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State of Washington

SUP. CT. NO. 92332-9

COA NO. 71292-6-I

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF
MARK BLACK

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PETITION FOR REVIEW

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u>	1
B. <u>COURT OF APPEALS OPINION</u>	1
C. <u>ISSUES PRESENTED FOR REVIEW</u>	2
D. <u>STATEMENT OF THE CASE</u>	3
E. <u>ARGUMENT</u>	8
1. THE COURT OF APPEALS' DECISION CONFLICTS WITH BASIC PRINCIPLES OF ERROR PRESERVATION AND WITH RAP 2.5.....	8
2. THE COURT OF APPEALS' DECISION ERRONEOUSLY CONFLATES DUE PROCESS IN CIVIL CASES WITH THE "CRITICAL STAGE" ANALYSIS THAT APPLIES ONLY IN CRIMINAL CASES.	11
F. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Mathews v. Eldridge, 424 U.S. 319,
96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)..... 14

Washington State:

In re Detention of Duncan, 142 Wn. App. 97,
174 P.3d 136 (2007), *aff'd*,
167 Wn.2d 398, 219 P.3d 666 (2009)..... 14

In re Detention of Law, 146 Wn. App. 28,
204 P.3d 230 (2008), *rev. denied*,
165 Wn.2d 1028 (2009)..... 10

In re Detention of Morgan, 180 Wn.2d 312,
330 P.3d 774 (2014)..... 13

In re Detention of Stout, 159 Wn.2d 357,
150 P.3d 86 (2007)..... 13, 16

In re Detention of Strand, 167 Wn.2d 180,
217 P.3d 1159 (2009)..... 12, 13, 15

In re Detention of Ticeson, 159 Wn. App. 374,
246 P.3d 550 (2011)..... 14

In re Detention of Young, 122 Wn.2d 1,
857 P.2d 989 (1993)..... 12, 13, 16

In re Welfare of A.W. and M.W., 182 Wn.2d 689,
344 P.3d 1186 (2015)..... 15

State v. Irby, 170 Wn.2d 874,
246 P.3d 796 (2011)..... 1, 2, 3, 12, 16, 17

<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	11
<u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	14

Constitutional Provisions

Federal:

U.S. CONST. amend. V.....	11
U.S. CONST. amend. VI.....	11, 13

Washington State:

WASH. CONST. art. I, § 10.....	12
WASH. CONST. art. I, § 22.....	11, 13, 15

Rules and Regulations

Washington State:

RAP 13.4.....	3
RAP 2.5.....	2, 9, 10, 11

A. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, asks this Court to accept review of the Court of Appeals' decision as set forth in Section B.

B. COURT OF APPEALS OPINION

The State seeks review of the published Court of Appeals opinion in In re the Detention of Mark Black, No. 71292-6-1 (filed 8/24/15), holding that Black's commitment as a sexually violent predator must be reversed because Black was not present for a limited portion of jury selection. Specifically, the State seeks review of the Court of Appeals' conclusions: 1) that the error alleged in this case is reviewable in the first instance when there was no objection on the record at trial and no showing of manifest error affecting a constitutional right on appeal; and 2) that reversal of the jury's verdict that Black is a sexually violent predator is required by this Court's decision in State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) – a criminal case that does not apply to civil proceedings. The Court of Appeals' published opinion is attached as Appendix A, and is hereinafter cited as "Slip Op."

C. ISSUES PRESENTED FOR REVIEW

In summary, this Court should accept review to address the following: 1) whether an objection on the record or a showing of manifest error under RAP 2.5 is required to review an alleged error of this nature in a civil case; 2) whether there has been any error at all, given that Black waived his presence for the individual questioning of prospective jurors; 3) whether Black was deprived of due process where there is no possibility that any prospective jurors would not have been excused if Black had been present and no showing of prejudice in any event, and thus, there was no risk of an erroneous deprivation of liberty; and 4) whether this Court should make clear that Irby does not apply in civil cases.

The Court of Appeals' decision is inconsistent with the axiomatic principle that a party cannot set up an error at trial and then claim that error on appeal. The Court of Appeals' decision expands Irby well beyond its boundaries by holding that a civil litigant has essentially the same constitutional right to be present for every "critical stage" of the trial as a criminal defendant. And the Court of Appeals erred in concluding that the alleged error resulted in a deprivation of due process.

For all of these reasons, this Court should grant review in accordance with RAP 13.4(b)(1), (3) and (4).

D. STATEMENT OF THE CASE

The State filed a petition to civilly commit Mark Black as a sexually violent predator in October 2011 at the end of Black's prison sentence for, among other crimes, child molestation in the second degree and attempted child molestation in the second degree. CP 1-87. Pretrial motions and trial proceedings took place in September, October, and November 2013 before the Honorable Carol Schapira at the Maleng Regional Justice Center (MRJC).

During pretrial motions, Black's trial counsel explained that Black would not be present for the first day of jury selection because prospective jurors were likely to be more open during individual questioning about sensitive matters if Black was not present. RP (9/26/13) 42-43.¹ Defense counsel stated:

Just so Your Honor knows, if this helps with figuring this out at all, we are planning for Mr. Black to arrive on the second day of trial. So the first day, which the jurors may want to speak to us privately, he

¹ Some volumes of the verbatim report of proceedings are identified only by date, others are identified by date and a Roman numeral, and others are identified by date and the type of proceedings that occurred (e.g. "jury voir dire"). This brief references the transcripts accordingly.

wouldn't have to be here for that. I think that can also help them be more open and honest about their history without having the person here accused of something like that. So our hope was to address those that first day, so that can be taken care of.

RP (9/26/13) 42-43. The trial court agreed that that was a sensible strategy. RP (9/26/13) 43.

The first day of jury selection proceeded in Black's absence as planned. The trial court began the jury selection process by addressing hardship excusals, distributing a questionnaire, and asking a few general questions of the entire venire. RP (10/21/13) 13-29, 36-40. Each party then conducted a round of questioning focused primarily on identifying prospective jurors who should be questioned individually or who should be immediately excused for cause. RP (10/21/13) 44-80. The court and the parties spent the remainder of the day conducting individual questioning of prospective jurors who wanted to be questioned more privately about sensitive matters. RP (10/21/13) 85-135. Throughout the day, a number of prospective jurors were excused both for hardship and for cause without objection.

The next day, defense counsel notified the court off the record that Black was not present in court due to an issue with the

jail.² CP 1430. Individual questioning of additional prospective jurors who wanted to speak more privately about sensitive matters then continued without objection from the defense. RP (10/22/13, *voir dire*) 3-45. As a result of further individual questioning, one prospective juror was excused for cause at the defense's request, and another was excused for cause *sua sponte* by the trial court. RP (10/22/13, *voir dire*) 32-33, 43-45.

At some point during this process, a representative of the jail informed the court and the parties that the problem with transporting Black to court stemmed from the timing of the transport order, the jail booking process, and inadequate staffing at the MRJC.³ RP-II (10/22/13) 11-17. The court and the parties then

² The entry in the clerk's minutes reads in its entirety as follows:

(OFF THE RECORD.)

Counsel is present to proceed with trial, however, the Defendant (sic) is not present.

Counsel states that the Defendant (sic) has not been brought up from the jail, even though he did not waive his presence from this point forward. The Court directs the Bailiff to contact the jail about the situation and report back to the court.

CP 1430. The Court of Appeals' opinion does not mention the fact that this occurred off the record. Slip Op., at 3.

³ Although the court clerk's minutes indicate that this discussion took place at some point in the midst of the individual questioning, this is not at all clear from the transcripts. CP 1430.

continued with additional individual questioning. CP 1430; RP-II (10/22/12) 17.

At a later point, after clarifying a legal issue that would apply "in the general voir dire," defense counsel asked the trial court to excuse the venire for the day. RP 1430; RP (10/22/13, *voir dire*) 49-51. The trial court inquired whether Black would be willing to waive his presence so that general *voir dire* could proceed. Defense counsel responded that although she could speak with Black about it, "it would be better for the jury to see him at some point before it's actually picked. You know, someone may recognize him." RP (10/22/13, *voir dire*) 51. The trial court noted that further delay would cause substantial inconvenience to a large group of citizens for another day, even though the vast majority of them would be sent home in any event. RP (10/22/13, *voir dire*) 51-52. Defense counsel stated that she thought it was important to have Black's input on selecting the jury. The court agreed with defense counsel on that point, and then took a recess. RP (10/22/13, *voir dire*) 52-53.

Upon returning from the recess, the court and the parties briefly discussed additional potential hardship excusals. RP (10/22/13, *voir dire*) 53-58. The venire was then brought into the

courtroom, and the trial court announced that jury selection could not continue because "some parts of our system which have not responded in the way that [the court] had expected." RP (10/22/13, *voir dire*) 60. The court permanently excused a few additional prospective jurors for hardship, asked a couple of prospective jurors to remain for individual questioning, and, with apologies, instructed the remaining prospective jurors to return the following day. RP (10/22/13, *voir dire*) 61-67. Following a brief recess, one additional prospective juror was excused for hardship, one was excused for cause at the defense's request, two were excused due to language difficulties, and one was asked to return the next day. RP (10/22/13, *voir dire*) 68-89. Again, the defense did not object to excusing any of these additional prospective jurors. The rest of the day was then devoted to addressing other matters.⁴ RP-II (10/22/13) 18-103.

Black was present in court the following day for the remainder of jury selection, which consisted of general questioning of the venire by the attorneys for both parties, the exercise of peremptory challenges by both parties, and empaneling and

⁴ Black does not challenge the propriety of addressing other matters in his absence for the rest of the day.

swearing in the jury. RP (10/23/13, *voir dire*, opening stmts.) 3, 8-131.

At the conclusion of the trial, the jury found beyond a reasonable doubt that Black is a sexually violent predator. CP 1411.

E. ARGUMENT

1. THE COURT OF APPEALS' DECISION CONFLICTS WITH BASIC PRINCIPLES OF ERROR PRESERVATION AND WITH RAP 2.5.

The Court of Appeals' decision is erroneous in finding that the trial record is sufficient to preserve the issue of Black's absence from a limited portion of jury selection, and in completely dispensing with the requirement under RAP 2.5(a)(3) that there must be a showing of a manifest error affecting a constitutional right in order to raise an issue for the first time on appeal.

In holding that Black preserved the issue for review, the Court of Appeals relied upon statements that were not made on the record (see CP 1430) and interpreted the record as establishing a blanket objection to proceeding in Black's absence. Slip Op., at 15. Although the record certainly shows that Black was not present for the second day of jury selection, the record *does not* show that Black's counsel objected to the trial court continuing with individual

questioning in his absence. Rather, when the trial court directed that individual questioning continue, Black's counsel said nothing. RP-II (10/22/13) 17. This is plainly because Black was absent from individual questioning as a matter of choice and strategy in the first instance. Moreover, when defense counsel asked that the venire be excused for the day and stated that Black's input was needed in selecting the jury, the trial court agreed and honored that request. RP (10/22/13, *voir dire*) 52-53, 60-67. Black was present the next day for general *voir dire*, peremptory challenges, and empaneling and swearing in the jury. RP (10/23/13, *voir dire*, opening stmts.) 3, 8-131.

In sum, the record reflects that the only jury selection procedures that took place in Black's absence were hardship excusals, individual questioning, and challenges for cause based on that individual questioning. The record further reflects that those limited procedures took place in Black's absence without objection from the defense. To the contrary, defense counsel had specifically stated that individual questioning would be more effective if conducted in Black's absence. Accordingly, the Court of Appeals misconstrued the record in order to find that the issue was preserved and in dispensing with any analysis under RAP 2.5.

It is axiomatic that an issue that was not preserved in the trial court cannot be raised for the first time on appeal unless the appellant can show manifest error affecting a constitutional right. RAP 2.5(a)(3); see also In re Detention of Law, 146 Wn. App. 28, 44, 204 P.3d 230 (2008), *rev. denied*, 165 Wn.2d 1028 (2009) (SVP detainee's failure to object to admission of purportedly coerced confession on constitutional grounds is not "manifest constitutional error"). In order to make this showing, an error must be "truly of constitutional dimension" and must have "actually affected the [party's] rights at trial. It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Therefore, in this context, Black was required to show both that his absence for a limited portion of the jury selection process truly violated the constitutional right to due process *and* that it resulted in actual prejudice. Black did not make this showing, and the Court of Appeals erred in dispensing with the requirement that he do so.

**2. THE COURT OF APPEALS' DECISION
ERRONEOUSLY CONFLATES DUE PROCESS IN
CIVIL CASES WITH THE "CRITICAL STAGE"
ANALYSIS THAT APPLIES ONLY IN CRIMINAL
CASES.**

In addition to dispensing with the requirements of RAP 2.5, the Court of Appeals compounded its error by conflating the constitutional right of criminal defendants to be present for every "critical stage" of a trial with the due process analysis that applies in civil cases. More specifically, the Court of Appeals equated the test for whether there has been a due process violation in a civil case with the constitutional "critical stage" analysis for criminal cases as applied in State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011). This misapplication of this Court's precedent merits review.

The right to be present for every "critical stage" of trial under both the federal and state constitutions is expressly guaranteed to criminal defendants, not civil litigants. U.S. CONST. amend. VI (guaranteeing rights to "the accused"); WASH. CONST. art. I, § 22 (also guaranteeing rights to "the accused"). It is well-settled that sexually violent predator cases are civil, not criminal. In re Detention of Young, 122 Wn.2d 1, 23, 857 P.2d 989 (1993); In re Detention of Strand, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009). Accordingly, "the rights afforded under the Fifth and Sixth

Amendments do not attach to SVP petitioners.” In re Strand, 167 Wn.2d at 191.

For example, an SVP detainee does not have a constitutional right to confront witnesses and or a right against self-incrimination. See In re Detention of Stout, 159 Wn.2d 357, 369, 150 P.3d 86 (2007) (no right to confrontation); In re Young, 122 Wn.2d at 50-51 (no right against self-incrimination). Double jeopardy and *ex post facto* principles also have no application in SVP cases. In re Young, at 23-25. Although a criminal accused has the right to counsel from the moment of arrest, SVP detainees do not have a right to counsel until the initiation of court proceedings (*i.e.*, the filing of an SVP petition). In re Strand, 167 Wn.2d at 190-92. Unlike a criminal trial, an SVP civil commitment trial may be held while the SVP detainee is incompetent. In re Detention of Morgan, 180 Wn.2d 312, 320-24, 330 P.3d 774 (2014). An SVP detainee has no right to refuse to participate in a mental health evaluation by the State's expert, and the fact that he has refused to participate may be used against him at trial. In re Detention of Duncan, 142 Wn. App. 97, 103-05, 174 P.3d 136 (2007), *aff'd*, 167 Wn.2d 398, 219 P.3d 666 (2009). And, although SVP proceedings are presumptively open to the public under Article

I, section 10 of the Washington Constitution, SVP detainees are not entitled to a presumption of prejudice on appeal as criminal defendants are under Article I, section 22 in cases where there has been an improper courtroom closure. In re Detention of Ticeson, 159 Wn. App. 374, 382-83, 246 P.3d 550 (2011), *overruled on other grounds*, State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012).

As the cases cited above demonstrate, SVP detainees do not have the constitutional trial rights that are expressly conferred upon criminal defendants by the Fifth and Sixth Amendments to the United States Constitution and by Article I, section 22 of the Washington Constitution. Therefore, it certainly follows from these cases that an SVP detainee does not have the right to be present for every "critical stage" of the proceedings, as this is another constitutional trial right that is expressly conferred upon criminal defendants and not upon civil litigants. Although the Court of Appeals stated that it agreed with the State that the "critical stage" constitutional analysis does not apply in SVP cases, it nonetheless applied that analysis in this case.

In order to find that Black's absence from the second day of individual questioning and hardship excusals warrants reversal of

his civil commitment as a sexually violent predator, such a ruling must rest “solely on the guaranty of ‘fundamental fairness’ provided by the due process clause.”⁵ In re Strand, 167 Wn.2d at 191. In determining whether a civil litigant has been deprived of fundamental fairness as guaranteed by the due process clause, Washington courts utilize the three-part balancing test enunciated in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The three factors to be balanced are as follows:

1) the private interest affected; 2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and 3) the governmental interest, including costs and administrative burdens of additional procedures.

In re Stout, 159 Wn.2d at 370 (citing Mathews, 424 U.S. at 335, and In re Young, 122 Wn.2d at 43-44). In this case, the Court of Appeals’ analysis went astray when it equated the second factor of the Mathews test with the “critical stage” analysis in Irby.

In Irby, this Court addressed whether an email exchange between the trial court and the lawyers regarding excusing prospective jurors in a murder case constituted a critical stage of the proceedings at which the defendant’s presence was required.

⁵ The Washington State Constitution and the United States Constitution provide identical due process protections. In re Welfare of A.W. and M.W., 182 Wn.2d 689, 701-02, 344 P.3d 1186 (2015).

In deciding that it was, the Court emphasized that the email exchange did not only address excusing potential jurors for hardship, which is an administrative task, but it also addressed excusing some of them for cause because their parents had been murdered:

In our judgment, the e-mail exchange was a portion of the jury selection process. We say that because this novel proceeding did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as jurors in this particular case.

Irby, 170 Wn.2d at 882. Citing Article I, section 22 of the Washington Constitution, which expressly guarantees that “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel,” this Court held that Irby's constitutional right to be present for jury selection had been violated, and that the State could not meet its burden of showing that the error was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 884-87. The Court reached this conclusion because the State could not show that all of the jurors who were excused for cause via email “had no chance to sit on Irby's jury.” Id. at 886.

In this case, while acknowledging that Irby is a criminal case and that the Mathews test applies, the Court of Appeals nonetheless applied the “critical stage” analysis from Irby. The

court focused on the individual questioning that continued on the second day of *voir dire*, and held that Black was deprived of due process because Black did not “exercise his personal judgment” and “consult with counsel” about the prospective jurors who were questioned individually on the second day. Slip Op., at 12. Despite the fact that Black and his lawyers had decided that Black would not be present for individual questioning in order to obtain more “open and honest” answers from the prospective jurors about sensitive matters,⁶ the Court of Appeals stated:

[W]e cannot conclude that the existing procedural safeguards during this phase [of jury selection] were sufficient. To the contrary, we conclude that there was an erroneous risk of deprivation of Black's right to his physical liberty by his exclusion from participation in this portion of jury selection.

Slip Op., at 13. The court reached this conclusion based on the fact that ten jurors were questioned individually on the second day, and that some of them were excused while others were retained for

⁶ RP (9/26/13) 42-43.

general *voir dire*.⁷ Slip Op. at 12-13. Also, in rejecting the State's argument that experienced defense counsel were certainly able to represent Black's interests, thus ensuring a fundamentally fair proceeding, the court explicitly applied the "critical stage" analysis from Irby:

But as Irby explained, the right to be present for jury selection is important to the opportunity to defend because of the power to "give advice or suggestion or even to supersede . . . lawyers altogether." As this explanation makes clear, counsel's judgments about suitable jurors do not supplant those of the client.

Slip Op., at 13 (alteration in original).

The Court of Appeals erred in applying Irby to find a due process violation and a deprivation of fundamental fairness here. It is puzzling at best as to how the individual questioning and excusals for hardship and for cause that took place on the first day of *voir dire* could proceed in Black's absence as a matter of choice and strategy, yet the individual questioning and excusals that took place on the second day created such a great risk of an erroneous deprivation of liberty that it denied Black his right to due process

⁷ However, on the first day of *voir dire*, 13 prospective jurors were excused for hardship, three prospective jurors were excused for cause without being individually questioned, and 12 prospective jurors were individually questioned. Of those who were individually questioned, ten were excused for cause. RP (10/21/13, *voir dire*). Black obviously had no input on excusing these jurors, either.

under the Mathews test. The Court of Appeals also required no showing of prejudice by Black in holding that a due process violation occurred. To the contrary, the Court of Appeals applied the Irby analysis, which requires the State to prove that the error was harmless beyond a reasonable doubt – a constitutional standard that applies only in criminal cases.

In summary, the Court of Appeals misapplied this Court's precedent in reversing the jury's verdict that Black is a sexually violent predator. In so doing, the Court of Appeals created a new constitutional right to be present for all aspects of jury selection in civil cases that is the functional equivalent of the right to be present for every critical stage of the proceedings in criminal cases. Further, this new constitutional right holds a higher status than the right to confrontation, the right against self-incrimination, and all other constitutional trial rights that do not apply in civil cases. This error merits review.

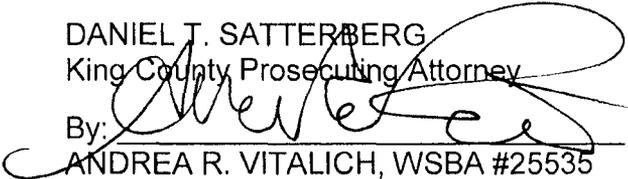
F. CONCLUSION

For the reasons stated above, the State asks this Court to grant review in accordance with RAP 13.4(b)(1), (3), and (4).

DATED this 21st day of September, 2015.

Respectfully submitted,

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APPENDIX A

No. 71292-6-I/2

second day of such selection from which he was absent. Accordingly, we reverse and remand for a new trial.

In October 2011, the State petitioned to civilly commit Black as a sexually violent predator. This was near the end of his prison sentence for his convictions of sexually violent offenses—child molestation in the second degree and attempted child molestation in the second degree. The State alleged that Black suffered from a mental abnormality and/or personality disorder that made him likely to engage in predatory acts of sexual violence.

In September 2013, pretrial motions and other proceedings occurred at the Maleng Regional Justice Center in Kent. At that time, the court and counsel discussed jury selection. During that discussion, counsel for Black stated:

Just so Your Honor knows, if this helps with figuring this out at all, we are planning for Mr. Black to arrive on the second day of trial. So the first day, which the jurors may want to speak to us privately, he wouldn't have to be here for that. I think that can also help them be more open and honest about their history without having the person here accused of something like that. So our hope was to address those that first day, so that can be taken care of.^[1]

The court agreed that this approach made sense.

On October 21, 2013, jury selection began. Consistent with Black's waiver of his presence for the first day of jury selection, the court told the members of the venire that Black "is not here today for this part of the jury selection. But he is coming tomorrow."²

¹ Report of Proceedings (Sept. 26, 2013) at 42-43.

² Report of Proceedings (Oct. 21, 2013) at 4.

The next day, October 22, 2013, this record reflects that Black was not present in court, as he requested. The minute entry for that date states:

Counsel is present to proceed with trial, however, the Defendant is not present.

Counsel states that the Defendant has not been brought up from the jail, even though he did not waive his presence from this point forward. The Court directs the Bailiff to contact the jail about the situation and report back to the Court.³

It appears from the record that there was an administrative problem because the jail did not have adequate personnel to accompany Black to the courtroom.

Nevertheless, jury selection continued. The court and counsel individually questioned several potential jurors who requested to be questioned out of the presence of others. Of these, three remained as potential jurors. The other two were excused.

Later that morning, counsel and the court had the following exchange:

[Counsel]: If your Honor is going to bring out the rest of the jury to explain to them the reason for the delay, if that happens, Your Honor, we request that you not indicate anything having to do with being in custody and requiring two officers. And I'm concerned about that possible explanation to the jury would be detrimental to Mr. Black receiving a fair trial.

[The Court]: Well, of course, I agree with you.

[Counsel]: . . . I want to explain it to them, Your Honor, but I fear there may be some things that may be detrimental to Mr. Black. Other than that, I suppose we're in a situation where we should excuse the jury until tomorrow. I can't think of any other—

[The Court]: Well, the alternative would be if Mr. Black would waive his presence. I don't know whether he wants to do that so we could move the case along.

³ Clerk's Papers at 1430.

[Counsel]: Your Honor, I don't think that would be feasible for him.⁴

Just before the noon recess, the court released the prospective jurors for the day due to Black's absence. But individual questioning of several prospective jurors continued. Of these, one was retained. The rest were excused. The record does not show any voir dire that afternoon.

Black was present for jury selection during the next day, October 23, 2013.

In support of the allegations in its petition for involuntary commitment, the State included a 2008 evaluation and a 2011 "Evaluation Update" from Dr. Dale Arnold, a psychologist. Dr. Arnold diagnosed Black with three disorders: (1) sexual sadism; (2) paraphilia NOS, persistent sexual interest in pubescent aged females, non-exclusive; and (3) personality disorder not otherwise specified (NOS) with antisocial and narcissistic characteristics.

Based on Frye v. United States⁵ and ER 702, 703, and 403, Black moved to exclude Dr. Arnold's second diagnosis—paraphilia NOS, persistent sexual interest in pubescent aged females, non-exclusive. He argued that the diagnosis was the equivalent of "hebephilia" and that hebephilia is not generally accepted in the relevant scientific community as a valid diagnosis. In response, the State moved to strike the Frye hearing, arguing that there was nothing new or novel

⁴ Report of Proceedings (Oct. 22, 2013) at 50-51.

⁵ 54 App. D.C. 46, 293 F. 1013 (1923).

No. 71292-6-1/5

about Dr. Arnold's diagnosis of paraphilia NOS, persistent sexual interest in pubescent aged females, non-exclusive. The State further argued Black's diagnosis was distinct from hebephilia.

At a hearing on the motions, Black offered testimony from psychologist Dr. Karen Franklin. Dr. Franklin testified that there was "no consistent definition of what hebephilia is." And she described the general criticisms of this diagnosis. Dr. Arnold did not testify at this hearing.

At the conclusion of the hearing, the trial court granted Black's motion to exclude evidence regarding hebephilia. But the trial court denied the motion with respect to the diagnosis in this case—paraphilia NOS, persistent sexual interest in pubescent aged females, non-exclusive. The court ruled that this latter diagnosis of Black was different from hebephilia and not inadmissible under Frye.

At the conclusion of the trial, the jury found beyond a reasonable doubt that Black suffers from a mental abnormality and/or personality disorder that causes him serious difficulty in controlling sexually violent behavior. It also found beyond a reasonable doubt that the mental abnormality and/or personality disorder makes Black likely to engage in predatory acts of sexual violence if not confined to a secure facility.

Based on the jury verdict, the trial court entered an order of commitment.

Black appeals.

DUE PROCESS RIGHT TO BE PRESENT

Black first argues that the trial court denied him his right to be present at trial and to participate in a "critical stage" of proceedings.⁶ He relies on Washington criminal cases and civil cases from other jurisdictions.

The question is whether a respondent in an involuntary civil commitment proceeding has a right to be present during jury selection. No Washington appellate court has addressed this issue.

Black asserts that, like a criminal defendant, he had a right to be present and participate in this "critical stage" of trial. He further claims that this violation requires the State to prove that his absence was harmless beyond a reasonable doubt. In contrast, the State asserts that, as a civil litigant, Black does not have the specific right to be present for every "critical stage" of the trial. Rather, the State contends that the inquiry is whether Black has been deprived of fundamental fairness as guaranteed by due process, under the test enunciated in Mathews v. Eldridge.⁷ We agree with the State on the governing test.

We hold that Black had a due process right to be present during jury selection in this civil commitment proceeding. Applying the Mathews test, we conclude that his absence during a portion of jury selection violated that right. Accordingly, we reverse and remand for a new trial.

⁶ Appellant's Opening Brief at 9-18.

⁷ 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Washington courts have repeatedly refused to extend to SVP respondents all the rights of criminal defendants.⁸ For example, this court expressly declined to extend article I, section 22 of the state constitution to SVP cases.⁹ Rather, courts consistently hold that SVP respondents "must rely solely on the guaranty of 'fundamental fairness' provided by the due process clause."¹⁰

In re Detention of Stout is particularly instructive.¹¹ There, the supreme court considered whether an SVP detainee had a due process right to confront witnesses.¹² The court stated at the outset, "[W]e take this opportunity to reiterate that although SVP commitment proceedings include many of the same protections as a criminal trial, SVP commitment proceedings are *not* criminal proceedings."¹³ The court further stated that "the Sixth Amendment right to confrontation is available only to criminal defendants."¹⁴ Thus, the court

⁸ See, e.g., In re Det. of Strand, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009); In re Det. of Leck, 180 Wn. App. 492, 503, 334 P.3d 1109, 1115, review denied, 335 P.3d 941 (2014); In re Det. of Ticeson, 159 Wn. App. 374, 380-81, 246 P.3d 550 (2011).

⁹ Ticeson, 159 Wn. App. 381.

¹⁰ Strand, 167 Wn.2d at 191.

¹¹ 159 Wn.2d 357, 150 P.3d 86 (2007).

¹² Id. at 368-75.

¹³ Id. at 368-69 (emphasis in original).

¹⁴ Id. at 369.

No. 71292-6-1/8

determined that it would only entertain Stout's confrontation claim with respect to his claimed rights in that case to both due process and equal protection.¹⁵

The court then stated that civil commitment is a significant deprivation of liberty.¹⁶ And "individuals facing commitment, especially those facing SVP commitment, are entitled to due process of law before they can be committed."¹⁷

Due process is a flexible concept that, at its core, is a right to be meaningfully heard.¹⁸ But the minimum requirements of due process depend on what is fair in a particular context.¹⁹

The Stout court applied the Mathews test to determine whether due process was satisfied.²⁰ Under that test, in order to determine what procedural due process requires in a given context, courts balance the following three factors: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures.²¹

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id. at 370.

¹⁹ Id.

²⁰ Id. at 370-72.

²¹ Id. at 370.

Here, Black expressly waived his presence for the first day of jury selection. And the record is clear that he did so for the strategic reasons we explained earlier in this opinion. There is no dispute that he had the right to expressly waive his presence during the first day of jury selection, with or without explaining his reasons for doing so.

Accordingly, the focus of our analysis is whether his absence from the second day of jury selection violated due process in this case. Accordingly, we apply the Mathews test to that portion of jury selection.

The Private Interest Affected

There can be no serious dispute that this first factor weighs heavily in Black's favor. Black has a significant interest in his physical liberty.²² Involuntary commitment constitutes a massive curtailment of this liberty.²³ The State concedes this.²⁴

Risk of Erroneous Deprivation Through Existing Procedures

The question for this factor is whether Black's absence from the second day of jury selection risked erroneously depriving him of his physical liberty. We conclude that it did.

We first note that a review of the record shows that both the court and counsel were concerned about the efficient use of time in selecting a jury. We

²² See id.

²³ Id. at 369.

²⁴ Brief of Respondent at 22.

No. 71292-6-1/10

understand that it was in no one's interest in having prospective members of the jury sitting around waiting for unreasonable amounts of time. We do not fault anyone for keeping this goal in mind while the administrative problem with the jail was sorted out.

Nevertheless, this does not lessen the need to assess the second factor under Mathews. In analyzing this factor, we first recognize that there are several existing protections within chapter 71.09 RCW.²⁵ For example, an SVP respondent has the right to a twelve person jury.²⁶ At trial, the State carries the burden of proof beyond a reasonable doubt and the verdict must be unanimous.²⁷ Further, at all stages of the proceedings, the respondent has the right to counsel, including appointed counsel.²⁸ We acknowledge that these statutory safeguards help protect against an erroneous deprivation of liberty.²⁹

But there is a very high probable value of ensuring that an SVP respondent is present during jury selection for this civil proceeding. In reaching this conclusion, we are guided by State v. Irby.³⁰

²⁵ See Stout, 159 Wn.2d at 370.

²⁶ RCW 71.09.050(3).

²⁷ RCW 71.09.060(1).

²⁸ RCW 71.09.050(1).

²⁹ See In re Det. of Morgan, 180 Wn.2d 312, 321-22, 330 P.3d 774 (2014); In re Det. of Coe, 175 Wn.2d 482, 510-11, 286 P.3d 29 (2012); Stout, 159 Wn.2d at 370-71.

³⁰ 170 Wn.2d 874, 246 P.3d 796 (2011).

In that case, the supreme court decided whether email exchanges regarding excusing potential jurors in a criminal case between the court and all counsel violated Irby's right to be present for a "critical stage."³¹ A criminal defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."³² The right to be present "is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence."³³

Albeit Irby was in a different context than this civil commitment proceeding, it provides useful guidance in applying the Mathews test for due process that is before us.

Irby emphasized the significance of the accused's presence during jury selection. The supreme court noted that voir dire bears "a relation, reasonably substantial, to [a defendant's] opportunity to defend" because it would be in [the defendant's] power "to give advice or suggestion or even to supersede his lawyers altogether" about the composition of the jury.³⁴ The court further noted that jury selection is the "primary means" by which a court may enforce an accused's right to be tried by a jury free from "ethnic, racial, or political prejudice,

³¹ Id. at 881.

³² Id. (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

³³ Id. (quoting Snyder, 291 U.S. at 107-08).

³⁴ Id. at 883 (quoting Snyder, 291 U.S. at 106).

No. 71292-6-1/12

or predisposition about the defendant's culpability."³⁵ The supreme court concluded that Irby's absence from a portion of jury of jury selection violated his right to be present.³⁶

In our view, these same concerns are present in this SVP proceeding. The court and both counsel examined potential jurors during Black's absence on the second day of jury selection. Jurors 7, 48, 61, 70 and 74 were individually questioned that morning. That occurred because each had indicated a request for individual questioning out of the presence of the other potential members of the jury. As a result of this questioning, Jurors 7, 48, and 70 remained in the jury pool. The others were excused.

This was done without Black having the ability to exercise his personal judgment and to consult with counsel about the retention of these three potential jurors. In short, he was unable to ensure that his jury was free from either prejudice or predisposition in this proceeding to commit him as a sexual predator.

Likewise, Black had no ability to exercise his personal judgment or to consult with counsel about the jurors that were individually questioned later that morning. The court and counsel questioned five additional prospective jurors after the initial round, excusing one for hardship, one for cause, two for language difficulties, and retaining one more potential juror.

³⁵ Id. at 884 (quoting Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)).

³⁶ Id.

In short, given the significance of this phase of jury selection and the high value of Black's presence during it, we cannot conclude that the existing procedural safeguards during this phase were sufficient. To the contrary, we conclude that there was an erroneous risk of deprivation of Black's right to his physical liberty by his exclusion from participation in this portion of jury selection.

The State argues that the risk under this second factor is "nonexistent." We disagree.

The State asserts that "Black's experienced trial attorneys were present and ably represented his interests."³⁷ But as Irby explained, the right to be present for jury selection is important to the opportunity to defend because of the power to "give advice or suggestion or even to supersede . . . lawyers altogether."³⁸ As this explanation makes clear, counsel's judgments about suitable jurors do not supplant those of the client. There is significant value to having a respondent in an SVP proceeding involved during this process. Thus, this argument is not persuasive.

The State also argues that Black's absence during individual questioning was strategic. This misreads the record. Black's absence during the first day of jury selection was strategic. But a fair reading of this record makes clear that he did not waive his presence for jury selection on the second day. Black's counsel twice made this abundantly clear to the court, and the court eventually released

³⁷ Brief of Respondent at 22.

³⁸ Irby, 170 Wn.2d at 883 (quoting Snyder, 291 U.S. at 106).

No. 71292-6-1/14

potential jurors due to Black's absence. The State's argument to the contrary is not convincing.

Governmental Interest of Additional Procedures

The State has an interest in protecting the community from sex offenders who pose a risk of reoffending.³⁹ But in this case, there were no additional procedures required, only compliance with those previously envisioned—ensuring Black's presence during the second day of jury selection.

The State argues that requiring the court to retain jurors who should have been excused would have placed an undue burden on the prospective jurors themselves and would undermine judicial economy. That may be so. But the more likely choice was for the court to have released prospective jurors earlier due to Black's absence. In that case, there would have been delay in selecting a jury. But it is difficult to believe that doing so would have imposed substantial additional costs or administrative burdens on the State.

Balancing Black's interests against those of the State under these three factors, we hold that Black had a due process right to be present during the second day of jury selection. We further hold that this right was violated when jury selection proceeded in his absence.

In *In re Young*, the supreme court cited the *Mathews* test and concluded that due process required that a 72-hour hearing be available to SVP detainees.⁴⁰ But the court then stated, "While this requirement was not complied

³⁹ *Stout*, 159 Wn.2d at 373.

⁴⁰ 122 Wn.2d 1, 43-47, 857 P.2d 989 (1993).

No. 71292-6-I/15

with here, it had no bearing on the ultimate outcome of petitioners' trials; thus the omission in this instance does not require reversal."⁴¹

Here, on this record, we cannot say that this violation had no bearing on the ultimate outcome of this trial. Accordingly, we reverse and remand for a new trial.

RAP 2.5

The State argues that Black did not object on the record to his absence from jury selection. It also argues that he cannot raise this due process issue for the first time on appeal under RAP 2.5(a)(3). We disagree.

The record shows that Black waived being present for the first day of jury selection but not the second—October 22, 2013. The court clearly understood this and so stated to the jury before voir dire commenced. On the second day of jury selection, counsel twice raised Black's absence as problematic, both before individual voir dire resumed and later. Black preserved this issue for appeal. Because he did so, we need not address whether he can raise this issue under RAP 2.5(a).

EVIDENTIARY RULINGS

Black next argues that the trial court improperly admitted expert opinion testimony that he suffers from paraphilia NOS, persistent sexual interest in pubescent females, non-exclusive. He also contends that the trial court deprived

⁴¹ *Id.* at 47; but see *State v. Brousseau*, 172 Wn.2d 331, 363, 259 P.3d 209 (2011) (Owens, J. dissenting) (applying a constitutional harmless error analysis to a procedural due process violation).

him of his ability to challenge this diagnosis when it excluded evidence of hebephilia. These issues are likely to recur on remand. Accordingly, we address them to a limited extent.

"The Frye standard requires a trial court to determine whether a scientific theory or principle 'has achieved general acceptance in the relevant scientific community' before admitting it into evidence."⁴² "[T]he core concern . . . is only whether the evidence being offered is based on established scientific methodology."⁴³

If the Frye test is satisfied, the trial court must then determine whether expert testimony should be admitted under the two-part test of ER 702, which considers whether the witness qualifies as an expert and whether the expert's testimony would be helpful to the trier of fact.⁴⁴

This court reviews de novo a trial court's ruling under Frye.⁴⁵ And we review for abuse of discretion a ruling under ER 702.⁴⁶

Here, on the basis of Frye and ER 702, 703 and 403, Black challenged Dr. Arnold's diagnosis of paraphilia NOS, persistent sexual interest in pubescent

⁴² In re Det. of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003) (internal quotation marks omitted) (quoting Young, 122 Wn.2d at 56).

⁴³ Id. (alterations in original) (internal quotation marks omitted) (quoting Young, 122 Wn.2d at 56).

⁴⁴ State v. Copeland, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996).

⁴⁵ State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999).

⁴⁶ Id.

aged females, non-exclusive. He argued that this diagnosis was the same as hebephilia and that hebephilia is not generally accepted as a valid diagnosis within the psychiatric and psychological communities.

At the Frye hearing, Black presented testimony from Dr. Karen Franklin. Dr. Franklin testified that there is "no consistent definition" of the hebephilia diagnosis.⁴⁷ She also testified that hebephilia is a controversial diagnosis, because "the idea that sexual attraction to adolescents is somehow deviant or disordered, it goes against pretty much the mainstream of science and the mainstream of popular culture" ⁴⁸ She further testified that there is no reliable method to diagnosing hebephilia, because it is "a moving target that keeps changing."⁴⁹ And she testified that a proposal to include hebephilia in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) was rejected after much criticism.⁵⁰

Dr. Arnold, the State's expert providing the diagnoses of Black in this case did not testify at this hearing. He did testify at trial.

After considering Dr. Franklin's testimony at the Frye hearing and the briefing from the parties, the trial court concluded that hebephilia is not a generally accepted diagnosis in the psychological community. However the trial

⁴⁷ Report of Proceedings (Sept. 13, 2013) at 35.

⁴⁸ Id. at 39-40.

⁴⁹ Id. at 40.

⁵⁰ See id. at 53-60.

court found that Dr. Arnold did not diagnose Black with hebephilia, but rather, that he diagnosed Black with paraphilia NOS, persistent sexual interest in pubescent aged females, non-exclusive. Further, the court concluded that Dr. Arnold's diagnosis and methodology were generally accepted in the psychological community, thus meeting Frye.

Black asserts on appeal that the trial court correctly concluded that hebephilia is not a generally accepted diagnosis. The State did not cross-appeal the trial court's adverse ruling on this issue.

However, in its briefing on appeal, the State argues that it "does *not* concede that evidence regarding hebephilia should be excluded under the Frye standard."⁵¹ It asserts that "whether hebephilia is a generally-accepted psychiatric diagnosis remains an open question in Washington."⁵² But the State argues on appeal that the diagnosis of paraphilia NOS, persistent sexual interest in pubescent aged females, non-exclusive is different from a hebephilia diagnosis. Thus, its position is that Dr. Arnold's diagnosis of Black is not excludable on the basis of Frye.

The State asserts that Dr. Franklin described "hebephilia" as a sexual attraction to adolescents in general.⁵³ And it distinguishes between "adolescent" and "pubescent" to argue that hebephilia is broader than the diagnosis here. The

⁵¹ Brief of Respondent at 26.

⁵² Id.

⁵³ Id. at 27.

No. 71292-6-I/19

State also argues that Black's diagnosis is consistent with the DSM. In doing so, it relies on the definitions of "paraphilia" and "paraphilic disorder" in the DSM-V.⁵⁴ But Dr. Arnold's diagnosis of Black was done with respect to the DSM-IV, not the DSM-V. We do not find the specific language on which the State relies in its argument on appeal in the DSM-IV.

For these and other reasons, we do not decide, on this record, whether hebephilia is excludable on the basis of Frye.⁵⁵ Likewise, we do not decide, on this record, whether the diagnosis in this case—paraphilia NOS, persistent sexual attraction to pubescent females non-exclusive is sufficiently distinct from hebephilia or otherwise excludable on the basis of Frye. Finally, we do not decide another issue that the State argues on appeal: whether and to what extent a diagnosis based on the International Statistical Classification of Diseases and Related Health Problems, 10th Revision (ICD-10) is excludable on the basis of Frye. On remand, the parties will have the opportunity to develop a better record and present to the trial court relevant case and other authorities to address these and related issues.

⁵⁴ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 685-86 (5th ed. 2013) ("The term **paraphilia** denotes any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners. . . . A **paraphilic disorder** is a paraphilia that is currently causing distress or impairment to the individual or a paraphilia whose satisfaction has entailed personal harm, or risk of harm, to others.").

⁵⁵ See In re Pers. Restraint of Meirhofer, 182 Wn.2d 632, 645, 343 P.3d 731 (2015).

No. 71292-6-1/20

Black also argues that the court's Frye ruling undermined the fairness of the proceedings because it hampered his ability to challenge Dr. Arnold's diagnosis. Because we do not decide the Frye issues and remand for a new trial, we need not address this claim.

SUFFICIENCY OF THE EVIDENCE

Finally, Black argues that the State did not prove that each of the alternative means of commitment caused the lack of volitional control constitutionally required for civil commitment. We also need not address this issue because of the reversal and remand for a new trial.

We reverse the order of commitment and remand for a new trial.

Cox, J.

WE CONCUR:

Trickay, J

Wendling

Certificate of Service by Electronic Mail

Today, in accordance with a standing electronic service agreement, I directed electronic mail addressed to the attorney for the appellant, Nancy Collins, at wapofficemail@washapp.org, containing a copy of the Petition for Review, IN RE THE DETENTION OF MARK BLACK, Cause No. 71292-6-1, in the Court of Appeals, Division I, for the State of Washington.

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

Kelly Bronson

Name

Done in Seattle, Washington

9-21-15

Date

KING COUNTY PROSECUTOR

September 22, 2015 - 3:37 PM

Transmittal Letter

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