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No. 61923-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of

CURTIS MARTEN

STATE'S RESPONSE BRIEF

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FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 OCT 28 PM 4:55

W554 King County Courthouse
Seattle, Washington 98104
(206)205-0580

ORIGINAL

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I. INTRODUCTION

Relying on a number of extra-record materials, appellant Marten challenges admission of evidence blow regarding his mental abnormality diagnosis of Paraphilia Not Otherwise Specified (NOS) Rape or Nonconsent and the personality diagnosis of Anti-social Personality Disorder. He fails to assign error to any particular objection that should have been upheld and fails to acknowledges that trial counsel did not seek a *Frye* hearing. Because appellant failed to preserve error and these diagnoses have been regularly approved by Washington appellate courts, appellant's "due process" claimed based on the *Frye* test should be denied. He has also failed to demonstrate any other error in trial proceedings. As such, Marten's civil commitment as a sexually violent predator should be affirmed.

II. ISSUES

1. Should the court consider extra-record materials that were not introduced during proceedings below? No.

2. Should the court consider a *Frye* challenge to mental abnormality and personality disorder diagnosis that was not raised below, especially when allowing Marten to raise it for the first time on appeal would prejudice the State? No.

3. Are the diagnosis of Paraphilia NOS Nonconsent/Rape and Antisocial Personality Disorder admissible in a sexually violent predator civil commitment proceeding under *Frye* and ER 702? Yes.

4. Does sufficient evidence exist in the record to support the jury's determination that Marten committed a recent overt act? Yes.

5. Has Marten satisfied his burden of demonstrating the trial court abused its discretion by refusing a mistrial and giving a curative instruction in order to remedy a half-sentence of improper testimony?

III. STATEMENT OF THE CASE

On January 7, 1997 Respondent Curtis Marten approached K.Z. a 19-year-old woman who was waiting at a bus stop. VRP 5/28/08 at 119. K.Z. was pregnant and on her way to a Dr.'s appointment. Ex. 17. She had recently come to the United States from Honduras and spoke little English at the time. K.Z. was supporting herself by cleaning houses. VRP 5/28/08 at 119. Marten falsely told her his name was Robert Jenkins. VRP 5/28/08 at 120. Respondent offered her a ride, and as K.Z. had missed her bus, she accepted. Ex. 17. Respondent bought her breakfast and drove to a park. VRP 5/22/08 at 183. As they sat in the car, Respondent brought out a video camera from behind his seat and asked K.Z. if he could film her pregnant belly. VRP 5/27/08 at 98. She refused and he reached over and tried to pull up her shirt over her breasts. VRP

5/27/08 at 99. She pulled her shirt back down. Ex. 17. Respondent got out of his seat and got on top of her. Ex. 17. He then reached around K.Z. pinning her down. VRP 6/2/08 at 89. He told her he was looking for the recline button. Ex. 17. K.Z. screamed and struggled, believing he was going to rape or kill her. VRP 6/2/08 at 90. She was ultimately able to get away. VRP 6/2/08 at 90.

Around the same time, Respondent had been to the Q & T nail salon in West Seattle using the false name of "Tony". Ex. 17. Victim T.N. works as a manicurist at Q & T. Ex. 17. She is Vietnamese and does not speak English very well. T.N. gave respondent a manicure in December 1996. Ex. 17. According to the police report, Respondent came into the Q & T Nail salon in January 1997. VRP 6/2/08 at 91. He asked to purchase some nail polish. VRP 6/2/08 at 91. When T.N. reached for the polish, Respondent grabbed her buttocks. Ex. 17. T.N. ran to another area and yelled at him to leave. Ex. 17. Respondent grabbed her arm and pulled her into the bathroom, where he attempted to grab her breasts. VRP 6/2/08 at 91. She struggled to get away, and hurt her elbow in the struggle. Ex. 17. He told her that he loved her and unzipped his pants and exposed his penis to her before eventually leaving the business. VRP 6/2/08 at 91. T.N. reported that respondent had a video camera and appeared to be filming the assault. VRP 6/2/08 at 91. Two days later, respondent drove

by the Q & T and phoned T.N. VRP 6/2/08 at 91. He told her he was sorry about the other day. VRP 6/2/08 at 91. T.N. then called police. Ex. 17.

SPD detectives also learned that Marten was being investigated by the Algona Police department for similar behavior involving an Asian woman who ran the Blue Heron deli in Algona. According to the victim, N.S., she opened the Blue Heron every Saturday morning at 5:00 a.m. Marten had been waiting for her when she arrived for several months every Saturday morning. CP 400. He would come into the store as soon as she opened and order coffee. He frequently parked outside the store and waited in the car. VRP 6/2/08 at 85.

N.S. reported that on one occasion Marten came into the store and spent about 15 minutes in the men's room. He tried to get her into the men's bathroom, telling her that the toilet was clogged and he needed to show her how to fix it. VRP 6/2/08 at 86. N.S. told him that a maintenance person could handle it, but Marten persisted in trying to get her into the bathroom, asking her 3-4 more times to take a look. N.S. felt alarmed and phoned her husband at home. He told her to call the police, but she stayed on the phone with him until Marten left. N.S. went into the men's room and found a large bunch of paper towels rolled up into a big ball and stuffed into the toilet. VRP 6/2/08 at 88. N.S. believed that

Marten had purposefully clogged the toilet. On another occasion Marten entered the store with a video camera and told N.S. he was looking for a repair shop because the lens was broken. Algona police officers observed Marten on several occasions at 4:00 a.m. in front of the store until N.S. opened up at 5:00. He parked several blocks away and was seen lurking near the dumpster.

Respondent turned himself into Seattle Police on February 7, 1997. VRP 5/22/08 at 178. He told detectives that he had been going around to small businesses run by women. CP 51. He would schedule appointments or purchase items and then continue to visit in an effort to develop relationships with the women who ran the businesses. VRP 5/22/08 at 178. He said that sometimes the women told him not to come back, but could not explain why. When speaking about K.Z., he admitted that he had taken the "Hispanic pregnant woman" to a park. VRP 5/22/08 at 183. He said he wanted to film her stomach so he could have before and after shots of her pregnancy. He said he was hoping to date her, but she "freaked out" when he tried to kiss her. He said he knew something was wrong with him the last couple days and he "is out of control." CP 51.

Marten pleaded guilty to Unlawful Imprisonment (Count I) and Indecent Liberties with Forcible Compulsion (Count II), under King County cause number 97-1-01086-8 SEA. Ex. 19. In addition to the 1997

convictions, Marten has an extremely long history of arrests, charges and convictions. Ex. 17. He has numerous alcohol-related convictions and charges, as well as convictions involving aggressive and assaultive behavior. He was charged in 1984 with Assault with Intent to Commit Rape in Los Angeles County, California. Ex. 2. He was charged in 1991 in King County with Indecent Exposure for exposing his penis to a strange woman. VRP 6/2/08 at 67. He was charged in 1994 with Sexual Abuse/Physical Touching. Marten has two non-sexual felony convictions, Taking a Motor Vehicle without Permission in 1992 and Grand Theft from a Person in 1993. Ex. 20. He has twenty-one misdemeanor convictions and at least seven other charges whose disposition has not been confirmed. Those convictions include repeated Driving While Intoxicated (four separate convictions between 1991 and 1995); Assault – both Domestic Violence and non-DV - (at least eight between 1986 and 1995); and other driving while license suspended (six between 1989 and 1995). He has also been convicted of Malicious Mischief (1985 & 1991); Property Destruction (1988); Obstruction (1988); False reporting (1991); and Reckless Driving (1991). Ex. 19, 17.

On January 15, 1984 Respondent was involved in an incident that is markedly similar to the 1997 incident involving K.Z. According to the Los Angeles Police report case # 84-15-03239, S.H. was grabbed from

behind and pulled into Marten's vehicle. She tried to scream, but he put his hand over her mouth. He put S.H. in the front passenger seat, reclined the seat and climbed on top of her and touched her breasts. VRP 5/22/08 at 28. Marten was still covering her mouth with his hand and holding her down with his right arm as he got into the driver's seat and started the car. He drove to a secluded area, still holding her down. He stopped the car and climbed back on top of her. He started to remove S.H.'s clothing, pulling down her stockings. At that point she started screaming and kicking. VRP 5/22/08 at 29. She told him if he raped her she would kill herself. VRP 5/22/08 at 35. Marten got off her. S.H. saw some people on bicycles and screamed for help. Marten got back in the driver's seat and started up the engine. He let go of S.H. allowing her to unlock and open the door. S.H. rolled out of the door as Marten started to drive away. VRP 5/22/08 at 31. S.H. sustained minor injuries to her arm as a result. Marten did not stop and drove off. At some point while Marten had S.H. pinned down, he took her wallet out of her coat pocket. On the floor of the car, S.H. saw a San Fernando Valley Christian School student I.D. card with a picture of Marten with the name listed as "Curtis." VRP 5/22/08 at 31. S.H. was able to give a description of the suspect and the vehicle, and Los Angeles police arrested Marten several weeks later.

Marten did enter SOTP at Twin Rivers Correction Center,

beginning February 1, 1999. He remained in the sex offender treatment program until February 2, 2000. VRP 5/27/08 at 81. When he was released from DOC he entered Phase III of SOTP, but was terminated early from that program for non-compliance. VRP 5/29/08 at 40. During SOTP he described the 1984 incident in California. He said when he was 18; he approached a woman in front of a store and convinced her to get into his car. He drove to a park where they engaged in consensual sexual activity. VRP 6/2/08 at 56. He then stole money from her. He claims that when she discovered the theft, she demanded the money back. When he refused, she became frightened and got out of the car. VRP 5/27/08 at 93. Marten claimed that S.H. made up the allegation of attempted rape to provide an alibi to her boyfriend explaining why she was with Marten.

According to his statements made during sex offender treatment and in other interviews, Marten has used prostitutes, frequented topless/dancing establishments, engaged in peeping, and grabbed women's buttocks at bars and parties. VRP 5/27/08 at 103. He also admitted to exposing his penis on at least one occasion. The SOTP treatment summary indicates that Marten's build up to sexual reoffense includes the following: use of drugs or alcohol, or cruising or stalking behavior, specifically of Asian or Hispanic women. He approaches and grooms the women while they are alone; he uses a false name, and may carry a video camera with

him. VRP 5/27/08 at 126. According to the treatment summary, he is at high risk to reoffend sexually if he engages in any behavior related to his offending pattern. After his release, Marten clearly engaged in his pattern of stalking Asian and Hispanic women who operate small businesses alone. Additionally, he has committed many of the self-identified risk factors and has not utilized the relapse prevention plan devised for him at SOTP. VRP 5/29/08 at 49.

After his initial release in 2000, Marten refused to cooperate with his Community Custody Officer. He was repeatedly in violation of terms, was on escape status several times and had numerous warrants issued by DOC for his arrest. VRP 5/29/08 at 75, 76, 77. He was sanctioned for his behavior several times, and was in and out of jail repeatedly. VRP 5/29/08 at 167. Nonetheless, Marten still refused to comply with the terms of supervision. He continued to drink alcohol and use drugs, he continued to terrorize women in small businesses and he refused to report to his CCO. Additionally, Marten was on supervision from his 1995 Domestic Violence Assault conviction at the time he committed the 1997 offenses.

Between 2001 and 2002, Marten was in and out of jail for numerous and frequent violations of his community supervision. He spent long stretches of time in jail, including several 90 days sanctions and one 6-month sanction. VRP 5/29/08 at 129. In the short time he was out on

the streets, he was caught consuming alcohol, ingesting cocaine, lying to his CCO, failing to report. He was also terminated from sex offender treatment during this time. Marten considers himself an alcoholic. VRP 5/27/08 at 91. His drinking has played a role in his sexual offending, and Marten claims he had been drinking heavily and was under the influence of alcohol when he committed both of the 1997 offenses. He also stated that he was using cocaine when he offended against T. N. VRP 5/27/08 at 88. As a result of his DUI convictions, Marten has been court-ordered to undergo alcohol treatment, and has participated in three out-patient and one in-patient program. VRP 5/27/08 at 91. Unfortunately, he has resumed his drinking patterns after completing each program. VRP 5/27/08 at 92. He also participated in DOC substance abuse treatment while incarcerated. VRP 6/2/08 at 98.

In August, 2002 Marten's stalking behavior escalated. He began frequenting several different tanning, hair and nail salons, all owned or operated by small women of Asian or Hispanic descent. VRP 6/2/08 at 147. Marten's conduct occurred in King and Snohomish Counties and was in conformity with his offense cycle as described by his treatment providers. Marten was on Escape status from DOC during this time. VRP 5/29/08 at 165.

He was released from jail during the last week of July, 2002. On

August 19, A.M., a 17-year-old woman reported to Snohomish County Sheriff's Department that a man using the name of "Andres Salmon" had come to the Hot Spot Tanning Salon in Bothell where she worked on several occasions. CP 423. A.M. reported that this same man called the salon asking for her and used the name "Jerry". VRP 6/2/08 at 145. A.M. gave police the license plate number and description of a car that was registered to Marten. A.M. subsequently identified Marten in a photo montage. A.M. reported that he came into the salon and asked strange questions and then left. He sat in his car for 10 minutes, staring at A.M. He drove off but then came back into the salon 10 minutes later and asked for a tan. VRP 6/2/08 at 145. A.M. called her manager and said she was uncomfortable being alone around Marten. VRP 5/22/08 at 82. When the manager arrived, A.M. left the salon while Marten was still in the tanning booth. Two days later he called and asked for A.M. He scheduled another tanning session later that day. A.M. got friend to come over to stay with her, and while he tanned she wrote down his license plate number. After Marten left the salon, he called A.M and asked her why she "looked so good?" A.M later learned that he had called several times asking for her. He was told A.M. could not accept telephone calls at work. When Marten called again he was told he could not call or come into the salon again, he became angry and shouted "Fuck you" into the phone. VRP 6/2/08 at 145.

K.N. is the owner of Vi Vi Nails in Burien. She is Vietnamese. On August 21, K.N. said she had been followed by man in White Ford. She said he was initially driving a Green Passport, and had been coming into her salon making "weird" requests. K.N. reported that Marten had come over to her car as she was leaving work and claimed to be out of gas. CP 56. She also reported that on several occasions Marten sat outside her business and watched her. K.N. believed that he followed her home one night. K.N. provided the license plate numbers which were tracked to Marten. She identified him in a photo montage. K.N. also said several employees and other women who worked nearby had had encounters with Marten. Police spoke with several women who worked nearby and learned that Marten had been following and harassing other women in a similar manner.

T.N.T. works at Glamour Nails which is next door to Vi Vi nails. CP 56. T.N.T. is also Vietnamese. On August 1, Marten approached her in the parking lot and said he was out of gas. She tried to leave and he said he only needed 5 minutes of her time. He asked her where she lives and asked for help again. When T.N.T. left, Marten followed her in his car. CP 57.

Another Vietnamese woman, M.V-P., works at a hair salon next door to Vi Vi. She told police that Marten came into store to make

appointments. He contacted her in the parking lot and said he had run out of gas and needs her help. She said she thought he followed her home because she saw his car in her neighborhood. He ducks when she looks at him and acts "strangely". M.V-P. reported that on August 21 Marten was videotaping her one day as she left the salon. She identified Marten in a photo montage.

IV. LEGAL ARGUMENT

A. THE COURT SHOULD NOT CONSIDER EXTRA-RECORD MATERIALS CITED IN MARTEN'S OPENING BRIEF

In accord with RAP 10.7, the court should not consider Marten's references to unpublished and extrarecord "articles" in his opening brief. Under RAP 9.1(a) the record on review is limited to materials that were before the trial court. Supplementation of this basic record is allowed only through the procedures and criteria outlined in RAP 9.11. It has been recognized that "RAP 9.11 is a limited remedy." *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 849 P.2d 669 (1993). The various unpublished internet articles and transcripts referenced brief were not part of the record before the trial court. There is currently no RAP 9.11 motion before the court. Absent supplementation of the record, the court should refuse to consider extra-record materials that are cited in Marten's opening brief.

B. MARTEN HAS FAILED TO PRESERVE HIS *FRYE* CHALLENGE

In his opening brief, Marten claims that his commitment should be reversed because admission of testimony regarding Marten's Paraphilia NOS Rape/Nonconsent diagnosis and his Anti-Social Personality Disorder were insufficiently accepted to pass a *Frye* inquiry. However, Marten failed to preserve his claimed error because trial counsel did not request a *Frye* hearing on these diagnoses or seek to exclude them with a properly lodged ER 702 objection. Marten has failed to preserve any error on this issue.

1. A Party Must Preserve Error to Obtain Review

Under RAP 2.5, an “appellate court may refuse to review any claim of error which was not raised in the trial court.” In general, “an issue not briefed or argued in the trial court will not be considered on appeal.” *Brower v. Ackerley*, 88 Wn.App. 87, 96, 943 P.2d 1141 (1997). A litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. *State v. Guloy*, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986). Objections must be made at the time the evidence is offered. *State v. Davis*, 141 Wash.2d 798, 850, 10 P.3d 977 (2000).

In proceedings below, Marten did not request a *Frye* hearing. Despite filing a 58 page trial brief and other briefing raising numerous issues, Marten nowhere requested a *Frye* hearing or challenged the validity of the paraphilia and personality disorder diagnoses. CP 199-256 (Marten's trial brief); 468-479 (Marten's supplemental limine motions) 592-612 (Marten's second supplemental motions in limine). He also failed to object when Dr. Rawlings testified that Marten suffered from a mental abnormality, namely Paraphilia Not Otherwise Specified (Nonconsent). VRP 6/2/2008 at 41-42. Likewise, there was no objection when Dr. Rawlings diagnoses Marten with Personality Disorder Not Otherwise Specified (with antisocial and schizoid features).¹ *Id.* 42-43. The record is simply devoid of any timely objections to the diagnostic testimony based on a *Frye* theory. *Id.* at 41-44.

Absent an objection, Marten can not raise his claimed *Frye* error for the first time on appeal. The Washington Supreme Court recently applied the preservation of error doctrine to sexually violent predator cases because, among other reasons:

¹ In his appellate brief, Marten cites various non-record sources criticizing the diagnosis of anti-social personality disorder. As the above cited transcript indicates, however, Marten was diagnosed with a Personality Disorder NOS that is characterized by antisocial and schizoid features. Marten's criticisms, even if valid, do not apply to this more nuanced diagnosis.

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

In re the Detention of Audett, 158 Wash.2d 712, 725, 147 P.3d 982 (2006)

(citing 2A Karl B. Teglund, *Washington Practice: Rules Practice* RAP 2.5(1), at 192 (6th ed. 2004).

Here, the State was not afforded the opportunity to address Marten's broad *Frye* challenge in proceedings below. As a result, the record before this court is entirely deficient on matters related to the validity of the challenged diagnoses under the *Frye* test. If Marten had lodged a timely objection, the State could easily have established that the diagnoses meet a *Frye* challenge, but appellant waited for an appeal in the absence of an adequate record. This court should reject this effort to circumvent the rules of appellate procedure and refuse to consider the claim.

2. A *Frye* and/or ER 702 Must Be Preserved Below to Obtain Review

In order to avoid his failure to preserve error, Marten attempts to mask the nature of his *Frye* challenge by claiming that his "due process" rights were violated. However, this court has repeatedly held that a *Frye* and/or ER 702 challenge is fundamentally an evidentiary error that must

be preserved through a timely objection below. It is not a proper matter to raise for the first time on appeal under the theory of a constitutional due process violation. Marten fails to cite the abundant authority contrary to his position.

Most recently, in *In re Post*, 145 Wash.App. 728, 755-756, 187 P.3d 803 (2008), this court held that the appellant had failed to preserve error by not requesting a *Frye* hearing or objecting under ER 702 in response to admission of testimony on Paraphilia NOS Rape/Nonconsent. The court found that Mr. Post's failure to preserve error was not cured by the effort to frame the evidentiary issue in due process terms:

Post rests his substantive due process argument on his contention that the evidence he now challenges “fails to satisfy fundamental principles of sound science.” Br. of Appellant at 54. By doing so, Post improperly attempts to transform that which should have been raised as an evidentiary challenge in the trial court into a question of constitutional significance on appeal. In point of fact, Post attempts to sidestep the fact that he did not seek a *Frye* hearing in the trial court, and, thus, has not preserved an evidentiary challenge for review. *In re Det. of Taylor*, 132 Wash.App. 827, 836, 134 P.3d 254 (2006), *rev. denied*, 159 Wash.2d 1006, 153 P.3d 196 (2007).

Id. (footnotes omitted).

In *State v. Florczak*, 76 Wash.App. 55, 72-73, 882 P.2d 199, 209 (1994), this court similarly ruled that a *Frye* challenge cannot be raised for the first time on appeal and that it was necessary to preserve the claim of error with a proper objection. An evidentiary matter could be

raised for the first time on appeal only if it was a "manifest error affecting a constitutional right." *Id.* The failure to request a *Frye* hearing falls outside the "manifest error" doctrine, and thus will not be reviewed on appeal absent preservation of error below:

Failure to object to the admissibility of evidence at trial precludes appellate review of that issue unless the alleged error involves manifest error affecting a constitutional right. *State v. Lynn*, 67 Wash.App. 339, 342, 835 P.2d 251 (1992); *State v. Stevens*, 58 Wash.App. 478, 485-86, 794 P.2d 38, *review denied*, 115 Wash.2d 1025, 802 P.2d 128 (1990). Such error is not created by the failure to lay an adequate foundation under *Frye*. For example, in *State v. Jones*, 71 Wash.App. 798, 820, 863 P.2d 85 (1993), the court concluded that the admission of a CPS caseworker's testimony was improper because it included "generalized assertions about common behaviors of sexually abused children" and thus exceeded the limits of the caseworker's personal experience. However, because the defendant failed to specifically object to an inadequate foundation under *Frye* for the caseworker's testimony, the issue was not preserved for review. 71 Wash.App. at 821, 863 P.2d 85. Terrell similarly failed to preserve for review any challenge to Wilson's expert status or to the foundation for her testimony regarding post-traumatic stress syndrome.^{FN11}

Id. *Accord State v. Russell* 141 Wash.App. 733, 742, 172 P.3d 361 (2007) (failure to object to a foundation under *Frye* is not a manifest constitutional error that allows consideration for the first time on appeal).

The Washington rule requiring preservation of a *Frye* claim for review is in accord with other authorities. *Accord, e.g., State v. Brannon*, 971 So.2d 511, 518-519, 2007-431 (La.App. 3 Cir. 2007)("Since there was no motion for a *Daubert* hearing when Dr. Brennan testified, a *Daubert* hearing was never held and no objection was made to preserve the alleged

error."); *U.S. v. Diaz*, 300 F.3d 66, 74 -77 (1st Cir. 2002)("As we have previously stated, litigants must raise a timely objection to the validity or reliability of expert testimony under *Daubert* in order to preserve a challenge on appeal to the admissibility of that evidence."); *United States v. Gilbert*, 181 F.3d 152, 162-63 (1st Cir.1999) (declining to consider *Daubert* validity challenge to admitted expert testimony where no objection was made to the trial court on that basis); *Cortes-Irizarry v. Corporation Insular De Seguros*, 111 F.3d 184, 189 (1st Cir.1997) ("[W]e can envision few, if any, cases in which an appellate court would venture to superimpose a *Daubert* ruling on a cold, poorly developed record when neither the parties nor the nisi prius court has had a meaningful opportunity to mull the question.").

Because Marten failed to preserve error by objecting to the expert diagnostic testimony under *Frye* and/or ER 702, the question of whether such testimony was properly admitted is not before this court. Marten has simply failed to preserve his claim of error.

3. The Court Should Not Review Marten's *Frye* Claims Under the Guise of Ineffective Assistance of Counsel

The court should not consider any claims of ineffective assistance of counsel raised in Marten's reply brief. Allowing Marten to raise such an

important issue in a reply brief would deprive the State of the ability to respond and violate the rules of appellate procedure.

Nonetheless, a sexually violent predator, like criminal defendant, has a right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner has the burden of establishing ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. To prevail on a claim of ineffective assistance of counsel the petitioner must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) that he was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Marten has failed in his burden to demonstrate ineffective assistance of counsel. He has not overcome the presumption that counsel acted effectively, nor has he provided the record necessary to prove ineffective assistance of counsel:

Courts engage in a strong presumption counsel's representation was effective. *State v. Brett*, 126 Wash.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wash.2d at 226, 743 P.2d 816. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *State v. Crane*, 116 Wash.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); *State v. Blight*, 89

Wash.2d 38, 45-46, 569 P.2d 1129 (1977). *Accord State v. Stockton*, 97 Wash.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the brief but not included in the record cannot be considered on appeal). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.

State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251, 1256 - 1259 (1995).

Indeed, given the plethora of case law allowing admission of Antisocial Personality Disorder and Paraphilia NOS to support civil commitment, *see below*, it is likely that defense counsel made the strategic choice not to wage this battle and to retain his credibility for other matters.

Defense counsel might also have had legitimate strategic purpose in using the materials described in Marten's appeal to cross-examine the State's expert on diagnostic issues. If the jury found that the State's expert was relying on a questionable diagnosis, the jury might find against the State's position. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Such strategic decisions by defense counsel are entirely possible in this case. The more important point is that Marten has failed to satisfy his burden of demonstrating ineffective assistance of counsel by

demonstrating that defense counsel did not act for reasonable strategic purposes. In the absence of such a record, Marten cannot prevail on this claim. *See McFarland*, 127 Wn.2d at 322 (noting appellant's burden to provide record materials supporting an ineffective assistance of counsel claim). "The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below." *Id.* at 36.

Likewise, Marten has failed to demonstrate prejudice from counsel's alleged deficient performance. "The defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." *Id.* at 337. As demonstrated below, a *Frye* and/or ER 702 challenge was unlikely to succeed due to case law affirming admissibility of the challenged diagnoses.

C. THE DIAGNOSES OF ANTISOCIAL PERSONALITY DISORDER AND PARAPHILIA NOS RAPE/NONCONSENT ARE ADMISSIBLE UNDER *FRYE* AND ER 702.

Appellant cites a number of articles written by forensic experts who testify exclusively for the defense in sexually violent predator cases. Despite the criticism offered in these articles, both the diagnosis of Paraphilia NOS Rape/Nonconsent and the diagnosis of Antisocial

Personality disorder have been found to support civil commitment in the face of *Frye*/ER 702 objections.

1. The Paraphilia NOS Rape/Nonconsent and Antisocial Personality Disorder Diagnosis Are Not Subject to *Frye* Because They Are Not Novel

The Washington Supreme Court has addressed the admissibility of psychological testimony in RCW 71.09 proceedings through a number of opinions, including *In re Young*, 122 Wn.2d 1, 56 (1993); *In re Campbell*, 139 Wn.2d 341, 356-58 (1999), *In re Thorell*, 149 Wash.2d 724, 756, 72 P.3d 708, 725 (2003), and *In re Halgren*, 156 Wash.2d 795, 806, 132 P.3d 714, 719 (2006). No Washington appellate court has ever excluded psychological testimony on diagnosis in a sexually violent predator matter. Instead, it is widely held that the types of issues raised by Marten "go to weight and not admissibility."

In setting out the "*Frye* test," Marten misses the important precondition that *Frye* applies to scientific testimony only when the science is "novel." As the Supreme Court explained in *Halgren*:

The *Frye* test allows a court to admit novel scientific evidence only if the evidence is generally accepted in the relevant scientific community. *State v. Copeland*, 130 Wash.2d 244, 255, 922 P.2d 1304 (1996). *However, the Frye test is unnecessary if the evidence does not involve new methods of proof or new scientific principles. State v. Baity*, 140 Wash.2d 1, 10-11, 991 P.2d 1151 (2000); *State v. Ortiz*, 119 Wash.2d 294, 311, 831 P.2d 1060 (1992).

156 Wash.2d at 806 (emphasis added). As noted in *In re Young*, the *Frye*

inquiry applies only to “evidence based on *novel* scientific procedures.” 122 Wn.2d at 56 (emphasis added). There is no basis under the *Frye* test to exclude testimony of Anti-Social Personality Disorder or Paraphilia NOS Rape/Nonconsent in a sexually violent predator proceeding because this testimony is not "novel." Even if "novel," the courts have routinely found such testimony admissible to prove a "personality disorder" or "mental abnormality" under RCW 71.09.020, .060.

2. Diagnosis of ASPD in a Sexually Violent Predator Is Admissible

In *In re Young*, 122 Wash.2d 1, 37-38, 857 P.2d 989 (1993), the Washington Supreme Court upheld RCW 71.09 against a due process challenge and rejected the argument that it somehow violated the *Foucha v. Louisiana*, 504 U.S. 71 (1992) decision to base a civil commitment on anti-social personality disorder. In *Young*, the State's expert testified that Young suffered from antisocial personality disorder. Like paraphilia, antisocial personality disorder is classified as a mental disorder in the DSM. *Young* at 30. The court in *Young* recognized that antisocial personality disorder falls under the SVP statute as a "personality disorder" and thus is sufficient to commit an individual when all other elements are met. *Id.* at 37-38. "What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality

are able to identify sexual pathologies that are real and meaningful as other pathologies listed in the DSM." *Young* at 28(citation omitted).

In *Young*, the Supreme Court held that psychological testimony is not novel for purposes of a *Frye* inquiry:

*[T]he sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable cause and effect petitioners seek, the level of acceptance is sufficient to merit consideration at trial. As Justice White pointed out in *Foucha*, "such opinion is reliable enough to permit courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous". 112 S. Ct. at 1783*

122 Wn.2d at 57 (emphasis in original).

The appellants in *Young* argued for exclusion of the State's expert testimony under the *Frye* standard. In particular, they argued that "the experts had no basis for their testimony that any particular mental abnormality or personality disorder exists which makes a person likely to rape, or that *Young* or *Cunningham* was in fact likely to re-offend." *Id.* An amicus brief from the Washington State Psychiatric Association supported their claim. The Supreme Court, however, concluded "that the testimony was properly admitted." *Id.*

The Supreme Court noted that it was particularly important in the area of psychological testimony to defer to legislative determinations in RCW 71.09 that mental abnormalities and personality disorders where

conditions subject to diagnostic support:

Our position is supported by the Legislature's determination, following numerous hearings, that the sexually violent predator condition is not only recognized, but treatable *and* capable of diagnosis. *See* RCW 71.09 . As Justice O'Connor pointed out in *Foucha v. Louisiana*, 504 U.S. 71, ----, 112 S.Ct. 1780, 1789, 118 L.Ed.2d 437 (1992), the inherent uncertainty involved in making psychological judgments requires courts to “ ‘... pay particular deference to reasonable legislative judgments’ about the relationship between dangerous behavior and mental illness.” (O'Connor, J., concurring) (quoting *Jones v. United States*, 463 U.S. 354, 365 n. 13, 103 S.Ct. 3043, 3050 n. 13, 77 L.Ed.2d 694 (1983)).

Id. at 57. The court also rejected claims that diagnostic testimony on mental abnormalities and personality disorders failed ER 702: "the expert testimony was certainly helpful to the trier of fact-psychiatric testimony is central to the ultimate question here: whether petitioners suffer from a mental abnormality or personality disorder." *Id.*

Expert testimony on diagnosis was also challenged under *Frye* in *In re Aguilar*, 77 Wash.App. 596, 601-602, 892 P.2d 1091, 1094 (1995). There, Aguilar argued that "the presence of certain personality disorders" was not well accepted in clinical and empirical research. *Id.* The court rejected Aguilar's challenge to the expert testimony and affirmed admission of an ASPD diagnosis:

Whether expert testimony is admissible is within the sound discretion of the trial court. *Young*, at 57, 857 P.2d 989; *State v. Ortiz*, 119 Wash.2d 294, 310, 831 P.2d 1060 (1992). An expert's opinion is admissible if the witness qualifies as an expert and the

testimony would be helpful to the trier of fact. ER 702; *State v. Cauthron*, 120 Wash.2d 879, 890, 846 P.2d 502 (1993). Dr. Rawlings' qualifications are not in dispute. Further, his diagnosis of Mr. Aguilar's antisocial personality disorder and opinion of the likelihood Mr. Aguilar would be sexually violent in the future were central to the issues of this case.

Id.

Very recently, this court affirmed that civil commitment can be based on a personality disorder alone when supported by expert testimony. In *In re Sease*, ___ Wn. App. ___, ___, 201 P.3d 1078, 1080 (2009), appellant Sease challenged the State's use of Borderline Personality Disorder and Antisocial Personality Disorder to support his civil commitment as a sexually violent predator. The State relied on expert testimony on Mr. Sease's personality disorders:

[Dr.] Doren then testified that “each of [Sease's] personality disorders caused him serious difficulty in controlling his behavior” and that the antisocial personality disorder and borderline personality disorder “predispose him to commit criminal sexual acts and make him likely to commit a criminal sexual act in the future if not confined.” RP (July 2, 2007) at 173. He noted that not all people with these disorders manifest sexually violent behavior but that Sease did.

Id. at ___. The court determined that such evidence of a personality disorder was sufficient to uphold civil commitment: "Viewing the evidence in the light most favorable to the State, there was sufficient evidence to persuade a fair minded rational person beyond a reasonable

doubt that Sease suffers from a mental illness that makes him more likely to engage in predatory acts of sexual violence if he is not confined to a secure facility." *Id.* at ____.

Similarly, a decision from the Pennsylvania Supreme Court, *Commonwealth v. Dengler*, 586 Pa. 54, 890 A.2d 372 (2005), supports the admission of Antisocial Personality Disorder to support civil commitment.. In *Dengler*, the court addressed whether expert testimony that a person met criteria as a sexually violent predator, including testimony that the person suffered from Personality Disorder NOS, was subject to the *Frye* test. 586 Pa. at 69. Similar to *Young*, the Pennsylvania Supreme Court rejected the *Frye* challenge because the expert psychological testimony "did not involve science which could properly be deemed novel under *Frye*." *Id.* at 71.

Under the above authorities, appellant Marten has failed in his burden to demonstrate that Antisocial Personality Disorder is either novel or inadmissible under the *Frye* test. Even without an appropriate objection from Marten, the trial court did not err.

3. The Diagnosis of "Paraphilia NOS" Withstands Challenge

If the court does decide to consider the *Frye*/ER 702 issue despite Marten's failure to preserve, the case law firmly supports the admission

and use of a Paraphilia NOS Rape/Nonconsent diagnosis to support an RCW 71.09 civil commitment. States retain considerable leeway in defining the mental abnormalities and disorders that make an individual eligible for SVP commitment. *In re the Detention of Thorell*, 149 Wash.2d 724, 735, 72 P.3d 708 (2003) (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 857 (2002)). As long ago as 1993, the Washington Supreme Court upheld the diagnosis of paraphilia NOS against a constitutional challenge. "The specific diagnosis offered by the State's experts at each commitment trial was 'paraphilia not otherwise specified'." *In re the Detention of Young*, 122 Wash.2d 1, 29-30, 857 P.2d 989, 1002 (1993). It was as clear 16 years ago as it is today that the "[t]he weight of scientific evidence, therefore, supports rape of adults as a specific category of paraphilia." *Id.*

Since the 1993 *In re Young* decision, the Court has upheld numerous commitments based on diagnoses of paraphilia NOS by countless qualified professionals. *See e.g. In re the Detention of Halgren*, 156 Wash.2d 795, 132 P.3d 714, (2006) (Dr. Robert Wheeler testified that the sexually violent predator suffered from Paraphilia NOS); *In re the Detention of Stout*, 159 Wash.2d 357, 363, 150 P.3d 86, 90 (2007) (Dr. Richard Packard opined that Stout suffered from the mental disorder "paraphilia not otherwise specified (NOS), non-consent."); *In re the*

Detention of Marshall, 156 Wash.2d 150, 155, 125 P.3d 111, 113 (2005) (Dr. Amy Phenix determined that Mr. Marshall suffers from pedophilia, sexual sadism, and paraphilia not otherwise specified (nonconsenting adults or rape-like behavior.); *In re Detention of Campbell*, 139 Wash.2d 341, 357, 986 P.2d 771, 779 (1999) (Dr. Roger Wolfe diagnosed Campbell as suffering from the condition of "paraphilia").²

The recent *Post* decision determined that a diagnosis of Paraphilia

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

NOS rape/nonconsent was sufficient to support civil commitment and admissible under *Frye*. As with Marten, Post argued that a diagnosis of Paraphilia NOS rape/nonconsent “fails to satisfy fundamental principles of sound science.” *In re Post*, 145 Wn.App. at 755. The court noted testimony that the Paraphilia NOS diagnosis is “generally accepted in the scientific community of people who treat serious sex offenders” despite some controversy in the forensic community who testify in SVP actions. *Id.* at 757. The court found that testimony regarding Paraphilia NOS was sufficient to support civil commitment. *Id.* at 756.

As with Antisocial Personality Disorder, testimony regarding Paraphilia NOS rape/nonconsent is admissible under *Frye* and ER 702. The court should reject Marten's claim that he could not be civilly committed based on these diagnosis.

D. SUFFICIENT EVIDENCE SUPPORTED THE JURY'S DETERMINATION THAT MARTEN COMMITTED A RECENT OVERT ACT

In his appellate brief, Marten argues that he should be applauded for doing “exactly what our society should be encouraging former sex offenders to do: he controlled his behavior by walking or driving away if and when he was tempted. Opening Brf. at 43. He further suggests that he cannot be subject to civil commitment jurisdiction under a recent overt act

that he was likely to re-offend.)

theory because he did not actually reoffend. *Id.* Although this argument mirrors the defense closing argument at trial, it does not provide a legal basis for finding a lack of sufficient evidence to support the jury's verdict.

1. STANDARD OF REVIEW

Because Marten was free in the community when the State filed its petition to commitment him as a sexually violent predator, the finder of fact needed to determine beyond a reasonable doubt that Marten "had committed a recent overt act." RCW 71.09.060(1). Because Marten challenges the sufficiency of the evidence supporting the factual determination that he committed a recent overt act, this case presents nothing more than a review for sufficiency of the evidence.³

The criminal standard of review applies to sufficiency of the evidence challenges under the sexually violent predator statute. *In re*

³ The current case stands in contrast to the review standard applied in *In re McNutt*, 124 Wn.App. 344, 101 P.23d 422 (2004) for the simple reason that the *McNutt* commitment was filed under the total confinement provisions of the statute. *See* RCW 71.09.030(1). Because Mr. McNutt was in total confinement when commitment proceedings were initiated, it was a mixed question of law and fact for the trial judge (sitting as a legal arbitrator) to decide whether the State had a due process obligation to plead and prove a recent overt act. The inquiry in this situation examines the basis for the predator's current incarceration to determine whether there is a constitutional requirement for additional proof beyond the statute. *See In re McNutt*, 124 Wn. App. at 351-52. In contrast, Mr. Marten' case required the state to plead and prove a recent overt act under the statute because he was not in total confinement custody at the time of filing. In this situation, the jury was sitting as the sole trier of

Thorell, 149 Wn.2d 724, 720, 72 P.3d 708 (2003). Under this standard, "when viewed in the light most favorable to the State, there must be sufficient evidence," *id.*, to allow a rational trier of fact to conclude that the person facing commitment has committed a recent overt act. A determination that a sex predator committed a recent overt act is a factual determination subject to the sufficiency of the evidence review standard. See *In re Swanson*, 668 N.W.2d 570, 574 (Iowa 2003) (reviewing recent overt act determination for sufficiency of the evidence under Iowa's sexually violent predator civil commitment law).

When the record contains conflicting testimony and the trier of fact has determined that certain evidence lacks credibility, such a determination will not be disturbed under the sufficiency of the evidence test:

But in reviewing the sufficiency of the evidence, the reviewing court does not "determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.*' " *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). **Determinations of credibility are for the fact finder and are not reviewable on appeal.** *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

State v. Hughes, 154 Wash.2d 118, 152, 110 P.3d 192 (2005)(emphasis

fact and is reviewed under the sufficiency test.

added). Thus, Marten's reliance on conflicting testimony from Dr. Donaldson to refute the recent overt act finding cannot succeed to defeat sufficiency under the applicable standard of review.

2. Sufficient Evidence Exists to Support Marten's Commission of Various Recent Overt Act's Evidencing His Continued Danger to Reoffend

Because Marten was not in total confinement when the State initiated civil commitment proceedings, it was necessary under the statute to plead and prove a recent overt act. RCW 71.09.030(5). Under the circumstances of this case, at trial, it was the State's obligation to "prove beyond a reasonable doubt that the person had committed a recent overt act." RCW 71.09.0606(1). The former statute defines a "recent overt act" as "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." RCW 71.09.020(10).⁴

Marten appears to rest much of his argument on the lack of proof that he committed a new sex offense while free in the community. In defining "recent overt act," however, RCW 71.09 is not concerned with

⁴ The definition was amended in 2001 to clarify that the act should be considered "in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." RCW 71.09.020(10). Since trial in this matter, it was again amended in 2009.

convicting Marten of a new, criminal sexual assault. Instead, the statute is concerned with whether Marten has engaged in an “act” or made a threat that evidences his current danger to commit sexually violent acts. Given the fundamental purpose of RCW 71.09 to prevent new crimes by sex offenders, the statute allows that an “act” or “threat” can fall far short of an actual new crime. A “reasonable apprehension” that someone like Marten is well on the road to new sexually violent actions is sufficient for the State to exercise its compelling interest in civil commitment. It would be difficult to fulfill the compelling state interests of RCW 71.09 to prevent crime, if the State had to wait for (and prove) a new crime before it could act.

The purpose behind the recent overt act requirements is simply to provide *additional* evidence of current dangerousness before an individual is involuntarily committed. See *In re Harris*, 98 Wn. 2d 276, 284, 654 P.2d 109 (1982); *In re Aqui*, 84 Wn.App. 88, 929 P.2d 436, review denied 133 Wn. 2d 1015, 946 P.2d 403 (1996); *In re Young* 122 Wn. 2d 1, 857 P.2d 989 (1993). Predictions of future dangerousness do not violate due process. *Id.* at 33 (citing *Harris*, 98 Wn. 2d at 180-81.)⁵ The State’s

⁵ Although *Young* and *Henrickson* are controlling Washington authority, all jurisdictions, except one, that have considered this issue in the last 25 years have concluded that due process *does not* require that an individual’s dangerousness be proven by a recent overt act. This almost

interest in preventing the sort of harm exacted by sexually violent

predators is clearly compelling. *Id.* at 42. A “recent overt act” by very

unanimous rejection of the recent overt act requirement demonstrates the judiciary’s recognition that simply because a person has not immediately engaged in some behavior demonstrating their dangerousness does not mean that he or she is not dangerous. This is particularly true in the SVP arena where: 1) It is not uncommon for an offender to remain offense-free for months or even years before ultimately returning to their pattern of sexual offending; and 2) The statutory inquiry is long-term in nature and focuses on the risk that a person will, at *any time* in the future, reoffend. Cases rejecting a recent overt act requirement as a matter of due process include *Project Release v. Prevost*, 722 F.2d 960, 972-75 (2nd Cir. 1983) (proof of recent overt act is not constitutionally required because, *inter alia*, “we are not convinced that, as a practical matter, the addition of a recent overt act requirement would serve to reduce erroneous commitments.”); *United States v. Sahhar*, 917 F.2d 1197 (9th Cir. 1990); *Colyar v. Third Judicial District Court for Salt Lake County*, 469 F.Supp. 424, 434-35 (D.Utah 1979); *United States ex rel. Mathew v. Nelson*, 461 F.Supp. 707, 709-12 (N.D.Ill. 1978); *Matter of Maricopa County Cause No. MH-90-00566*, 840 P.2d 1042, 1049 (Ariz.Ct.App. 1992); *People v. Stevens*, 761 P.2d 768, 771-774 (Colo.S.Ct. 1988); *Matter of Snowden*, 423 A.2d 188, 192 (D.C. 1980); *People v. Sansone*, 309 N.E.2d 733, 739 (Ill.App. 1974); *Matter of Albright*, 836 P.2d 1, 5-6 (Kan.Ct.App. 1992); *State v. Robb*, 484 A.2d 1130, 1134 (N.H.S.Ct. 1984); *Commonwealth v. Rosenberg*, 573 N.E.2d 949, 958-59 (Mass.Sup.Jud.Ct. 1991); *Matter of Sonsteng*, 573 P.2d 1149, 1155 (Mont.S.Ct. 1977); *Scopes v. Shah*, 398 N.Y.S.2d 911, 913 (1977) (proof of a recent overt act is “too restrictive and not necessitated by substantive due process. The lack of any evidence of a recent overt act . . . does not necessarily diminish the likelihood that the individual poses a threat of substantial harm to himself or others.”); *In the Matter of Salem*, 228 S.E.2d 649, 652 (N.C.App. 1976); *In re Slabaugh*, 475 N.E.2d 497, 500 (OhioCt.App. 1984)(“we do not believe, as contended by appellant, that a mentally ill person can be said to be dangerous only if there is evidence that the person recently committed a dangerous overt act or threatened one.”); *Matter of Giles*, 657 P.2d 285, 287-88 (UtahS.Ct. 1982); *In re L.R.*, 497 A.2d 753, 756 (Ver.S.Ct. 1985); *but see, Matter of Mohr*, 383 N.W.2d 539 (IowaS.Ct.

definition may be any act that “creates a reasonable apprehension.”⁶

There is no requirement that the overt behavior be an effort or attempt to engage in sexually violent behavior.

The statute in effect at the time of trial required that a recent overt act, i.e. an act that causes "reasonable apprehension" of harm of a sexually violent nature, be viewed "in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." The purpose of this directive is to ensure that a recent overt act is not viewed in a vacuum. For example, it would not be a "recent overt act" for a *normal* person, like a parent or a grandparent, to go to a elementary school playground. But if a sex offender with a lengthy history of offending against children, including instances of abducting children from similar settings, where reported on a playground, it would likely be enough for a recent overt act. The children might be unaware of the danger; even a playground monitor might not perceive the risk. Nonetheless, a reasonable person knowing the sex offender's history would certainly have a

1986).

⁶ The Washington Supreme Court discussed “reasonable apprehension” in the context of self-defense which uses a similar combined subjective/object approach. *See State v. Janes*, 121 Wn. 2d 220, 850 P.2d 495 (1993). The court noted that utilizing the combined approach was a way to balance jurisprudence. 121 Wn. 2d at 239. “The subjective aspects ensure the jury fully understands the totality of the defendant’s actions.... [t]he objective portion of the inquiry serves the crucial

reasonable apprehension that the person was well along the path of offending against children.

The Iowa Supreme Court, in *Swanson*, noted the importance of considering the history and circumstances of a sex offender when evaluating a recent overt act. 668 N.W.2d at 576-77. The court noted that: "without putting the act of a person in context, the purpose of the statute would not be served because it would fail to protect unsuspecting victims. Consequently, the public as a whole would not be protected." *Id.* at 576.

In reviewing a recent overt act case for sufficient evidence, the *Swanson* court correctly held that proper consideration of context can turn an otherwise innocuous act into a recent overt act justifying civil commitment. In *Swanson*, a sex predator with a history of rape claimed that his "acts of calling [a young woman] on the telephone and sending a letter constituted innocent discourse," rather than a recent overt act. In finding sufficient evidence for the factual finding of a recent overt act, the Iowa Supreme Court explained that:

Yet, placed in context, the acts engaged in by Swanson clearly created a "reasonable apprehension of [harm of a sexually violent nature]" to a reasonable person. *Id.* The circumstances known to Eiselstein--that a virtual stranger, much older than her and who had recently been released from prison, was contacting her, asking

function of providing an external standard." *Id.*

whether she wanted to be "friends" and to move in together in her one-bedroom apartment-- were clearly enough to justify concerns for her safety. Yet, Swanson's prior conduct, which may have been unknown to Eiselstein but was known to the State, supported a reasonable apprehension that Swanson was targeting Eiselstein like he had targeted other women before her. We think the Sexually Violent Predator Act was designed to include convicted sex offenders who target victims in such a manner.

Swanson, 668 N.W.2d 576 -577.

The context for Marten' actions in approaching various Asian or Hispanic women in the community at nail, hair, and tanning salons demonstrate sufficient evidence of a recent overt act. The combined objective/subjective test of the sexually violent predator statute requires looking at the individual's complete history (sexual and otherwise) as well as his mental condition in making that determination of dangerousness. The question is not did the offender commit or try to commit a sexually violent offense, but considering his patterns of behavior when he offends *would a reasonable person think* the individual is on the path to committing a sexually violent offense.

During testimony, Dr. Rawlings explained the concept of an "offense cycle," which "can be thought of as a sequence of thoughts, feelings, behaviors and circumstances that precede a relapse or reoffense" VRP 6/2/2008 at 109. It is well established in the field of sex offender treatment that once an individual is "in cycle" or engaging in behavior in

their “offense pattern” their risk of sexual offending is high. *Id.* When a sex offender is engaging in risks that typify his offense cycle, it is a cause for concern. *Id.* at 110. What constitutes a “recent overt act” will therefore differ from offender to offender. An innocuous action for one individual (e.g. viewing pornography) may be a substantial step towards offending for another.

The facts of Marten’s 1997 conviction for Unlawful Imprisonment and Indecent Liberties w/ Forcible Compulsion evidence a distinct pattern of behavior with paraphilic tendencies of non-consenting sexual contact. Marten engaged in behavior with N.T. and K.Z. that quickly escalated into sexually violent offenses, in K.Z.’s case less than an hour after he met her, in N.T.’s case after several visits to her place of employment. Marten told police that he had been repeatedly visiting the same businesses, all run by Asian women. He claimed he wanted romantic relationships with them. He admitted that his behavior was “out of control.”

As Dr. Rawlings's noted, Marten’s SOTP treatment summary identified a clear and distinct pattern of behavior that would lead to his re-offending in a sexually violent manner:

what the SOTP, the sex offender treatment program had identified as his risk behaviors was targeting minority women, particularly Asian or Hispanic women, approaching them, grooming them when they were alone. Perhaps using a false name. Giving false information about himself. Perhaps carrying a video

camera with him

VRP 6/2/2008 at 110. Another part of Marten's offense cycle for sexual reoffending involves a general pattern of anti-social and deviant conduct, "including substance abuse, withdrawal from the family, return to antisocial associates[, and] any kind of behavior that was associated with his sexual offense cycle . . ." *Id.* In his testimony, Dr. Rawlings explained that research into sexual recidivism shows that "recidivism is best predicted by two very broad factors, that is, sexual deviance and antisocial behavior." VRP 6/2/2008 at 48. Marten's treatment providers were clear that any of these behaviors would indicate Marten was "in cycle" or on the road to re-offending, i.e. would constitute recent overt acts.

Marten's behaviors prior to his detention on the sexually violent predator petition reflected the behaviors identified in his offense cycle. As Dr. Rawlings explained, these behaviors reflected the serious difficulty that Marten was having controlling his sexual aggression:

While on the one hand, these behaviors are not overt offenses, on the other hand, they were well identified during the time that he was in treatment at the sex offender program as high risk behaviors and that when he engaged in these kind of behaviors, they reflected that he was *at a very increased risk for taking the next step, which would have been to reoffend.*

VRP 6/2/2008 at 153 (emphasis added). His behaviors in the community "reflect serious difficulty controlling his behavior . . . because of their

association with the behaviors that go to [sexually violent] reoffense." *Id* at 156.

Based on Marten's behaviors in the community and there relationship to Marten's identified sex offense cycle, Dr. Rawlings opinioned to a reasonable degree of psychological certainty that Marten had committed a recent overt act. VRP 6/3/2008 at 11-15. During his time in the community in 2002, Marten engaged in a number of concerning behaviors:

He was following minority women, especially Asian. . . . He was interacting with them by providing some kind of ruse. The ruse was in part phoning and saying there was something -- or that the lights were on in their cars, or he would offer to ask for -- for money for his gasoline tank, saying he doesn't have any gas. He was seeking in those behaviors to isolate these women. He was following several of them. He gave false information about his identity as he had previously. In at least one of the instances, he was carrying a video camera.

Id. at 18. In short, Marten's behavior constituted a recent overt act because of "the similarities between the behaviors that he engaged in at the time that he was offending in 1997 and behaviors that he was engaging in 2002." *Id.* at 15.

In light of Marten's history and other actions while in the community, as well as Dr. Rawlings testimony explaining the significance of those behaviors, there was ample evidence for the jury to conclude that he had committed a recent overt act. Taking the evidence in the light most

favorable to the State, the jury was entitled to consider the evidence of the assault using the expert theories explained by Dr. Rawlings and Marten's own admissions regarding the significance of his behaviors. The fact that the defense expert, Dr. Donaldson, disagreed with Dr. Rawlings testimony, has no bearing on the sufficiency of the evidence claim raised by Marten in this appeal.

If anything, Marten's behavior exceeded the necessary quantum of proof for a recent overt act because he was on the direct edge of a new sexual offense. The recent overt act doctrine does not require "imminence" of harm, *In re Young*, 122 Wn.2d 1, 40-41, 857 P.2d 989 (1993), nor does it forbid the State from addressing Marten likelihood of reoffense until just before he is found standing over a new victim. In order to serve the compelling interests of RCW 71.09 in addressing the *risk* of new sexual offenses by high risk sex offenders, *see* RCW 71.09.010, a recent overt act must allow some anticipation of likely actions when determining "reasonable apprehension" that fall significantly short of the penultimate step that was reached in this case. In other words, the State can act to protect the public before a sex offender reaches the most extreme point of danger.

E. DR. RAWLING'S INADVERTANT USE OF THE WORD "RAPE" WAS CURED BY THE COURT'S INSTRUCTION

During the State's direct examination, the State asked Dr. Rawlings "what, if anything, did [Marten] say to you about the nature or quality of his sexual relationship with Maria, [his wife].?" VRP 6/2/2008 at 119. Dr. Rawlings provided the following answer: "Well, there were a couple of things. He didn't say it to me but he did say it, I believe, to a law enforcement officer on one occasion, that he has sexually assaulted her, that he had raped her on a couple of occasions." *Id.*

Defense counsel immediately objected. *Id.* The court sustained the objection and instructed the jury to disregard Dr. Rawlings' answer. *Id.*

During the next break, the court admonished the witness, noting that the court's significant displeasure that Dr. Rawlings had used the term "rape" in "response to a question that did not call for the use of that term." *Id.* at 126-27. After the court informed Dr. Rawlings that he was not to use the term "rape" again, defense counsel indicated that "we would be making a motion for a mistrial at this point, to protect my record." *Id.* at 127.

On the following day, the court considered additional argument from the defense on the mistrial request. VRP 6/3/2008 at 196+. The defense continued to argue for a mistrial "at least to make sure that there is

a record of it." *Id.* The court offered a curative instruction to the defense and requested language from the defense. *Id.* at 199-200.

On returning to court the next morning, the defense provided the court with a proposed instruction. VRP 6/5/2008 at 2, 4. After being reminded by the court, defense counsel continued to request a mistrial, which the court denied. *Id.*

After some discussion, the following curative instruction was given to the jury:

Dr. Rawlings use of the word "rape" in response to direct questions by Mr. Lee regarding his interaction with his wife, which the court instructed you to disregard, was contrary as to a specific pretrial order of the court. The court will instruct you that there has never been any incident of rape, as that word will be defined for you in the instructions, by Mr. Marten involving his wife reported to Dr. Rawlings.

I will add that in response to the question by Mr. Lee, that question did not utilize the word "rape." The word "rape" was used by the witness in response to the question. You will recall that I sustained an objection to it and instructed you to disregard it. But I thought giving this instruction under these circumstances is appropriate.

Id. at 8.

On appeal, Martin claims that a mistrial should have been granted because Dr. Rawlings' half-sentence remark "created an enduring prejudice which so infected the proceedings that the curative instruction could not have been -- and was not -- effective." Opening Brief at 46. To support this high rhetoric and claim of prejudice, Marten points to the "hostile tone

of this witness" and the "implication that Dr. Rawlings knowingly gave testimony that he knew was contrary to his notes . . . and the court's pre-trial order" as a reason to grant the "extreme remedy" of a mistrial. *Id.* at 47. However, Marten fails to provide record cites for his claims of Dr. Rawlings' "hostile tone" and purposeful violation of a court order. *Id.* The trial court made no such findings and the record cites do not exist.

Marten has failed in his burden to demonstrate that the trial court manifestly abused its discretion by giving a very strong curative instruction.⁷ The decision to grant or deny a motion for a mistrial is reviewed for abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

Marten fails in his burden to demonstrate that the trial court abused its discretion by denying his mistrial motion. A mistrial should be granted only when an irregularity in the trial proceedings, viewed in light of all of the evidence, is so prejudicial as to deprive the defendant of a fair trial. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). In evaluating a claimed abuse of the trial court's discretion, an appellate court

⁷ The curative instruction essentially informed the jury that Dr. Rawlings had violated a court order and misspoke in representing the facts. Arguably, this curative instruction went beyond the court's role to comment on the credibility of Dr. Rawlings. Although the State does not dispute the trial court's decision in this regard, it is difficult to understand the prejudice faced by Marten when the court granted his

looks to the following factors: (1) the seriousness of the irregularity, (2) whether the challenged evidence was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the evidence. *State v. Escalona*, 49 Wn.App. 251, 254, 742 P.2d 190 (1987) (citing *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)). Here, these factors weigh heavily toward affirming the trial court's denial of a mistrial and affirming Marten's civil commitment.

Although the State readily acknowledges that the pre-trial order should not have been violated by Dr. Rawlings, a trial irregularity does not justify a mistrial when the trial court's original decision to exclude the evidence is open to challenge. As the trial prosecutor pointed out on the record: "what Dr. Rawlings was referring to was a statement made by Mr. Marten to Detective McLean, which . . . certainly arguably constitutes rape in the third degree in the State of Washington. The statement is -- Mr. Marten said, 'I mean I've had incidents with my wife where she doesn't want to, but I go ahead anyway, but I don't hold her down and beat her up. I know that isn't right, either.'" VRP 6/5/2008 at 4-5.

A case directly on point is *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). In *Weber*, the Supreme Court determined that a mistrial request to effectively admonish the State's expert in front of the jury.

was appropriately denied because the trial court had erred in its original decision to disallow the allegedly offending testimony: "We first consider the seriousness of the irregularity, *which, in the instant case, was minor because the trial judge's decision to exclude the statement itself was error.*" 99 Wn.2d at 165 (emphasis added). In other words, if the trial court's original decision to exclude the testimony is in error, then there can be no "serious irregularity."

Any remote chance of prejudice is further diminished by the fact that the trial court struck the impulse control disorder reference from the jury's consideration. The court directly instructed the jury to disregard Dr. Rawlings brief rape testimony.

A curative instruction is presumed to cure any error. Recently, in *State v. Warren*, ___ Wn.2d ___, 195 P.3d 940, 945 (2008), the Supreme Court reiterated that a curative instruction operates to remedy any error and it is presumed that "the jury was able to follow the court's instruction."

A curative instruction is an appropriate alternative to declaring a mistrial. *State v. Robinson*, 146 Wn.App. 471, 483, 191 P.3d 906, 913 (2008).

In determining the effectiveness of a curative instruction, the trial court is given great deference. "Since the trial judge is best suited to determine the prejudice of the statements, the appellate court reviews the decision to grant or not to grant a mistrial under an abuse of discretion

standard." *State v. Escalona*, 49 Wash.App. 251, 254-255, 742 P.2d 190, 192 (1987). Marten has not carried his burden to demonstrate that this case presents the unique fact pattern where a curative instruction would be inadequate. A trial court's denial of a motion for mistrial "will be overturned only when there is a 'substantial likelihood' the prejudice affected the jury's verdict." *State v. Russell*, 125 Wash.2d 24, 85, 882 P.2d 747 (1994).

Although unfortunate, Dr. Rawlings' brief mention of rape during a lengthy trial did not prejudice Marten. In particular it was not addressed in opening or closing arguments. "The lack of emphasis in closing supports a harmless error conclusion." *U.S. v. Logan*, 998 F.2d 1025, 1032, 302 U.S.App.D.C. 390 (D.C. Cir.1993). This court should affirm the verdict.

V. CONCLUSION

For the foregoing reasons, appellant Marten's civil commitment as a sexually violent predator should be affirmed.

DATED this 28th day of October 2009.

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