Supreme Court No. _____
COA No. 84214-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of

SHAWN SKELTON,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

The State sought to indefinitely confine Shawn Skelton under Chapter 71.09 RCW based on unreliable and unproven hearsay. The court permitted the State's expert to testify to extensive and detailed hearsay about an unfounded claim that Mr. Skelton twice forcibly raped his ex-girlfriend. His ex-girlfriend did not testify and never reported such allegations to police. Her untested, uncorroborated out-of-court statements were inadmissible. But the court construed evidence rules for expert testimony to circumvent hearsay rules and permit consideration of these unreliable allegations.

This Court should accept review to join other supreme courts across the county in rejecting this fundamentally unfair practice and to prevent using expert testimony to evade protections against unreliable hearsay evidence.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Shawn Skelton asks this Court to accept review of the Court of Appeals decision terminating review. Opinion (Feb. 18, 2025); Order Denying Reconsideration (Mar. 13, 2025). RAP 13.3(a)(1); RAP 13.4(b)(1)-(4).

C. ISSUES PRESENTED FOR REVIEW

1. Due process and the rules of evidence prohibit courts from admitting unreliable evidence at trial. Evidentiary rules that permit expert witnesses to testify about otherwise inadmissible hearsay evidence under the guise of explaining their opinions allow parties to circumvent these important constitutional and evidentiary protections. This Court should accept review to follow the lead of other states and categorically prohibit such unreliable evidence, particularly when it does not bear sufficient indicia of reliability. RAP 13.4(3)-(4).

2. Even under this Court's current caselaw interpreting expert testimony, due process and the rules of evidence prevent

courts from admitting unreliable evidence at trial and require courts to weigh the prejudicial impact of any evidence before admitting it. Here, the court permitted the State's expert to testify to extensive and detailed hearsay that Mr. Skelton twice forcibly raped his ex-girlfriend, despite its scant probative value and overwhelming undue prejudice. These out-of-court statements were not corroborated, never tested, and were unreliable. Mr. Skelton was denied a fair trial when the State's expert testified about these unreliable, unproven, and inflammatory out-of-court statements. This Court should accept review to stop the presumptive application of ER 703 and 705 to bypass hearsay rules and evade reliability concerns. RAP 13.4(b)(1)-(2).

3. Washington's robust open courts doctrine protects the public's interest in accessing court proceedings and filings. This Court interprets article I, section 10's broad protections to prohibit redactions of names in court filings, absent satisfaction

of the *Ishikawa*[1] factors and compliance with GR 15. The Court of Appeals violated these provisions and ignored this Court's precedent by sua sponte redacting the name of a witness in its opinion. RAP 13.4(1)-(4).

D. STATEMENT OF THE CASE

Shawn Shelton grew up in poverty in a "very dysfunctional," chaotic, and neglectful environment. RP 1023, 1309-10. His unstable, verbally abusive mother was mentally ill and provided little supervision. RP 857-59, 1308-10. Mr. Skelton was exposed to pornography as a child and eventually became "sexually preoccupied." RP 713, 1030-31. He started exposing himself to others as a child, a behavior he continued into adulthood. RP 718-26, 745-48.

As an adult, Mr. Skelton had two long term romantic relationships, but he also engaged in anonymous sex with strangers. RP 685-92. Mr. Skelton enjoyed consensual rough

[1] *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

sex and sought willing partners through Craigslist postings or random encounters. RP 689-713. Mr. Skelton explained he was aroused by forcible oral sex where people "have a choice" and "they have chosen to participate in this." RP 1587.

In 2009, Mr. Skelton posted an advertisement on Craigslist looking for a woman who would let him have sex with her and then "kill her" as he ejaculated. Ex.6. He invited responses from "Serious inquiries only please." Ex.6. After Craigslist referred the posting to police, Detective Harry James, posing as a pimp, responded to the posting. RP 556-61, 607-10.

Although Mr. Skelton solicited a willing participant, Detective James responded to the ad by offering Mr. Skelton "a girl working for me." Ex.5. Detective James told Mr. Skelton he did not trust her and suggested Mr. Skelton use her. Ex.5; RP 610. Mr. Skelton answered, "I wrote the ad with the intention of finding a girl who actually WANTED it." Ex.5. Despite Mr. Skelton's desire to find a willing partner, he ultimately agreed to Detective James's ruse in exchange for

payment. Ex.5. When Mr. Skelton arrived at the arranged motel, police arrested him. RP 629-30.

Mr. Skelton pleaded guilty to attempted first-degree robbery and attempted second-degree assault with sexual motivation. Ex.1. He also pleaded guilty to indecent exposure with sexual motivation for an unrelated flashing incident. Ex.1. Before Mr. Skelton finished his sentence, the State moved to indefinitely confine him. CP 1-15.

The attempted assault conviction, which Mr. Skelton did not contest, served as the required first element of commitment under RCW 71.09.020(19). CP 1. The jury heard conflicting accounts of whether Mr. Skelton had a mental abnormality causing him serious difficulty controlling sexually violent behavior and whether he was likely to reoffend, the two remaining elements required for commitment.

Both testifying experts agreed Mr. Skelton's acts of exposing himself to others evidenced an exhibitionistic disorder. RP 986, 1174-75, 1319-20, 1456-57. However, both

doctors also agreed this nonviolent, non-contact offending behavior did not constitute a mental abnormality that caused serious difficulty controlling sexually violent behavior. RP 1004-06, 1380-83, 1511-16.

Dr. Teofilo admitted Mr. Skelton did not meet the "full criteria" for any other identified paraphilic disorders, but he concluded Mr. Skelton must suffer from the catchall other specified paraphilic disorder, RP 1319-23, and "a general personality" disorder of other specified personality disorder. RP 1289-93. However, Dr. Teofilo agreed other specified personality disorder also was not sufficient to satisfy this element necessary for commitment. RP 1515-16. The only condition that could potentially meet the definition of mental abnormality necessary for commitment was the contested diagnosis of other specified paraphilic disorder. RP 165-66.

Dr. Saleh rejected Dr. Teofilo's diagnoses, concluding the evidence was insufficient to establish them. RP 986, 993-94, 1004-05. Dr. Saleh recognized Mr. Skelton committed

illegal acts and was interested in some forcible sex acts, but the evidence established he was interested in *consensual* sexual acts. RP 1011-12. Because Mr. Skelton desired consensual acts, he did not display the underlying deviance necessary to diagnose him with a disorder that met the requirements of a mental abnormality. RP 1056, 1074-76.

To support his diagnosis of other specified paraphilic disorder, Dr. Teofilo relied on the uncorroborated, untested statements that Mr. Skelton had twice forcibly raped his ex-girlfriend, Brieehohnah Kooken, to form his opinion that Mr. Skelton met the criteria for commitment.[2] RP 1339-45, 1354-61, 1389-90, 1558-64, 1589-93, 1605-07, 1686-92, 1718-24, 1727-29. Mr. Skelton denied both incidents. RP 770-73, 1354-56, 1691-92, 1698-99.

[2] Dr. Teofilo also relied on fantasies in Mr. Skelton's journal entries, statements to an evaluator, which Mr. Skelton disputed, and Mr. Skelton's admission that he put his penis in the mouths of his sleeping girlfriends four times. RP 763-72, 1326-28, 1331-35, 1345-46, 1496-98, 1567-73.

Rather than present Ms. Kooken as a witness to testify about the disputed violent incidents and allow the jury to assess her credibility, the court, over Mr. Skelton's objection, allowed the State to introduce evidence of these alleged incidents through Dr. Teofilo. CP 163-67, 466, 545; RP 110-14. The sole source of the contested allegations was an ex parte petition Ms. Kooken filed for an order of protection. RP 1354-55.

Ms. Kooken's uncorroborated, untested statements in the petition claiming Mr. Skelton forcibly raped her were key to Dr. Teofilo's diagnosis of other specified paraphilia disorder. Ms. Kooken never reported the alleged rapes. RP 1718-20. According to Ms. Kooken's written petition, she claimed both incidents occurred within feet of other people, but she did not cry out or seek help. RP 1341-45, 1389-90. No police reports, hospital records, or other evidence corroborated the alleged incidents. RP 1354-55, 1360-61, 1718-20. The only evidence of the incidents was the petition for the order of protection,

filed six years after they supposedly occurred. RP 1340-43, 1357. No criminal charges were ever brought. RP 1718-20.

After reciting Ms. Kooken's untested accusations, Dr. Teofilo explained he considered them to conclude Mr. Skelton acted on his fantasies and committed sexually violent acts and to reject Mr. Skelton's claims he was not aroused by nonconsensual sexual violence. RP 1339-45, 1354-61, 1389-90, 1558-64, 1589-93, 1606-08, 1686-92, 1718-24, 1727-29. Dr. Teofilo also used Mr. Skelton's denials of Ms. Kooken's bare allegations to reinforce his diagnoses because Mr. Skelton was unable to explain to Dr. Teofilo "why … she would accuse you of this" if it did not actually happen. RP 1355-56, 1531-33.

Dr. Teofilo further discussed Ms. Kooken's out-of-court statements to conclude Mr. Skelton had serious difficulty controlling his sexually violent behavior. RP 1356-63, 1389-90, 1563-64. Dr. Teofilo told the jury about the alleged forcible rapes again in concluding Mr. Skelton was likely to commit

future predatory crimes of sexual violence. RP 1687-92, 1697-99, 1718-24, 1753-57.

After hearing repeated evidence about the untested allegations in the order of protection petition, the jury found Mr. Skelton met the criteria for commitment, and the court confined him indefinitely. CP 676-78.

E. ARGUMENT

The court's admission of "case-specific hearsay" that Mr. Skelton forcibly raped his ex-girlfriend denied Mr. Skelton his due process right to a fair trial. The rules of evidence and Washington's greater due process protections must be interpreted to prohibit the backdoor admission of untested out-of-court allegations under the guise of explaining the basis for an expert's opinion. Alternatively, an expert's testimony about out-of-court allegations from someone who does not testify must bear adequate indicia of reliability before a court should admit it.

Here, Dr. Teofilo testified about Ms. Kooken's disputed statements in her petition. These statements were uncorroborated, not disclosed until six years after the alleged incidents, never reported to the police, and not prosecuted. These untested out-of-court accusations were too unreliable to be admitted for any purpose, and the prejudicial effect of this highly inflammatory evidence far outweighed any minimal probative value.

This Court should accept review to join other states in prohibiting the use of expert testimony as a vehicle to evade evidentiary rules and admit this sort of unreliable evidence. The Court should declare such evidence categorically inadmissible. Alternatively, the Court should hold such evidence may not be admitted without sufficient indicia of reliability and a careful prejudice analysis. Under either standard, its admission was improper here.

1. **This Court should accept review to adopt a categorical rule prohibiting the use of expert testimony as an end-run around evidentiary rules designed to ensure reliability.**

    a. Washington's heightened due process protections and evidentiary rules guard against the admission of unreliable evidence.

Involuntary civil confinement is a massive curtailment of the fundamental right to liberty. *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Such a "significant deprivation of liberty" triggers strict due process protections. *In re Det. of Thorell*, 149 Wn.2d 724, 731, 72 P.3d 708 (2003); U.S. Const. amend. XIV; Const. art, I, § 3. For civil commitment to satisfy due process, it must be predicated on a narrowly tailored statutory scheme that ensures the individual is currently both mentally ill and dangerous. *In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

The massive curtailment of liberty at stake for a person facing indefinite confinement under RCW 71.09 compels heightened procedural protections to safeguard a full and meaningful opportunity to defend against the allegations.

Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); *In re Det. of Young*, 122 Wn.2d 1, 47-49, 857 P.2d 989 (1993). The due process protections mandated to safeguard against this significant liberty deprivation demand only reliable evidence form the basis of commitment. "[R]eliability is the linchpin" in determining the admissibility of evidence under the Due Process Clause. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). Where evidence is not reliable, it is inadmissible. *Id.*

Article I, section 3 provides even greater protection against the admission of unreliable evidence than the Fourteenth Amendment. *State v. Bartholomew*, 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984) (invalidating sentencing statute permitting evidence without regard to reliability). Washington "deem[s] particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." *Id.* at 640. This Court reaffirmed article I, section 3's primacy in *State v. Blake*, 197 Wn.2d 170, 181 n.9, 481

P.3d 521 (2021), and *State v. Clark*, 143 Wn.2d 731, 778, 24 P.3d 1006 (2001).

Just as the use of unreliable, uncharged allegations at a sentencing hearing violates article I, section 3, as in *Bartholomew*, the use of unreliable, uncharged allegations at an involuntary commitment trial violates article I, section 3. 101 Wn.2d at 639-40. Courts must interpret the rules of evidence consistent with Washington's greater concern for the reliability guarantees of the Due Process Clause and decide admissibility issues accordingly. Here, this Court should apply those greater protections to prohibit the use of expert opinion testimony to serve as an end-run around inadmissible hearsay.

b. Admitting untested, unreliable accusations under the guise of explaining an expert's opinion violates the Due Process Clause and the rules of evidence.

"Hearsay" is a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted. ER 801(c). Evidentiary rules preclude the introduction of hearsay statements that do not fall under an

exception as insufficiently reliable. ER 801-04; *see Hemphil v. New York*, 595 U.S. 140, 155, 142 S. Ct. 681, 211 L. Ed. 2d 534 (2022).

Here, the State used evidentiary rules governing expert opinion testimony to evade the hearsay rules. ER 703 allows experts to base their opinions on data "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," even if the underlying data is not itself admissible. ER 702 permits experts to testify to their opinion when it will assist the jury to understand the evidence or determine a fact in issue. And ER 705 provides that courts may allow experts to disclose the underlying facts on which they relied to form their opinion. When those underlying facts are not otherwise admissible, the rules of evidence governing expert testimony conflict with the rules of evidence governing hearsay prohibitions.

Although experts may rely on inadmissible evidence to form their opinions, "Experts should not act as funnels to allow

lawyers to get into evidence through their expert opinion what is otherwise inadmissible." *In re Det. of Coe*, 175 Wn.2d 482, 516, 286 P.3d 29 (2012) (Chambers, J., concurring). That is precisely what occurred here.

Dr. Teofilo diagnosed Mr. Skelton with other specified paraphilia disorder based on Ms. Kooken's allegations of forcible rapes described in an ex parte petition for a no-contact order. Dr. Teofilo relied on the alleged forcible rapes to conclude Mr. Skelton was aroused by nonconsensual sexual violence. He also used it to discredit Mr. Skelton's statements he was not aroused by nonconsensual sexual acts. Ms. Kooken's out-of-court accusations were crucial to Dr. Teofilo's opinion. And in explaining his opinion to the jury, he repeated Ms. Kooken's out-of-court, unproven, allegations.

The court instructed the jury it could use these out-of-court statements "only in deciding what credibility and weight" the jury should give Dr. Teofilo's opinions, but that it "may not consider it as evidence that the information relied upon by Mr.

Teofilo is true or that the events described actually occurred." RP 1799; WPIC 365.03.[3] However, as other courts have recognized, jurors cannot follow this instruction and cabin "case-specific hearsay" evidence. In addition, such out-of-court evidence is relevant *only* if it true, undercutting the instruction. This Court should follow the lead of other states and categorically prohibit the introduction of such evidence.

For example, California has revised its standards for admissibility to exclude "case-specific hearsay" offered through experts to ensure fair trials. The California Supreme Court recognizes that when the validity of an expert's opinion depends on the truth of the inadmissible evidence on which they rely, that evidence *is* being admitted for the truth of the matter, contrary to the legal fiction the evidence rules try to

[3] The court gave similar instructions preceding Dr. Saleh's testimony and in closing instructions. RP 1050, 2413-14; CP 666; WPIC 365.04.

construct. *People v. Sanchez*, 63 Cal.4th 665, 374 P.3d 320 (2016).

> When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth.

Id. Instead, such testimony improperly conveys to the jury the expert's opinion is valid because the hearsay content is actually true. *Id.* at 683-84.

To avoid jurors relying on out-of-court allegations, experts may explain only the general "type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." *Id.* at 686.[4] This is true in sexual commitment proceedings as well as criminal trials.

[4] *Sanchez* excluded the "case-specific statements" as inadmissible unreliable hearsay. It separately ruled some of the hearsay statements were also prohibited by the Confrontation Clause. *Id.* at 685-94.

For example, in *Walker v. Superior Court*, the State offered two expert evaluations to support a petition for civil commitment. 12 Cal.5th 177, 494 P.3d 2 (2021). One evaluator relied on allegations in a probation report and police affidavit about sexual misconduct even though the individual was not convicted of these crimes. *Id.* at 186. The California Supreme Court held the trial court erred when it admitted and relied on these "case-specific hearsay facts" to find probable cause to detain Mr. Walker for a commitment trial. *Id.*at 192-94.

California has applied the same principles to preclude the introduction of out-of-court statements through experts at commitment trials, as well as probable cause hearings. *People v. Yates*, 25 Cal. App. 5th 474, 476 (Ct. of Appeal 2018). In *Yates*, experts relied on allegations contained in inadmissible records when reaching their opinions. *Id.* at 479. Both experts recited details about forcible rape allegations contained in those records. *Id.* at 479-81. The appellate court reversed. It held

that although experts may rely on hearsay in forming their opinions, they may not recite "case-specific hearsay" facts to the jury unless it is "subject to a hearsay exception" or "independently established by competent evidence." *Id.* at 482-85. Because the inadmissible hearsay the expert relayed to the jury was "unquestionably prejudicial," the court reversed the commitment and remanded for a new trial. *Id.* at 486.[5]

This Court should follow California's lead. California's rules of evidence, like Washington's, permit experts to base their opinion "on matter[s] … made known to [them] at or before the hearing, whether or not admissible" if experts reasonably rely on those matters in forming their opinion. *Compare* Cal. Evid. Code § 801(b), *with* ER 703. California, like Washington, permits experts to explain to the jury "the reasons for [their] opinion and the matter … upon which it is

[5] The court found the inadmissible hearsay prejudicial and reversed based on counsel's ineffectiveness for failing to object to its admission. *Yates*, 25 Cal. App. 5th at 487-88.

based." *Compare* Cal. Evid. Code § 802, *with* ER 705. California, like Washington, attempts to address the admission of inadmissible evidence through expert witnesses by instructing juries they are limited to considering such information as the basis for the expert's opinion but not for its truth. *Compare Sanchez*, 63 Cal.4th at 679, *with Coe*, 175 Wn.2d at 514-15.

But as California has recognized, a limiting instruction is insufficient to guard against jurors' improper consideration of inadmissible evidence for its truth "because an expert's testimony regarding the basis for an opinion *must* be considered by the jury for its truth." *Sanchez*, 63 Cal.4th at 679. California's interpretation comports with reliability requirements and ensures jurors do not consider highly prejudicial, inadmissible evidence for its truth.

The United States Supreme Court echoed the reasoning of California courts in *Smith v. Arizona*, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024). *Smith* examined a

Confrontation Clause challenge to a testifying expert conveying the opinion of a non-testifying expert to explain the basis of his own opinion. 602 U.S. at 789-92. *Smith* is instructive for the due process issue here, involving the impact of testifying expert opinions relying on out-of-court information when the out-of-court information is helpful only if it is true.

In *Smith*, the Supreme Court recognized, "If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts." *Id.* at 795. "The jury cannot decide whether the expert's opinion is credible without evaluating the truth of the factual assertions on which it is based." *Id.* at 796. Indeed, the truth of the information on which the testifying expert based his opinion is precisely why the information is valuable. *Id.*

Like *Smith*, the out-of-court allegations at issue here are relevant only if true. It is only when the out-of-court information—there, the non-testifying expert's drug analysis

report, here, Ms. Kooken's statements in the protection order petition—is true that it "provide[s] a reason to credit" the testifying expert. *Id.* at 1802.

This Court should grant review and follow California's lead to interpret Washington law to prohibit using expert testimony as a platform for introducing otherwise inadmissible, prejudicial, and untested hearsay evidence at commitment trials.

2. Alternatively, this Court should accept review to require sufficient indicia of reliability before allowing inadmissible hearsay through expert testimony.

Other states address the impermissibility of using expert testimony to introduce inadmissible evidence by requiring a heightened demonstration of reliability, rather than the categorical rule in California.

For example, New York prohibits experts from relaying unreliable hearsay evidence, even when it is the basis for an expert's properly proffered opinion testimony, absent a showing of sufficient reliability, under its equivalent confinement laws. *Matter of State of New York v. Floyd*, 22

N.Y.3d 95, 98, 2 N.E.3d 204 (2013). The "high risk that jurors will rely on unreliable material only because it was introduced by an expert" compelled this holding. *Id.* at 106.

Like Dr. Teofilo, the government's expert in *Floyd* testified about "unproven sex offenses" described by alleged victims who did not testify at the commitment trial as the basis for her opinion. *Id.* at 99-100. The court imposed "[a] requirement that evidence meet a test of reliability and substantial relevance" for it to be admissible through experts, even for the limited purpose of assisting the jury in evaluating experts' opinions. *Id.* at 106. This proof of "reliability and substantial relevance" "is necessary to protect the important liberty interests at stake."[6] *Id.*

The *Floyd* court determined hearsay evidence is sufficiently reliable only if a person was convicted of the

[6] The concurring justices favored excluding all hearsay evidence without an exception for so-called "reliable" hearsay. *Floyd*, 22 N.Y.S.3d at 107; *id.* at 112-18 (concurrence).

conduct or otherwise admitted to it. *Id.* at 109-10. Acquitted or uncharged conduct is not sufficiently reliable. *Id.* at 110-11.

Other states have adopted similar rules prohibiting experts from testifying about "case-specific hearsay," even if they relied on it in forming their opinions, where that hearsay is insufficiently reliable. *E.g.*, *In re Det. of Stenzel*, 827 N.W.2d 690, 708-10 (Iowa 2013) (experts may not testify about details of prior offenses contained in "criminal history records"); *Lawrence v. Commonwealth*, 279 Va. 490, 497-99 (2010) (expert's testimony "about the details of unadjudicated allegations of sexual misconduct" from "police reports" was prejudicial and inadmissible even with limiting instruction); *In re Interest of A.M.*, 281 Neb. 482, 513-15 (2011) (due process permits experts to testify to out-of-court statements supporting their opinions only when they "bear sufficient reliability").

These states prohibit experts from testifying about "case-specific hearsay" to explain the bases of their opinions because limiting instructions do not effectively restrict jurors'

consideration of case-specific hearsay evidence. *Lawrence*, 279 Va. at 497. Such instructions are nonsensical because "an expert who relies on an out-of-court statement in reaching an opinion … has inferred that the facts asserted in it are true." *A.M.*, 281 Neb. at 514 (internal quotation omitted). Telling jurors they cannot infer those facts are true, when the expert did, makes little sense. Due process requires the out-of-court statements be sufficiently reliable for a jury to hear them.

Like the above cases, the out-of-court statements claiming forcible rapes in Ms. Kooken's petition for an order of protection were allegations "not supported by extrinsic evidence or [defendant's] own admissions." *Floyd*, 22 N.Y.3d at 110. If this Court does not follow California and categorically prohibit experts from repeating inadmissible evidence, it should follow New York and interpret our rules of evidence to prohibit the admission of such evidence unless it is demonstrably reliable.

Such a rule would build on this Court's existing caselaw addressing ER 705. Neither ER 705 nor this Court's cases addressing it hold that trial courts should automatically allow experts to testify to the inadmissible hearsay evidence informing their opinions. In fact, *In re Det. of Marshall*, 156 Wn.2d 150, 162-163, 125 P.3d 111 (2005), and *In re Det. of Coe*, 175 Wn.2d 482, 513-15, 286 P.3d 29 (2012), both recognized the discretionary nature of ER 705. *Marshall* emphasized that ER 705 "was not designed to enable a witness to summarize and reiterate all manners of inadmissible evidence." 156 Wn.2d at 162 (internal quotations omitted).

However, as Mr. Skelton's case shows, courts treat *Marshall* and *Coe* as mandating the admission of hearsay to explain an expert's opinion, without considering reliability or prejudice. This Court should accept review to address the imperative weighing of reliability before permitting experts to upend hearsay rules and convey highly prejudicial, untested allegations as if they are true.

3. The Court of Appeals violated article I, section 10 when it sua sponte redacted a witness's name from its opinion without considering the *Ishikawa* factors or complying with GR 15.

This Court also should grant review because the Court of Appeals sua sponte redacted a witness's name from its opinion and instead used initials. The court did so without notice to any party, without holding a hearing, and without offering any necessity for this redaction. This unjustified sealing did not comply with *Ishikawa* or GR 15, violates article I, section 10, and disregards this Court's precedent. This Court should accept review to address this important constitutional issue of substantial public interest.

In *John Does 1, 2, 4, and 5 v. Seattle Police Dep't*, this Court reiterated, "[N]ames in court pleadings are subject to article I, section 10 and GR 15." __ Wn.3d __, 563 P.3d 1037, 1054 (2025). The Court recognized the unjustified use of pseudonyms violates the open courts doctrine. Const. art. I, § 10. Such redactions are permissible only if the proponent

satisfies the *Ishikawa* factors. *John Does 1, 2, 4, and 5*, 563 P.3d at 1054-55 (citing *Ishikawa*, 97 Wn.2d 30).

When a court uses pseudonyms without "show[ing] a need to seal the court record," no compelling privacy interest outweighs the public interest in access to the records. Such redactions violate article I, section 10. *Id.* at 1055.

In Mr. Skelton's case, Brieehohnah Kooken's name was used throughout every phase of every proceeding in the trial court and on appeal. No party moved to redact her name, seal any portion of the court proceedings, or close the courtroom. However, the Court of Appeals opinion redacted her name and referred to her as "B.K." Slip op. 3-4, 6-9, 12-15. This is an unjustified sealing.

The open courts requirement of article I, section 10 prohibits the redaction or sealing of court records unless the requirements of *Ishikawa* are satisfied. *John Does 1, 2, 4, and 5*, 563 P.3d at 1054-55 (citing *Ishikawa*, 97 Wn.2d at 37-39). This Court has "always stressed the importance of transparency

and access to court records." *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 11, 330 P.3d 168 (2014). Redaction of court records, including pseudonyms, are permissible "only in the most unusual of circumstances." *Id.*; *John Does 1, 2, 4, and 5*, 563 P.3d at 1054-55; *John Doe G. v. Dep't of Corr.*, 190 Wn.2d 185, 202, 410 P.3d 1156 (2018). This was not such an unusual circumstance.

The desire to protect the identities of sexual assault victims is an insufficient basis to seal or alter records. *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 209, 848 P.2d 1258 (1993). While such interests could be sufficiently compelling at times, generalized concerns cannot prevent disclosure. 121 Wn.2d at 212. *Eikenberry* held a statute prohibiting disclosure of the identities of child sexual assault victims violated article I, section 10. *Id.* at 209-12.

Unwarranted redaction also violates GR 15. GR 15 establishes a procedure for redaction of court records, including briefs. GR 15(b)(2); GR 31(c)(4). This includes a "uniform

procedure for the destruction, sealing, and redaction of court records." GR 15(a). The procedure requires notice, a hearing, and a showing that the "redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." GR 15(c)(2). The Court of Appeals employed no such procedure here before redacting Ms. Kooken's name in its opinion.

Open courts are "of utmost public importance" and "foster the public's understanding and trust in our judicial system." *Dreiling v. Jain*, 151 Wn.2d 900, 903, 93 P.3d 861 (2004). Anonymity of participants in the criminal justice system, whether they are victims, witnesses, jurors, or those accused, eliminates transparency and frustrates the public's understanding and trust.

The opinion's redaction of Ms. Kooken's name through the use of initials without conducting an *Ishikawa* analysis violated article I, section 10 and GR 15. This Court should grant review.

F. CONCLUSION

For all these reasons, this Court should accept review. RAP 13.4(b)(1)-(4).

In compliance with RAP 18.17(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 5,000 words.

DATED this 14th day of April, 2025.

Respectfully submitted,

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APPENDIX A

February 18, 2025, Opinion

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of SHAWN T. SKELTON, Appellant.	No. 84214-5-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — In this appeal, Shawn Skelton challenges the trial court's order civilly committing him as a sexually violent predator (SVP). Pointing to due process case law and out-of-state case law discussing what it calls "case-specific hearsay,"[1] Skelton claims among other things that the trial court erred by allowing the State's expert to relay inadmissible information explaining the basis for his opinions under ER 703, ER 705, and ER 403. Finding no error, we affirm.

I

In April 2009, Shawn Skelton posted a classified advertisement on Craigslist,[2] seeking a woman who was willing to have sex with him, but, he wrote, "here is the catch," before finishing "I want to kill her." Craigslist alerted the Seattle Police Department (SPD) to Skelton's advertisement. SPD's assigned detective responded covertly, purporting to offer to make a sex worker available to Skelton.

[1] E.g., Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); People v. Sanchez, 63 Cal.4th 665, 682, 374 P.3d 320 (2016).

[2] "Craigslist" is an online classifieds platform.

He e-mailed Skelton, telling him that he had a girl that he did not trust anymore and that maybe Skelton "could do both [of them] a favor" and he could "have [his] fun," implying that Skelton could fulfill his goal posted in the advertisement by killing the sex worker. In the ensuing e-mail exchange, Skelton asked for details about how the girl's body would be taken care of, demanded payment, discussed the timing and location of the meeting, told the detective to tell the girl that he wanted to do "all kinds of crazy abuse fetish stuff," and when arrangements had been made, told the detective, "Alright, consider it taken care of."

When Skelton arrived at the designated meeting location, he was arrested and found carrying a knife with a three to three and a half inch blade, shoelaces, and a chain. In January 2010, Skelton pleaded guilty to first degree attempted robbery and second degree attempted assault with sexual motivation. He also pleaded guilty to indecent exposure with sexual motivation for an earlier incident in November 2008. The court imposed determinate sentences of 40.5 months in prison for Skelton's attempted robbery conviction and 12.5 months, plus a 12 month enhancement, for his indecent exposure with sexual motivation conviction. It imposed an indeterminate sentence of 12 months to 10 years, plus a 24 month enhancement, for his attempted assault with sexual motivation conviction. In July 2020, the State initiated SVP civil commitment proceedings against Skelton.

To commit Skelton, the State had to prove that he (1) has been convicted or charged with a crime of sexual violence, and (2) suffers from a mental abnormality or personality disorder (3) which makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW

71.09.020(19). Skelton's conviction for second degree attempted assault with sexual motivation satisfied the first element and was uncontested. Dr. Craig Teofilo, testifying as the State's expert, concluded that Skelton was an SVP under the criteria set forth in chapter 71.09 RCW.

Dr. Teofilo stated that he has conducted over 500 SVP evaluations. He testified that it is customary for SVP evaluators to rely on police reports, court documents, Department of Correction (DOC) records, medical records, mental health records, and sex offender treatment records. In Skelton's case, Dr. Teofilo estimated that he had reviewed over 4,000 pages of documents. Dr. Teofilo diagnosed Skelton with other specified paraphilic disorder (OSPD), with somnophilic, coercive, and sadistic traits. This provided the basis for Dr. Teofilo's conclusion that Skelton had a mental abnormality, as defined under Washington law. And he concluded Skelton was "more likely than not to commit a future crime of predatory sexual violence if not committed."

In reaching this opinion, Dr. Teofilo relied on "maybe 25 or 27 datapoints." These included a 2014 petition for protection order filed by Skelton's ex-girlfriend, B.K. In the petition, filed while Skelton was in DOC custody, B.K. alleged that Skelton had violently raped her twice, in 2007 and 2008. During pretrial motions Skelton sought to exclude all details from the petition, arguing the allegations were unadjudicated. The trial court provided a limiting instruction to the jury and allowed Dr. Teofilo to testify about B.K.'s allegations as part of the basis for his opinions for the limited purpose of evaluating the credibility of his opinions.

At the conclusion of the 10 day commitment trial, the jury returned a unanimous verdict finding Skelton is an SVP, on whose basis the court entered the order of commitment. Skelton appeals.

II

Skelton asserts the trial court erred by allowing Dr. Teofilo to discuss B.K.'s protection order petition, including her allegations that Skelton had violently raped her twice. We disagree. The trial court properly admitted this testimony as basis evidence under ER 703 and 705, and controlling Washington case law, and properly balanced the probative value of the evidence against potential prejudice.

We review trial court decisions to admit evidence for abuse of discretion. State v. Quaale, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). Trial courts have "considerable discretion" to determine if evidence is admissible. Id. " 'Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion.' " Id. (quoting State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). An abuse of discretion occurs when a trial court exercises discretion in a manifestly unreasonable way or based on untenable grounds or reasons. Id. at 197.

A

Skelton urges this court to follow a California decision regarding "case-specific hearsay," which held, under Sixth Amendment confrontation principles, that inadmissible evidence an expert describes to the jury and relies on as being true is being admitted for the truth of the matter, and adopted a rule barring such evidence regardless of limiting instructions. People v. Sanchez, 63 Cal.4th 665,

684-85, 374 P.3d 320 (2016). Because Sanchez runs counter to the plain text of ER 703, ER 705, and controlling Washington case law, we decline to follow Skelton's proposed rule.

ER 703 allows experts to testify about the "facts or data in the particular case upon which the expert bases an opinion" which "need not be admissible in evidence" so long as they are "of a type reasonably relied upon by experts in the particular field." "Thus, the rule allows expert opinion testimony based on hearsay data that would otherwise be inadmissible in evidence." In re Det. of Marshall, 156 Wn.2d 150, 162, 125 P.3d 111 (2005). ER 705 grants trial courts discretion to require disclosure of the underlying facts or data of an expert opinion, including the relay of "hearsay or otherwise inadmissible evidence to the trier of fact to explain the reasons for [an expert's] opinion, subject to appropriate limiting instructions." In re Det. of Leck, 180 Wn. App. 492, 513, 334 P.3d 1109 (2014). The rule permits an expert to relay inadmissible information on which the expert has relied for this limited purpose. State v. Caril, 23 Wn. App. 2d 416, 428, 515 P.3d 1036 (2022), review denied, 200 Wn.2d 1025, 522 P.3d 50, cert. denied, 144 S. Ct. 125 (2023). Conversely, courts retain discretion to limit the expert's disclosure of inadmissible limited purpose evidence when the proffer would be unfairly prejudicial, misleading, or simple avoidance of the rules of evidence. Id. at 427-28.

In Marshall, a licensed clinical psychologist retained by the State reviewed records of the defendant's "criminal and psychiatric history, including police reports, legal records, treatment records, juvenile records, psychological and psychiatric evaluations, and medical records" to conclude that the defendant

should be committed as an SVP. Marshall, 156 Wn.2d at 154-55. The records were of a kind reasonably relied on by experts in the field, but were challenged for "relat[ing] inadmissible hearsay as factual assertions." Id. at 161-62. The court found no abuse of discretion because the evidence was admitted subject to an appropriate limiting instruction consistent with ER 703 and ER 705.[3] Marshall, 156 Wn.2d at 163.

In another SVP commitment case, In re Detention of Coe, 175 Wn.2d 482, 513, 286 P.3d 29 (2012), the defendant challenged the trial court's decision to allow the State's expert to disclose allegations of 20 unadjudicated sexual offenses to the jury. The trial court gave the following limiting instruction to the jury,

> "[The expert] is about to testify regarding the factual bases of her opinion. You may consider this testimony only in deciding what credibility and weight should be given to the opinions of [the expert]. You may not consider it as evidence that the information relied upon by the witness is true or that the evidence described actually occurred."

[3] The analysis of Marshall is not changed by Smith v. Arizona, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024). Smith held that when an expert in a criminal case relays inadmissible facts as the basis for an opinion and they support the expert's opinion only if they are true, then the defendant's right in a criminal case to confront the defendant's accusers is triggered. Smith, 602 U.S. at 802. But it "is well settled that the Sixth Amendment right to confrontation is only available to criminal defendants." In re Det. of Stout, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). Civil commitment under Washington's SVP law is not a criminal proceeding and therefore not subject to the Sixth Amendment. Id.; cf. Allen v. Illinois, 478 U.S. 364, 374, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986) (Illinois SVP law not criminal proceeding for purposes of the Fifth Amendment). Assuming Dr. Teofilo relied on B.K.'s allegations for the truth of the matter asserted, that made them hearsay and inadmissible, but his relaying that hearsay could not implicate a confrontation right because Skelton did not have a confrontation right in this civil proceeding.

Id. at 514. This limiting instruction, coupled with the common and reasonable reliance on unadjudicated offenses by experts in SVP proceedings, led the court to find no abuse of discretion in the disclosure of the 20 sexual offenses. Id.

Skelton objected to the admission of B.K.'s hearsay allegations through Dr. Teofilo's testimony. The court granted Skelton's motion to exclude any evidence that B.K.'s protection order had been granted but allowed Dr. Teofilo to testify about the contents of the petition for protection order, and that they were made under oath. At trial, before Dr. Teofilo testified about this and other basis evidence, the trial court gave the following limiting instruction to the jury:

> Dr. Teofilo is about [to] testify regarding information contained in the records about Mr. Skelton's alleged background, social history, sexual and non-sexual misconduct, participation in treatment and other programming, and prior statements he made to others besides Dr. Teofilo. You may consider this testimony only in deciding what credibility and weight should be given to his opinions. You may not consider it as evidence that the information relied upon by Dr. Teofilo is true or that the events described actually occurred.

As in Coe and Marshall, the trial court gave an appropriate limiting instruction before Dr. Teofilo testified about B.K.'s allegations. This confined the evidence to the limited purpose of explaining the basis of the expert's opinion. By following Marshall and Coe, the trial court did not abuse its discretion in admitting evidence commonly relied on by experts in SVP cases for the limited purpose of assessing expert witness credibility.

B

Skelton's next evidentiary claim is that B.K.'s out-of-court statements "should have [been] prohibited" as "insufficiently reliable and unduly prejudicial"

under ER 403. Without reaching Skelton's contention that courts "must . . . always exclude evidence where the danger of unfair prejudice outweighs its potential probative value" or the State's contention that Skelton's failure to request an ER 403 analysis waived any challenge on appeal, we conclude that the court engaged in an ER 403 analysis and did not abuse its discretion.

ER 403 allows courts to exclude evidence if the "probative value" of such evidence is "substantially outweighed" by the danger of unfair prejudice, confusion of issues, misleading the jury, undue delay, waste of time, or needlessly cumulative evidence. Skelton sought to prohibit any introduction of B.K.'s allegations through an expert witness or to at least exclude any evidence of B.K.'s no-contact order having been granted by the court. In response, the State sought to introduce evidence of the fact of the protection order petition, that B.K.'s allegations in it were made under oath. The trial court balanced the probative value of B.K.'s allegations, and that they were made under oath, against the prejudice of a court seemingly vouching for those allegations by granting the no-contact order. The court's tailored order was a reasonable exercise of discretion balancing the probative value of B.K.'s allegations as evidence supporting Dr. Teofilo's opinions against the dangers of unfair prejudice in the no-contact order being granted. The trial court did not abuse its discretion under ER 403.[4]

[4] Under the Washington Supreme Court's decisions in Coe and Marshall, we lack the authority to adopt a contrary rule promulgated by the California Supreme Court in Sanchez. But Washington's approach to expert basis evidence is well in line with the range of approaches the states have taken towards evidence of this nature in SVP cases. New York's high court described that range in State v. Floyd Y., explaining that a "significant number of jurisdictions take a flexible approach that allows the admission of hearsay but requires courts to make an

III

Skelton claims that Dr. Teofilo, in relaying basis evidence to the jury detailing his two alleged violent rapes of B.K., violated his constitutional right to due process under the Fourteenth Amendment and article 1, section 3 of the Washington Constitution. Civil commitment, as a massive curtailment of liberty, requires robust due process protections. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); In re Det. of Stout, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). Skelton claims that these protections foreclose the trial court's ruling under ER 703, ER 705, and ER 403 allowing Dr. Teofilo to relay inadmissible facts supporting his opinions. To the extent that Skelton seeks to characterize this evidentiary issue as a constitutional one, his argument fails.[5]

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independent reliability assessment." 22 N.Y.3d 95, 108-09, 2 N.E.3d 204 (2013). New York adopted this approach. Id. at 109. Washington case law does not require an "independent reliability assessment," id., which would at first blush put it nearer the end of the spectrum allowing expert basis evidence without an independent ground for admissibility, id. at 108 (citing In re Care & Treatment of Manigo, 389 S.C. 96, 106, 697 S.E.2d 629 (2010), aff'd, 398 S.C. 149, 728 S.E.2d 32 (2012)). But as noted Washington has repeatedly cautioned against allowing experts to use ER 705 to unfairly bypass the Rules of Evidence, Caril, 23 Wn. App. 2d at 427 (quoting State v. Anderson, 44 Wn. App. 644, 652, 723 P.2d 464 (1986)). When Washington trial courts properly consider and apply those cautions as the trial court did here, Washington effectively curbs evidence that is so unreliable its consideration would be unfair, much as Floyd Y. urged. In Floyd Y., New York did not foreclose the use of hearsay allegations of sexual misconduct not reduced to conviction, though it required a finding they were substantially more probative than prejudicial and preferred live confrontation. 22 N.Y.3d at 110. Skelton does not show, and we are not convinced, that B.K.'s petition would not meet this standard for limited purposes just as it met the standards of Washington's ER 703, ER 705, and ER 403.

[5] Even in criminal cases subject to the Sixth Amendment, "[i]t is not the case" that "phrasing an evidentiary ruling as a constitutional claim provides a means for an end run around the Rules of Evidence." State v. Ritchie, 24 Wn. App. 2d 618, 629, 520 P.3d 1105 (2022), review denied, 1 Wn.3d 1006, 526 P.3d 851 (2023).

Skelton cites Manson v. Brathwaite, 432 U.S. 98, 113-14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) for the proposition that "reliability is the linchpin" in determining the admissibility of evidence under the Fourteenth Amendment, even in state civil cases. Brathwaite relied on the due process clause in establishing a reliability standard for identifications in criminal cases, based on at least six factors, all particularized to eyewitness identification of criminal accused. Id. Washington has rejected the proposition that Brathwaite created a generalized reliability rule independent of suggestive police identification, even in criminal cases. State v. Vaughn, 101 Wn.2d 604, 608-09, 682 P.2d 878 (1984). Skelton cites Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), to support his theory of a Fourteenth Amendment reliability standard for evidence in civil cases. But Holmes, another criminal case,[6] held that a state cannot constitutionally bar certain other-suspect evidence offered by the defendant. Id. at 330-31. Holmes and Brathwaite do not stand for the proposition, put forward by Skelton, that evidence offered in a civil case may be objected to on constitutional grounds as insufficiently reliable, independently of the Rules of Evidence.[7]

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[6] The court in Holmes did not decide whether its holding derived from the Sixth Amendment or the Fourteenth Amendment, but it relied on a line of cases decided under the compulsory process clause of the Sixth Amendment. Holmes, 547 U.S. at 324-26. Skelton's reliance on Sixth Amendment case law is unavailing.

[7] Citing Lilly v. Virginia, 527 U.S. 116, 131, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999), Skelton argues, "Out-of-court statements from nontestifying witnesses are inherently unreliable and therefore inadmissible, absent an exception to the prohibition against hearsay." Skelton misrepresents Lilly. First, Lilly never said that all hearsay was "inherently unreliable"—after all, hearsay meeting the many hearsay exceptions is routinely admitted in evidence because it can be reliable—rather, the opinion censured only the hearsay in those situations "in which the government seeks to introduce 'a confession by an accomplice which incriminates a criminal defendant.' " Lilly, 527 U.S. at 130-31 (quoting Lee v. Illinois, 476 U.S.

Skelton's next authority does not suggest otherwise. Skelton cites State v. Bartholomew, 101 Wn.2d 631, 638-39, 683 P.2d 1079 (1984), for the proposition that article 1, section 3 of the Washington Constitution "provides even greater protection against the admission of unreliable evidence than the Fourteenth Amendment." However, Bartholomew dealt with a criminal sentencing statute that allowed the introduction of "any evidence regardless of its admissibility under the Rules of Evidence," including a defendant's prior criminal activities regardless of conviction. Id. at 640. The problem with which Bartholomew was concerned was evidence admitted without having to meet the Rules of Evidence. Id. The rules include ER 403, which is "premised on allowing evidence which is trustworthy, reliable, and not unreasonably prejudicial." Id. No such concern is presented here, because Skelton's SVP proceeding was decided on the basis of evidence that was required to meet the Rules of Evidence.

Finally, Skelton cites Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18, 33, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), for its holding that "[i]n its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." This statement, at the highest possible level of abstraction, was made in the context of holding there was no right to counsel for an indigent parent facing the termination of parental rights. Id. at 33-34. Lassiter, like the

530, 544 n.5, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986)). Second, this statement was not the holding of the court, because it is found in a section of the lead opinion joined by only three justices. Id. at 120, 125. And third, Lilly was decided under the Sixth Amendment. Id. at 120.

other cases cited by Skelton, does not establish a constitutional standard supplanting the Rules of Evidence in civil cases. Skelton fails to show that his constitutional rights were implicated or violated by the trial court's evidentiary rulings applying the Rules of Evidence.

IV

Skelton asserts that the prosecutor committed misconduct by (1) treating B.K.'s out-of-court statements as "substantive evidence" and arguing in closing that the hearsay was "fact," (2) vouching for the basis of Dr. Teofilo's opinion, and (3) asking Dr. Teofilo about one witness (Skelton) commenting on the credibility of another witness (B.K.).

We review claims of prosecutorial misconduct to determine if improper conduct prejudiced the defendant. In re Det. of Sease, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009). Prejudice is measured by weighing the strength of the State's case and reversing only if there is a "substantial likelihood that the misconduct affected the jury's verdict." Id. at 81. If a defendant fails to object at trial, the issue of misconduct is waived unless the misconduct was " 'so flagrant or ill-intentioned' " that it caused prejudice not curable by a trial court's admonishment. Id. (quoting State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)). During closing arguments, prosecutors are afforded a wide latitude to argue reasonable inferences from the evidence, including evidence regarding witness credibility. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). On appeal, we consider the prosecutor's arguments within the context of the case,

arguments as a whole, evidence presented, and jury instructions. State v. Slater, 197 Wn.2d 660, 681, 486 P.3d 873 (2021).

Because Skelton did not raise a prosecutorial misconduct objection during trial, we must find that any potential misconduct was flagrant or ill-intentioned. Skelton does not meet this standard.

A

Skelton alleges that the prosecutor treated the limited purpose evidence of B.K.'s petition as substantive evidence. At issue are instances in which the prosecutor, during closing, referred to B.K.'s allegations using the word "fact" and listed the alleged rapes on PowerPoint slides. Of the three times that the prosecutor used the word "fact" to refer to B.K.'s allegation, the first two were clearly made in the context of referring to limited purpose evidence on which Dr. Teofilo relied. This context is shown by the prosecutor's arguments, "The fact that one of the forced vaginal rapes of [B.K.] started when she was asleep . . . , [w]hich Dr. Teofilo explained was right in [Skelton's] wheelhouse," and "in fact, [B.K.] noted, as you heard from Dr. Teofilo, in her protection order that Mr. Skelton knows right from wrong but he disregards it." That was not improper, as the evidence had been admitted for the purpose of supporting Dr. Teofilo's opinions. The third instance in which the prosecutor used the word "fact" invited the jury to consider evidence for a purpose for which it had not been admitted:

> We got—the fact that he committed one of the forcible rapes against [B.K.]—and Dr. Teofilo talked about this when he was detailing her allegation of rape in the protection order—he committed one of the rapes against [B.K.] when she was seven months pregnant and her

> family was right outside the house. So that's risky. I mean, it would be much more likely to get caught.

Though improper, this could have been remedied by a timely objection invoking the limiting instruction the jury had already been given, and is presumed to have followed. Coe, 175 Wn.2d at 513-14; Sease, 149 Wn. App. at 81. The PowerPoint slides conveyed only information properly before the jury for a limited purpose. The prosecutor generally respected the limiting instruction and the appropriate use of the information before the jury. To any extent the prosecutor strayed from that, Skelton fails to show ill-intentioned or flagrant conduct.

B

Skelton claims that the prosecutor improperly vouched for the assertions in B.K.'s petition and Dr. Teofilo's reliance on those assertions. Improper vouching occurs when a prosecutor expresses personal belief in the veracity of a witness or otherwise indicates that evidence not presented at trial supports the testimony of a witness. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). The prosecutor, in discussing Dr. Teofilo's opinion during closing, referred to B.K.'s alleged rapes as a "factor" to consider, told the jury that Dr. Teofilo had "reasonably relied upon this information in forming his opinion," and stated that B.K.'s "firsthand account" was made under oath, adding additional reliability. The prosecutor had qualified this information, telling the jury, "[T]here is nothing unusual, whatsoever, about the methodology that either of the experts employed in this case even if it involved unadjudicated offenses or other things that have not gone to trial." The prosecutor acted within the wide latitude to argue at closing, drawing reasonable inferences, and using B.K.'s allegations for their proper and limited purpose as basis evidence

for Dr. Teofilo's opinion. These arguments did not indicate a personal opinion or allude to outside evidence, and so there was no improper vouching.

C

Skelton's last prosecutorial misconduct claim is that the prosecutor improperly asked Dr. Teofilo about Skelton commenting on B.K.'s credibility. It can be prosecutorial misconduct to ask a witness whether another witness is lying. State v. Ramos, 164 Wn. App, 327, 334, 263 P.3d 1268 (2011). Whether this is misconduct depends on the specific facts and the issue of that witness's credibility. See id. at 334-35. In Ramos, the court held that the defendant being asked whether another witness had a motive to testify untruthfully was improper but not so flagrant or ill-intentioned as to not be curable by court instruction. Id. at 335.

During closing, the prosecutor referenced the question posed to Skelton whether he could think of a reason why B.K. would make up the two alleged violent rapes—asked by Dr. Teofilo in his SVP evaluation, by the prosecutor in Skelton's deposition, and by Skelton's expert witness in his SVP evaluation. Skelton was not asked whether B.K. was telling the truth. Instead he was asked about B.K.'s possible motivation in filing her petition. Skelton's answer was relevant to the basis Dr. Teofilo (and Skelton's expert) used in forming opinions. The testimony of Dr. Teofilo and Skelton's expert indicates that inviting Skelton to respond to the existence of the petition was an appropriate part of their evaluations. It was not misconduct for the prosecutor to reference the inquiry.

V

Skelton claims his constitutional rights to a unanimous verdict were violated by the trial court's refusal of a unanimity instruction. He argues that because the State proved only one diagnosis that could amount to mental abnormality, OSPD, it should have been named in the jury instructions. We disagree.

To commit Skelton as an SVP, the State was required to prove beyond a reasonable doubt that Skelton suffered "from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(19). In In re Det. of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006), the court held that criminal law unanimity principles apply in SVP cases. However, the court rejected Halgren's argument requiring unanimity on whether the jury found a mental abnormality or a personality disorder based on State v. Petrich, 101 Wn.2d 566, 673 P.2d 173 (1984), abrogated by State v. Kitchen, 110 Wn.2d 403, 759 P.2d 105 (1988). Halgren, 156 Wn.2d at 811. Instead, applying criminal law principles, the court held that mental abnormality and personality disorder were "alternative means" for making an SVP determination. Id. at 810.

The unanimity requirement functions "uniquely" for alternative means crimes. State v. Aguilar, 27 Wn. App. 2d 905, 918, 534 P.3d 360 (2023). When multiple means of committing a crime are implicated, the jury need not be unanimous as to which means it relied on, so long as each means is supported by substantial evidence. State v. Armstrong, 188 Wn.2d 333, 340, 394 P.3d 373 (2017). In a criminal case, if even a single means on which the jury is instructed

is unsupported by sufficient evidence, a conviction will not be affirmed. Id. In Skelton's case, the trial court instructed only on mental abnormality. Skelton does not advocate an "alternative means" unanimity defect, and this court in Sease, 149 Wn. App. at 78, rejected a means-within-a-means analysis, explaining that where the State presented evidence of two personality disorders to support the personality disorder prong, unanimity on one or the other was not required.

Skelton argues instead for a Petrich multiple acts analysis. In criminal law, multiple acts cases are "cases in which 'the prosecution presents evidence of several acts that could form the basis of one count charged.' " Aguilar, 27 Wn. App. 2d at 924 (quoting State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)). In such cases, we require either an election from the State telling the jury what act it should rely on in its deliberations, or an instruction that the jury must unanimously rely on a specific criminal act to support its conviction. Id. By asking us to apply a multiple acts analysis, Skelton asks us to conclude the State presented evidence of "several acts" that "could" form the basis of mental abnormality, without an election or an instruction requiring unanimity. Id.

"Mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(9). By its terms, the definition invites clinical and forensic examination of multiple facets of a defendant's mental condition. Skelton was diagnosed with OSPD. But his having other features of other psychopathologies was relevant to Dr. Teofilo's diagnosis and properly

considered by the jury in its determination whether Skelton's "condition" met the statutory definition. Skelton fails to show the State presented evidence of multiple acts that might have independently amounted to a standalone "condition," akin to separate criminal acts requiring application of Petrich unanimity principles. See e.g. State v. Vander Houwen, 163 Wn.2d 25, 38, 177 P.3d 93 (2008) (separate acts of taking game); Aguilar, 27 Wn. App. 2d at 927 (separate acts of rape).

Skelton's condition is not a case of multiple acts. Dr. Teofilo's assessment of Skelton and the State's presentation of it did not necessitate the State to make an election or secure a unanimity instruction. Skelton's right to a unanimous jury verdict was not violated.

VI

Skelton claims the State's burden of proof was lowered when the court refused an instruction defining the word "likely." We are unpersuaded. A trial court's decision to give a certain jury instruction is reviewed for abuse of discretion. Wright v. 3M Co., 1 Wn.3d 795, 805, 533 P.3d 113 (2023). "Jury instructions are proper when, read as a whole, they permit parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." Spivey v. City of Bellevue, 187 Wn.2d 716, 738, 389 P.3d 504 (2017). "Even if an instruction is misleading, it will not be reversed unless it prejudices a party. We presume that juries follow lawful instructions." Id. (citation omitted).

The trial court instructed, " 'Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released from detention in this proceeding."

Skelton sought to add, " 'Likely' means the probability the person will commit predatory acts of sexual violence exceeds fifty percent." The trial court acted well within its discretion in using the usual definition defining "likely" as "more probably than not." The instruction accurately stated the law, was not misleading, and allowed Skelton to argue his theory of the case. Skelton has provided no indication that the instruction was prejudicial.

VII

Skelton last states that if no individual errors warrant reversal, he is entitled to reversal due to cumulative errors. The cumulative error doctrine may entitle defendants to a new trial "when cumulative errors produce a trial that is fundamentally unfair." State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). Though not generally applied in the civil context, "cumulative error is argued in personal restraint petitions as well as in sexually violent predator actions." Rookstool v. Eaton, 12 Wn. App. 2d 301, 311, 457 P.3d 1144 (2020). Here, the record does not support that error occurred. Thus, there was no cumulative error.

Affirmed.

Birk, J.

WE CONCUR:

Chung, J.

Dwyer, J.

APPENDIX B

March 13, 2025, Order Denying Motion for Reconsideration

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

In the Matter of the Detention of SHAWN T. SKELTON, Appellant.	No. 84214-5-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Shawn Skelton, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Birk, J.

Judge

WASHINGTON APPELLATE PROJECT

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Appellate Court Case Number:	84214-5
Appellate Court Case Title:	In Re the Detention of Shawn Skelton

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Comments:

CORRECTED PETITION FOR REVIEW. Please disregard previously filed Petition for Review. Thank you.

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