FILED

MAY 15 2017

WASHINGTON STATE
SUPREME COURT

FILED
Apr 26, 2017
Court of Appeals
Division I
State of Washington

Supreme Court No. 94494-6
(COA No. 71292-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF MARK BLACK

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

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 3

E. ARGUMENT 7

1. The court misapplied *Frye* by correctly ruling the diagnosis of "hebephilia" was inadmissible due to insufficient scientific support then illogically admitting the same diagnosis under a different name based on the same faulty science 7

2. The Court of Appeals assumed the primary mental abnormality addressed at trial was erroneously admitted and Mr. Black was denied his right to fully contest this evidence, yet it affirmed the jury's verdict by using a harmless error test that conflicts with this Court's decision in *Woodlyn* 11

F. CONCLUSION 16

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 260 P.3d 857 (2011) 8

In re Det. of Halgren, 156 Wn.2d 795, 132 P.2d 714 (2006) 12

In re Det. of Meirhofer, 182 Wn.2d 632, 343 P.3d 731 (2015) 8

In re Det. of West, 171 Wn.2d 383, 256 P.3d 302 (2011) 15

Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 296 P.3d 860 13

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583, 587 (2010) 13

State v. Cauthron, 120 Wn.2d 879, 846 P.2d 502 (1993) 9

State v. Greene, 139 Wn.2d 64, 984 P.2d 1024 (1999) 8

State v. Woodlyn, Wn.2d _, 2017 WL 1392973 (April 13, 2017) ... 3, 12, 15

Thomas v. French, 99 Wn.2d 95, 659 P.2d 1097 (1983) 13

Washington Court of Appeals Decisions

Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 313 P.3d 408 (2013), *rev. denied*, 179 Wn.2d 1019 (2014) 8

State v. Kunze, 97 Wn. App. 832, 988 P.2d 977 (2000) 9

State v. Sipin, 130 Wn. App. 403, 123 P.3d 862 (2005) 9

United States Supreme Court Decisions

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) 7

Federal Court Decisions

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)..... 1, 2, 3, 4, 7, 8, 9, 10, 11, 13

Court Rules

RAP 13.3(a)(1) 1

RAP 13.4 ..... 1, 10, 15

Other Authorities

Allen Frances & Michael B. First, *Hebephilia Is Not* a *Mental Disorder in DSM–IV–TR and Should Not Become One in DSM–5,* 39 J. Am. Acad. Psychiatry & L. 78, 82–84 (2011) 8

Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.2013) 3, 4

In re Detention of New, 992 N.E.2d 519 (Ill.App.Ct. 2013) 10

State v. David D., 37 N.Y.S.3d 685 (N.Y. Sup. Ct. 2016) 10

State v. Ralph P., 39 N.Y.S.3d 643, (N.Y. Sup. Ct. 2016) 10

A. IDENTITY OF PETITIONER

Mark Black, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISIONS

Mr. Black seeks review of the Court of Appeals decision dated March 27, 2017, attached as Appendix A. This decision expounds upon the Court of Appeals' reasoning in a related decision, entered on August 24, 2015, which is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Novel scientific evidence is inadmissible when it is not generally accepted in the relevant scientific community. After a *Frye*[1] hearing, the trial court ruled hebephiliac is an inadmissible as a mental abnormality for civil commitment under RCW ch. 71.09 because it is not generally accepted in the scientific community. But the court admitted a diagnosis premised on the same controversial science when called a different name. Did the court improperly use the guise of a

[1] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

different name to admit a diagnosis that it found lacks the scientific acceptance necessary for admission?

2. Does substantial public interest favor review of the admissibility of hebephilia-type science when there remains significant controversy, questions of admissibility will recur, and the Court of Appeals was unable to resolve the issue despite substantial briefing?

3. A person facing civil commitment has the right to meaningfully challenge the evidence against him. After ruling that hebephilia is inadmissible under *Frye* but admissible if called "paraphilia not otherwise specified, persistent sexual interest in pubescent females," the court barred Mr. Black from using the scientific controversy surrounding hebephilia to cast doubt on the State's case in its cross-examination of the State's evaluator. Did the court deny Mr. Black his ability to meaningfully contest the basis for his civil commitment?

4. The Court of Appeals did not decide what harm followed the trial court's illogical evidentiary rulings regarding the scientific controversy around hebephilia. Instead, it affirmed Mr. Black's commitment solely because alternative diagnoses were presented to the jury, even though they were not focal point of the State's case. In *State*

v. Woodlyn,[2] this Court criticized the Court of Appeals for presuming it could tell what alternative means jurors relied upon when they gave a general verdict. Here, the jury did not specify the basis of its verdict. Did the Court of Appeals misapply controlling law by affirming a commitment based on the mere existence of potential alternative means without a special verdict, when one alternative means that should not have been presented to the jury was the focus of the evidence and argument at trial?

D. STATEMENT OF THE CASE

Before Mark Black's jury trial to decide whether he met the criteria for indefinite civil commitment under RCW ch. 71.09, the court heard testimony and reviewed lengthy pleadings for a *Frye* challenge to the diagnosis of hebephilia. CP 1412-13. Psychologist Karen Franklin testified that hebephilia is a novel and controversial disorder premised on allegedly deviant sexual attraction to pubescent or post-pubescent minors. 9/13/13RP 39-40.

The scientific community excluded hebephilia from the DSM-V, after a debate among professionals.[3] 9/13/13RP 56-57, 60, 71-72. The

[2] _ Wn.2d _, 2017 WL 1392973 (April 13, 2017).

DSM-V excluded this claimed disorder because the only study of its validity had never been replicated and used faulty methodology. *Id.* at 60. It was also excluded because paraphilias involve deviant sexual interests, but it is common for adults to find young teenagers sexually attractive. *Id.* at 62, 74 , 93, 98.

The court ruled that hebephilia was inadmissible under *Frye* due to its lack of general acceptance and reliability, but it also ruled it was admissible if called paraphilia NOS, persistent sexual interest in pubescent females, as the State's evaluator Dr. Arnold named his diagnosis. CP 1413. Dr. Arnold conceded his diagnosis was premised on the same science underlying hebephilia and he created this label to describe Mr. Black's mental status because hebephilia is not in the DSM-V. CP 839, 841-43; 9RP 944-45.

The State relied on the claimed mental abnormality of paraphilia not otherwise specified (sexual interest in pubescent females) as the basis of its commitment and made it a focal point of its case. 5RP 379-81, 429-35, 441-42; 12RP 1539-40, 1543-44. It was the first matter the State discussed at the start of its closing argument and its rebuttal. 12RP

---

[3] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.2013).

1539, 1601. It was the diagnosis Mr. Black spent the most time trying to challenge in his closing argument. 12RP 1562-77. The jury spent four days deliberating before reaching its verdict, and informed the court it was having a hard time reaching a unanimous decision. CP 1407, 1411; 12RP 1607; 14RP 1630.

During the trial, the jury heard conflicting accounts of whether Mr. Black had a mental abnormality or personality disorder causing him serious difficulty controlling his sexually violent behavior. Dr. Joseph Plaud testified Mr. Black did not have a psychological condition meeting the criteria for commitment. 9RP 932-33, 838. He believed that while Mr. Black committed illegal acts and made bad choices, he did not display the necessary underlying sexual deviance required for a mental abnormality or personality disorder. 9RP 946, 951, 969-70.

Mr. Black committed sex offenses resulting in criminal convictions during two time periods. In the fall of 1995, he had non-forcible intercourse with a 13-year-old, Heather Paul, who was 5'8" and well-developed for her age, and sexual contact with a 14-year-old girl, Valerie Foster, who lied about her age. 4RP 212, 215, 219, 246, 249, 251, 257-58. Mr. Black was convicted and sentenced to prison. In the spring of 2003, he touched the chests of two girls, the 13-year-old

daughter of his girlfriend and her friend. 6RP 682, 7RP 799, 801. After serving his prison sentence imposed for child molestation, the State filed a petition to indefinitely commit him and he has not been released from confinement since his 2003 arrest. CP 1-2.

The State's evaluator Dr. Arnold diagnosed Mr. Black with sexual sadism[4] and personality disorder not otherwise specified (antisocial and narcissistic traits), in addition to his claim of paraphilia not otherwise specified (persistent sexual interest in pubescent females). 5RP 382. He said these disorders independently caused Mr. Black the inability to control his commission of sex offenses because he went to prison for such conduct yet committed another offense after his release. 5RP 445-46.

The Court of Appeals initially overturned Mr. Black's conviction based on a violation of his right to be present during jury selection, but this Court reversed that ruling and remanded the case to the Court of Appeals to consider the issues it had not ruled on in its first decision. App. A, Slip op. at 1 n.1 & 2 (citing prior decisions). In its second decision, the Court of Appeals found there was sufficient

evidence of the alternative mental abnormalities and personality disorder presented. *Id.* at 4-8. It further ruled that it need not decide whether the trial court's rulings admitting a diagnosis after deeming its underlying scientific basis novel and unreliable, because the jury could have based its decision on other diagnoses offered by the State. *Id.* at 9-10.

E. ARGUMENT

1. The court misapplied *Frye* by correctly ruling the diagnosis of "hebephilia" was inadmissible due to insufficient scientific support then illogically admitting the same diagnosis under a different name based on the same faulty science

Having a serious mental disorder recognized by the psychiatric community as the underling condition is essential to the constitutionality of civil commitment. *Kansas v. Hendricks,* 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). In *Hendricks*, the court emphasized that the disorder on which the state's authority to civilly confine a person rested was a "condition the psychiatric profession itself classifies as a serious mental disorder." *Id.* at 360.

---

[4] Mr. Black was never charged or convicted for any acts on which this diagnosis was based. The basis of the diagnosis is discussed in Appellant's Opening Brief at 38-40.

When most recently revising the DSM, psychological professionals "explicitly rejected" adding hebephilia "because it was based on imprecise and incomplete research." *In re Det. of Meirhofer*, 182 Wn.2d 632, 658, 343 P.3d 731 (2015) (Wiggins, J. dissenting, citing Allen Frances & Michael B. First, *Hebephilia Is Not* a *Mental Disorder in DSM–IV–TR and Should Not Become One in DSM–5,* 39 J. Am. Acad. Psychiatry & L. 78, 82–84 (2011)).

In determining the reliability and admissibility of scientific evidence, Washington courts apply the *Frye* standard. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 600-01, 260 P.3d 857 (2011); *see Frye*, 293 F. at 1014. The trial court acts as gatekeeper, assessing the reliability and admissibility of expert testimony before permitting its admission. *Id.* at 600.

> Under *Frye,* expert testimony is admissible where:
> (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and
> (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.

Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 175, 313 P.3d 408 (2013), *rev. denied*, 179 Wn.2d 1019 (2014) (quoting *State v. Sipin,* 130 Wn. App. 403, 414,

123 P.3d 862 (2005)). General acceptability is not satisfied "if there is a significant dispute between qualified experts as to the validity of scientific evidence." *State v. Kunze*, 97 Wn. App. 832, 853, 988 P.2d 977, *rev. denied*, 140 Wn.2d 1022 (2000). (citing *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993).

After a contested *Frye* hearing, the court concluded that "[h]ebephilia is not a generally accepted diagnosis in the psychological community." CP 1414. But the court ruled that the State could offer the same evidence if the State's evaluator called it "paraphilia NOS persistent sexual interest in pubescent aged females," even though the evaluator admitted this label was predicated on the same science as that underlying hebephilia. *Id.*; CP 344, 831. The court's nonsensical and erroneous ruling abdicated the court's gatekeeping role and let the jury commit Mr. Black based on novel science that is not generally accepted. The court misapplied *Frye* by failing to exclude expert opinion testimony that it deemed to be predicated on unreliable evidence that was not generally accepted in the scientific community. Consequently, this Court should grant review because the court's ruling is contrary to controlling law. RAP 13.4(b)(ii).

This Court should also grant review because the admissibility of this novel and dubious purported condition is likely to recur and is a matter of substantial public interest. RAP 13.4(b)(iv). Several courts have agreed that hebephilia-based disorders are insufficiently generally accepted to be admissible under *Frye* after extensive hearings, or have reversed where no *Frye* hearing occurred. *See State v. Ralph P.*, 39 N.Y.S.3d 643, 683-84 (N.Y. Sup. Ct. 2016) (ruling State did not meet burden of proving general acceptance of hebephilia as a paraphilia and noting that any acceptance is only among evaluators for State sex offender programs); *State v. David D.*, 37 N.Y.S.3d 685, 694 (N.Y. Sup. Ct. 2016) (concluding "the specifier hebephiliac is not generally accepted as reliable in the relevant psychiatric community"); *see also In re Detention of New*, 992 N.E.2d 519, 529 (Ill.App.Ct. 2013) (reversing commitment where no *Frye* hearing occurred before admitting hebephiliac diagnosis).

Here, the Court of Appeals struggled with the trial court's *Frye* ruling in its first decision, explaining the various issues and arguments without resolving them. App. B, Slip op. at 15-19. Rather than determine whether an error occurred requiring reversal, the Court of Appeals remanded the case for other reasons and invited the parties to

continue litigating the issue. *Id.* at 19. But when the portion of its ruling ordering a new trial on other grounds was reversed, the Court of Appeals again dodged the issue. Instead, it ruled there was sufficient evidence to support other diagnoses, even though they were not the focal point of the case. App. A, Slip op. at 9. The Court of Appeals' difficulty resolving this issue demonstrates the need for guidance from this Court.

The trial court's misapplication of *Frye*, and the Court of Appeals' refusal to address this problem, undermined the fairness of Mr. Black's trial. This Court should grant review.

2. The Court of Appeals assumed the primary mental abnormality addressed at trial was erroneously admitted and Mr. Black was denied his right to fully contest this evidence, yet it affirmed the jury's verdict by using a harmless error test that conflicts with this Court's decision in *Woodlyn* The Court of Appeals applied a harmless error.

The Court of Appeals assumed the trial court incorrectly admitted the hebephilia-based paraphilia and improperly restricted the defense's cross-examination, then it moved straight to the question of whether these errors were harmless. App. A, Slip op. at 9. In cursory analysis, it affirmed Mr. Black's commitment because the jury heard other alternative diagnoses that could satisfy the mental illness

component of commitment and those diagnoses were "sufficient" to support the verdict. App. A, Slip op. at 9-10. This analysis is patently incorrect, contrary to controlling law, and undermines Mr. Black's inviolate right to a jury trial.

Under RCW ch. 71.09, the mental abnormality or personality disorder alleged are "distinct means of establishing the mental illness element" required for commitment. *In re Detention of Halgren*, 156 Wn.2d 795, 811, 132 P.2d 714 (2006). When the State does not prove an alternative means beyond a reasonable doubt, reversal is required. *Woodlyn*, 2017 WL 1393973 *4-5.

Woodlyn criticized the Court of Appeals for affirming a conviction even though it found insufficient evidence of an alternative means. *Id.* at *4. In *Woodlyn*, the Court of Appeals surmised that the jury would not have decided the case based on the unsupported alternative given the lack of evidence and affirmed the conviction. *Id.* This Court in *Woodlyn* rejected the analysis of the lower court. It ruled that when alternative means are presented, a reviewing court may not guess a general jury verdict means the jurors reached their decision by unanimous agreement on the alternative that was sufficiently presented.

Id. When one alternative means is not supported by the evidence, reversal is required. *Id*.

In Mr. Black's case the Court of Appeals presumed a significant evidentiary occurred and then ignored it. App. A, Slip op. at 9. It affirmed because the jury heard other alternative means that were not patently legally insufficient. *Id*. This analysis disregards the harm flowing from improperly admitted evidence undermining the mental abnormality that was the focal point of the State's case.

When a judge erroneously admits evidence, a new trial is necessary "where there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting *Thomas v. French,* 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). The Court of Appeals has previously ruled that improperly admitted scientific evidence under *Frye* requires reversal when it is "within reasonable probabilities" that the outcome of the trial would have been different. *Sipin*, 130 Wn. App. at 421.

If the trial court's *Frye* ruling was erroneous, the jury should not have heard the alternative means of paraphilia predicated on attraction to pubescent girls. *See Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d

909, 918-19, 296 P.3d 860 ("*Frye* excludes testimony based on novel scientific methodology until a scientific consensus decides the methodology is reliable"). At the very least, the court's evidentiary rulings constrained Mr. Black's ability to debunk the State evaluator's opinion and credibility by drawing a parallel between hebephilia and paraphilia not otherwise specified (sexual interest in pubescent females) and using the controversy surrounding hebephilia to cast doubt on the evaluator's expertise and validity of his opinions. Cross-examination would have been effective, as demonstrated by Mr. Black's ability to convince the court to exclude hebephilia by presenting evidence that the scientific community had rejected its validity and reliability.

Even with this erroneously admitted evidence, the jury deliberated for four days and at one point told the judge it was having trouble reaching a unanimous decision. CP 1407. The jury was instructed it did not need to unanimously agree on which alternative mental abnormality or personality disorder it relied upon. CP 1385 (Instruction 5). Mr. Black's alleged paraphilia involving your teenagers was a significant part of the State's case and was how the State started its closing and rebuttal arguments. 12RP 1539, 1601. It is illogical and

unreasonable to simply ignore this evidence when at least some jurors would surely have relied on it when reaching its verdict.

The only case law the Court of Appeals cited for its harmless error analysis is *In re Det. of West*, 171 Wn.2d 383, 410, 256 P.3d 302 (2011). App. A, Slip op. at 9. But other than also being a civil commitment case, *West* lacks any similarity to the case at bar. *West* assessed the harm of minor evidentiary errors arising in a case with overwhelming evidence that Mr. West met the criteria for commitment and none of the errors touched on the admissibility of the State's diagnosis. *Id.* The Court of Appeals decision misapplied *West*, is contrary to *Woodlyn*, and undermines Mr. Black's right to a fair trial by jury. This Court should grant review.

F. CONCLUSION

Based on the foregoing, Petitioner Mark Black respectfully requests that review granted pursuant to RAP 13.4(b).

DATED this 26th day of April 2017.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner
(206) 587-2711

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Detention of	)	No. 71292-6-I
MARK A. BLACK,	)	DIVISION ONE
Appellant.	)	UNPUBLISHED
	)	FILED: March 27, 2017

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 MAR 27 AM 10: 52

COX, J. – Mark Black challenges his order of commitment as a sexually violent predator. In our August 2015 decision, we reversed the order on due process grounds because he had not been present during portions of jury selection.[1]

The supreme court granted the State's petition for review and denied Black's.[2] The supreme court then reversed our decision on the basis that Black waived his right to be present during the relevant portions of jury selection. The court remanded the case to this court for further proceedings consistent with its opinion.

Two issues remain for decision. First, whether there was sufficient evidence to prove that Black's disorders caused him serious difficulty controlling his behavior. Second, whether the court abused its discretion in admitting certain

---

[1] In re Det. of Black, 189 Wn. App. 641, 357 P.3d 91 (2015).

[2] In re Det. of Black, No. 92332-9, slip op. at 1 (Wash., Dec. 15, 2016), https://www.courts.wa.gov/opinions/pdf/923329.pdf.

expert opinion. We hold there was sufficient evidence to support the jury's decision. And there was no evidentiary error requiring reversal. We affirm.

We need not repeat here the factual and procedural background detailed in our prior opinion. Rather, we only discuss facts insofar as necessary to address the remaining issues for decision.

SUFFICIENCY OF THE EVIDENCE

Black argues that the State failed to prove that each of the alternative means of commitment caused the lack of volitional control required for civil commitment. We hold there was sufficient evidence to support the jury's verdict.

The right to a unanimous jury verdict applies in SVP commitment proceedings.[3] When the defendant stands charged with and the jury is instructed on an alternative means crime, the jury must determine unanimously the means by which the defendant committed the crime.[4]

To show the mental illness element for an SVP determination, the State can present proof that the respondent "suffers [either] from a 'mental abnormality' or proof that such a respondent suffers from a 'personality disorder.'"[5] These "are the two factual alternatives set forth in the relevant statute."[6]

---

[3] In re Det. of Halgren, 156 Wn.2d 795, 809-11, 132 P.3d 714 (2006).

[4] State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

[5] In re Det. of Pouncy, 144 Wn. App. 609, 618, 184 P.3d 651 (2008) (quoting Halgren, 156 Wn.2d at 811).

[6] Id.

"[W]hen there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required."[7] But the jury's finding must be unanimous when there is insufficient evidence to support any individual alternative means.[8]

Thus, where a rational trier of fact could have found beyond a reasonable doubt that the defendant suffered from both a mental abnormality and a personality disorder, the defendant's constitutional right to jury unanimity is not violated.[9]

A "mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."[10]

Evidence is sufficient to support a guilty verdict if, viewed "in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt."[11] In so construing the evidence, we draw "all reasonable inferences . . . in favor of the State."[12] We interpret it "most strongly against the

---

[7] Owens, 180 Wn.2d at 95.

[8] Id.

[9] Pouncy, 144 Wn. App. at 620.

[10] RCW 71.09.020(8).

[11] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[12] Id.

defendant."[13] And we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence.[14]

Here, through the testimony of Dr. Dale Arnold, the State presented sufficient evidence to prove both alternative means to support commitment—personality disorder and mental abnormality.

First, Dr. Arnold testified that Black has a personality disorder not otherwise specified (NOS) with antisocial and narcissistic traits.[15] These traits include a sense of entitlement, manipulation of others, deceitfulness, lack of remorse, and irresponsible behavior.[16] Dr. Arnold made this diagnosis after an evaluation of Black and consultation with the Diagnostic and Statistical Manual of Mental Disorders IV-Text Revision (DSM-IV TR).[17]

Dr. Arnold further testified that Black's personality disorder was "severe" according to the psychopathy checklist.[18] And he testified that individuals who score in the high range of the psychopathy checklist, like Black, "tend to reoffend more quickly" and "have more violent offenses."[19] He also testified that Black's

---

[13] Id.

[14] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

[15] Report of Proceedings Vol. 5 (Oct. 28, 2013) at 382.

[16] Id. at 405-06.

[17] Id.

[18] Id. at 406.

[19] Id. at 408-09, 427.

personality disorder had a "direct link" to sexual reoffending.[20] He opined that this was because Black likes "the adventure . . . of finding someone on the internet" and "the process of grooming the child for victimization."[21] Further, Dr. Arnold testified Black's personality disorder caused Black serious difficulty controlling his behavior because he lacks concern for others and enjoys exploiting others.[22]

Second, the State presented sufficient evidence to prove that Black has a mental abnormality. Specifically, the evidence showed that Black has two mental abnormalities—sexual sadism and paraphilia NOS, persistent sexual attraction to pubescent females (paraphilia NOS).[23] Dr. Arnold also made these diagnoses after the evaluation of Black and consultation with the DSM-IV.[24]

Dr. Arnold based his paraphilia NOS diagnosis on the fact that Black was "sexually excited by the budding breasts [of young females]."[25] Dr. Arnold testified that this paraphilia caused stress and dysfunction in Black's life.[26] Dr. Arnold opined that paraphilia NOS is a mental abnormality that affected Black's

---

[20] Id. at 427.

[21] Id. at 427-28.

[22] Id. at 444-45.

[23] Id. at 382.

[24] Id.

[25] Id. at 430.

[26] Id. at 433.

emotional and volitional control.[27] And he testified that it caused Black serious difficulty in controlling his sexually violent behavior.[28]

Dr. Arnold also testified that Black has sexual sadism.[29] He based this diagnosis on the fact that Black was sexually aroused by abuse.[30] He testified that Black continued to have sex with girls even though they were crying and did not like it.[31] Further, Dr. Arnold testified that Black told him that this caused dysfunction in his relationships.[32] Dr. Arnold opined that sexual sadism is also a mental abnormality that affected Black's emotional and volitional control.[33] And he testified that it also caused Black serious difficulty in controlling his sexually violent behavior.[34]

In sum, through the testimony of Dr. Arnold, the State presented sufficient evidence to establish both alternative means for the jury to convict.

Black argues that there was no evidence that the personality disorder caused him serious difficulty controlling his sexually dangerous behavior. This is

---

[27] Id. at 441, 442-44.

[28] Id. at 444.

[29] Id. at 382, 436.

[30] Id. at 439.

[31] Id. at 438.

[32] Id.

[33] Id. at 441-44.

[34] Id. at 444.

incorrect. Dr. Arnold expressly testified that Black's personality disorder "in and of itself" caused him serious difficulty controlling his behavior, due to the fact that Black lacks concern for others and enjoys exploiting others.[35]

Black relies on State of New York v. Donald DD.[36] to argue that "[m]erely committing similar offenses more than once does not show the offender is unable to control predatory sexual conduct due to a personality disorder."[37] There, the court held that a diagnosis of antisocial personality disorder and evidence of sexual crimes, alone, is an insufficient basis for commitment.[38] It did so because such a diagnosis does "not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case."[39]

In contrast, there was more than just evidence of Black's personality disorder and evidence of sexual crimes in this case. Specifically, Dr. Arnold testified that there was a "direct link" between Black's personality disorder and sexual reoffending, and he explained how the disorder affected Black's ability to control his sexually dangerous behavior.[40] In short, Donald DD. is distinguishable.

---

[35] Report of Proceedings Vol. 5 (Oct. 28, 2013) at 445.

[36] 24 N.Y.3d 174, 21 N.E.3d 239, 996 N.Y.S.2d 610 (2014).

[37] Appellant's Opening Brief at 44.

[38] Donald DD, 24 N.Y.3d at 190.

[39] Id.

[40] Report of Proceedings Vol. 5 (Oct. 28, 2013) at 427.

Black next argues that his actions toward teenage girls did not constitute a mental abnormality over which he lacked volitional control. He argues that "[w]hile he took advantage of teenagers who trusted him, he exhibited control over these behaviors."[41] But Dr. Arnold testified to the contrary. He testified that the mental abnormalities affected Black's volitional control "in that [Black is] unable to sort of appreciate the harmfulness of his actions and to keep himself from doing the very same thing."[42]

This argument is wholly unpersuasive. It presumes that we reweigh evidence on appeal. We do not. There was sufficient evidence to sustain on appeal the jury's verdict as the finder of fact at trial.

Finally, Black argues that Dr. Arnold could not explain how the sexual sadism disorder caused him serious difficulty controlling his sexually sadistic behavior. But as just stated, Dr. Arnold testified that Black's mental abnormalities, which included sexual sadism, affected his volitional control by preventing him from appreciating the harmfulness of his actions and keeping himself from doing the very same thing.

In sum, Black's arguments are not persuasive. There was sufficient evidence to support the jury's verdict. And there is simply no unanimity problem.

---

[41] Appellant's Opening Brief at 41.

[42] Report of Proceedings Vol. 5 (Oct. 28, 2013) at 443.

EVIDENTIARY RULINGS

Black finally argues that the trial court improperly admitted expert opinion testimony that he suffers from paraphilia NOS. He also contends that the trial court deprived him of his ability to challenge this diagnosis when it excluded evidence of "hebephilia." We hold that any evidentiary error in this respect was harmless.

We need not address Black's arguments based on the claimed failure to satisfy the Frye standard.[43] Even had the evidence failed to meet that standard, Black must also show its admission resulted in prejudice.[44] An error is prejudicial if "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'"[45] When the trial court improperly admits evidence, but the jury can review alternative evidence establishing the same element, the improper admission is likely harmless.[46]

Here, the admission of the paraphilia NOS diagnosis was harmless. That is because this was not the only diagnosis ascribed by Dr. Arnold. As we already discussed in this opinion, Dr. Arnold also diagnosed Black with sexual sadism and a personality disorder. There was sufficient evidence to support each of these diagnoses. Further, Dr. Arnold testified that any of these diagnoses in and of itself was sufficient to cause Black serious difficulty in controlling his behavior.

---

[43] In re Det. of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003).

[44] In re Det. of West, 171 Wn.2d 383, 410, 256 P.3d 302 (2011).

[45] Id. (quoting State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

[46] Id. at 410-11.

In short, given this evidence, there is not a reasonable probability that the outcome of the trial would have been different because of the admission of the challenged evidence.

The admission of the evidence was harmless, given the evidence that Black suffered from sexual sadism and a personality disorder, each of which was sufficient to cause Black serious difficulty in controlling his behavior.

We affirm the order of commitment.

COX, J.

WE CONCUR:

Trickey, J

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Detention of	)	No. 71292-6-I
MARK A. BLACK,	)	DIVISION ONE
Appellant.	)	PUBLISHED
	)	FILED: August 24, 2015

2015 AUG 24 AM 8:45
COURT OF APPEALS DIV I
STATE OF WASHINGTON

Cox, J. — Mark Black appeals his order of commitment as a sexually violent predator. He claims that the trial court denied him his right to be present during a portion of jury selection. He further claims that the court abused its discretion in admitting expert opinion evidence diagnosing him with paraphilia not otherwise specified (NOS), persistent sexual interest in pubescent aged females, non-exclusive. He also claims that the State did not prove and the jury did not unanimously find that his claimed disorders caused him serious difficulty controlling his behavior.

We hold that Black was deprived of due process in this civil commitment case where portions of the jury selection proceeded in his absence. His express waiver of his presence during the first day of jury selection did not extend to the

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 States[5] 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).

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.

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.

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 Synder, 291 U.S. at 107-08).

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

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).

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).

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.

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).

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:

Trickey, J