72306-5

NO. 72306-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re Detention of Calvin Malone,

STATE OF WASHINGTON,

Respondent,

v.

CALVIN MALONE,

Appellant.

FILED
July 5, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to exclude the State's expert's diagnosis of hebephilia under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), because it is not generally accepted in the relevant scientific community.

2. The trial court erred in failing to hold a Frye hearing to determine whether the diagnosis of hebephilia is generally accepted in the relevant scientific community.

3. Appellant's counsel was ineffective for failing to expressly request a Frye hearing on the hebephilia diagnosis.

4. The trial court erred in refusing to exclude the State's expert diagnosis of other specified paraphilic disorder, nonconsent under ER 702 where it was misleading, unreliable, and not helpful to the jury.

5. The trial court erred in refusing to give appellant's proposed jury instructions on the possibility of a recent overt act petition if unconditionally released from detention.

6. The State's disparagement of the defense and personal opinions on credibility in rebuttal constituted flagrant and ill-intentioned misconduct that denied appellant his due process right to a fair trial.

7. The trial court erred in refusing to investigate several allegations of juror misconduct.

8. Cumulative error deprived appellant of a fair trial.

Issues Pertaining to Assignments of Error

1. The State's expert diagnosed appellant with hebephilia, which has been loosely defined as sexual attraction to pubescent and postpubescent teenagers. Hebephilia has been purposefully excluded from the DSM-5[1] as a valid diagnosis and has received intense criticism.

a. Did the trial court err in failing to hold a Frye hearing to determine whether the hebephilia diagnosis is generally accepted in the relevant scientific community?

b. Did the trial err in admitting the State's expert's hebephilia diagnosis under Frye where it is not generally accepted in the relevant scientific community?

2. Was appellant's counsel ineffective for failing to expressly request a Frye hearing where hebephilia is not a generally accepted diagnosis in the relevant scientific community?

3. Did the trial court err in admitting the State's expert's diagnosis of other specified paraphilic disorder, nonconsent under ER 702 where it was actually a diagnosis of hebephilia, making it misleading, unreliable, and not helpful to the jury?

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[1] AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5TH EDITION, DSM-5 (2013).

4. The State may file a new chapter 71.09 RCW petition if the individual is released into the community and commits a "recent overt act." This is a placement condition, relevant to whether the individual is likely to commit acts of sexual violence if released into the community. Did the trial court err in refusing to give appellant's proposed instructions that he could be subject to a recent overt act petition if released, depriving him of the ability to effectively argue that theory to the jury?

5. In rebuttal, the State disparaged the defense and expressed personal opinions on credibility by repeatedly referring to the defense's "misdirection, idle truths, half truths," and "selective listening," claiming the defense "bamboozled" the jury, and calling appellant a "charlatan." Does such flagrant and ill-intentioned misconduct necessitate a new trial?

6. Did the trial court abuse its discretion by refusing to investigate several allegations of juror misconduct, including a sleeping juror, several jurors who announced they made up their minds the third day of a two week trial, and a presiding juror who refused to ensure deliberations proceeded only when all 12 jurors were present?

7. Did cumulative error deprive appellant of a fair trial?

B. STATEMENT OF THE CASE

On September 29, 2012, the State filed a petition to involuntarily commit Calvin Malone as a sexually violent predator (SVP) under chapter

71.09 RCW. CP 960-61. The State alleged Malone was convicted of sexually violent offenses—first degree child rape and two counts of first degree child molestation—on January 26, 1993 in Snohomish County. CP 960. In its certification of probable cause, the State recounted several other adjudicated and alleged sex offenses against boys ages 11 to 15. CP 962-69.

The case was first tried in February and March of 2014. The jury could not reach a unanimous verdict. CP 322. The trial court declared a mistrial, and the case proceeded to a new trial in July 2014. 5RP 14.[2] The trial lasted two weeks. Fourteen witnesses testified or provided depositions in support of Malone's release. 15RP 868; 16RP 1046-1157.

1. Malone's Testimony

The State played a video deposition of Malone taken on November 19, 2013. 9RP 47; CP 1351. Malone also testified at trial. 9RP 104. He was 63 years old at the time.

Malone was born on February 26, 1951 in Germany to a white mother and black father. CP 1362-72. Malone had a difficult childhood.

[2] This brief refers to the verbatim reports of proceedings as follows: 1RP – September 20, 2012; 2RP – February 18, 2014; 3RP – February 25, 26, 2014; 4RP – April 11, 2014; 5RP – May 2, 2014; 6RP – May 2, 2014 vol. 2; 7RP – May 30, 2014; 8RP – June 11, 2014; 9RP – July 14, 2014; July 14, 2014 (afternoon session); 10RP – July 15, 2014; July 15, 2014 (afternoon session); 11RP – July 16, 17, 18, 2014; 12RP – July 21, 2014; 13RP – July 22, 2014; 14RP – July 23, 2014; 15RP – July 24, 2014; 16RP – July 25, 28, 2014; 17RP – July 29, 2014; 18RP – July 30, 2014; 19RP – September 5, 2014; 20RP – September 11, 2014; 21RP – September 17, 2014; 22RP – September 22, 2014; 23RP – September 26, 2014; 24RP – October 17, 2014.

His mother came from an affluent German family while his adoptive father grew up in poverty before joining the military. CP 1372. In addition to this causing a significant rift in Malone's family, it was also a "very difficult" time "for mixed-raced families." CP 1372. Malone belonged to the Boy Scouts and was molested by his scoutmaster when he was only 12 or 13 years old. CP 1390. This continued for a year. CP 1390.

Malone admitted to molesting boys for nearly his entire adult life when not incarcerated. CP 1381. The first time he did so was a 13 or 14 year old boy he fondled around 1970 when Malone worked at a summer camp, Pico Blanco. CP 1387-89.

Malone joined the U.S. Army in 1971. CP 1391. He was stationed in Ulm, Germany, where he ran a youth center and a Boy Scout troop. CP 1391-93. Malone admitted to molesting six or seven boys while stationed there. CP 1394-95. He said this consisted of kissing, hugging, and fondling. CP 1397. Malone admitted he groomed these boys by offering gifts and affection, recognizing he "took advantage of them." CP 1398-99, 1404.

Malone started drinking heavily and using drugs, particularly heroin, in Germany. CP 1404-06. During this time, Malone contracted hepatitis C through intravenous drug use. CP 1363. Malone explained "[m]ost of the time when I was molesting I was either under the influence of drugs or I was

drunk or both. I don't recall a time when I was completely sober when I actually molested." CP 1405.

After his army tour ended in March 1974, Malone moved to California and then quickly to Portland, Oregon. CP 1408-09. Malone started another Boy Scout troop in Portland, where he worked with boys ages 11 or 12 to 17. CP 1409. Malone molested six to seven boys during this time, consisting mainly of fondling and oral sex. CP 1411-13. From there, Malone moved to Monterey, California, to Sylacuga, Alabama, then to Roundup, Montana. CP 1413-27. In each location he either joined or founded a Boy Scout troop, and continued to molest boys. CP 1415-27.

Malone eventually returned to Oregon, where he worked for youth organizations and molested boys ages 13 to 15. CP 1431-35. Malone first began engaging in anal sex with boys around this time. CP 1435. Around this time, Malone explained, he traveled with one particular boy, 13-year-old B.M., around Europe for approximately 10 months, with permission from B.M.'s mother. CP 1435-38. B.M. and Malone engaged in anal and oral sex, as well as fondling. CP 1438-39.

In April 1986, Malone was arrested in California for lewd and lascivious acts against a 13-year-old boy, M., who Malone molested in 1981. CP 1444-45. Malone pled guilty to a lesser charge of battery and spent a year in jail. CP 1444-45. In March 1987, Malone was extradited to Oregon

on sodomy and sexual abuse charges from when he worked for one of the youth organizations there. CP 1445-46. He pled guilty to one count of third degree sodomy and one count of second degree sexual abuse. CP 1446. He was incarcerated in Oregon until March 1989. CP 1451.

Around September 1991, Malone moved to Edmonds, Washington, where he lived with and cared for a terminally ill man. CP 1454-55. Malone started grooming J.M., who lived next door and was 11 or 12 at the time. CP 1456-57; 11RP 49-50. Malone was arrested in September 1992. CP 1461-62. He pled guilty to one count of first degree child rape and two counts of first degree child molestation. CP 1462. He was sentenced to 20 years confinement and has been incarcerated ever since. CP 1462.

Malone considers himself to be an alcoholic and a drug addict. CP 1463. He agreed remaining sober would be key to his success if released. CP 1465. Malone found sobriety in prison, explaining he had not used drugs or alcohol since his arrest in 1992, even though they are readily available in prison. CP 1464-65; 11RP 169-71. At the time of the commitment trial, he had been sober for 22 years—refraining from drugs and alcohol is no longer difficult for him. 11RP 171-72. He further explained he would die from drinking alcohol because of his hepatitis C. 11RP 185.

Malone was also introduced to Buddhism while incarcerated and it has become a central part of his life. 11RP 172. He practices mindfulness

and, since being incarcerated at the Special Commitment Center (SCC), he has worked to improve resources for the Buddhist community there. 11RP 169-75. Malone wrote a book called "Razor-Wire Dharma: A Buddhist Life in Prison," which consisted of several short stories about his experience becoming a Buddhist in prison. CP 1476. He has donated almost all his book royalties to Buddhist organizations and the Way Home Project. 11RP 176-78. Malone created the Way Home Project to establish "a house where people could go to as a release address" after prison. 11RP 177-78.

While incarcerated, Malone completed the sex offender treatment program, which lasted for more than a year. CP 1469, 1489. He participated in a counselor-assisted self-help (CASH) group, which is focused on substance abuse "[i]n relation to how it also affects other areas of our life." CP 1479. He also attended numerous workshops on non-violent communication, alternatives to violence, mediation, stress and anger management, and dozens of Buddhist weekend retreats. 11RP 173. He also goes to narcotics anonymous (NA) and alcoholics anonymous (AA) meetings. 11RP 173. He volunteers at the SCC chapel and attends several Buddhist meditation groups at the SCC. 11RP 173-75.

Malone identified his risk factors as drugs, alcohol, isolation, depression, and being alone with teenage and pubescent youth. CP 1480-81; 11RP 182. Through mindfulness, Malone explained, "it's much easier for

me to absorb difficulties or difficult circumstances without resorting to substance." 11RP 182. He explained that upon release, he would engage in the community phase of the sex offender treatment program and attend NA meetings. CP 1489; 11RP 179-81. Malone has also completed the majority of an associate degree while incarcerated and planned to finish it upon release. CP 1490. Finally, Malone would continue practicing Buddhism and seek out support from the Buddhist community. CP 1492-93; 11RP 181-82.

Malone testified he feels "a tremendous amount of sadness" and "horrible on multiple levels" for the boys and their families. 11RP 184-85. He did not believe he would ever commit a sex offense again. 11RP 186.

2. State's Witnesses

D.L. testified Malone was his Boy Scout leader in Roundup, Montana, when he was 12 years old. 9RP 78-80. D.L. said he performed oral sex on Malone twice. 9RP 85-88. Malone did not threaten D.L. or hurt him during these encounters. 9RP 90-91.

T.E. also testified Malone was his Boy Scout leader in Roundup. 10RP 206. He related two incidents in which he said Malone fondled his genitals. 10RP 210-14. Malone never used any force or threat of force during these encounters. 10RP 219-20.

Finally, B.M.'s deposition was read for the jury. 9RP 95. He and Malone went to Europe when he was 13 years old, where they engaged in

oral and anal sex approximately three to four dozen times over the course of one year. CP 1308-13.

3. State's Expert: Amy Phenix

Dr. Matthew Logan testified as the State's expert in the first trial. CP 553; 3RP 1. He diagnosed Malone with pedophilic disorder, sexually attracted to males, nonexclusive type; polysubstance dependence (including alcohol), in remission through a controlled environment; and adult antisocial behavior. CP 554; 3RP 33, 41-43, 70-75. Of these diagnoses, Logan testified pedophilia alone was a mental abnormality that diminished Malone's ability to control his sexually violent behavior. 3RP 89-94.

In between the first and second trial, Logan retired, so the State retained Dr. Amy Phenix as its expert in the second trial. 12RP 224-25; 14RP 773. Phenix conducted a document review of Malone's records, but never interviewed or asked to interview Malone. 12RP 240-42. The American Psychological Association's ethical guidelines specify psychologists should give opinions only after making a reasonable effort to interview the subject. 13RP 432-35. Phenix claimed watching Logan's videotaped interview with Malone from June 2013 was adequate, but agreed the interview was not current and further agreed it is preferable to conduct an in-person interview. 13RP 438-50.

Based on her record review, Phenix diagnosed Malone with two sexual abnormalities or "paraphilias": pedophilic disorder, sexually attracted to males, nonexclusive type, and a new diagnosis of other specified paraphilic disorder, nonconsent. 12RP 249, 266-68. Phenix also diagnosed Malone with opioid use disorder based on his past heroin use. 12RP 249, 271. Phenix testified all three of these diagnoses constituted mental abnormalities. 12RP 291.

Phenix testified the term "paraphilia" comes from the DSM-5, "which is a classification manual of almost all of the known psychiatric and psychological disorders." 12RP 250. The DSM-5 "describes the disorders, the course of the disorder, the symptoms associated with the disorder," and is "used by almost all mental health professionals." 12RP 250. The diagnoses included in the DSM-5 are those published and accepted by the American Psychiatric Association. 12RP 251. Phenix claimed, though, that "there may be diagnoses that the American Psychiatric Association does not believe warrant including in the DSM but there may be sufficient research for clinicians in my field to decide to use those various diagnoses." 12RP 251.

Phenix testified an individual with a paraphilia is one who, over at least six months, experiences intense, recurrent sexually arousing fantasies and urges, and commits abnormal sexual behaviors against individuals that involve pain or humiliation. 12RP 251-58. Pedophilic disorder, specifically,

is sexual arousal to prepubescent children, which is defined by the DSM generally as children 13 years or younger. 12RP 252, 257-58; DSM-5, supra note 1, at 697. Nonexclusive pedophilia means the individual is not attracted to only children, but also teenagers and adults. 12RP 255. Phenix believed Malone met the criteria for pedophilia because he had a "clear sexual preference for boys from age 11 to about age 16," even though this includes pubescent and postpubescent boys. 12RP 263.

Phenix testified her diagnosis of "other specified paraphilic disorder" also comes from the DSM-5. 12RP 265-68. She claimed:

> Every individual with abnormal sexual arousal doesn't fit neatly into the specific categories under a paraphilia in the DSM-5. So when there is an individual with an abnormal sexual arousal pattern over at least a six-month period of time and there's no specific descriptor in the paraphilia chapter, you would use this category, other specified paraphilic disorder, which allowed you to essentially describe the disorder that is not listed in the DSM-5 category of paraphilias.

12RP 266-67. Phenix diagnosed Malone with other specified paraphilic disorder, nonconsent because "he engages in and is aroused to sexual activity with boys who are essentially going through puberty and just postpuberty." 12RP 367. She explained she added the descriptor of nonconsent because the boys were legally incapable of consenting based on their ages. 12RP 267-68; 14RP 787.

On cross-examination, Phenix admitted her diagnosis of other specified paraphilic disorder, nonconsent was really a diagnosis of hebephilia. 13RP 497-99. Hebephilia is loosely defined as sexual attraction to pubescent or postpubescent teenagers. 13RP 495-96. The American Psychiatric Association rejected it for inclusion in the DSM-5 "both for conceptual and practical reasons." 13RP 497-99. There are eight other specified paraphilic disorders in the DSM-5 and hebephilia is not one of them.[3] 13RP 493-96. Phenix agreed the DSM-5 editors do not consider hebephilia to be a legitimate paraphilia because the sexual arousal pattern is not inherently deviant. 13RP 539-40. Phenix also agreed there is significant criticism of hebephilia in the scientific community. 13RP 498-501.

Phenix used two actuarial tools, the Static-99R and the Static-2002R, to predict Malone's purported likelihood of sexual reoffense. 12RP 300-01. With the Static-99R, Phenix testified Malone scored in the moderate to high range of reoffense risk, relative to other offenders. 12RP 309-15. She estimated the likelihood he would reoffend in five years was about 20.1 percent and 29.6 percent in ten years. 12RP 315. Based on the Static-2002R, Phenix testified the risk of reoffense was 19.4 percent in five years and 28.4 percent in ten years. 12RP 335. Phenix claimed these tests

[3] They are: telephone scatologia (obscene phone calls), necrophilia (corpses), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine). DSM-5, supra note 1, at 705.

underestimate the overall risk of sexual reoffense because of the underreporting of sex crimes. 12RP 303-04.

Phenix believed Malone's pedophilia, hebephilia, and opioid use disorder each made him likely to engage in acts of sexual violence if not confined in a secure facility. 12RP 291-92, 370-71. Phenix acknowledged, though, that older individuals like Malone are less likely to reoffend. 12RP 353. She further acknowledged the five-year recidivism rate for sex offenders over 60 is only two percent. 13RP 595.

At the close of Phenix's testimony, the jury asked her to define hebephilia. 15RP 860; CP 139. She responded that it means "intense, recurrent sexually arousing fantasies, urges or behaviors toward children generally going through pubescence and postpubescence." 15RP 860. She explained "some of the literature would define that as 12 through age 14, sometimes even to age 15." 15RP 860.

4. Malone's Expert: Joseph Plaud

Dr. Joseph Plaud again testified as Malone's expert, as he did in the first trial. 15RP 868. He is a licensed psychologist with 27 years experience evaluating and treating sex offenders. 15RP 868-69. Plaud previously worked as a tenured professor of psychology at the University of North Dakota and served as the director of research for the Cambridge Center of Behavioral Studies, affiliated with Harvard University. 15RP 870. While in

North Dakota, Plaud developed a statewide treatment program for sex offenders and founded a similar clinic at the university. 15RP 870-71. He founded his own private practice called Applied Behavioral Consultants, providing assessments, evaluations, and treatment services for sex offenders. 15RP 870. During his career, Plaud has been published over 100 times in peer reviewed journals, treated over 1,000 sex offenders, and testified more than 600 times in civil commitment proceedings. 15RP 873, 878, 885-86.

In 2012, Dr. Plaud began reviewing Malone's records, including his criminal history, institutional history, disciplinary reports, police reports, as well as Malone's developmental, psychosocial, and psychosexual history. 15RP 886-87. Plaud received updated records throughout the case. 15RP 887. He also conducted two clinical interviews with Malone at the SCC: one after his initial records review and one in June 2014 just before the second trial. 15RP 887. Plaud explained these psychodiagnostic interviews formed the "cornerstone" of his risk assessment. 15RP 888.

Plaud conducted objective personality testing with Malone using the International Personality Disorders Examination. 15RP 889. He concluded there were no indications Malone suffered from any personality disorder. 15RP 891. Plaud also concluded Malone did not have any mental abnormalities. 15RP 892. Plaud explained the hallmark feature of pedophilic disorder is recurrent and intense sexually arousing fantasies,

urges, or behaviors involving prepubescent children over a period of at least six months. 15RP 894-95. Malone did not meet these criteria. 15RP 895.

Plaud explained the only way to determine whether an individual is a pedophile is not based on the victims' ages, but on their sexual development, which is measured by the Tanner Stages. 15RP 907-08. Pedophilia encompasses only Tanner Stage 1, which for boys means no pubic hair or enlargement of the testes or penis. 12RP 257-58; 15RP 1009. Tanner Stage 2 for boys means some pubic hair and enlarged penis and testicles. 13RP 470. At 11 years old, nearly 72 percent of white males have entered puberty, or Tanner Stage 2. 13RP 470. By age 12, 83 percent have started puberty. 13RP 473. The mean age for boys entering Tanner Stage 2 is 10.3 years old. 15RP 908. Though the DSM-5 classifies prepubescence as 13 years old or younger, Plaud explained, the "vast majority" of 11 to 13 years olds are in puberty. 15RP 906. Moreover, most of Malone's victims were 13, 14, and 15 years old or older, which is pubescent and postpubescent. 15RP 897.

Plaud testified he did not diagnose Malone with hebephilia because it is not a valid diagnosis. 15RP 913-21. He explained the "other specified paraphilic disorder" designation in the DSM is reserved "for low frequency types of disorders." 15RP 914. Plaud opined:

> But if you're referring to sexual behavior or sexual interest, sexual fantasies, urges with pubescents, postpubescents who are not legally able to give consent, it's a

> legal term and it varies significantly in the states and in the world. Some places it's 12 years old. For example, Spain, the country of Spain, 12 is the age of consent for sexual behavior. In Massachusetts where I'm from it's 16. The federal is 18. So it varies significantly.

15RP 914. And therein lies the problem with hebephilia, Plaud explained. Hebephilia was considered and ultimately rejected from the DSM-5 because it is not deviant "from a physiological sexual arousal perspective." 15RP 915. Plaud testified the diagnosis was "nonsense" and has "not been empirically validated." 15RP 917.

Plaud further testified Malone's offenses were not the product of any mental abnormality, but rather that he was actively engaged in cognitive distortions during the offending period. 15RP 901. Cognitive distortions "generally refer to strategies, conscious or not, that relate to offenders giving themselves permission to engage in sexual[ly] abusive behavior such that it doesn't really have the consequences that it does . . . Minimizing, denying problems." 15RP 901. During his offense period, Malone "was not thinking about the consequences of the victims." 15RP 901. This, combined with his very heavy substance abuse, contributed to Malone's offense cycle. 15RP 902. In addition, Malone struggled with his own sexual identity and being molested as a child. 15RP 900-02.

Plaud explained Malone now understands he was in a cognitive distortion cycle during his offense years. 15RP 1032-33. In the State's

rebuttal case, Phenix agreed Malone correctly identified two significant cognitive distortions that allowed for ongoing offending, specifically Malone's resentment for authority and his belief that all problems originate externally. 17RP 1327, 1341-42. Phenix further agreed Malone's treatment providers believed he possessed the clarity to counter these cognitive distortions should they occur again. 17RP 1327.

Also using the Static-99R, Plaud believed Malone's risk of sexual reoffense was eight percent over five years, even with the underreporting of sex crimes. 15RP 926, 945. Plaud explained there was no data to measure Malone's risk of reoffense over 10 years given his age. 15RP 926-27.

5. Malone's Witnesses and Release Plan

Numerous witnesses offered their support to Malone. For instance, Noah Young testified he met Malone in prison in 1993 or 1994, and introduced Malone to Buddhism. 16RP 1046; CP 1112-16. Young and Malone became friends and eventually began a sexual relationship, which lasted for about six months. CP 1114. The two have remained close friends and Young offered to be a support person for Malone upon release, including some financial support. CP 1116-17. But Young doubted Malone would need his help: "He's a very resourceful man. I imagine he'll do quite well in taking care of himself." CP 1117.

Buddhist leaders also offered their support. Eido Carney, a Buddhist priest at the Olympia Zen Center, offered to help Malone with day-to-day needs, including obtaining a driver's license, helping him with money for clothing and rent, and setting up a bank account. 16RP 1056; CP 1186, 1192-93. She also offered to connect him with local Buddhist communities. CP 1193. Katharine Blackman, a Buddhist priest who worked with Malone for about five years, also offered him personal support and spiritual guidance upon release, including regular meetings. 16RP 1055; CP 1250-57.

Sunyana Graef, a Buddhist priest and teacher at the Vermont Zen Center, explained Malone began writing to her in the early 1990s, sending her stories of his experiences practicing Buddhism in prison. 16RP 1051; CP 1270. She was impressed with his writing and eventually compiled his stories into a book. CP 1270-72. Graef knew Malone was incarcerated for child rape and explained it was an editorial decision, not Malone's, to state in the book that he was convicted of aggravated assault. CP 1277. Graef said she and Malone continued to write each other four to six times a year and the Vermont Zen Center would help support him financially upon release. CP 1281-82. Graef explained that over the 20 years she had known Malone, "he's become less egotistical. He's become more aware of the suffering of other people." CP 1293.

Rowan Conrad was a chapel volunteer and Zen Buddhist teacher at Airway Heights Corrections Center when Malone was incarcerated there. 16RP 1052; CP 1214. Conrad explained one of the tenets of Zen mindfulness is do not misuse your sexual energies and do not harm with your sexual behavior. CP 1217-18. Conrad observed Malone "many times over the years" and found him to be "incredibly kind and thoughtful and observant." CP 1219. Malone expressed "great remorse and regret" for his offenses. CP 1220-21. Conrad believed "[t]here's been an amazing transformation" in Malone, explaining "I have confidence the person you're thinking about incarcerating or not incarcerating, is not [the] person [he was] then." CP 1231. Conrad was willing to offer Malone personal support upon his release. CP 1223.

The chaplain at the SCC, John Peterson, also testified on Malone's behalf. 16RP 1075. Peterson explained Malone helps with chaplain duties, including organizing the library, checking out books, planning events, and doing yard work. 16RP 1079. Peterson said Malone is a diligent, responsible worker, and "would be a hard one to replace." 16RP 1081. Peterson respected and trusted Malone so much that he offered for Malone to live with him if Malone were released. 16RP 1089-92. Peterson also said he would assist Malone with transportation as needed. 16RP 1093-94.

Edward Fischer, who has a doctorate in clinical psychology, also worked with Malone at the SCC, where Fischer was a psychology associate and led the CASH group. 16RP 1100-02. Fischer explained Malone successfully abstained from drug and alcohol use, despite both being available at the SCC. 16RP 1102-05. Malone was able to successfully identify that drugs and alcohol "led him to his criminal activities" and recognized they were "a potential risk for him." 16RP 1104-05.

Finally, Heather Turner, case manager for the Snohomish County Public Defender's Association and the Office of Public Defense, testified. 16RP 1112-13. She explained she helped Malone locate housing and, at the time of trial, he had a room reserved at the Boylston Hotel on Capitol Hill in Seattle. 16RP 1115-16. The Boylston is close to numerous services, including the Department of Social and Health Services, food banks, health care, NA and AA meetings, non-conflict resolution classes, and an organization called Gay City. 16RP 1116-19. Turner explained she would help Malone navigate these services, as well as apply for social security and veteran's benefits upon release. 16RP 1117-19.

The jury found the State proved beyond a reasonable doubt that Malone is an SVP. CP 100; 18RP 1481. The trial court ordered Malone committed to the SCC. CP 99. Malone timely appealed. CP 96-98.

C. ARGUMENT

The State must prove beyond a reasonable doubt that the respondent is a "sexually violent predator." RCW 71.09.060(1). The jury must find three elements: (1) the respondent has been convicted of or charged with a crime of sexual violence; (2) the respondent suffers from a mental abnormality or personality disorder; and (3) that mental abnormality or personality disorder makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility. CP 109; RCW 71.09.020(18); In re Det. of Post, 170 Wn.2d 302, 309-10, 241 P.3d 1234 (2010). The verdict must be unanimous. RCW 71.09.060(1).

1. PHENIX'S HEBEPHILIA DIAGNOSIS SHOULD HAVE BEEN EXCLUDED UNDER FRYE BECAUSE IT HAS BEEN SOUNDLY REJECTED BY THE RELEVANT SCIENTIFIC COMMUNITY.

Before trial, Malone moved to exclude Phenix's "other specified paraphilic disorder, nonconsent," or hebephilia, diagnosis. CP 185-201; 9RP 81-89. Malone argued the diagnosis was inadmissible under ER 702 and 703, because it had no factual basis and was misleading, unreliable, and not helpful to the jury. CP 191-201. Malone also argued the diagnosis should be excluded because it was not generally accepted in the scientific community. CP 194-98; 9RP 83-84. Malone presented extensive scholarly

research showing "how highly contested and soundly rejected this diagnosis is within the scientific community." 9RP 84; CP 193-98.

The State acknowledged hebephilia is "controversial in this field." 9RP 87. However, the State claimed the diagnosis was admissible because Washington Supreme Court previously decided in In re Personal Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993), "that paraphilia not otherwise specified is a valid diagnosis in these cases." 9RP 86.

The trial court agreed with the State and ruled:

> All right. Well, I understand Mr. Malone's argument, but the Young and the [In re Detention of Berry, 160 Wn. App. 374, 380-81, 248 P.3d 592 (2011)] case seem to indicate that this type of diagnosis is allowable. The witness is expected to testify that this is in fact her diagnosis. That will be subject, I'm sure, to significant cross examination. But the motion is denied.

9RP 88-89. When Malone's counsel pointed out Young and Berry did not address the hebephilia diagnosis, the court simply repeated "[t]he motion's denied." 9RP 89.

The U.S. Supreme Court in Kansas v. Hendricks recognized the importance of distinguishing between the dangerous sexual offender subject to civil commitment, and other dangerous, but typical, recidivists, who are more properly dealt with through the criminal system. 521 U.S. 346, 360, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). The Court found this distinction was made possible, in part, by the "presence of what the 'psychiatric

profession itself classifie[d] . . . as a serious mental disorder.'" Kansas v. Crane, 534 U.S. 407, 412, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) (quoting Hendricks, 521 U.S. at 360). The Court likewise recognized civil commitment laws could not be validated "if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified." Hendricks, 521 U.S. at 373.

a. Hebephilia is not a generally accepted diagnosis in the psychiatric and psychological communities.

For expert testimony about scientific evidence to be admissible, it must first pass the Frye test. State v. Cauthron, 120 Wn.2d 879, 886-87, 846 P.2d 502 (1993), overruled on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997). Under Frye, novel scientific evidence is admissible only where (1) the scientific theory upon which the evidence is based has gained general acceptance in the relevant scientific community; and (2) there are generally accepted methods of applying the theory in a manner capable of producing reliable results. State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). While unanimity is not required, scientific evidence is inadmissible "[i]f there is a significant dispute among qualified scientists in the relevant scientific community." State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001), overruled on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

Courts review de novo a trial court's determination of whether a Frye hearing is necessary and whether there is general acceptance in the relevant scientific community. Cauthron, 120 Wn.2d at 887; State v. Gregory, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014). A reviewing court will undertake a searching review that is not confined to the trial record. Cauthron, 120 Wn.2d at 887-88. Review may involve consideration of scientific literature, secondary legal authority, law review articles, and cases from other jurisdictions. Id.; State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996).

The Illinois Supreme Court recently held the diagnosis of hebephilia is subject to the Frye standard and a hearing is necessary to determine its general acceptance. In re Det. of New, 386 Ill. Dec. 643, 644, 21 N.E.3d 406 (Ill. 2014). The specific diagnosis at issue in New was paraphilia not otherwise specified (NOS), sexual attraction to early adolescent males—otherwise known as hebephilia. Id. at 650. New is therefore instructive on whether Phenix's diagnosis meets the Frye standard. Phenix did not initially use the hebephilia label in diagnosing Malone with other specified paraphilic disorder, nonconsent. 12RP 265-68. But she admitted on cross-examination it was really a diagnosis of hebephilia. 13RP 497-99.

Hebephilia was the subject of a fairly recent proposal to be included in the DSM–5 based on the research of Dr. Ray Blanchard and his colleagues. Ray Blanchard et al., Pedophilia, Hebephilia, and the *DSM-V*, 38 ARCHIVES OF SEXUAL BEHAV. 335 (2009). They defined the condition as an erotic preference for pubescent children, "roughly, ages 11 or 12 – 14." Id. at 335. The proposal sought to include hebephilia as a listed category of paraphilic disorder in the DSM, or as an extension of pedophilic disorder. Id. The authors argued studies have "demonstrated the utility of specifying a hebephilic group, at least for research purposes." Id. at 336. They acknowledged, however, the term "has not come into widespread use, even among professionals who work with sex offenders." Id.

The proposal set off a firestorm of criticism. Opponents contended the hebephilia diagnosis would dramatically expand or add to the DSM diagnostic categories of mental disorders "without any evidence or reasoning that those who would be newly included under the mental disorder rubric can be properly categorized as mentally disordered." Philip Tromovitch, Manufacturing Mental Disorder by Pathologizing Erotic Age Orientation: A Comment on Blanchard et al. (2008), 38 ARCHIVES OF SEXUAL BEHAV. 328 (2009); see also Joseph J. Plaud, Are There "Hebephiles" Among Us? A Response to Blanchard et al. (2008), 38 ARCHIVES OF SEXUAL BEHAV. 326 (2009) (setting forth "multiple methodological issues that preclude a call for

the establishment of hebephilia as a diagnostic entity in the DSM-V"); Gregory DeClue, Should Hebephilia be a Mental Disorder? A Reply to Blanchard et al. (2008), 38 ARCHIVES OF SEXUAL BEHAV. 317 (2009); ("The decision to classify a pattern of sexual attraction as a mental disorder (paraphilia) inevitably entails more than (1) reliable differences in patterns of sexual attractions and (2) checking law books to see which sexual activities are currently illegal in a particular jurisdiction."); Karen Franklin, Hebephilia: Quintessence of Diagnostic Pretextuality, 28 BEHAVIORAL SCI. & THE LAW 751, 764, 766 (2010) ("Hebephilia is being advanced as a mental disorder by a small cadre of government experts intent on legitimizing the indefinite detention of men who have committed culturally repugnant acts with minors and who do not meet the diagnostic criteria for other, more established disorders . . . In the end, hebephilia will come to haunt not only those who are civilly committed on pretexual grounds, but the entire mental health field, for years to come.").

The consensus of this criticism was that hebephilia is not a valid diagnosis and is not generally accepted in the relevant scientific community. See, e.g., John Matthew Fabian, Diagnosing and Litigating Hebephilia in Sexually Violent Predator Civil Commitment Proceedings, 39 J. AM. ACAD. PSYCHIATRY & L. 496, 501 (2011) ("To this date, there appears to be no clear professional consensus as to the clinical application of hebephilia . . . Put

simply, hebephilia is not in the DSM-IV-TR currently as a listed paraphilia, and the paraphilia NOS category in the DSM-IV-TR does not include evidence suggesting that it is intended to include hebephilia as a paraphilia. Since hebephilia is absent from the DSM-IV-TR, its reliability and validity as a diagnosis is negated."); Allen Frances & Michael B. First, Hebephilia Is Not a Mental Disorder in the DSM–IV–TR and Should Not Become One in DSM–5, 39 J. AM. ACAD. PSYCHIATRY & L. 78, 84-85 (2011) ("[T]he very preliminary studies conducted by a few research groups should not be construed to indicate that hebephilia has any solid scientific support. Hebephilia is not an accepted mental disorder that can be reliably diagnosed and should not be treated as such in SVP proceedings."); Thomas K. Zander, Adult Sexual Attraction to Early-Stage Adolescents: Phallometry Doesn't Equal Pathology, 38 ARCHIVES ON SEXUAL BEHAV. 329, 330 (2008) ("[T]here is neither a professional consensus nor a convincing body of research to support such pathologization [of attraction to adolescents].").

Ultimately, hebephilia was rejected by the American Psychiatric Association for inclusion in the DSM-5. New, 386 Ill. Dec. at 651 (citing DSM-5, supra note 1, at 685-705). Though the absence of a diagnosis from the DSM is not dispositive on the Frye issue, it is a significant consideration. Berry, 160 Wn. App. at 380-81. This is especially true where Phenix

purported to rely on the DSM-5 as legitimizing authority for her hebephilia diagnosis, despite its rejection from the DSM-5. 12RP 266-67; 13RP 498.

Further, the DSM is an "authoritative source," New, 386 Ill. Dec. at 652, that "'reflect[s] a consensus of current formulations of evolving knowledge' in the mental health field." State v. Greene, 139 Wn.2d 64, 71, 984 P.2d 1024 (1999) (quoting State v. Greene, 92 Wn. App. 80, 98, 960 P.2d 980 (1998)). The lack of inclusion in the DSM further indicates a current lack of consensus in the scientific field.

Most importantly, there is significant, ongoing debate about the validity of a diagnosis that pathologizes attraction to adolescents. Fabian, supra, at 500 (explaining various cultures accept sexual attraction to adolescents); Frances & First, supra, at 84 ("Hebephilia is not a paraphilia, because the sexual arousal pattern that would define it is not inherently deviant. Normal men have fantasies and urges in response to pubescent targets; acting on such attractions is a serious crime, not a mental disorder."); Zander, supra, at 330 (recognizing "research shows a common human male sexual response to adolescents" and "demonstrates that this male sexual response is broadly represented in cultures that sanction marriage between mature adults and adolescents, including early-stage adolescents").[4]

[4] Zander also explained "[p]hallometric evidence that some men are sexually aroused by images of early-stage adolescents no more justifies the designation of

Hebephilia's lack of inclusion in the DSM is the product of this reality. "The DSM diagnostic criteria and classification of mental disorders are applied by experts to legitimize a diagnosis as being grounded at some level in sound scientific principles." New, 386 Ill. Dec. at 651. That a paraphilic condition grounded in attraction to adolescents was rejected for inclusion after vigorous opposition in the scientific community should be dispositive.

Washington courts have not yet decided whether hebephilia requires a Frye hearing or meets the Frye standard. At a Frye hearing in In re Detention of Black, the defense expert testified there is "no consistent definition" of hebephilia. 189 Wn. App. 641, 656, 357 P.3d 91 (2015). She explained 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." Id. She further testified hebephilia is "a moving target that keeps changing," so there is no reliable method for diagnosing it. Id.

The trial court in Black concluded hebephilia is not a generally accepted diagnosis in the psychological community. Id. at 656-57. However, the court found the State's expert did not diagnose Black with

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such arousal as pathology than does phallometric evidence that some men are aroused by images of other men—even though acting on either form of arousal is illegal in many countries." Zander, supra, at 330. He therefore argued the DSM should not be amended to accommodate the "rogue diagnosticians" who make ad hoc hebephilia diagnoses to support recommending civil commitment. Id.

hebephilia, but rather with paraphilia NOS, persistent sexual interest in pubescent females, nonexclusive. Id. at 657. The court concluded this diagnosis and methodology were generally accepted in the psychological community, thus meeting Frye. Id.

On appeal, Black argued the trial court improperly admitted expert opinion testimony that he suffers from paraphilia NOS, persistent sexual interest in pubescent females, nonexclusive because this diagnosis was the same as hebephilia, and hebephilia is not generally accepted within the psychiatric and psychological communities. Id. at 655-56. The State acknowledged "whether hebephilia is a generally-accepted psychiatric diagnosis remains an open question in Washington." Id. at 657. But the State argued the diagnosis of paraphilia NOS, persistent sexual interest in pubescent females, nonexclusive is different from a hebephilia diagnosis because the latter covers adolescents in general, whereas the former applies to pubescents. Id.

Based on the conflicting record, this Court declined to decide whether hebephilia is excludable under Frye, or whether the paraphilia NOS, persistent sexual attraction to pubescent females, nonexclusive diagnosis is sufficiently distinct from hebephilia or otherwise excludable under Frye. Id. at 658. This Court noted the parties on remand would

have the opportunity to develop a better record and present other authorities to the trial court to address these issues.[5] Id.

This case has the record missing in Black. Phenix agreed her diagnosis of other specified paraphilic disorder, nonconsent was the same as a hebephilia diagnosis. 13RP 495-99. This Court should therefore squarely decide that admission of the alleged diagnosis requires a Frye hearing and fails the Frye standard.

Malone's counsel argued hebephilia "has never been and is not currently accepted as a legitimate diagnosis in the scientific community." CP 191; see also CP 198 (asserting "the validity of this diagnosis and the criteria for this diagnosis has been widely disputed in the psychological community"); 9RP 83 (arguing hebephilia "has actually been rejected in the scientific community"). Scientific evidence is inadmissible under Frye "[i]f there is a significant dispute among qualified scientists in the relevant scientific community." Gore, 143 Wn.2d at 302; see also Copeland, 130 Wn.2d at 259 ("The trial court's gatekeeper role under Frye involves by

[5] Similarly, the Washington Supreme Court in Meirhofer was faced with the argument that hebephilia is not a diagnosis generally accepted in the scientific community. In re Pers. Restraint of Meirhofer, 182 Wn.2d 632, 644-45, 343 P.3d 731 (2015). The court ultimately did not decide the issue because the State presented sufficient evidence that Meirhofer suffered from paraphilia NOS nonconsent and a personality disorder, rendering the hebephilia condition unimportant for determining whether the State met its prima facie case for continued confinement. Id. at 645.

design a conservative approach, . . . thus helping to ensure, among other things, that 'pseudoscience' is kept out of the courtroom.").

Malone establishes there is significant dispute among psychologists and psychiatrists on whether hebephilia is a valid diagnosis. The trial court therefore erred in ruling the diagnosis met the Frye standard and that no hearing was needed to resolve the issue. This Court should remand for a Frye hearing on the hebephilia diagnosis.

b. Malone's counsel was ineffective for failing to expressly request a *Frye* hearing on Phenix's hebephilia diagnosis.

Malone's trial counsel clearly asserted the diagnosis of hebephilia is not generally accepted in the relevant scientific community—the Frye standard for admission of novel scientific evidence. See, e.g., CP 191, 198; 9RP 83. This was sufficient to preserve the Frye issue for appeal. Cf. In re Det. of Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006) (finding issue waived where counsel did not object to the expert's testimony or raise a Frye issue below); State v. Newbern, 95 Wn. App. 277, 289, 975 P.2d 1041 (1999) (declining to review Frye issue where appellant did not "otherwise argue that the evidence was not accepted within the scientific community"). The State may argue, however, the issue is waived because Malone's counsel did not expressly request a Frye hearing. If the State's waiver claim has merit, then Malone's counsel was ineffective.

Individuals subject to commitment under chapter 71.09 RCW have the right to counsel, which "is meaningless unless it includes the right to effective counsel." In re Det. of Ransleben, 135 Wn. App. 535, 540, 144 P.3d 397 (2006); RCW 71.09.050(1). A claim of ineffective assistance may be raised for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

The right to effective assistance of counsel is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).[6] Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. If counsel's conduct demonstrates a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance claim. Strickland, 466 U.S. at 689. Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

[6] See also In re Det. of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012) (applying Strickland standard in chapter 71.09 RCW context)

Malone's counsel clearly sought to exclude Phenix's hebephilia diagnosis, writing a lengthy trial memorandum that included extensive scholarly research. CP 185-201. Counsel also asserted the diagnosis did not meet Frye by arguing it was not generally accepted in the relevant scientific community. CP 191, 198; 9RP 83. The State even acknowledged the diagnosis "was controversial in this field." 9RP 87. This is precisely what a Frye hearing examines. As such, there was no legitimate strategic reason for failing to expressly request a Frye hearing on the hebephilia diagnosis.[7]

Counsel's deficient performance in failing to explicitly request a Frye hearing prejudiced the outcome of Malone's trial. As established above, hebephilia is not a generally accepted diagnosis in the psychological and psychiatric communities. Only a few fringe clinicians believe it is a legitimate diagnosis. This does not meet the Frye standard. Had the trial court held a Frye hearing, it would have had no choice but to exclude Phenix's hebephilia diagnosis. As discussed in argument 2, infra, there is a reasonable probability the outcome of Malone's trial would have been different had the hebephilia diagnosis been properly excluded.

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[7] See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (counsel deficient for failing to present an available defense); State v. Ermert, 94 Wn.2d 839, 848, 850-51, 621 P.2d 121 (1980) (counsel deficient for failing to preserve error); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel deficient for failing to recognize and cite appropriate case law).

2. PHENIX'S "OTHER SPECIFIED PARAPHILIC DISORDER, NONCONSENT" DIAGNOSIS SHOULD HAVE BEEN EXCLUDED UNDER ER 702 BECAUSE IT WAS MISLEADING, UNRELIABLE, AND NOT HELPFUL TO THE JURY.

Even if the Frye test is satisfied, the trial court must determine whether expert testimony meets the two-part test under ER 702: (1) the witness is qualified as an expert and (2) the expert testimony is helpful to the trier of fact.[8] Copeland, 130 Wn.2d at 256. Expert testimony is "helpful" only if it concerns matters beyond the common knowledge of a layperson and does not mislead the jury. State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004). Likewise, "[u]nreliable testimony does not assist the trier of fact." Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 918, 296 P.3d 860 (2013). A trial court's decision to admit expert testimony is reviewed for abuse of discretion. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

Phenix diagnosed Malone with other specified paraphilic disorder, nonconsent, and believed this mental abnormality made him likely to commit acts of sexual violence if not confined in a secure facility. 12RP 265-68, 291-92, 370-71. Phenix claimed this diagnosis came from the DSM-5. 12RP 265-68. She testified the "other specified paraphilic

[8] ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

disorder" category in the DSM-5 is used "when there is an individual with an abnormal sexual arousal pattern over at least a six-month period of time and there's no specific descriptor in the paraphilia chapter." 12RP 266-67. She claimed the diagnosis "allow[s] you to essentially describe the disorder that is not listed in the DSM-5 category of paraphilias." 12RP 267. She added the descriptor of "nonconsent" because the boys were legally incapable of consenting based on their ages. 12RP 267-68; 14RP 787.

Phenix's diagnosis is misleading and unreliable for several reasons. Phenix admitted her other specified paraphilic disorder, nonconsent diagnosis was actually a hebephilia diagnosis. 13RP 497-99. But, as discussed above, hebephilia was expressly rejected for inclusion in the DSM-5. Phenix could therefore not properly rely on the DSM-5 to diagnose Malone with hebephilia. She nevertheless used the authoritative guise of the DSM to attempt to convince the jury (and the trial court) her hebephilia diagnosis was valid and accepted in the scientific community, which it is not. Put simply, Phenix attempted to cloak hebephilia in the legitimacy of the DSM's classification system.

Furthermore, the editors of the previous DSM edition, the DSM-IV-TR, made clear the paraphilia NOS[9] diagnostic category was never intended

[9] This previous version of the DSM called the other specified paraphilic disorder "paraphilia not otherwise specified." AMERICAN PSYCHIATRIC ASS'N,

to be used as a way to diagnose hebephilia in forensic settings. Frances & First, supra, at 81. "Clinicians who are currently using the miscellaneous DSM diagnosis of Paraphilia Not Otherwise Specified to pathologize adult sexual attraction to adolescents of all stages of sexual development are creating a diagnosis on an ad hoc basis." Zander, supra, at 330. Couching a hebephilia as other specified paraphilic disorder is not permitted by the DSM. It is therefore misleading, at best.

The trial court itself was misled by Phenix's other specified paraphilic disorder diagnosis. The trial admitted the diagnosis, citing Young and Berry. 9RP 86-89. But neither case is on point. The courts in those cases held *paraphilia NOS* was a valid diagnosis, not hebephilia. Young, 122 Wn.2d at 29-30; Berry, 160 Wn. App. at 381-82. The trial court therefore missed the point that Phenix did not simply diagnose Malone with other specified paraphilia disorder, but rather identified a specific sexual attraction to adolescents. 12RP 367. "Part of the debate here involves whether that diagnosis fits within the rubric of paraphilia NOS or whether the paraphilia NOS diagnosis is being misused in this context." New, 386 Ill. Dec. at 653. Young and Berry do not resolve those issues.

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4TH EDITION TEXT REVISION, DSM-IV-TR, at 576 (2000).

The "nonconsent" descriptor is further misleading and unreliable. In Young and Berry, "nonconsent" signified the individual was pathologically driven by rape and the victim's lack of consent. Young, 122 Wn.2d at 28; Berry, 160 Wn. App. at 380-81. Not so here, where it signifies only that the boys have been deemed legally incapable of consent. "Nonconsent" here means the hebephilia diagnosis will depend on the jurisdiction in which the individual committed the offenses, as the age of consent varies from jurisdiction to jurisdiction. A person who has sexual contact with a 15-year-old could have a mental abnormality and be civilly committed in one jurisdiction, yet be law-abiding and have no mental abnormality in another. Dr. Plaud explained the age of consent is 12 in Spain, 16 in Massachusetts, and 18 under federal law. 15RP 914. This illustrates one of the numerous problems with the diagnosis and the lack of reliable criteria for making it. See 15RP 917 (explaining hebephilia has "not been empirically validated").

The Young court explained what is critical "is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM." 122 Wn.2d at 28 (quoting Alexander D. Brooks, The Constitutionality and Morality of Civilly Committing Violent Sexual Predators, 15 U. PUGET SOUND L. REV. 709, 733 (1992)). Phenix did not do so here with her misleading and unreliable other

specified paraphilic disorder, nonconsent diagnosis. The trial court should have excluded the diagnosis under ER 702.

An evidentiary error is prejudicial if, within reasonable probabilities, it materially affected the trial's outcome. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). At Malone's first commitment trial, Dr. Logan diagnosed Malone solely with the mental abnormality of pedophilic disorder. 3RP 89-94. The jury hung. CP 322. At Malone's second trial, Phenix diagnosed Malone with both pedophilic disorder and hebephilia, which she couched as other specified paraphilic disorder, nonconsent. 12RP 249, 266-68. She testified both of these mental abnormalities made Malone likely to engage in predatory acts of sexual violence if not confined. 12RP 291-92, 370-71. The jury found Malone to be an SVP. CP 100; 18RP 1481.

The difference between the first trial, which resulted in a hung jury, and the second trial, which resulted in commitment, was Phenix's hebephilia diagnosis. This makes sense, because hebephilia encompassed the vast majority of Malone's victims: pubescent and postpubescent boys who fall outside the scope of pedophilia.

Post provides a useful comparison. There, Post's first trial resulted in a hung jury. 170 Wn.2d at 315. In Post's second trial, the court erroneously admitted irrelevant evidence of the treatment that would be available to Post at the SCC if he were committed. Id. at 306-07, 311. This evidence was not

introduced in the first trial. Id. at 314-15. The jury found Post was an SVP in the second trial. Id. at 308. In holding the error was not harmless, the supreme court explained "[t]his is persuasive evidence that the introduction of the evidence may have impacted the outcome." Id. at 315.

The same is true here. As in Post, it is well within the range of reasonable possibilities that improper introduction of the hebephilia diagnosis materially affected the outcome of this closely contested case. Under these circumstances, the error cannot be said to be harmless. This Court should reverse and remand for a new trial with instructions to exclude Phenix's misleading diagnosis. Id.

3. THE TRIAL COURT ERRED IN REFUSING MALONE'S JURY INSTRUCTIONS ON THE POSSIBILITY OF A RECENT OVERT ACT PETITION IF HE IS UNCONDITIONALLY RELEASED.

Under chapter 71.09 RCW and settled case law, if the jury entered a defense verdict, the State could file a new petition if it could prove Malone committed a "recent overt act" while in the community. Numerous cases show the State understands this definition and has no tactical difficulty applying it.[10] The ability to refile upon proof of a recent overt act provided the State with a substantial hammer over Malone's head to avoid reoffense.

[10] See, e.g., In re Det. of Broten, 130 Wn. App. 326, 335-36, 122 P.3d 942 (2005) (State proved "recent overt act" where Broten had, without a chaperone, parked near a playground where children were playing); In re Det. of Albrecht, 129 Wn. App. 243, 256-57, 118 P.3d 909 (2005) (State proved "recent overt act" where

As a placement condition, the possibility of a recent overt act petition was relevant for the jury to consider in determining whether Malone was likely to engage in acts of sexual violence if not confined in a secure facility. Although the evidence was properly admitted, the trial court refused to instruct the jury on the possibility of a recent overt act petition. Malone was left unable to effectively argue his theory of the case, which hampered his defense. This Court should reverse and remand for a new trial.

Jury instructions must properly inform the jury of the applicable law and allow each party to argue its theory of the case, where there is evidence to support that theory. State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). Failure to give such instructions is presumed prejudicial. Id. A new trial is required unless the State proves the error is harmless beyond a reasonable doubt. Id. at 559. A trial court's refusal to give an instruction based on an error of law is reviewed de novo. State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005).

Due process requires that, before indefinitely committing a person to a secure facility, a jury must find beyond a reasonable doubt that he is both mentally ill and presently dangerous. In re Det. of Leck, 180 Wn. App. 492, 508, 334 P.3d 1109 (2014). The State must therefore prove the individual

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Albrecht offered young boy 50 cents to follow him and attempted to grab the boy's hand).

has a mental abnormality or personality disorder that makes him "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). "Likely" means the person more probably than not will engage in predatory acts if unconditionally released from detention. RCW 71.09.020(7). In making this determination, the jury "may consider all evidence that bears on the issue," including "placement conditions or voluntary treatment options." CP 111; accord 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 365.14, at 516 (5th ed. 2005 & Supp. 2009) (WPI).

If a person is not incarcerated when the State files the commitment petition, the State must prove present dangerousness with evidence of a recent overt act. Leck, 180 Wn. App. at 508; RCW 71.09.020(7).

> "Recent overt act" means any act, threat, or combination thereof 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 or behaviors.

RCW 71.09.020(12). The State does not need to prove a recent overt act if the individual is in custody when the petition is filed. In re Det. of Hendrickson, 140 Wn.2d 686, 692, 2 P.3d 473 (2000).

Malone was in custody when the State petitioned to involuntarily commit him. CP 962. The State therefore did not need to prove he

committed a recent over act. Hendrickson, 140 Wn.2d at 692. However, "[e]vidence that a respondent in an SVP proceeding who is subsequently released could be subject to another SVP proceeding if he commits a recent overt act is relevant and is a condition that would exist upon placement in the community." Post, 170 Wn.2d at 316.

The State petitioned to commit Post under chapter 71.09 RCW while Post was still in custody. Id. at 306. Therefore, like Malone, the State did not need to prove Post committed a recent overt act. A major component of Post's defense was he had a voluntary treatment plan that would reduce the likelihood he would commit another sexually violent act if released. Id. However, the trial court prohibited Post from introducing evidence that, if released, he also could be subject to a new commitment petition if he committed a recent over act. Id. at 307.

The court of appeals affirmed, reasoning "such 'hypothetical evidence' was not evidence of conditions that would exist upon the respondent's release." Id. at 316 (quoting State v. Harris, 141 Wn. App. 673, 680, 174 P.3d 1171 (2007)). The supreme court corrected this "misapprehension" and held "the evidence is relevant and does not violate RCW 71.09.060(1)." Id. at 317. The court did not decide whether the evidence was admissible in Post's case, reasoning ER 403 issues of unfair prejudice and jury confusion were best addressed by the trial court. Id.

In correcting the court of appeals, the supreme court explained an SVP petition may be filed when "'a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.'" Id. at 316 (quoting RCW 71.09.030(1)(e)). "By its plain terms, this would apply to Post if he were released and committed a recent overt act." Id. The evidence was therefore relevant in two ways.

First, Post's knowledge of the consequences for engaging in an overt act "may well serve as a deterrent to such conduct and, therefore, has some tendency to diminish the likelihood of his committing another predatory act of sexual violence." Id. at 317. This likelihood is an element the jury must consider. Id. Second, the possibility of a recent overt act petition "is, in a literal sense, a condition to which Post would be subject if released." Id.

At trial, Malone explained that, if released, he would go to his community corrections officer (CCO) and "make sure that I know what the conditions are for my community placement." 11RP 179. Malone also acknowledged that if he started using substances or offending again, he "would go back to prison." 11RP 185.

CCO Christopher Ervin supervises released sex offenders and testified at trial. 17RP 1213-14. He explained the conditions Malone would be subject to upon release, including urinalyses to monitor his drug use and

no contact with minors. 17RP 1250. He also explained Malone could be subject to full confinement again if he committed a recent overt act. 17RP 1251. He acknowledged a recent overt act was "anything that created an apprehension of harm based on someone knowing what he's done in the past" and "can result in him being civilly committed again." 17RP 1252. Ervin further agreed if Malone "were released after this trial" and, for instance, went to a youth center near the Boylston House, "he could potentially have a new petition filed on him." 17RP 1251-52.

Based on this testimony and pursuant to Post, Malone proposed the following jury instructions:

> Placement conditions that do exist in the community is the fact the state may file a new Petition charging Calvin Malone as a sexually violent predator if it learns he has committed a "recent overt act."
>
> A "recent overt act" means any act, threat, or combination thereof 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 or behaviors.[]

CP 172.

The State claimed instructing the jury about the possibility of a recent overt act petition would be misleading because it is not "an actual specific-to-him placement condition that [Malone] can argue mitigates his dangerousness." 17RP 1364. This argument conflicts with Post, which held

the possibility of a recent overt act petition "is, in a literal sense, a condition to which [Malone] would be subject if released." 170 Wn.2d at 317.

The trial court acknowledged evidence of the possibility of a recent overt act petition was admissible under Post. 17RP 1366. The court further acknowledged it was "certainly . . . something that came up during the course of the trial." 17RP 1366. However, the court refused to give the requested instructions, stating "I'm concerned, amongst other things, it's a comment on the evidence for me to say." 17RP 1366.

This refusal was an error of law. Malone's first proposed instruction is consistent with Post. A placement condition of Malone's release is that he could be subject to a new SVP petition if he committed a recent overt act. Post, 170 Wn.2d at 316-17. Ervin testified to this and Malone explained the conditions of release would deter him from reoffending. 11RP 179-85; 17RP 1251-52. Malone's second proposed instruction defining "recent overt act" is taken verbatim from the statutory definition in RCW 71.09.020(12). The instructions would "properly inform the jury of the applicable law." Irons, 101 Wn. App. at 549. There was no legal basis to deny the instructions.

The court was mistaken that the proposed instructions would comment on the evidence. A judge impermissibly comments on the evidence by instructing the jury "that matters of fact have been established as

a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). For instance, the trial court commented on the evidence in Becker where language in a special verdict form resolved a factual dispute about whether a youth program constituted a school. Id. at 64-65.

By contrast, whether Malone could be subject to a recent overt act petition if released is not a question of fact; it is a matter of law. The State is authorized by statute to file a commitment petition if a person previously convicted of a sexually violent offense has been released from total confinement and commits a recent overt act. RCW 71.09.050(1). "By its plain terms," this would apply to Malone if he were released and committed a recent overt act. Post, 170 Wn.2d at 316. To instruct the jury Malone would be subject to such a petition does not remove a factual decision from the jury—it properly informs the jury of applicable law.

Without the instructions, Malone's counsel was left attempting to argue it to the jury without proper guidance. In closing, Malone's counsel pointed to the conditions of Malone's two-year community custody. 18RP 1434. Counsel explained "it's not like in two years, the supervision, he will suddenly be in no man's land." 18RP 1433. Instead, counsel emphasized,

> [F]or the rest of his life he will be subject to the recent overt act. And Mr. Ervin explained to you a little bit what that is. He said you don't even have to attempt a sex crime. If you are in the neighborhood and loitering around the Lambert House, that's a recent overt act. He'd go back.

18RP 1434. Malone's counsel had to define "recent overt act" for the jury, again emphasizing "hanging outside the Lambert House where the teens go, recent overt act." 18RP 1438-39.

Malone's defense was hamstrung by lack of instruction on the possibility of a recent overt act petition. Without his requested instructions, the jury had no guidance for how to examine that evidence. Nor was the jury instructed it could even consider the recent overt act evidence. The defense "is entitled to a correct statement of the law and should not have to convince the jury what the law is." Thomas, 109 Wn.2d at 228; accord State v. Acosta, 101 Wn.2d 612, 621-22, 683 P.2d 1069 (1984).

Further, the jury was instructed to "disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you." CP 103. Jurors are presumed to follow the court's instructions. State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). Malone's argument that he would be subject to a recent overt act petition as a condition of release was not supported by law contained in the jury instructions. This Court must therefore presume the jury disregarded it, even though it was a proper argument under Post.

The State exacerbated the prejudice in closing. One of the State's themes was the community custody conditions and Malone's release plan

were inadequate to deter him from reoffending. For instance, the State emphasized Malone would be on community supervision for only two years. 18RP 1408. The State argued "Mr. Malone has extremely limited conditions of supervision . . . There's very little that a community corrections officer can do with Mr. Malone other than give him urinalysis samples. So you need to bear that in mind." 18RP 1407.

Similarly, in rebuttal, the State argued Malone would be subject only to the community custody conditions enumerated in his 1992 judgment and sentence: "Nothing else other than what's written on here can happen." 18RP 1449. Malone's counsel objected, but the trial court overruled and said, "I've instructed the jury on the law." 18RP 1449. In fact, the court had not. The State then misrepresented this law—Malone would not be subject solely to community custody, but also to a subsequent commitment petition if he committed a recent overt act. The deficient jury instructions did nothing to correct this misrepresentation.

A recent overt act petition is a placement condition Malone would be subject to for the rest of his life if released. He was entitled to jury instructions that allowed him to argue his that this would diminish the likelihood of reoffense. There was no legal or factual basis for the trial court to deny Malone's requested instructions. Malone had a due process right to present a defense and respond to the State's theory that there were no

effective restrictions on his conduct if released. U.S. CONST. amends. V, XIV; WASH. CONST. art. 1, § 3; Washington v. Texas, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Because the instructional error was prejudicial, this Court should reverse and remand for a new trial before a properly instructed jury. Irons, 101 Wn. App. at 559.

4. MALONE WAS DENIED A FAIR TRIAL BECAUSE THE STATE PURPOSEFULLY DISPARAGED THE DEFENSE IN REBUTTAL.

The state and federal constitutions guarantee the right to due process and a fair trial. U.S. CONST. amend. XIV; WASH. CONST. art. 1, § 3. Prosecutorial misconduct can deny that right. Dye v. Hofbauer, 546 U.S. 1, 4-5, 126 S. Ct. 5, 163 L. Ed. 2d 1 (2005). A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). A prosecutor also has a special duty to act impartially in the interests of justice and not as a heated partisan. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). He may "strike hard blows, [but] he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935).

A prosecutor's improper comments violate the right to a fair trial when there is a substantial likelihood they affected the jury's verdict. Reed, 102 Wn.2d at 145; see also In re Detention of Law, 146 Wn. App. 28, 50,

204 P.3d 230 (2006) (applying prosecutorial misconduct rules to chapter 71.09 RCW proceedings). Reversal is required, even without defense objection, when the prosecutor's misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Prosecutors may properly argue the evidence does not support the defense theory. State v. Lindsay, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). "However, a prosecutor must not impugn the role or integrity of defense counsel. Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." Id. at 431-32 (citations omitted). It is likewise impermissible "for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant." Id. at 437.

The Lindsay court held the prosecutor improperly impugned defense counsel where he argued, "'This is a crock. What you've been pitched for the last four hours is a crock.'" Id. at 433 (quoting VRPs). The term "crock" implied deception and dishonesty. Id. The prosecutor further argued co-defendant Holmes's testimony was "'the most ridiculous thing I've ever heard.'" Id. at 438 (quoting VRPs). These comments were targeted both at defense counsel's closing argument and Holmes's testimony, "because the

two are to some degree inseparable." Id. They were also "an obvious expression of personal opinion as to credibility." Id.

Similar disparagement occurred in State v. Thorgerson where the prosecutor characterized the defense as "bogus" and involving "sleight of hand." 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011). A prosecutor's argument was likewise improper where he described defense counsel's argument as a "'classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.'" State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (quoting VRPs).

Disparagement of the defense began in closing argument when the State impugned Malone's counsel by name, "And while Ms. Forde tried to say these aren't changeable factors for Mr. Malone --." 18RP 1389. Defense counsel objected, but the trial court overruled. 18RP 1389.

Disparagement then became the theme of the State's rebuttal. The assistant attorney general (AAG) began:

> So Mr. Malone's presentation of evidence and his closing argument consist of little more than misdirection, idle truths, half truths, and lots of evidence of selective listening as to what happened during the last two and a half weeks. And until I heard the argument I thought it was just limited to Mr. Malone and Dr. Plaud that those two things were true.

18RP 1444. This blatant disparagement is remarkably similar to and just as offensive as Lindsay. By referring to the "presentation of evidence" and "closing argument," the AAG was plainly referring to Malone's attorneys. The second sentence purposefully targets "misdirection, idle truths, half truths," and "selective listening" at Malone's attorneys, with the intent to make them seem deceitful. The statement also expresses a personal opinion on Malone's and Dr. Plaud's credibility, like in Lindsay.

Disparagement of the defense and personal opinions on the credibility of defense witnesses did not end there. The AAG referred to defense counsel's "misdirection" in her closing argument that older individuals reoffend less often and argued she "misrepresented" data on closing slides. 18RP 1446-47. Similarly, referring to Dr. Plaud's testimony, the AAG argued, "So that's another example of misdirection." 18RP 1450.

Then, near the end of rebuttal, the AAG stated:

> [T]his is a quote that I happen to like. It says, one of the saddest lessons of history is this. If we've been bamboozled long enough we tend to reject any evidence of the bamboozle. We're no longer interested in finding out the truth. The bamboozle has captured us. It's simply too painful to acknowledge even to ourselves that we've been had. Once you give a charlatan power over you, you almost never get it back.

18RP 1462. The State claimed this quote "accurately describes Mr. Malone's life," but it was also clearly aimed at defense counsel, given the theme of the State's rebuttal. 18RP 1462.

"Bamboozle" means "to conceal one's true motives from esp. by elaborately feigning good intentions so as to gain an end or achieve an advantage : MISLEAD, HOODWINK." WEBSTER'S THIRD NEW INT'L DICTIONARY 169 (1993). "Charlatan" means "a pretender to medical knowledge : QUACK" and "one making esp. noisy or showy pretenses to knowledge or ability : FRAUD." WEBSTER'S, supra, at 378. These words, quite literally, mean deceit and deception, just like "crock" in Lindsay. They are also similar to Thorgerson, where the State's theme in closing was "[t]he entire defense is sl[e]ight of hand." 172 Wn.2d at 451. Here, the State's theme was the entire defense was misdirection, fraud, and lies.

Defense counsel's initial objection to the State's disparagement was overruled, indicating there would be no relief from the trial court. The State then built its entire rebuttal around disparagement of the defense. Calling the defense case "misdirection, idle truths, half truths, and lots of evidence of selective listening" was flagrant and ill-intentioned.[11] 18RP 1444. It was

[11] Given the resources necessary to pursue the State's petition, the length of the first and second trials, and the fact that the first trial resulted in a hung jury, it is disappointing—albeit not entirely surprising—that counsel for the State would decide to push past the boundaries of proper argument in seeking a verdict of commitment.

purposefully intended to impugn Malone's attorneys and Malone himself, "because the two are to some degree inseparable." Lindsay, 180 Wn.2d at 438. The State then went even further, arguing the jury had been "bamboozled" by Malone and his attorneys, calling Malone a "charlatan." 18RP 1462. This not only maligned Malone's attorneys, but constituted a personal opinion on Malone's credibility. The State's rebuttal argument easily rises to the level of the offensive conduct in Lindsay.

The Lindsay court held such blatant, childish disparagement of the defense was highly prejudicial and necessitated a new trial. Lindsay, 180 Wn.2d at 443. The court recognized the "cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Id. (quoting In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). Furthermore, "comments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice." Id. In Linsday, the prosecutor made his improper comments, including the "crock" statement, during rebuttal, "increasing their prejudicial effect." Id.

This case was all about the credibility of Malone's defense. Malone testified at length about his great remorse, his sobriety and release plan, his Buddhism and mindfulness practice, and how he did not believe he would reoffend. 11RP 186. Dr. Plaud opined Malone did not suffer from

pedophilic disorder, but rather cognitive distortions that Malone had successfully addressed through treatment and sobriety. 15RP 892-901, 935-39. Fourteen witnesses came forward to offer their belief in Malone and pledge to support him in the community, including the SCC chaplain and CASH counselor. There was substantial evidence Malone had transformed himself remarkably over his 20-year sentence—evidence that could easily persuade a rational juror to doubt the State's case.

The outcome of the case therefore hinged on whether the jury believed the defense case that Malone was sufficiently rehabilitated and would not reoffend. The State unfairly undermined that with pervasive and insulting disparagement of the defense. He called into question not only Malone's and Plaud's credibility, but also the integrity of Malone's attorneys and the defense they had mounted. The record demonstrates the trial court would not have given a curative instruction has one been requested and, regardless, it could not have erased the resulting prejudiced.

The State's flagrant and ill-intentioned misconduct deprived Malone of his due process right to a fair trial. This Court should reverse and remand for a new trial. Lindsay, 180 Wn.2d at 444.

5. THE TRIAL COURT ERRED IN REFUSING TO INVESTIGATE NUMEROUS ALLEGATIONS OF JUROR MISCONDUCT, NECESSITATING REMAND FOR AN EVIDENTIARY HEARING.

Numerous allegations of juror misconduct came to light after Malone's trial, including a sleeping juror, jurors announcing they had made up their minds on the third day of a two week trial, and deliberations proceeding without all jurors present. Each of these instances, standing alone, could warrant a new trial, and together they almost certainly do. Yet the trial court failed to investigate these allegations, despite a continuing obligation. This Court should remand for an evidentiary hearing for the trial court to determine the extent and prejudice of this juror misconduct.

The federal and state constitutions provide that the right to trial by jury shall be preserved and remain inviolate. In re Det. of Broten, 130 Wn. App. 326, 336, 122 P.3d 942 (2005) (citing U.S. CONST. amend. VII; WASH. CONST. art. I, § 21). The right to trial by jury "means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." Id. This right "is compromised when the trier of fact is unable to render a disinterested, objective judgment." United States v. Thompson, 744 F.2d 1065, 1068 (4th Cir. 1984). "Clearly, such a jury must be composed of members who not only are free of bias in favor of or against a particular party but are also able,

in a more basic sense, to carry out their function." United States v. Brothers, 438 F.3d 1068, 1071 (10th Cir. 2006).

CR 59(a)(2) authorizes the trial court to vacate a verdict and grant a new trial when juror misconduct materially affected the rights of the parties. "[S]uch misconduct may be proved by the affidavits of one or more of the jurors." CR 59(a)(2). In Washington, the dismissal of an unfit juror is governed by statute:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110. This statute places "a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000).

Juror misconduct is presumed prejudicial. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). The State must demonstrate "it is unreasonable to believe the misconduct could have affected the verdict." Id. "Any doubt that the misconduct affected the verdict must be resolved against the verdict." State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). A new trial is required unless the reviewing court "is satisfied beyond a

reasonable doubt that the extrinsic evidence did not contribute to the verdict." Boling, 131 Wn. App. at 333.

a. Relevant facts

The jury reached a verdict on July 30, 2014. CP 100. On August 7, the trial court notified the parties it had "received information which is appropriate to provide counsel," and set a hearing date for September 5. Supp. CP__ (Sub. No. 293, Letter to Counsel Setting Hearing Date). At the hearing, the court informed the parties a juror filled out an exit questionnaire describing several instances of juror misconduct. 19RP 3-6.

The juror wrote in the questionnaire:

> The judge gave us several admonishments including:
>
> No discussion of any aspect of trial with ANYONE even amongst jurors until it goes to deliberation; No research, no mention on social media
>
> No gum chewing in court (**no mention of hard candy which one of our jurors crunched on was distracting**)
>
> I would also suggest: NO SLEEPING DURING TESTIMONY or maybe the question could be asked in Voir Dire if anyone has a problem staying awake during the day. The same "candy crunching" juror works a night shift and had trouble staying awake.
>
> The aforementioned juror also admitted (after everything was over) that he had done some research on some aspect of the case **during the trial**. Don't know how this can be controlled.

> **My experience with this juror in particular and the fact that a couple of the jurors by the third day of a two week trial, commented that they had heard enough "my mind is made up"** has made me believe that being judged by a jury of one's peers is risky
>
> . . . .
>
> Discussions cannot proceed if all jurors are not present. I brought this to the presiding juror's attention when a juror had to use the bathroom in the middle of a discussion. But this was brushed off saying "it doesn't matter[.]"

CP 95. The court acknowledged it "reminded [the jurors] at virtually every recess, even when we were sending them in for 15-minute breaks, don't discuss the case, don't do any research." 19RP 10. Malone moved for a new trial or, alternatively, for the trial court to hold a fact-finding hearing to determine the full nature and extent of the alleged misconduct. CP 84-87. The court ordered the parties not to contact any of the jurors and scheduled a hearing to speak with the complaining juror. 19RP 11-12.

Malone's counsel proposed several questions of the complaining juror, Shirley Mukhar, about the alleged misconduct. CP 81-82. The court, however, refused to ask Mukhar about any of the alleged misconduct except the juror who conducted outside research. 21RP 12-21. At a hearing, Mukhar explained the "sleeping juror" told the rest of the jury after they returned a verdict, "I have to admit I did some research." 22RP 9-10. The

sleeping juror did not say what research he did or when he did it. 22RP 10. Mukhar did not testify to anything else. 22RP 8-12.

The court then called in the sleeping juror, Thomas Reilly, to testify. 23RP 10. Reilly admitted to looking up Malone's book online during the trial, explaining he was curious about it. 23RP 11-13. Reilly could not remember exactly which website he visited, but said it contained reviews of the book. 23RP 13, 18. He did not believe he shared his research with any other jurors. 23RP 19. He could not remember exactly what he read online, but claimed "[p]retty much what I read is what I heard in court." 23RP 20. The court did not ask Reilly about sleeping during trial and did not call any other jurors to testify. 23RP 10-26; 24RP 3.

Malone moved for a new trial based on Reilly conducting outside research during trial. CP 1-10; 24RP 9-11. The trial court agreed Reilly "did engage in misconduct." 24RP 21. The court explained, "I can't even begin to express how distressed the Court is that this juror did this." 24RP 25. However, the court continued: "I'm not satisfied, though, and the evidence doesn't show me that this juror learned anything that hadn't been presented to him during the court of the trial. It would be speculative of me to find that he had." 24RP 25. Accordingly, the court was "satisfied beyond a reasonable doubt that his actions, although improper, could not have affected his deliberation and his verdict." 24RP 27. The court denied

Malone's motion for a new trial, without conducting any further investigation into the other allegations of juror misconduct. 24RP 27.

b. A juror who sleeps during trial is unfit and unable to decide the case based on the evidence presented.

In Jorden, the trial court excused a juror who fell asleep several times during trial. 103 Wn. App. at 224-25. Because the juror did not hear all the evidence presented, her fitness was compromised, and the trial judge was required to dismiss her under RCW 2.36.110 and CrR 6.5.[12] Id. at 230. The judge did not need to individually question the juror before dismissing her, because he allowed both parties to call witnesses, heard argument from both sides, and considered his own notes about the juror's conduct. Id. at 227.

By contrast, in United States v. Barrett, after the trial court instructed the jury but before deliberations began, a juror asked to be removed from the panel because he had been sleeping during trial. 703 F.2d 1076, 1082 (9th Cir. 1983). The court refused to dismiss the juror, believing it did not have authority to do so. Id. After the jury returned a guilty verdict, Barrett filed a motion to permit the defense to interview the sleeping juror. Id. The trial court denied the motion without conducting any investigation, finding "there was no juror asleep during this trial." Id.

[12] CrR 6.5 specifies, in part: "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the jurors place on the jury."

The Ninth Circuit did not believe "that under the particular circumstances of this case, the trial judge could properly take judicial notice of the fact that 'there was no juror asleep during this trial' without making further inquiry into the matter." Id. at 1083. Trial courts have "considerable discretion in determining whether to hold an investigative hearing on allegations of jury misconduct and in defining its nature and extent." Id. However, "in failing to conduct a hearing or make any investigation into the 'sleeping'-juror question, the trial judge abused his considerable discretion in this area." Id. The Ninth Circuit held remand was necessary for the trial court to hold a hearing on whether the juror was sleeping during trial and, if so, whether it denied Barrett a fair trial.[13] Id.

In Jorden, the juror was removed before deliberations began and replaced with an alternate. 103 Wn. App. at 229. The issue of whether her

[13] State appellate courts have reached the same conclusion where the trial court fails or refuses to investigate a sleeping juror. See, e.g., Commonwealth v. Braun, 74 Mass. App. Ct. 904, 905, 905 N.E.2d 124 (2009) ("[W]e conclude that the judge abused his discretion by failing to conduct a voir dire where there was a very real basis for concluding that the juror was sleeping during testimony and the judge's instructions, thereby calling into question that juror's ability to fulfil her oath to try the issues according to the evidence."); People v. South, 177 A.D.2d 607, 608, 576 N.Y.S.2d 314 (1991) ("[T]he court should have granted the defendant's request and conducted a probing and tactful inquiry to determine whether juror number 9 was unqualified to render a verdict based upon her apparent sleeping episodes."); State v. Hampton, 201 Wis. 2d 662, 673, 549 N.W.2d 756 (1996) ("[W]e conclude that the responsibility of the trial court to assure the impartiality of the jury and due process is of such paramount importance that when it is conceded that a juror was sleeping, summarily foreclosing further inquiry is an erroneous exercise of trial court discretion.").

misconduct prejudiced Jorden's right to a fair trial was therefore premature. Id. The Jorden court recognized, however, that the allegation of the sleeping juror in Barrett, "if true, prejudiced Barrett's right to a fair trial," because "he was convicted by a jury that included one member who had not heard all the evidence." Id. at 228.

Barrett is on point. In her exit questionnaire, Mukhar wrote the same juror, Reilly, who did outside research, was also sleeping during testimony. CP 95. She explained he worked a night shift and had trouble staying awake during trial. CP 95. This was a credible allegation, considering Mukhar's allegation of Reilly's outside research was proven true. The trial court had an obligation to investigate this allegation. At the very least, the trial court should have allowed the parties to investigate the allegation or obtain an affidavit from Mukhar. Hampton, 201 Wis. 2d at 673. Because the sleeping juror participated in deliberations, Malone's right to a fair trial could have been compromised. Jorden, 103 Wn. App. at 228. The trial court's failure to investigate the credible allegation of a sleeping juror was therefore an abuse of discretion.

This Court should remand for the trial court to conduct an evidentiary hearing to determine the extent of the juror's inattentiveness, the importance of the testimony missed, and whether such inattention, combined

with his outside research, prejudiced Malone to the extent he did not receive a fair trial. See Hampton, 201 Wis. 2d at 673.

c. The right to a unanimous jury verdict requires deliberations to proceed only when all 12 jurors are present.

Individuals facing involuntary commitment under chapter 71.09 RCW are entitled to a unanimous jury verdict. RCW 71.09.060(1); In re Det. of Young, 122 Wn.2d 1, 48, 857 P.2d 989 (1993) ("[W]e find that the Legislature included the need for a unanimous verdict when it required 'proof beyond a reasonable doubt' in the statutory scheme."); In re Det. of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006) (holding "that unanimity rules are applicable in SVP cases").

An essential element of this right is the "jurors must reach their consensus through deliberations which are the common experience of all of them." State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389 (1979) (emphasis added) (citing People v. Collins, 17 Cal. 3d 687, 552 P.2d 742 (1976)). Thus, "unanimity" is not just all 12 jurors coming to agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is insufficient.

The Washington Supreme Court recently concurred with the California Supreme Court's description of how a constitutionally correct unanimous jury verdict is reached and how it is not:

> "The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint."

State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting Collins, 17 Cal. 3d at 693).

This heightened degree of unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew. State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60, 70 (1993). In Ashcraft, the jury deliberated for a time before the trial court replaced one of the jurors with an alternate. Id. at 450. The court did not instruct the reconstituted jury on the record to begin deliberations anew after seating the alternate. Id. at 451.

This Court held it was "reversible error of constitutional magnitude to fail to instruct the reconstituted jury on the record that it must disregard all prior deliberations and begin deliberations anew." Id. at 464. "An appellate court must be able to determine from the record that jury unanimity has been preserved." Id. at 465. Because the State failed in its burden to show beyond a reasonable doubt that the error was harmless,

this Court reversed and remanded for trial. Id. at 466-67; see also State v. Blancaflor, 183 Wn. App. 215, 228-29, 334 P.3d 46 (2014) (same).

Mukhar's exit questionnaire indicates Malone's jury was properly instructed it could not deliberate unless all 12 jurors were present and participating. CP 95. Mukhar explained she "brought this to the presiding juror's attention when a juror had to use the bathroom in the middle of a discussion. But this was brushed off saying 'it doesn't matter[.]'" CP 95; see also 20RP 13 (Malone expressing concern and wanting to investigate the allegation that the jury "deliberated while one of them was gone").

This strongly suggests deliberations took place when fewer than 12 jurors were present. If so, the verdict was not the product of "the common experience" of all the jurors. Fisch, 22 Wn. App. at 383. If even just one of the jurors was deprived of deliberations shared by the other 11, then the resulting verdict is not "unanimous." Lamar, 180 Wn.2d at 585; Collins, 17 Cal. 3d at 693. As this Court held in Ashcraft, it must be clear "from the record that jury unanimity has been preserved." 71 Wn. App. at 465. Given the Mukhar's exit questionnaire, the record is not clear deliberations occurred *only* when all 12 jurors were present. Remand for an evidentiary hearing is necessary.

d. The jurors who announced they made up their mind before the end of trial demonstrated an unwillingness and inability to follow the court's instructions.

Mukhar also reported "a couple of the jurors by the third day of a two week trial, commented that they had heard enough 'my mind is made up.'" CP 95. This is plainly contrary to the law contained in the jury instructions, which specify: "Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it." WPI 365.01 (read to the jury after voir dire). Similarly: "Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation." WPI 365.01 (same). Before deliberating, the jury is likewise instructed: "As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors." WPI 365.02.

The trial court refused to investigate this alleged misconduct, believing it inhered in the verdict. 21RP 12-20; 22RP 3. The court was mistaken. A juror's testimony inheres in the verdict if "'the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him.'" State v. Crowell, 92 Wn.2d 143, 146, 594 P.2d 905 (1979) (quoting

Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962)). However, "'[i]t can be considered if 'that to which the juror testifies can be rebutted by other testimony without probing a juror's mental processes.'" Id. (quoting Gardner, 60 Wn.2d at 841). Probing into the jurors' reasoning for making up their minds so early might inhere in the verdict. However, by announcing to the rest of the jury they had already made up their minds, the jurors violated the law and demonstrated their inability to follow the court's instructions, which does not inhere in the verdict.

Federal courts hold a trial court properly dismisses a juror who demonstrates an inability or unwillingness to follow the court's instructions. For instance, in United States v. Augustin, the jury foreperson informed the trial court that one juror already "made up her mind well in advance of deliberations." 661 F.3d 1105, 1130 (11th Cir. 2011). The trial court found the juror "violated her oath and duty . . . to follow the Court's instructions on the law and apply the law to the evidence or lack of evidence." Id. at 1132 (internal quotation marks omitted). Her replacement with an alternate was therefore proper. Id. In United States v. Cabrera-Beltran, trial court properly dismissed prospective jurors who indicated they might not be unable to accept court-approved translations. 660 F.3d 742, 750 (4th Cir. 2011).

Similarly, in Thompson, the trial court refused to declare a mistrial when a juror became upset after seeing a photo of the deceased victim and

then gave equivocal responses about his ability proceed with an open mind. 744 F.2d at 1067-68. The Fourth Circuit held the trial court abused its discretion in proceeding with trial instead of replacing the juror with an alternate. Id. at 1068. "[T]he right to an impartial jury dominated all other considerations, and [the juror's] equivocal responses to the court's questions so compromised the defendants' right to an impartial jury that they outweighed any concerns about the expense of a mistrial." Id. at 1069.

The behavior alleged above demonstrates Malone's trial was plagued with rampant juror misconduct, potentially denying him a fair trial and a unanimous verdict by an impartial jury. Jurors repeatedly and willfully disregarded the court's instructions. The trial court had a continuing duty to investigate this alleged misconduct, which it refused to do. The cases discussed above show this refusal is an abuse of discretion. This Court should accordingly remand for an evidentiary hearing to the trial court to determine the scope and prejudice of the juror misconduct.

6. CUMULATIVE ERROR DEPRIVED MALONE OF HIS RIGHT TO A FAIR TRIAL.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the accused a fair trial. State v. Coe, 101 Wn2.d 772, 789, 684 P.2d 668 (1984); In re Det. of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012).

Each of the individual errors described above was prejudicial and many were intentional. Courts must "closely examine[]" the State's claim that an error is harmless when it "results from the deliberate effort of the prosecution to get improper evidence before the jury." State v. Aaron, 57 Wn. App. 277, 282, 787 P.2d 949 (1990). This Court has recognized trained and experienced prosecutors do not toy with the threat of appellate reversal unless they believe such tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996).

Further, the errors cumulatively prejudiced Malone by emphasizing the State's pervasive themes: Malone was an untreated sex offender; he was manipulative, his defense a misdirection and his defense attorneys dishonest, and the conditions of his release inadequate. The cumulative effect of these errors deprived Malone of a fair trial. This Court should reverse and remand for a new trial. Coe, 101 Wn2.d at 789.

7. APPELLATE COSTS SHOULD NOT BE IMPOSED.

If Malone does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. This Court held in State v. Sinclair that RCW 10.73.160(1)[14] and RAP 14.2 gives appellate courts discretion to deny the State's request for costs when an indigent criminal

[14] RCW 10.73.160(1) specifies appellate courts "may require an adult . . . to pay appellate costs." (Emphasis added.)

defendant does not substantially prevail on appeal. State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). This court explained "[i]t is entirely appropriate for an appellate court to be mindful of" the hardships LFOs inflict on indigent individuals. Id. at 391 (discussing State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)). "Carrying an obligation to pay [an appellate cost bill] plus accumulated interest can be quite a millstone around the neck of an indigent offender." Id. The Sinclair court accordingly denied the State's request for appellate costs. Id. at 393-94

Costs are available to the State when an individual appealing his involuntary commitment under chapter 71.09 RCW does not substantially prevail. RAP 14.3(a) specifies "statutory attorney fees and the reasonable expenses actually incurred by a party . . . may be awarded to a party as costs." (Emphasis added.) RCW 4.84.080 specifies: "When allowed to either party, costs to be called the attorney fee, shall be as follows: . . . (2) In all actions where judgment is rendered in the supreme court or the court of appeals, after argument, two hundred dollars."

RAP 14.3(a) and RCW 4.84.080 do not mandate the award of costs to the state. Rather, RAP 14.3(a) provides only that appellate costs "may" be awarded. "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Similarly, RCW 4.84.080 nowhere specifies appellate courts must impose the attorney

fee or that the fee cannot be waived.[15] RCW 4.84.080 mandates only the amount of attorney fees awardable—it does not mandate their award.

In Sinclair, this Court denied the State's request for costs because Sinclair was a 66-year-old man serving a minimum sentence of more than 20 years. 192 Wn. App. at 393. "There is no realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs." Id.

The same is true here. At the time of filing this brief, Malone is 65 years old, with high blood pressure and hepatitis C. CP 1362; 13RP 587-88. He has been committed indefinitely to the SCC. It is very possible he will live out the remainder of his life there. Even if he is released from full confinement, he has a significant, sexually violent criminal history that will severely hamper his ability to find employment. Furthermore, he has been incarcerated since 1992, leaving him without many modern technological skills that are necessary for employment in this day and age. CP 1462. Of the small amount of royalties has he received from book sales, he has donated almost all of it to Buddhist organizations and individuals being

[15] Compare RCW 4.84.080, with RCW 7.68.035 ("When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." (Emphasis added.)), and RCW 43.43.7541 ("Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." (Emphasis added.)).

released from prison. 11RP 176-78. Like Sinclair, there is no realistic possibility that he will be able to pay appellate costs.

For all these reasons, this Court should not assess appellate costs against Malone in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the reasons stated above, this Court should reverse Malone's commitment and remand for a new trial, with instructions to either exclude the hebephilia diagnosis under ER 702 or hold a Frye hearing. Alternatively, this Court should remand for an evidentiary hearing to determine the scope and prejudice of the additional juror misconduct.

DATED this 5th day of July, 2016.

Respectfully submitted,

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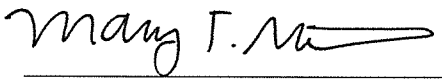

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