showed an increased risk for sexual recidivism when the individual suffers from both high psychopathy and sexual deviance, as appellant does. (20RP 66). Dr. Rawlings noted the difficulties appellant has had in treatment, historically and at present. (20RP 69-75). He appeared to be following the same pattern of manipulative behavior. (20RP 70). Dr. Rawlings also testified that appellant was still in the early phases of treatment -- Phase two of a six-phase program. (20RP 71). Dr. Rawlings was also concerned that there are no legal consequences if appellant drinks alcohol or drops out of treatment. (20RP 81-82).

Dr. Rawlings was also concerned about appellant's past pattern of escaping from authorities. Appellant escaped from a juvenile detention facility in the 1970s. (19RP 134). He attempted to escape from prison in 1978. (19RP 57). He did escape from the Department of Corrections in 1981. He fled the State of Washington and went to California. (19RP 58). Notably, he was with his sponsor, who was also his girlfriend at the time. (19RP 59). Dr. Rawlings testified that failure on conditional release is associated with higher levels of recidivism, and is the single highest factor for sexual recidivism. (19RP 60; 20RP 83-84). Appellant's

violations of conditions of release are not just a few random violations; he has a lifelong history of violations, including sexual re-offense while released on bail and while on parole.

b. Robin Murphy.

Ms. Murphy was appellant's treatment provider at SOTP.³ She testified that sex offender treatment requires honesty and hard work. (25RP 120). She recognized that psychopaths are a special breed and pose a higher risk; therapists need to know when they are dealing with one. (25RP 122). Ms. Murphy testified that in her experience working with sex offenders, those with histories like appellant are motivated by sexually deviant interests. (25RP 141). In her words, "It is obvious if one is committing this type of offense, there is some sexual motivation." (25RP 142).

Appellant didn't accomplish any treatment goals in SOTP. (25RP 138). There was no change in appellant, except that as time went on, he attempted to manipulate the group more. He wanted to focus on his academic achievements and ignore sexual offending.

³ Despite appellant's concerns that she was not a "state certified" treatment provider, state-employed sex offender therapists are not required to be certified because they are monitored by the State on a regular basis. (25RP 118-19). See also Jim Anderson's testimony to the same. (26RP 32).

(25RP 155). His lack of candor interfered with treatment progress. (25RP 140). Murphy reiterated that group trust is very important. (25RP 125) Appellant repeatedly lied to his group. (25RP 152). Eventually the group was unwilling to work with him after he lied and manipulated them. (25RP 157-58). Appellant was caught by Ms. Murphy in 2001 trying to make a pact with a 21-year-old member of the group not to confront or challenge each other in the group sessions. (25RP 147.). He also bragged that if someone accused him of something and they couldn't prove it, he would simply say, "I can not recall." (25RP 148).

Appellant interfered with Ms. Murphy's ability to handle the group by "creating chaos." (25RP 164). The SOTP staff work hard to keep individuals in treatment. (25RP 227). She tried hard with appellant, even after the group asked her to kick him out. She ultimately took him out of group because he was so disruptive. (25RP 164). She considered terminating him from the entire program, but did not because he was so high risk, so she set up "one-on -one" sessions especially for him. (25RP 168-169). Appellant was ultimately moved out of Twin Rivers due to his infraction, which became an issue of safety of an employee. (25RP 170).

c. Maia Christopher.

Maia Christopher was Robin Murphy's supervisor at SOTP. She testified that appellant had problems with the entire group, not just Robin Murphy. (22RP 148). He was dishonest in treatment. (22RP 153). The staff was on the fence about whether he would be kicked out of the program. (22RP 156). She told the jury that approximately 94-97 percent of the offenders who begin SOTP complete the program. (22RP 160).

d. Jim Anderson.

Jim Anderson testified about the SCC treatment program in general, and about appellant's status in treatment. Appellant had the same trust issues with Jim Anderson at the SCC as he had with Robin Murphy of SOTP. (25RP 51). The SCC treatment program is specially tailored to high-risk individuals. (26RP 38). Psychopaths, like appellant, are much less capable of engaging with the therapist on an emotional level. (26RP 40).

In any sex offender treatment it is important that the individual is honest. (26RP 33, 35). Mr. Anderson testified about the various "controls", or methods of stopping oneself from

offending. There are external controls such as supervision, and electronic monitoring. Because appellant has no external controls placed on him, internal controls are critical. Yet, Anderson testified that appellant has none of those skills either. (26RP 36-38).

Appellant claims he was held back from phase advancement as a result of Anderson's mistake. (Opening Brief at 35). But, appellant was held back in May 2004; the records mistake Mr. Anderson made was several months later, in September 2004. (26RP 112).

2. DEFENSE EXPERT TESTIMONY.

a. Dr. Theodore Donaldson.

Dr. Donaldson is a psychologist with virtually no experience in the field of sex offender treatment or evaluation. (23RP 166).

After being fired from the California Mental Health Board (because of his evaluation and diagnosis methods), he sent out a letter to all defense attorneys in California soliciting work on SVP cases.

(23RP 39, 167-68).

In formulating his opinion, Donaldson did not find credible appellant's story that his primary motive was to rob women. (23RP 58). Donaldson confirmed that appellant is a master manipulator (23RP 66) "who is going to tell me what he thinks I want to hear."

(23RP 157). Donaldson agreed that appellant manipulated every evaluator; every treatment provider, and his family and friends who will be monitoring him if he is released. (23RP 174-75). Donaldson even thought he manipulates the legal system. (24RP 30).

Dr. Donaldson acknowledged that appellant needs extremely tight supervision -- including multiple polygraphs every week, and daily contact with a CCO. (24RP 46-47). Appellant would have none of these conditions imposed if he were released. Donaldson further testified that "jail house conversions" have no effect on recidivism. (24RP 51).

b. Dr. Luis Rosell.

Dr. Rosell testified that in his opinion all sex offenders need supervision when they are released into the community, yet appellant has none. (28RP 124). Rosell testified that appellant doesn't yet know his offense cycle. (28RP 126). Rosell believes it is important for an offender to know this before release. (28RP 126). Unfortunately, no one knows what appellant's deviant fantasies are. (20RP 130). Rosell thought it concerning that the longest appellant has ever been in the community without committing a crime is one year. (28RP 90). Appellant told Rosell

he committed a rape and robbery for which he was never caught. (28RP 89).

Not surprisingly given appellant's extensive history of violent sexual assaults, Dr. Rosell believes there is a sexual component to appellant's rapes. (28RP 82). Dr. Rosell admits that appellant's treatment in the community with Dr. Wing "would be sticky" given she thinks his rapes were sexually motivated and he refuses to admit that. (28RP 86). Appellant's pattern is to fire treatment providers if they disagree with him. His treatment with Sally Wing would be voluntary, with no legal requirement that he stay in treatment, and he could quit any time there is a disagreement. (28RP 87). Dr. Rosell testified that Stuart Frothingham, Maia Christopher and Robin Murphy all thought appellant was manipulative, deceitful and disruptive. (28RP 103-04). As recently as a month before the trial [in October 2004] appellant had a conflict with his therapist, so he requested that a new one be assigned. (28RP 108). Appellant had conflicts with other therapists besides Jim Anderson. They all agreed he was manipulative. (28RP 109). Allen Cook had problems with Post's openness and honesty. (28RP 119). Appellant had "negative emotionality" and hostility towards his SCC therapists, which were

the same problems he had with Robin Murphy at SOTP. (28RP 120). Appellant was put into Murphy's group as he had a history of bending rules and trouble-making, and she was thought to be able to handle him. (28RP 105-06). He was not put into a group with lower-functioning individuals, as appellant testified.

c. Dr. Sally Wing.

Dr. Wing testified that she would treat appellant if he were to be released on the petition. She evaluated him and assigned the same diagnoses as Dr. Rawlings -- paraphilia NOS and anti-social personality disorder. (26RP 175, 183). She found appellant more likely than not to re-offend. (27RP 121,122-23). Dr. Wing testified that in her opinion any sex offender being released needs "regular" surveillance. (27RP 121). She doesn't find credible his story of robbery and rape as afterthought. (26RP 190).

The problem with that is that a lot of people do robberies without doing rape, they may do some other things, but they don't rape; and so something had to put it into his mind to do a rape and that's trying to look back, well, what else was going on?

(26RP 191).

Dr. Wing expressed concern about appellant's "minimal admission of deviant behavior." (27RP 117). She believes he put

more pre-planning into rapes than he admits. (27RP 125).

Dr. Wing acknowledged that she needed to work more with his support team so they get a realistic idea of his offending. (27RP 127). Barbara Primo and his mother don't think he did everything for which he was convicted. (27RP 114-15). Dr. Wing acknowledged that appellant chose her as a treatment provider because he can manipulate her. (27RP 159). She is concerned that appellant will sue her if he doesn't like what she had to say. (26RP 204).

C. ASSIGNMENT OF ERRORS

1. THE COMMITMENT IS BASED ON SOUND SCIENTIFIC EVIDENCE.

a. Appellant Failed to Preserve Any Error.

On appeal, appellant asserts for the first time that the diagnosis of paraphilia NOS (non-consent or rape) is "scientifically unsound." He further argues for the first time that the application of the actuarial instruments was also not scientifically sound. He has not properly preserved any error because he failed to raise this argument below. RAP 2.5 (a) provides that "the appellate court may refuse to review any claim of error not raised in the trial court." A litigant cannot remain silent as to claimed error during trial and

later, for the first time, urge objections thereto on appeal.

State v. Guloy, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986).

Objections must be made at the time the evidence is offered. *State v. Davis*, 141 Wash.2d 798, 850, 10 P.3d 977 (2000).

The Washington Supreme Court recently applied the preservation of error doctrine to sexually violent predator cases because, among other reasons:

[O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

In re the Detention of Audett, 158 Wash.2d 712, 725, 147 P.3d 982 (2006) (citing 2A Karl B. Teglund, *Washington Practice: Rules Practice RAP 2.5(1)*, at 192 (6th ed. 2004).

Here, although the State's expert witness laid the proper testimonial foundation pursuant to ER 703, (*see below*) the State was not afforded the opportunity to address a specific *Frye* challenge. Yet now, for the first time, appellant claims his diagnosis is not valid. Because appellant never challenged this diagnosis under ER 703, *Frye* or in any other manner at trial, he is precluded from raising this argument now. The State could easily have

established that the diagnosis meets such a challenge, but appellant waited for the appeal in the absence of a perfected record. This court must reject this effort to circumvent the rules of appellate procedure and refuse to consider the claim.

b. The Diagnosis of "Paraphilia NOS" Withstands Challenge.

If the court does decide to consider the issue, it need only look to the multitude of cases in Washington that have upheld a diagnosis of paraphilia NOS based on qualified, expert testimony that the diagnosis is valid. States retain considerable leeway in defining the mental abnormalities and disorders that make an individual eligible for SVP commitment. *In re the Detention of Thorell*, 149 Wash.2d 724, 735, 72 P.3d 708 (2003) (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 857 (2002)). As long ago as 1993, the Washington Supreme Court upheld the diagnosis of paraphilia NOS against a constitutional challenge. "The specific diagnosis offered by the State's experts at each commitment trial was 'paraphilia not otherwise specified'." *In re the Detention of Young*, 122 Wash.2d 1, 29-30, 857 P.2d 989, 1002 (1993). It was as clear 17 years ago as it is today that the

"[t]he weight of scientific evidence, therefore, supports rape of adults as a specific category of paraphilia." *Id.*

Since that time, the Court has upheld numerous commitments based on diagnoses of paraphilia NOS by countless qualified professionals. (See *e.g. In re the Detention of Halgren*, 156 Wash.2d 795, 132 P.3d 714, (2006) (Dr. Robert Wheeler testified that Halgren suffered from at least one mental abnormality (paraphilia not otherwise specified (n.o.s.) nonconsent). 156 Wash.2d at 800-801. Dr. Wheeler described "paraphilia" as the "definitional word for a type of sexual deviance which involves repetitive, intense sexual urges, fantasies, or behaviors involving children, objects, or nonconsenting persons." *Id.* n.3.); *In re the Detention of Stout*, 159 Wash.2d 357, 363, 150 P.3d 86, 90 (2007) (Dr. Richard Packard opined that Stout suffered from the mental disorder "paraphilia not otherwise specified (NOS), non-consent."); *In re the Detention of Marshall*, 156 Wash.2d 150, 155, 125 P.3d 111, 113 (2005) (Dr. Amy Phenix determined that Mr. Marshall suffers from multiple mental abnormalities described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000) (DSM-IV-TR), a reference relied on by experts. Specifically, she found he suffers

from pedophilia, sexual sadism, and paraphilia not otherwise specified (nonconsenting adults or rape-like behavior.); *In re Detention of Campbell*, 139 Wash.2d 341, 357, 986 P.2d 771, 779 (1999) (Dr. Roger Wolfe diagnosed Campbell as suffering from the condition of "paraphilia").⁴

c. The Evidence Presented by Both Parties Confirmed That Appellant Suffers Paraphilia - NOS.

The evidence at trial established that Paraphilia N.O.S (non-consent or rape) is generally accepted in the scientific community

⁴ The court of appeals has also upheld commitments predicated on paraphilia not otherwise specified numerous times. *See In re Detention of Paschke*, 136 Wash. App. 517, 520, 150 P.3d 586, 587 (2007) (Dr. Les Rawlings, a psychologist, testified Mr. Paschke suffered from a mental abnormality known as "[r]ape, paraphilia not otherwise specified rape."); *In re Detention of Taylor*, 132 Wash. App. 827, 832, 134 P.3d 254, 257 (2006) (Dr. Richard Packard diagnosed a mental abnormality paraphilia not otherwise specified (non-consenting persons); *In re Detention of Broten*, 130 Wash. App. 326, 332, 122 P.3d 942, 945 (2005) (Dr. Brian Judd testified that he diagnosed Broten, among other things, paraphilia (not otherwise specified.); *In re Detention of Skinner*, 122 Wash. App. 620, 633, 94 P.3d 981, 987 (2004) (The evidence adduced at trial shows that Skinner was diagnosed with the mental abnormality of paraphilia (non-consent/rape); *In re the Detention of Hoisington*, 123 Wash. App. 138, 143, 94 P.3d 318, 320 (2004) (Dr. Dennis Doren testified that in his professional opinion Mr. Hoisington suffered from a mental abnormality, paraphilia.) *In re Detention of Strauss*, 106 Wash. App. 1, 6, 20 P.3d 1022, 1024 (2001) (Dr. Dennis Doren testified that Strauss suffers from paraphilia (not otherwise specified) non-consent.); *In re the Detention of Mathers*, 100 Wash. App. 336, 336, 998 P.2d 336, 337 (2000) (Roger Wolfe, diagnosed Paraphilia Not Otherwise Specified: Rape, and an Antisocial Personality Disorder. And these disorders, according to Wolfe, made Mathers likely to engage in future acts of sexual violence.); *In re the Detention of AQUI*, 84 Wash. App. 88, 94, 929 P.2d 436, 441 (1996) (Dr. Irwin Dreiblatt testified that AQUI suffered from paraphilia disorder, that he was likely to re-offend.)

of those who treat serious sexual offenders, and those who evaluate them as sexually violent predators. (19RP 117). The diagnosis is regularly used and relied on by forensic evaluators and clinicians. (19RP 117). Paraphilia NOS -- (non-consent, or rape) is a mental abnormality as defined by 71.09. (19RP 146; 23RP 42). There was no testimony at trial to the contrary -- in fact one of appellant's expert witnesses concurred with the State's expert that appellant suffered from the disorder.

Dr. Rawlings used the DSM-IV-TR in assessing appellant's mental condition. (19RP 108-09). Dr. Rawlings opined to a reasonable degree of psychological certainty that appellant suffered from a qualifying mental abnormality -- paraphilia -- NOS (rape, or non-consent). (19RP 109, 120). He testified that the essential features of a paraphilia are listed in the DSM. (19RP 112-15).⁵

Despite appellant's assertions to the contrary, according to the DSM, paraphilia diagnoses do not require the presence of fantasies. Nonetheless, appellant had rape fantasies and

⁵ The essential features of a paraphilia are: Recurrent, intense, sexually arousing fantasies, urges, or behaviors generally involving (1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other non-consenting persons that occur over a period of at least 6 months (Criterion A) and cause clinically significant distress or impairment in social, occupational, or other important areas of functioning." Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, Paraphilias, p. 566.

masturbated to them. (19RP 113; 20RP 167). When the individual has deviant fantasies, it confirms the presence of a paraphilia, particularly if combined with masturbation. (22RP 135). Further, a preference for rape is not a requirement for a diagnosis of paraphilia. (19RP 118; 22RP 109). Nonetheless, appellant sought out women to rape, even though he had consenting sexual partners available. (19RP 118; 22RP 133-34).

The defense expert, Dr. Theodore Donaldson, testified there was not enough evidence for him to reach a diagnosis. (28RP 21; 24RP 20-21). Dr. Donaldson couldn't reach an opinion because he didn't know what "intense" or "recurrent" means. (23RP 51, 129-32). The other testifying experts who knew how to apply the correct criteria had no trouble applying it to appellant, including appellant's hand-picked treatment provider, Dr. Sally Wing. Dr. Wing diagnosed him with the exact same disorders that Dr. Rawlings assigned: Paraphilia NOS (rape or non-consent) and anti-social personality disorder. (26RP 175, 183)

Dr. Donaldson acknowledged that paraphilic rape qualifies as a "mental abnormality" under RCW 71.09. (23RP 42). His opinion was not that paraphilia NOS does not exist, as alleged in the Opening Brief, but that in this case "[my] opinion is there is

insufficient evidence to make a diagnosis of paraphilic rape." (23RP 43). He readily acknowledged that if a person "really is a paraphilic rapist then you can diagnose paraphilia NOS." (23RP 141-42). He admitted that if an individual suffers from a paraphilia, he is more likely than not to re-offend. (23RP 123; 24RP 32).

Donaldson's difficulty in finding evidence to support the diagnosis was not based on any lack of evidence in the record, but is based on his inability to understand and apply the correct criteria from the DSM-IV-TR. (23RP 132). Due to his lack of prior clinical experience, Donaldson had trouble determining what either "intense" or "recurrent" mean. (23RP 51, 129-32). Donaldson ignored the criteria specifically listed in the DSM for diagnosing paraphilias, and went outside the DSM to apply a requirement of "sexual preference." (23RP 129).

d. Anti-Social Personality Disorder and Psychopathy Satisfy 71.09 Criteria.

Appellant argues that if the court finds that paraphilia NOS is not a valid diagnosis, there is insufficient evidence in the record to find that he meets SVP criteria.

This court may determine the sufficiency of the evidence that supports a finding that appellant suffers from a personality disorder. If there is evidence in the record, which if believed, satisfies both of the statutory criteria, the commitment is upheld. *In re Thorell*, 149 Wash.2d at 758-759. In a sufficiency challenge, the evidence is viewed in the light most favorable to the State. *In re the Detention of Audett*, 158 Wash.2d 712, 727, 147 P.3d 982 (2006) (citing *Thorell*, 149 Wash 2d at 744). There is substantial evidence if this court is convinced that a rational trier of fact could have found that he suffered from a personality disorder. *In re the Detention of Halgren*, 156 Wash.2d 795, 811, 132 P.3d 714 (2006).

Pursuant to the statute, a mental abnormality is not the only condition that meets commitment criteria. A sexually violent predator is any person ... "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 to a secure facility." RCW 71.09.020(16). The applicable Washington Administrative Code defines "personality disorder" as a condition that "carries the same definition as found in the DSM-IV-TR and includes psychopathy as assessed using the Hare PCL-R or similar

instrument. WAC 388-880-010. The DSM-IV-TR defines a personality disorder as:

an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, Personality Disorders, p. 685.

The manual further defines anti-social personality disorder as a "pattern of disregard for, and violation of, the rights of others." *Id.* Psychopathy (sometimes referred to as "psychopathic disorder" or "psychopathic personality disorder") is a mental disorder that is similar to anti-social personality disorder. (19RP 149).

In addition to paraphilia N.O.S, the undisputed testimony at trial was that appellant suffered from two other qualifying disorders: high psychopathy as measured by the Hare PCL-R, and anti-social personality disorder. Appellant's expert, Dr. Wing, agreed that appellant suffered from anti-social personality disorder. (26RP 175, 183). Appellant's other expert witness, Dr. Donaldson, confirmed that appellant suffers from high psychopathy (23RP 53) and anti-social personality disorder. (23RP 69-70). Dr. Donaldson explained psychopathy to the jury: "Inhibitions are not something wired into psychopaths. They take what they want when they want

it and they have very little concern for the consequences." (23RP 53). According to Dr. Donaldson, psychopathy is one of the few diagnoses of which the validity has been determined. (23RP 72).

Appellant is correct that there was no testimony from *Dr. Rawlings* that anti-social personality disorder caused appellant to commit rapes, but his own expert, *Dr. Donaldson*, did testify that anti-social personality disorder and high psychopathy is what caused him to rape.

Q: So what distinguishes Mr. Post from every other man in the world who sees these women in the same light but doesn't go out and attack them?

A: Because he's anti-social and psychopathic as hell and he's just going to take what he wants.

(23RP 176; 24RP 16).

Dr. Donaldson also testified that psychopathic rapists are the most dangerous kind. (23RP 176-77). He testified that because of appellant's psychopathy, if he wanted sex, he would not wait until he got home to his girlfriend, he would take it when he wanted it. (23RP 177-78).

In civil commitment cases, due process requires the State to show respondent is both mentally ill and dangerous. *Foucha v. Louisiana*, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). This Court confirmed that RCW 71.09 comports with due process in *In re*

Thorell. There the Court held that due process is satisfied for SVP detainees if the State can prove a nexus between the individual's mental condition and future danger:

What is critical to both *Hendricks* and *Crane* is the existence of "some proof" that the diagnosed mental abnormality has an impact in the offender's ability to control their behavior. *Crane* requires linking an SVP's serious difficulty in controlling behavior to a mental abnormality, which together with a history of sexually predatory behavior, gives rise to a finding of future dangerousness, justifies civil commitment, and sufficiently distinguishes the SVP from the dangerous but typical recidivist. It is the finding of this link, rather than an independent determination, that establishes the serious lack of control and thus meets the constitutional requirements for SVP commitment under *Hendricks* and *Crane*. Then, if the existence of this link is challenged in appeal, this case specific approach requires the reviewing court to analyze the evidence and determine whether sufficient evidence exists to establish a serious lack of control.

Thorell, 149 Wash.2d at 736.

Dr. Donaldson's testimony alone shows this nexus between his high degree of psychopathy, his anti-social personality disorder and his future dangerousness. The evidence was more than sufficient *from the defense expert* that appellant's other disorders met statutory definition. This jury was free to disregard the limitations Dr. Rawlings placed on appellant's anti-social personality disorder and find, based on Dr. Donaldson's testimony, that the

anti-social personality disorder and high psychopathy are what make him repeatedly rape women.

e. Dr. Rawlings Considered Appellant's Age.

Despite not raising the issue below, appellant now claims the State did not properly conduct a risk assessment. The evidence at trial belies this assertion, and this claim should be rejected. There was a great deal of testimony about age and the related implications for risk assessment. Dr. Rawlings' testimony was that appellant's age was not sufficient to override the numerous other factors that squarely placed him well-above the 50 percent threshold for risk. (20RP 66).

All of the actuarials that Dr. Rawlings relied on take age into account. The MnSOST-R reduces risk for older offenders, (20RP 47), as do the SORAG (20RP 58, 62) and the Static-99. (20RP 62). Appellant received one-point reduction on the SORAG that lowered his score because of his age. (20RP 62, 65). On the Static-99 he received a one-point reduction for his age; and on the MnSOST-R he received a two-point reduction for age. (20RP 63).

Q. So Charles Post was actually given credit in each of these actuarial tools for the fact that he's 50?

A: It was taken into consideration. I think perhaps a more accurate way to say it would be that it takes into consideration that he's in the higher age bracket as defined by the instrument.

(20RP 63-64).

Dr. Rawlings was extremely careful in his risk assessment.

"I looked at both risk-increasing factors as well as risk-decreasing factors." Among other factors, I considered that Mr. Post is 50, he's not 25, he's not 30; and I took all of those into consideration."

(20RP 66). Dr. Rawlings discussed the new research as it pertained to age and recidivism. (20RP 67-69). He testified that, "it's likely to some degree as people get much older that the actuarial instruments may not fully capture the reduction in risk that's associated particularly with let's say, particularly advanced age, **60 and beyond.**" (20RP 67) Dr. Rawlings testified that he relied on the lead researcher in this area, Dr. Karl Hanson, who concluded that the actuarial scores should not be further reduced for age. (20 68-69). Dr. Rawlings was also cross-examined at length about appellant's age. (22RP 5-9, 15, 28-30). Appellant's claim that Dr. Rawlings did not factor in his age is without merit.

Because appellant preserved neither of these claimed errors, they should be rejected outright. Nonetheless, if the court

does consider the claims, the record clearly contradicts his assertions. The mental abnormality upon which the State relied is a constitutionally valid diagnosis that has been upheld numerous times. Further, there was more than sufficient evidence from appellant's own witnesses for the jury to determine appellant suffered from several personality disorders that caused him to commit sexually violent offenses. And last, appellant's age of 50 was considered at length by the State's expert when he conducted his risk assessment. Appellant's commitment as a sexually violent predator should be affirmed.

2. THE COURT DID NOT ERR IN ALLOWING EVIDENCE REGARDING THE TREATMENT PROGRAM AT THE SCC.

- a. The Purpose of the Statute is to Treat Sexual Offenders.

Contrary to appellant's argument, there is not a statutory prohibition against the presentation of evidence of the SCC sex offender treatment program. Such a prohibition would run contrary to the purpose of the statute, which is to incapacitate and treat dangerous sexual offenders. RCW 71.09.010.

b. The Trial Court Did Not Abuse Its Discretion.

The trial court has wide discretion over evidentiary matters and will be overturned only if its decision is manifestly unreasonable or based on untenable grounds. *State ex. Rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.3d 775 (1971). It was not an abuse of discretion to allow evidence of the sex offender treatment program at the SCC. Contrary to appellant's claim, the State did not present prohibited evidence, and the jury was not asked to determine if an LRA was appropriate.⁶

The State presented testimony about the difference between the in-custody SCC treatment program and appellant's treatment plan to address appellant's claims that he was a fully treated sex offender. (16RP 19). Appellant argued that the evidence was "irrelevant and unfairly prejudicial because it suggested that Post was not finished with treatment." (Opening Brief at 31). But this is precisely the point: appellant's education and placement in the SCC treatment program -- a program that he volunteered for pre-trial -- demonstrated that he was far from "treated."

⁶ In response to a question from the defense attorney, Mr. Anderson testified that there is a phase 7 which takes place in the community. (26RP 86). Defense counsel further asked him about the number of individuals released unconditionally. (26RP 86-87).

There was never a real dispute at trial that appellant had not completed treatment. The court correctly recognized that the jury needed some understanding of the SCC treatment context: "the only relevance of the SCC testimony is the -- to explain to the jury the difference between the voluntary plan and the commitment plan." (16RP 24). In this way, the State's evidence helped the jury weigh the sufficiency of the "voluntary treatment option" -- a central aspect of the defense -- by contrasting the strength of appellant's evidence against a treatment program for high-risk sex offenders.

Appellant argues that any evidence of the treatment program at the SCC is not relevant to the issue of whether or not he suffers from a mental abnormality. Appellant neglects to consider that under the statute there are three elements the State must prove. In addition to determining appellant's mental status, the jury is also asked whether he is "likely to engage in predatory acts of sexual violence if not confined to a secure facility." RCW 71.09.020(16). Treatment evidence, and evidence of the offender's skill level in self-management techniques, is thus correctly before the jury so they can accurately assess his risk level. At any civil commitment trial pursuant to RCW 71.09, especially where the individual asserts he can be safely managed in the community, the jury is entitled to

hear about the person's status in sex offender treatment. It is important the jury learn about the specifics of sex offender treatment, as sex offender treatment concepts are not typically within the general knowledge of the jury. Because the issue before the jury is whether the person can live in the community without sexually re-offending, they need to see which aspects of relapse prevention, deviant arousal control and community re-integration he has mastered, or, in appellant's case, which of those skills he has yet to learn.

c. Appellant's Treatment Plan Would Not Prevent Him from Re-offending.

Because the first two elements of RCW 71.09 were essentially conceded at trial,⁷ appellant's entire case was based on the presentation of his treatment plan which he claimed would be sufficient to prevent him from raping if he were released into the community. He presented evidence that he hoped was sufficient to convince the jury that he should be released. He testified that he

⁷ Appellant will likely dispute this claim. However, the undisputed evidence at trial was that he had been convicted of several sexually violent offenses; testimony from one of his expert witnesses confirmed the State's evidence that he suffered from a mental disorder, paraphilia; his other expert testified that he suffered from two qualifying personality disorders that caused him to rape. This testimony does indeed take these elements out of controversy. (See Section C. I, *supra*.)

had years of sex offender treatment at Twin Rivers. (25RP 38). He asked the jury to believe that one hour per week with Sally Wing would enable him to manage his mental disorders sufficiently. The jury was entitled to know that he had never reached the levels of treatment that teach the real skills a deviant sexual offender needs. The testimony at trial established that appellant had no relapse prevention plan, one of the basic tenets of sex offender treatment. Further, highly relevant and probative of his risk is the fact that he had no arousal suppression skills because he had not graduated to that level of treatment yet. The SCC staff testified about what treatment classes he had taken, how he was progressing, and which treatment modules he had not yet taken. Appellant was only in phase 2 of a 6-phase treatment program which was specifically designed to empower mentally disordered sex offenders to manage their disorders and thus avoid re-offense. The State's evidence demonstrated that appellant's risk for re-offense was so high that he needed to complete the entire program before he was released, including the portion that was part conditional release, because he had never completed any sex offender treatment program. (25RP 39-41).

At trial, appellant called two expert witnesses, Dr. Rosell and Dr. Wing, to testify that sex offender treatment in the community would be sufficient to prevent him from committing a new sexually violent offense. The trial court admitted evidence of appellant's current status in treatment, as well as the treatment program at the SCC to counter the defense position, and to show that appellant's plan was not sufficient. (16RP 18).⁸

[H]ow can the jury evaluate your witness' opinion that the kind of treatment available in a community would be sufficient such that Mr. Post does not need to be committed to a secure facility, and, hence, is not a -- is not committable as a predator, without hearing why the State believes that's not true and what the difference is between in-custody and community based treatment."

(16RP 15).

I can't conceive of how the state can rebut the testimony of the defense expert concerning the efficacy of the defense's voluntary treatment plan without saying, you know, this isn't the model that works. And this is the model that works, is in-custody. . . . Once the defense puts forth evidence of its treatment plan, which clearly is going to be put forth in this case, the State has the right to say, to establish that this treatment is not efficacious. I can't see how

⁸ Appellant also asserts that the court ruled that this evidence was not admissible in the first trial. That is incorrect. At the first trial, appellant did not present the testimony of Dr. Rosell and Dr. Wing and the community-based "treatment plan." Appellant had barely begun treatment, and the State opted not to put on evidence of treatment program at the SCC. (16RP 106; CP ____ (Sub No.164), State's Reply to Motion to Exclude Witnesses, October 26, 2004,).

that can be done without comparing this treatment to what the state believes is efficacious treatment.

(16RP 113, 115).

The court did not abuse its discretion in allowing the SCC evidence to show exactly what treatment he had not yet received, treatment that he needs to complete before releasing to the community. This was compared with the treatment he was proposing to start with Sally Wing, in which (the testimony revealed) he was to begin learning his cycle, begin learning a relapse prevention plan, and ultimately begin learning deviant arousal control -- all things that multiple witnesses testified he needed to learn *before* he was released.

Appellant's treatment therapist at the SCC, Jim Anderson, testified about the different phases of treatment, and the amount of time the individuals spend in therapy each week. (26RP 41-51). Phase 1 and 2 are treatment orientation, and classes about what to expect in treatment. (26RP 45). Phase 6 is the stage when the individual is about to be considered for conditional release. (26RP 50). At the time of his trial, appellant was in the early stages of treatment and was not fully engaged in treatment. He was only in Phase 2, and had not engaged in any real treatment to date, merely

classes about treatment. (26RP 56). Mr. Anderson testified that appellant is evasive, manipulative and disingenuous. (26RP 57). Classes on how to successfully transition into the community were still well beyond appellant, in Phase 4. (26RP 49).

Despite appellant's claim that he had three years of sex offender treatment before he got to the SCC, he had very minimal treatment exposure. The "open group" sessions that he may or may not have attended were not treatment, but "information about the sex offender treatment program." These sessions were not sex offender treatment. (25RP 174-75, 230).

The testimony at trial established that each step in sex offender treatment is important, and the steps build on one another -- one must be covered before the person can progress to the next phase. Appellant didn't advance in treatment because he didn't accomplish any of the goals either Robin Murphy or he set when he was in SOTP at Twin Rivers. (25RP 179). Appellant did not have a relapse prevention plan and, had not learned deviant arousal control-key tools he needed to learn to safely manage his risk. (25RP 178). Robin Murphy testified that community transition is a stage at the end of SOTP. Because of his behavior, appellant never got that far in treatment. (25RP 123). The jury was entitled

to know that releasing him meant he had never had any training on reintegrating into the community -- either at SOTP or the SCC.

Appellant cites *State v. Rains* -- a criminal case -- for the proposition that the jury should not have been told that he would be confined in a secure facility. (See Opening Brief at 62). SVP commitments are civil, not criminal. *In re the Detention of Young*, 122 Wash.2d 1, 23, 857 P.2d 989 (1993). A jury in a criminal case is not to consider the consequences of a guilty verdict, as the question of punishment is for the court to decide. In RCW 71.09 civil commitment cases, the jury question involves the question of whether a respondent suffers from a mental abnormality and/or personality disorder that makes him sufficiently dangerous to require confinement in a "secure facility." RCW 71.09.060. In this way, the jury must evaluate whether confinement in a secure facility for a mental condition is appropriate. His progress in treatment is central to both his mental condition and the resulting danger, including the need for secure facility confinement.

It was this jury's duty to determine whether or not his risk to re-offend is so great that he should be "in a secure facility." RCW 71.09.020(16). The jury was correctly informed (without any objection) throughout the trial that appellant was detained in a

secure facility. Several SCC staff members testified about the nature of the facility, specifically during defense counsel's cross-examination of Jim Anderson in which she establishes that residents are "not free to come and go", and that appellant had been there for two years at the time of his trial. (26RP 85-86, 88). All of the expert witnesses testified about appellant's status as a detainee, because it was the jury's duty to determine if a secure facility is where he belonged. This is very different from the task of the *Rains* criminal jury who was simply deciding whether or not he committed a certain prohibited act. The jury was properly instructed on the law, (CP 797-822), and was specifically instructed to set aside "emotions, sympathy, bias, or personal preference." (CP 800).⁹

It was not error to deny appellant's proposed limiting instruction on the SCC evidence -- the jury had a limiting instruction read to them every time appellant's counsel requested it. Further, a limiting instruction (requested by appellant) was part of the written-instruction package provided to the jury. (CP 803). The jury's job

⁹ Appellant claims that since the first jury hung, it is proof that the SCC evidence was prejudicial to him. First, the evidence of the SCC treatment program was not "excluded" from the first trial. (See Note 8). But, more importantly, the fact that the first jury hung can not be used to show he was prejudiced in a subsequent trial as there could be (and were) multiple reasons for the lack of unanimity.

was spelled out to them clearly in other instructions. "So long as the jury instructions correctly state the law and allow each side to argue its case, a trial court is afforded considerable discretion in selecting the wording." *See In re the Detention of Gaff*, 90 Wash. App. 834, 845, n. 5, 954 P.2d 943 (1998) (citing *State v. Brown*, 132 Wash.2d 529, 618, 940 P.2d 546 (1997)).

The court did not abuse its discretion in permitting the State to truthfully tell the jury how far appellant had progressed in treatment; and what the next stages of treatment would be for him, including a community transition stage. The statute creates no bars to such evidence and it was not "manifestly unreasonable" for the court to allow the jury to accurately assess appellant's ability to manage his risk. Furthermore, appellant has failed to show that the limited testimony about conditional release affected the jury finding that he is a sexually violent predator. The court should affirm his commitment.

d. The Evidence Was Relied On by the Experts Pursuant to ER 703.

Otherwise inadmissible evidence may be admissible to explain the expert's opinion or to permit the jury to determine what

weight it should be given. *State v. Furman*, 122 Wash.2d 440, 452-53, 858 P.2d 1092 (1993), (emphasis added) citing *Group Health Coop. of Puget Sound, Inc. v. Department of Rev.*, 106 Wash.2d 391, 400, 722 P.2d 787 (1986). Evidence relied on by expert witnesses does not need to be admissible for the expert to relate those facts to the jury. *In re the Detention of Marshall*, 156 Wash.2d 150, 162, 125 P.3d 111 (2005), (citing *Young*, 122 Wash.2d at 58).

In this case, all of the experts who testified relied on appellant's treatment records, including his current treatment stage. In particular, Dr. Rosell relied on appellant's participation in the SCC treatment program. His report on appellant says "prognosis for success in community good based on current treatment compliance and participation." (28RP 108). During his direct testimony, he went through the SCC checklist of classes and requirements (28RP 44-46), including release planning, discharge planning (28RP 45) and final promotion from Phase VI to VII. He admitted that appellant "is not ready for all of them, but is pretty ready." (28RP 46). Dr. Rosell testified that all sex offenders need supervision, which appellant does not have. (28RP 124). He testified that appellant doesn't know his offense cycle. (28RP 126)

Dr. Rosell agreed that it is important for a sex offender to know his offense cycle and relapse prevention plan before being released to the community. (28RP 126). Yet, he admitted "we just don't know" what appellant's deviant fantasies are (28RP 130). Dr. Rosell also testified that the scientific research showed that offenders who complete in-custody treatment recidivate at lower rate than non-completers. There is no difference in recidivism rates for those who complete treatment out-of-custody. (28RP 122-23, 151).

Dr. Rawlings opined that appellant has not done enough treatment in a secure setting, and as a result of his underlying mental disorders, he needs to remain in a secure setting until he learns to manage those disorders. He also relied on the recidivism studies that show that offenders who complete in-custody treatment recidivate at lower rate than non-completers. Community-based treatment has not been shown to reduce the recidivism rate. (19RP 37). Dr. Rawlings testified that appellant's treatment providers would face great difficulty treating him based on the number of differing versions of his offending he has given in the past. (22RP 63-64). Dr. Rawlings was concerned about appellant's manipulative characterization of the amount of treatment he had in

the past. (22RP 100). Dr. Rawlings was also very concerned about appellant's:

willingness to be straight forward and honest with Dr. Wing and whether or not he would accept any limits that she might attempt to impose given that there would not be any kind of potential legal consequence for failure to abide by any limit she might attempt to impose.

(22RP 101).

The court did not abuse its discretion by allowing the jury to hear testimony about the treatment program in which Post was participating at the time of the trial. The jury was required to evaluate both expert opinions, and had a right to know the underlying facts about appellant's treatment status -- what skills he has learned and, more importantly what skills he has not yet learned. The commitment should be affirmed on this point.

3. IT WAS NOT AN ABUSE OF DISCRETION TO EXCLUDE CONFUSING TESTIMONY.

The trial court did not abuse its discretion when it ruled that evidence about a future potential "recent overt act" ("ROA") was not admissible at the commitment trial.¹⁰ Trial courts have wide

¹⁰ A "recent overt act" means any act or threat that has either caused harm of a sexually violent nature or creates reasonable apprehension of such harm in the

discretion to determine the admissibility of evidence. *State v. Rivers*, 129 Wash.2d 697, 709-10, 921 P.2d 495 (1996). Under the rules of evidence, a trial court may exclude relevant evidence if the probative value is outweighed by the dangers of "**confusion of the issues or misleading the jury** or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. The trial court's ruling is afforded great deference and is reviewed under an abuse of discretion standard. *State v. French*, 157 Wash.2d 593, 605, 141 P.3d 54, 60 (2006) (citing *State v. Luvene*, 127 Wash.2d 690, 706-07, 903 P.2d 960 (1995)). Here, the trial judge found the proffered evidence was too confusing, as well as potentially misleading to the jury. It was not an abuse of discretion to limit evidence to that which was readily definable for the jury.

The court reasoned that "the law is not remarkably clear about what non-criminal behavior would qualify for a recent overt act." (30RP 11). The court itself did not know what would be a recent overt act for appellant. "If the only thing Mr. Post is doing, and I am not encouraging this, is drinking in the community, it's not

mind of an objective person who knows the history and mental condition of the person engaging in the act. RCW 71.09.020(10).

clear that would be a recent overt act." (30RP 10). (See *In re the Detention of Albrecht*, 147 Wash.2d 1, 11, 51 P.3d 73 (2002) (consumption of alcohol or other violation of terms of community custody not per se ROA). ROAs are subjective and what may be an ROA for one may not be for another.

The trial court was also concerned that the jury would get a wrong impression of the existing conditions of release if ROA testimony came in. "It implies that someone would be monitoring outside of the general police behaviors of Mr. Post if he were released would be subject to." (22RP 56).

In determining whether or not the person would likely engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options **that would exist** for the person if unconditionally released from detention on the sexually violent predator petition.

RCW 71.09.060(1).

Despite his assertions to the contrary, if released, appellant would be required to register as a sex offender and that is the extent of his legal obligations or "placement conditions." The court was correct in excluding ROA testimony because an undefined potential act is not a "placement condition that would exist." RCW 71.09.060(1). Under the statute, a jury is not allowed to consider

speculative and non-existent conditions to limit risk. *Id.* Appellant's claim that he would be picked up for committing a recent overt act falls in the realm of speculation. It is not a condition that "would exist" were he released.

The trial court instead allowed appellant to say he would act with the "fear of further incarceration" in mind instead of defining an ROA for the jury. (30RP 11). This ruling clearly permitted appellant to testify that he would mind his behavior for fear of future incarceration regardless of the criminal or civil source of that incarceration. His claim that he was precluded from showing that the State had a "legitimate option" that would "promote his compliance with the law and limit the risk of re-offense" has no merit in fact. Appellant was free at any point in his testimony to tell the jury that "fear of further incarceration" would make him promote such compliance. How the State might accomplish his detention -- particularly when the mechanism can be confusing and complicated -- is of no relevance when the jury is evaluating the deterrent effects of appellant's fear of incarceration.

Appellant asserts that the State wanted to "have its cake and eat it, too" regarding appellant's offending pattern. Counsel's comments aside, the testimony at trial from both of appellant's

expert witnesses Dr. Wing and Dr. Rosell was that appellant's offense pattern was unknown. (28RP 126; 27RP 117).

Dr. Rawlings was testifying about the pattern of scripted behavior respondent engaged in during his rapes, which are very different from an offense pattern leading up to the perpetration of the rapes. The court correctly didn't want to confuse this jury, as there was not an ROA question before them.

Appellant also mischaracterizes the court's ruling regarding Dr. Wing, and omits most of the quote which clarifies that the court was concerned that the treatment provider, in a therapeutic relationship, might view something that is a "legal" act (such as viewing pornography) as a recent overt act.¹¹ The court's complete statement follows:

[I]t creates this whole, issue of what is a recent overt act? If the doctor thought that Mr. Post was spending time on legal activities, but activities that were not appropriate for him. She's in a treatment relationship. So he was, for example, perusing pornography, violent pornography; what possible thing could Dr. Wing do about that, other than to say 'don't do that

¹¹ Appellant cites a section of the treatment contract to reiterate that Dr. Wing could report him if he committed a ROA. (Opening Brief at 67). Appellant waived confidentiality regarding any illegal acts that he might commit. It does nothing to change the fact that it is unclear what would constitute a ROA for him, which was Judge Halpert's concern. Appellant would have had no prohibition against drinking if he were released. Nor would there be any restrictions on when and where he could travel.

Mr. Post' I mean, she couldn't -- **it is not a crime.**
She couldn't call the police....

(26RP 12).

The court did not abuse its discretion in ruling that evidence regarding recent overt acts were not admissible because it was too confusing to the jury and had the potential to mislead them. Appellant was given a reasonable alternative that would have served the same purpose and made the same points to the jury he now argues he was precluded from making. His commitment should be affirmed.

4. APPELLANT PUT HIS CREDIBILITY AT ISSUE BY PRESENTING HIS RELEASE PLAN.

As stated previously, the first two elements of the sexually violent predator petition were essentially conceded, and thus the focus of the trial was appellant's risk for re-offense -- an element that appears to have been overlooked in his appeal. Appellant's entire case at trial was that he could be safely monitored by his friends and family, and that he would honestly report to them. Appellant further opened the door to credibility testimony by offering the testimony of Dr. Luis Rosell to testify that he believed appellant would comply with the plan and succeed in the community. (28RP

64-67, 122-25). The court did not abuse its discretion in allowing the State to rebut appellant's evidence.

Appellant's release plan was based on the presumption that he would tell the truth to his family and friends. In other words, the community safety was entirely dependent on appellant's honesty and candor. Yet, appellant had not told anyone the number of rapes he committed, not even the number of rapes he had actually been charged with. His wife and mother still don't think he is sex offender based on his reporting to them. (20RP 86). His honesty with these "support" people was critical, and yet absent. His history of deceitfulness is therefore directly relevant to the jury's ability to assess his risk. Allowing in evidence of his deceit rebuts the assertion that he can be safely managed by family members.

Appellant himself put his credibility at issue. On direct examination, appellant was asked by his lawyer: "Have you always answered everyone's question ... in an honest way." Answer: "No, I have not. I have lied and manipulated in attempt to make myself perhaps appear better than I really was so that I could get out of prison and go home." (30RP 37). He admitted that he would lie and manipulate to get what he wanted - exactly what the treatment

providers and evaluators testified he still did. Appellant admits he is manipulative and deceitful. (25RP 42).

Dr. Rawlings testified that appellant is willing to say whatever is necessary in a given situation in order to have the kind of outcome that he would like to achieve. "I think that has fairly serious implications for any kind of treatment." (22RP 116).

Dr. Rawlings also expressed concern about appellant's truthfulness in self-reporting, and concluded that he will not be a good self-reporter. (20RP 85-86). Further, his wife, Nancy Post, is not able to provide the kind of supervision that appellant needs. (20RP 86).

Appellant's lengthy history of manipulation, deceit and image management were essential to Dr. Rawlings' risk assessment. The record was replete with evidence of appellant's manipulation of treatment providers, evaluators, family and friends -- in essence anyone who had contact with him. Dr. Rawlings noted "the long history of engaging in manipulative behavior, misrepresentation or deceit..." that has continued through the treatment programs he was in the past to the present." (19RP 139-41). Western State Hospital said he was engaging in manipulative behavior when sent there in the 1970s. (19RP 57). Dr. Rawlings noted that Dr. Trowbridge said appellant was manipulative in a 1980 DOC

evaluation. (19RP 68; 139). When appellant was in SOTP he tried to manipulate the group. (19RP 95). In 1999 he attempted to manipulate Dr. Wing, his proposed treatment provider, by repeatedly asking her to change her diagnosis of him. (19RP 140; 25RP 53).

Appellant's expert witness, Dr. Rosell, admitted that the biggest problem with appellant's release plan is it is all based on appellant's self-reporting. (28RP 68). Dr. Rosell concurs with every single evaluator who evaluated appellant and says he is manipulative (28RP 82). Rosell acknowledged that appellant's current statements to therapist contradict what he has said in the past. (28RP 50).

Appellant's treatment providers, including Jim Anderson, Robin Murphy, Maia Christopher and Sally Wing, all testified that appellant was not honest, and was manipulative. This evidence was correctly put in front of the jury because appellant claimed that his treatment plan would keep him safe. The jury was entitled to see and hear the professional opinions of those whose job it was to evaluate his risk.

- a. No Witness Commented on Appellant's Status as a Sexually Violent Predator.

Appellant overclaims case law that prevents one witness from stating an opinion as to guilt. The case law holds that a witness cannot invade the province of the jury by commenting on the guilt or innocence of the defendant. *State v. Black*, 109 Wash.2d 336, 348, 745 P.2d 12 (1987).

The general rule is that no witness, lay or expert, may "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black*, 109 Wash.2d 336, 348, 745 P.2d 12 (1987); see also *State v. Garrison*, 71 Wash. 2d 312, 427 P.2d 1012 (1967). ... [T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.

City of Seattle v. Heatley, 70 Wash. App. 573, 577-578, 854 P.2d 658, 660-661 (1993). In cases brought pursuant to RCW 71.09 the jury question is not guilt or innocence, but status as an SVP. See *In re the Detention of Aqui*, 84 Wash. App. 88, 100-101, 929 P.2d 436 (1996).¹²

The fact that appellant has lied in the past and manipulated various situations was relevant to the questions before the jury.

¹² In *Aqui*, the court found the State's witness' testimony that *Aqui* was an SVP harmless error. Given that appellant has admitted to a life time of deception and manipulation, any erroneous comment would certainly be harmless.

These do not constitute a comment on his status as an SVP -- that remains for the jury to decide. Rather, the evidence provides information for the jury to consider in determining the strength of appellant's representations. The jury was instructed that they are the "sole judges of credibility of the witnesses." (CP 798). We presume that the jury follows all instructions given. *State v. Stein*, 144 Wash.2d 236, 247, 27 P.3d 184 (2001).

No witness testified that appellant was an SVP. The jury decided for themselves that appellant met 71.09 criteria, and the verdict should be affirmed.

b. The Testimony Was Not a Comment on Appellant's Credibility on the Witness Stand.

A witness's opinion testimony on the sincerity of a response by the defendant is admissible when prefaced with a proper foundation, such as personal observations factually recounted by the witness that directly and logically support the conclusion. *State v. Allen*, 50 Wash. App. 412, 418-19, 749 P.2d 702 (1988). (See also *State v. Stenson*, 132 Wash.2d 668, 719-25, 940 P.2d 1239 (1997); *State v. Craven*, 69 Wash. App. 581, 586, 849 P.2d 681 (1993)).

Mr. Frothingham conducted a penile plethysmograph ("PPG") on appellant in 2001. (18RP 110). Because it was a "flat line" result and therefore not valid, the jury was not told about the test. (16RP 35-36; 18RP 110). The court was concerned that the jury be given the wrong impression about the results of the test. *Id.* The jury was instead told that Mr. Frothingham conducted an "assessment" on appellant as part of the SOTP at Twin Rivers. (18RP 117-18). It was his job to assess the responses appellant gave to his questions and give treatment recommendations based on the assessment. (18RP 117-18, 126). Given that his testimony was sanitized to the point that the jury didn't even know the true purpose of his assessment, nor his opinion about the results, the court instructed counsel not to ask if appellant had been cooperative. (18 RP 111).

On cross-examination, defense counsel asked Mr. Frothingham if "the primary purpose" of the evaluation was to find out about appellant's sexual fantasies. (18RP 122). Counsel also asked if appellant was "cooperative" with the interview, in direct violation of the court's ruling. (18RP 111, 126). The jury was then left with the impression that was contrary to Mr. Frothingham's

actual opinion - that appellant had not been honest in his responses.

Mr. Frothingham was asked on redirect if, in his experience, some individuals were less than candid with him, and if in his opinion, appellant was less than candid during his assessment. He responded "Yes, it was my opinion that Mr. Post was being a bit hesitant, ... yes there was some hesitation. In his presentation." (18RP 130). As a result he wrote in his report that he had trouble making a treatment recommendation. (18RP 130). In keeping with *Allen*, Mr. Frothingham stated the reasons that supported his opinion. Mr. Frothingham's testimony did not make any reference to appellant's trial testimony, nor did he suggest appellant was a liar. He merely recounted his observation of appellant's demeanor during the assessment. It was Mr. Frothingham's job to make treatment recommendations based on the assessment, and it was his opinion that appellant had not been honest during the assessment, thereby making his job more difficult. His testimony was not a comment on appellant's credibility *in general*, but only as to the specific assessment and his encounter with appellant.

It was not error for this testimony to come before the jury. Given the amount of evidence before the jury (including appellant's

own testimony) that he was a liar, Mr. Frothingham's testimony that he found appellant " a bit hesitant" during one interview was not an impermissible comment on appellant's credibility. Further, appellant's counsel opened the door to Mr. Frothingham's opinion by asking if appellant had been "cooperative." The State was permitted to correct this mis-impression. There was no comment on appellant's credibility on the witness stand, and his commitment should be affirmed.

c. Appellant Invited Any Error and Failed to Preserve Any Error.

A litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. *State v. Guloy*, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986).

Appellant tries to get around his failure to object by noting that he had objected in motions *in limine* to any SCC witnesses testifying. (Opening Brief at 69). This does nothing to cure his lack of objection. When a party loses an evidentiary ruling, it must object again at trial to preserve the error. *State v. Powell*, 126 Wash.2d 244, 893 P.2d 615 (1995). Objections must be made at

the time the evidence is offered. *State v. Davis*, 141 Wash.2d 798, 850, 10 P.3d 977 (2000). Objections raised during motions *in limine* are not sufficient to preserve the error for appeal, even in cases where the court issues tentative pre-trial rulings. *Eagle Group v. Pullen*, 114 Wash. App. 409, 416-17, 58 P.3d 292 (2003). The objection must be raised at the time the evidence is offered. *Id.* at 417. Appellant has consequently waived this argument on appeal.

Jim Anderson testified that it is critical for sex offenders to be honest in treatment. (26RP 33). He testified that a relapse prevention plan without honesty would fail. (26RP 72). Without objection, Anderson testified that appellant was "not fully engaged in treatment." He found him to be "disingenuous" and manipulative, which makes it impossible for him to progress in treatment. (26RP 57). Defense did not object to Anderson's testimony that appellant's lack of honesty was problematic in treatment. Defense objected only to Anderson testifying that it was "implausible that appellant's numerous rapes were not sexually motivated" (26RP 65), a conclusion all three of his own expert witnesses had drawn.

Further, if Mr. Anderson's testimony was error, it was invited. On cross-examination, defense counsel asked Anderson about his

assessment of appellant's credibility numerous times: His "cognitive distortions" (26RP 93); "lack of transparency" (26RP 101, 106); "non-disclosure of offenses" (26RP 106); "denial, minimization and manipulation" (26RP 106-07); "not credible and implausible" (26RP 109).¹³

Appellant's claim should be rejected and the commitment affirmed.

5. APPELLANT FAILS TO MEET HIS BURDEN TO ESTABLISH PROSECUTORIAL MISCONDUCT.

In allegations of prosecutorial misconduct, the challenging party bears the burden of proving first that the acts were intentionally improper, and second, that the misconduct substantially affected the outcome of the case. *State v. Stenson*, 132 Wash.2d 668, 718, 940 P.2d 1239 (1997). A mistrial should be granted only in those cases where the individual has been "so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Lewis*, 130 Wash.2d 700, 707, 927 P.2d 235 (1996). Only errors affecting the outcome of trial

¹³ Oddly, this inquiry on cross-examination by Post's attorney was cited in the Opening brief as testimony elicited by the State over defense objection. (Opening Brief at 68; 69).

will be deemed prejudicial. *State v. Hopson*, 113 Wash.2d 273, 284, 778 P.2d 1014 (1989). Appellant fails to meet either requirement. As with his other claimed errors, he has neglected to point out to the court the portions of the record that would refute his claims. In this claim, there was no misconduct because the prosecutor was merely following up on an area of inquiry that was opened by the defense. Further, the court had clarified its ruling on what the State could say in closing, thus allowing the State to argue that appellant's best chance to reduce his risk is to complete treatment at the SCC.

a. Right to Trial and Right to Remain Silent in the Current Trial Was Not at Issue

Appellant does not have a fifth amendment right in sexually violent predator proceedings. *In re the Detention of Young*, 122 Wash.2d 1, 51-52, 857 P.2d 989 (1993). The statute is civil, not criminal. *Id.* at 23. His right to counsel at public expense is statutorily granted. RCW 71.09.050(1). The Washington legislature clearly intended to create RCW 71.09 as a "civil scheme both in the statutory language and legislative history," which is indicated by the statute's purpose. *Seling v. Young*, 531 U.S. 250,

256-257, 121 S. Ct. 727 (2001). Civil confinement does not amount to a second prosecution and punishment for the offense for which a person was convicted. *Kansas v. Hendricks*, 521 U.S. 346, 369, 117 S. Ct. 2072 (1997). The proceeding under RCW 71.09 does not focus on an offense as a basis for civil commitment. The prior convictions are merely used for "evidentiary purposes to determine whether a person suffers from a 'mental abnormality' or 'personality disorder' and also poses a threat to the public." *Id.* at 370. This does not violate the double jeopardy clause. *Id.* at 370.

Appellant was clearly protected by constitutional rights at his 1988 trial. However, those rights did not extend to the commitment trial and were effectively terminated when his appeal was finalized back in the early 1990s.¹⁴ *Mitchell v. U.S.*, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999). Appellant's Fifth Amendment rights only pertained to the actual criminal proceedings which were long over by the time of his commitment trial. Consequently, the State did not commit misconduct by following up about his 1988 trial.

¹⁴ See *State v. Post*, 118 Wash.2d 596, 826 P.2d 172 (1992), *reconsideration denied September 10, 1992*; and *Post v. DuCharme*, 165 F.3d 917 (9th Cir. 1998) (*denial of federal habeas corpus affirmed.*)

b. Appellant Opened the Door.

The State called appellant to the stand to testify in its case in chief. In "cross-examination" appellant's attorney asked him about the 1988 trial:

Q: Now, the trial in '88 involving M.F., did you take the stand in that case?

A: No, I did not.

Q: So you did not testify?

A: No.

(25RP 61).

The State did not follow up on this point, until after it was raised a second time, this time in his direct testimony:

Q: Now during your trial back in 1988 that involved Miss F., did you testify during that trial?

A: No, I did not.

(30RP 13).

Counsel for appellant went back to the subject of his criminal trial shortly thereafter by asking "How did you feel when MF testified at your trial?" (30RP 18) After this testimony, the State did feel the need to follow up on the issue that he put in front of the jury by claiming he "felt sad about raping MF." The prosecutor reiterated what appellant had testified to on direct. (30RP 145).

The prosecutor was well within the bounds of cross-examination to point out that appellant's claimed remorse was not evident in the 1988 trial.

Appellant now claims the State was asking the jury to make a negative inference from the fact that he went to trial in 1988. But no such inference was asked or intended. The State was merely pointing out that appellant, who now admitted he committed the rape and said at the time of his trial he was remorseful, had not actually demonstrated any remorse. The prosecutor was well within bounds when she pointed out how freely he had denied the rape to the Department of Corrections. The prosecutor never "theorized" to the jury that appellant's "right to remain silent was over" as he asserts; she merely asked appellant if it were true that at the time he denied that he had raped M.F., his trial was over. (30RP 151). Further, any alleged harm was cured by the court's instructions to the jury. The court explained that appellant had an absolute right to a trial in 1988, "and you can draw no adverse consequences in terms of ... his decision in 1988. This testimony is being admitted for the limited purpose of your evaluation of his current state of mind." (30RP 148; see *a/so* 30RP 151, "The rights

that Mr. Post had at the time of his trial in 1988 are not at issue. He had an absolute right to remain silent at that time.")

Appellant opened the door to this area of inquiry, and the prosecutor did not commit misconduct by cross-examining appellant on that issue. The court should reject this claim.

c. The State Did Not Violate any Motions in Limine.

Appellant mischaracterizes the court's ruling. In his Opening Brief at 75, appellant cites a number of places in the record that allegedly support his assertion that the State was precluded from arguing that he needed to complete the treatment program at the SCC, but a review of these citations belies his claim. The State was never precluded from arguing that the SCC was a better place for him than unconditional release -- that was the reason the evidence was presented in the first place. The court ruled that "testimony from the state needs to ... explain the difference between the voluntary release plan and the commitment plan" (16RP 24-25); the court specifically denied appellant's motion to exclude SCC evidence. (16RP 98-99). The court agreed that "anything related to Mr. Post's therapy is completely appropriate."

(16RP 111). "I don't know how the state can rebut the defense testimony without explaining what the state views as necessary treatment." (16RP 116).

Prior to closing arguments, the parties addressed the "treatment evidence" and how to present it during closing. The State argued that it should be able to "make argument regarding the evidence that was presented" including appellant's expert who testified that recidivism rates were reduced for individuals who completed treatment in a secure facility. (31RP 47-48). The court agreed with the State:

[I]n some ways it would be purer to not have treatment be such a focus, but the defense, of course, under 71.09.060 has an absolute right to establish that there's a voluntary treatment plan. ...I am not expecting the state to argue that they don't have to meet the three statutory requirements, and that he should be committed only because treatment would be better. That is not the law and I will sustain an objection if that's where we get., but there is no real way given the scope of treatment information that was presented by both sides to limit it as I initially thought we would.

(31RP 48-49).

The issue before the jury was whether or not appellant's risk was so great that it warranted an in-custody treatment program, or could he be managed safely in the community. The only in-custody

treatment program the jury heard about was the SCC. The State argued that it was way too soon for appellant to be released and that he needed to complete the in-custody treatment program before his risk would be reduced.

The evidence showed that appellant's first step in the treatment plan in the community with Dr. Wing was to figure out his offense pattern. According to Dr. Rosell he should be doing that while in custody, and then figuring out arousal modification and a relapse prevention plan. All these steps were available at the SCC treatment program. The State did not violate any of the court's ruling by discussing these aspects of the treatment program, and that he would be better off completing these tasks before he was released. The prosecutor properly argued that appellant met the statutory criteria and should not be released until he has learned to manage his sexual disorders.

Appellant has failed to meet his burden of showing prosecutorial misconduct and the claim should be rejected.

d. Appellant Failed to Prove the Alleged
Misconduct Affected the Outcome of the Trial.

Appellant has failed not only to establish prosecutorial misconduct, but he has failed in showing that even if there were misconduct that he was prejudiced by the acts. He cannot cite to the hung jury as evidence that he was prejudice when a second jury was able to agree. First, the State made almost identical arguments in its closing in the first trial. "The other factor to consider is that he has not completed treatment. And we know that individuals who do not complete treatment are at greater risk for reoffense than those who do complete treatment." (13RP 143). "You also know that he has no developed arousal control. If he gets aroused to the thought or the fantasy of a sexually deviant rape, he has no way to suppress that. He doesn't have the skills to do it." (13RP 142-43). "Charles Post needs treatment before he can be released. He needs to be in a secure facility." (13RP 175).

But more important, the fact that the 12 jurors in the first trial were not able to agree that appellant was a sexually violent predator does nothing to prove that the State committed prejudicial error in the second. Appellant fails to prove prejudice and his claim must be rejected.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING HEARSAY EVIDENCE.

Without citing anywhere in the record, appellant baldly asserts that the State offered evidence of his infractions at Twin Rivers to support the theory that he was manipulative and dishonest. (Opening Brief at 77). The State had plenty of direct evidence that appellant is manipulative and dishonest and did not need to rely on this one infraction to prove it. Appellant's claim that he sought to play a tape of an infraction hearing to rebut the State's assertion is also unsupported in the record. The record show that appellant sought to play the hearing to show "the climate, the tenor, the handling of that particular infraction hearing." (26RP 81). Appellant also wanted to offer the tape to show appellants feelings about what happened and that he didn't want to leave the institution. (26RP 77).

Appellant is correct that he had a right to present evidence in his defense. But that evidence is still required to be *admissible* under the rules of evidence. The State objected to the tape of his infraction being played as hearsay, as it was not a certified report of proceedings taken under oath, it was just a tape. It was appellant's burden to make a record as to the authenticity and admissibility of

the tape, which he failed to do. The trial court agreed that it was hearsay, and therefore unlikely to be admitted. (26RP 79, 81). The court also did not find the offered evidence relevant to the SVP trial. (19RP 6). But, the court allowed appellant to testify about his feelings and impressions about the incident, the whole reason he sought to have the tape admitted. (26RP 79-80).

a. The Evidence Was Admitted Pursuant to ER 703.

The experts reviewed the transcript and heard the tape. Appellant was found guilty of fraud, embezzlement, obtaining goods, services, money or anything of value under false pretenses, and was subsequently infractioned for threatening a librarian. (25RP 7-8). Testimony about the infraction hearing was admitted pursuant to ER 703. Dr. Rosell read the entire infraction report into the record. (28RP 135-38). Dr. Rosell reviewed the records of the incident and told the jury that in his opinion, appellant didn't seem to have a fair hearing. (28RP 31). There was no conflicting testimony, so the only evidence the jury heard about the hearing was in appellant's favor.

The 2001 infraction hearing was a completely side issue that the judge correctly ruled was not relevant to whether or not he was a sexually violent predator. The hearsay evidence was properly refused as substantive evidence, but appellant was allowed to make every argument about the way he was treated. Further, his expert witnesses told the jury that appellant was unfairly treated. Appellant cannot show that had the jury heard this tape they would not have found him to be an SVP. His commitment should be affirmed.

7. APPELLANT FAILED TO MEET HIS BURDEN TO SHOW THE OUTCOME OF THE SVP TRIAL WOULD HAVE BEEN AFFECTED.

A trial court has discretion in determining whether it will hold an *in camera* hearing to determine the scope of discovery for privileged records. *State v. Daniel*, 81 Wash. App. 464, 467, 914 P.2d 779 (1996). The remedy for an abuse of discretion is "remand to the trial court for *in camera* review of the relevant files. If the information in the files would probably have changed the outcome of the trial, then the defendant is entitled to a new trial. But if nondisclosure was harmless beyond a reasonable doubt, then the

convictions can be reinstated." *State v. Gregory*, 158 Wash.2d 759, 795, 147 P.3d 1201 (2006).

The appellant states that he "had a due process right to discover evidence in the State's possession that might lead to admissible defense evidence," referring to a footnote in *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n. 15, 107 S. Ct. 989 (1987).¹⁵ But Judge Halpert did conduct the very *in camera* review appellant claims he now deserves. (CP 730-34). The court reviewed the prosecutor's file, the vast majority of which had already been produced to appellant. (CP 732). The court disclosed additional information that she believed to be of potential assistance to the defendant -- a prosecutor's summary of the C.P. rape (CP 733), and a witness list for the I.S. rape (CP 734). The court found that "[n]one of the other non-disclosed documents contain information that would appear to have **any reasonable possibility of assisting the respondent.**" (CP 731). Appellant

¹⁵ The footnote in *Ritchie* explains that the defendant must make a "plausible showing" that the information will be both material (could change the result of the proceeding) and favorable to the defense. *Pennsylvania v. Ritchie*, 480 U.S. at 58 n. 15. A defendant cannot require a court to inspect a confidential file unless he has established the privileged records are material through a particularized factual showing, not mere speculation. *Daniel*, 81 Wash. App. at 467-68. Appellant failed to make any showing to the trial court, nonetheless, she conducted a review and provided him with documents, none of which he used at trial.

has failed to make any showing that there is information in the file that would alter the outcome of his commitment trial.

The prosecutor's file pertained to an attempted rape charge that was dismissed at his sentencing for another rape. (CP 729). No substantive testimony about these offenses was admitted at trial. Dr. Rawlings relied on the attempted rape case when he conducted his risk assessment, because all arrests and charges are counted on the actuarial instruments, and the relevant empirical research shows a high correlation between sexual recidivism and violations of conditional release, (such as bail). Dr. Rawlings did not discuss the facts of the charges, the victims' identities or anything other than the fact that appellant was arrested and charged. (19RP 55; 20RP 84) Additionally, appellant admitted that he was arrested and charged with three sexually violent offenses while he was out on bail. (25RP 17, 20-22).

Appellant has failed to show that the outcome of the commitment trial could have been affected by any new evidence. The plain fact that appellant was arrested and charged with three sexually violent offenses would not have changed regardless of what documents were in the file, and thus nothing would change the expert testimony on that limited point. Appellant fails to meet

his burden to show that the prosecutor's file held any evidence that could have affected the outcome of the commitment trial. The trial court held an *in camera* review, provided him with the only documents that might have been helpful and specifically held that there was nothing in the file that would assist his defense. The law requires nothing more. His claim should be rejected and the commitment affirmed.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks that this court reject appellant's claims, and affirm the jury's finding that appellant Charles Post is a sexually violent predator.

DATED this 14th day of July, 2007.

Respectfully submitted,

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