IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Detention of William Davenport, aka William Cummings	)	
STATE OF WASHINGTON,	)	**No. 23545-9-III**
Respondent,	)	**Consolidated with**
v.	)	**No. 27434-9-III**
WILLIAM DAVENPORT, aka WILLIAM CUMMINGS,	)	**Division Three**
Appellant.	)	
In re the Detention of William Davenport, aka WILLIAM CUMMINGS	)	**UNPUBLISHED OPINION**
STATE OF WASHINGTON,	)	
Appellant,	)	
v.	)	
WILLIAM DAVENPORT, aka WILLIAM CUMMINGS,	)	
Respondent.	)	

Brown, J. — In consolidated appeals, we first consider William Davenport's challenges to the 2004 Franklin County Superior Court order civilly committing him as a sexually violent predator (SVP). He mainly contends (1) his SVP hearing was untimely and noncompliant with the SVP statute (chapter 71.09 RCW); (2) the SVP statute violates due process; (3) the court committed evidentiary error, especially in allowing evidence of actuarial instruments to predict future dangerousness; (4) insufficient evidence supports the jury's SVP finding; and (5) ineffective assistance of counsel. We reject Mr. Davenport's contentions and affirm.

Second, we consider the State's appeal of the court's order granting Mr. Davenport a new trial on the question whether he remains an SVP. The State mainly contends Mr. Davenport failed to produce evidence of a change in his mental condition brought about through participation in treatment, as required by RCW 71.09.090(4). We agree with the State and reverse the new trial order.

FACTS

1. Civil commitment appeal, No. 26312-6-III. Four days before his scheduled March 26, 1996 prison release date for a 1992 second degree child molestation conviction, the State petitioned to civilly commit Mr. Davenport as an SVP under chapter 71.09 RCW. He was transferred from prison to the Franklin County Jail on March 26. The probable cause hearing set the same day did not occur due to Mr.

Davenport's multiple continuance requests and his stay request pending the United States Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), which upheld the constitutionality of sexual predator statutes. Mr. Davenport later moved to dismiss the State's petition on various grounds, including violation of his right to a probable cause hearing within 72 hours of his civil commitment detention. On June 24, 1999, the trial court issued a memorandum opinion dismissing the State's petition without prejudice.

On June 29, 1999, the State filed its second civil commitment petition. A probable cause hearing was held on July 1, 1999. The State's expert, Dr. Robert Wheeler, testified that actuarial tests "predict that Mr. Davenport is quite likely to reoffend sexually." Report of Proceedings (RP) at 38. The court found probable cause that Mr. Davenport is an SVP and ordered him detained at the Special Commitment Center (SCC) for evaluation.

Mr. Davenport directly appealed the June 24 memorandum opinion and August 27, 1999 following order dismissing the first petition without prejudice. On July 30, 1999, Mr. Davenport petitioned for discretionary review of the court's detention order in the second petition. In a consolidated review, this court held the trial court properly dismissed the first petition without prejudice, the State was not precluded from filing the second petition on June 29, and the trial court did not otherwise commit probable error

in its rulings. *See In re Det. of Davenport*, No. 18653-9-III (Wash. Ct. App. 2001), *review denied*, 145 Wn.2d 1030, 42 P.3d 975 (2002). Mr. Davenport has remained in total confinement since 1992, including being housed at the SCC (or in county jail during court proceedings) since the filing of the first SVP petition in 1996.

Mr. Davenport now challenges the court's failure to dismiss his 2004 SVP commitment proceedings on multiple grounds. First, the trial court rejected his argument that the State failed to evaluate him within 45 days of his initial detention, reasoning he had refused to participate in his evaluation and no statutory time limit is required. Second, the trial court rejected Mr. Davenport's theory that his 1992 child molestation conviction alleged as a predicate for his SVP determination was legally inadequate because it was based upon an *Alford*[1] plea, not a full factual adjudication.

Third, Mr. Davenport challenges several evidentiary rulings. Mr. Davenport unsuccessfully moved pretrial for a *Frye*[2] hearing regarding admissibility of actuarial tables predicting sex offender recidivism. He sought to exclude use of the Minnesota Sex Offender Screening Tool Revised (MnSOST-R) and the Sex Offender Risk Appraisal Guide (SORAG) on the theory that the instruments fail to properly consider decreasing recidivism rates of aging offenders. Mr. Davenport was age 51 at the time of trial. The court decided actuarial instruments are generally accepted by the scientific

[1] *North Carolina v. Alford*, 400 U.S. 25, 91. S. Ct. 160, 27 L. Ed. 2d 162 (1970).
[2] *Frye v. United States*, 293 F. 1013 (Cir. 1923).

community for use in SVP cases, and debate about their efficacy goes to weight and not admissibility.

Mr. Davenport sought to exclude evidence of an alleged 1979 rape for which a jury acquitted him. The court ruled the incident was relevant and admissible based upon the State's proof by a preponderance that the rape in fact occurred.

Mr. Davenport unsuccessfully sought to preclude the State from questioning his expert psychologist, Dr. Robert Halon, about disciplinary action taken against him by the California Board of Psychology in 1998. The discipline arose from acts of alleged dishonesty, including his failure to file a mandatory child abuse report, billing improprieties, failure to contact other psychologists to review treatment records, and an affirmative misstatement of a patient's test results. Dr. Halon signed a stipulated settlement and discipline order admitting to sufficient evidence to prove the allegations. The parties in the California stipulation agreed that the disciplinary action could not be used as evidence in any civil or criminal case. Here, the trial court ruled it was not bound by the stipulation and reasoned the impeachment evidence was relevant to Dr. Halon's qualifications as an expert and his credibility as a witness.

At the 2004 jury trial, the court asked prospective jurors if they knew any of the trial witnesses. Juror Blake Osborn indicated he knew two witnesses as school classmates 30 to 40 years earlier. The witnesses were two of Mr. Davenport's alleged

victims—L.M. in an unprosecuted 1981 incident and D.B. in an uncharged 1975 attack. After extensive colloquy with the court and counsel regarding possible bias, Mr. Osborn was seated for the jury without challenge by either party.

The jury heard certain sexual misconduct evidence against Mr. Davenport:

Uncharged 1975 assault. D.B. testified Mr. Davenport was a high school acquaintance and that he attacked her in her home in Pasco in April 1975. She recalled he came to her door to apologize for backing into her car. But he instead pushed her into her bedroom, ripped off her shirt, and pinned her on the bed. She tried to fight him off. Her roommate, D.W., appeared with a frying pan and told him to leave. D.W. called the police. They declined to pursue charges because D.W. foiled the assault and Mr. Davenport had fled. Mr. Davenport testified at the current commitment trial that the incident never occurred and he does not know D.B.

Acquittal on 1979 rape charge. R.G. testified that in April 1979, Mr. Davenport knocked on her door asking for directions and to use the telephone and restroom. She let him inside. He threatened he had a gun and then repeatedly raped her. She was terrified he would kill her. She called police when Mr. Davenport left. He was charged with rape but was acquitted. He testified at the commitment trial that he and R.G. had consensual sex.

1980 Indecent liberties conviction. Mr. Davenport pleaded guilty to indecent

liberties involving 13-year-old, S.W. Mr. Davenport forced S.W. to engage in oral sex and masturbate him. He was released to community supervision in December 1980.

Uncharged 1981 assault. L.M. testified that in April 1981, Mr. Davenport attacked her while she was bartending at the Kennewick Inn. After closing time, when all other customers had left, he pushed her onto a pool table, climbed on top of her, and groped her breasts. She fought him off and called police the next day. A warrant was issued for his arrest, but the case was never prosecuted because he fled the State (without his parole officer's permission) after the incident. At the commitment trial, Mr. Davenport denied pushing L.M. onto a pool table but did admit to touching her breasts.

1981 California conviction for assault with intent to rape. In November 1981, Mr. Davenport was convicted by guilty plea in Ukiah, California for assault with intent to commit rape after he attacked a woman outside a bar. He served a six-year prison sentence and was then transferred to Washington to serve the suspended portion of his indecent liberties sentence involving S.W. He remained incarcerated until early 1988. At the commitment trial, Mr. Davenport denied attacking the woman and said it started as a consensual encounter in which he only touched her breasts.

1992 *Alford* plea. Mr. Davenport was convicted of second degree child molestation after he entered his ex-girlfriend's trailer and molested her daughter, S.N. He was imprisoned on this conviction until his March 26, 1996 transfer to the Franklin

County Jail on the SVP petition. At the commitment trial, he testified he did not intend to touch S.N.; he thought he was touching her mother.

Expert testimony. Dr. Robert Wheeler, a specialist in forensic psychology, testified as the State's expert. He initially reviewed Mr. Davenport's file in 1995, and then again as new information emerged in 1998, 2003, and 2004. The file included police reports related to Mr. Davenport's alleged crimes, presentence investigation reports, prosecution records, judgments and sentences, Department of Corrections' records regarding prison behavior, treatment records from the SCC, full psychological evaluations dating back to 1980, and depositions from Mr. Davenport and several of his past victims (R.G., S.W., D.B., D.W., and L.M.). Dr. Wheeler reviewed reports from Mr. Davenport's experts, Dr. Robert Halon and Dr. Richard Wollert. Mr. Davenport declined to be evaluated in person by Dr. Wheeler.

Dr. Wheeler diagnosed Mr. Davenport with (1) a mental abnormality, specifically the sexual disorder "Paraphilia Not Otherwise Specified, Non Consenting Persons," (2) "Personality Disorder Not Otherwise Specified," with antisocial and narcissistic features, and (3) "Alcohol Abuse, In Controlled Environment," meaning he is not currently abusing alcohol due to his confinement. RP at 1016-17.

On direct examination, Dr. Wheeler explained Mr. Davenport's history during his adult life shows he has serious difficulty controlling his sexual behavior. He has

recurrently engaged in sexual activity with nonconsenting persons. This indicates the presence of strong kinds of uncontrolled urges to engage in that behavior despite being punished and the high likelihood he will be detected. Dr. Wheeler opined extensively that Mr. Davenport's paraphilia creates the urge to commit sexual acts and that his personality disorder with antisocial and narcissistic traits impairs his capacity to decide not to do the act. He opined that Mr. Davenport's mental abnormality causes him serious difficulty in controlling his behavior.

Dr. Wheeler concluded that because of Mr. Davenport's mental abnormality or personality disorder he will more likely than not commit a predatory act of sexual violence if he is not confined in a secure facility. He based this conclusion on a combination of objectively designed actuarial instruments, analysis of known sex offense risk factors, and consideration of Mr. Davenport's individual characteristics. Dr. Wheeler used three actuarial instruments that he said are all widely employed by professionals in the field of assessing reoffense risk—the Static 99, the MnSOST-R, and the SORAG. Under the Static 99, he opined there was a 40 percent chance Mr. Davenport would reoffend within 15 years. Under the MnSOST-R, he stated a 72 percent likelihood exists Mr. Davenport will reoffend within a six-year period. Under the SORAG, the chances are 58 percent within 7 years and 80 percent within 10 years. He opined Mr. Davenport's history of sexual violence indicates he is most likely to commit

predatory acts of child molestation and rape. Dr. Wheeler explained some reason exists to believe sex offenses diminish substantially for men over age 60, but the 50 to 60 age range is difficult to assess because little science exists on the topic. And virtually no science addresses whether reoffense rates of men who are high risk sex offenders are different than low risk sex offenders as they get older. He considered Mr. Davenport's age (then 51) as providing some protective benefit but not enough to significantly reduce his overall high risk to reoffend.

Mr. Davenport's expert, Dr. Halon, testified Mr. Davenport is merely a con artist rather than someone suffering from a mental disorder. He opined that under the DSM-IV-R, a diagnosis of paraphilia does not establish that the person's mental abnormality or personality disorder causes serious difficulty in controlling sexually violent behavior or makes him likely to engage in predatory acts of sexual violence. He testified to the opinion that a diagnosis of Paraphilia NOS: Nonconsent is not properly used when referring to rape, as the American Psychiatric Association has not included it as a diagnostic category in its Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-R). He said the category has been created by the State's experts. Yet, he conceded that the diagnosis has been widely assigned by experts in SVP cases and that Mr. Davenport's expert, Dr. Wollert, had even recently used the diagnosis.

In direct examination, Dr. Halon brought up his California disciplinary case. He

explained his license revocation was stayed during a two-year probationary period. He was allowed to practice during the probation, which ended in April 2002. During the State's cross-examination regarding the California discipline, he admitted he gave up the right to contest the allegations of gross negligence and dishonest conduct that occurred in the course of his professional practice.

Dr. Wollert testified recidivism rates show a linear decline with age. According to Dr. Wollert, the parent population of 50 to 60 year olds has a recidivism rate of about 8 percent. He said that age is not fully accounted for by the actuarial instruments. He testified that for someone Mr. Davenport's age, experts using the Static-99 and SORAG would be correct only about 20 percent of the time and wrong about 80 percent of the time regarding his recidivism rate. With the MnSOST-R, he said the experts will be wrong 77 to 87 percent of the time for someone Mr. Davenport's age. Dr. Wollert opined that due to Mr. Davenport's age, he has a very low recidivism rate—22 percent under the Static 99, 23 percent under the MnSOST-R, and 20 percent under the SORAG. Dr. Wollert admitted he did not review Mr. Davenport's file or interview him and did not review the victims' depositions. He did not write a report in this case. Dr. Wollert conceded he had recently used the Paraphilia NOS: Nonconsent diagnosis and that it was valid, but related he was now more cautious about using it.

Mr. Davenport testified that most of the alleged sexual assault incidents did not

occur, were consensual, or were misunderstandings. He denied having any kind of sexual disorder or that he needed sexual deviancy treatment. He described his sex offenses as "opportunistic" and said they were his "forte." RP at 2214.

Neither party objected to the jury instructions.

The jury found Mr. Davenport was an SVP. The court entered the commitment order on October 29, 2004. Mr. Davenport appealed. This court stayed the case when the superior court granted Mr. Davenport a new trial under RCW 71.09.090 on the question whether he still meets the definition of an SVP. An emergency stay of the new trial was entered in January 2010. The two matters are now consolidated.

2. Appeal of order granting new trial, No. 27434-9-III. Under 2005 amendments to RCW 71.09.090(4), a person civilly committed as a sexually violent predator (SVP) may receive a new evidentiary hearing on his status as an SVP by establishing probable cause that his mental condition has so changed through participation in treatment that he no longer meets the definition of an SVP and may be safely unconditionally released. A change in a single demographic factor, such as the person's chronological age, does not establish probable cause for a new trial. RCW 71.09.090(4)(c).

Since his civil commitment in 2004, Mr. Davenport has refused to participate in sex offender treatment. The State's psychologists who evaluated his mental condition

during annual reviews in 2005 through 2007 opined he continues to meet the SVP definition. But in 2008, the Franklin County Superior Court ordered a new evidentiary hearing to review Mr. Davenport's SVP status based upon expert opinion that he no longer meets the definition of an SVP in view of advances in diagnostic and actuarial sciences, new information regarding his sexual preferences, and his age. This court granted the State's motion for discretionary review of the trial court's order.

On December 1, 2005, November 21, 2006, and August 27, 2007, staff at the SCC completed annual reviews of Mr. Davenport's mental condition as required by RCW 71.09.070. Each evaluation indicated Mr. Davenport has refused to engage in any sex offender treatment since commitment and that he continues to suffer from mental conditions including Paraphilia Not Otherwise Specified (NOS): Nonconsent and Personality Disorder NOS with Narcissistic and Antisocial Traits. The State's evaluators—licensed psychologists Dr. Daniel Yanisch, Psy.D. (2005 report) and Dr. Holly R. Coryell, Ph.D. (2006 and 2007 reports)—both opined that Mr. Davenport continues to meet the definition of an SVP, and that placement in a less restrictive alternative is not appropriate.

Mr. Davenport contested the annual reports under RCW 71.09.090(2)(a). In November 2007, the State set the matter for a show cause hearing to determine whether a new trial was warranted as to Mr. Davenport's SVP status. The hearing was

to encompass all three review periods from 2005 through 2007.[3] Mr. Davenport moved for unconditional release or new trial under RCW 71.09.090. He supported his motion with a declaration from Dr. Richard Wollert—one of his experts at the 2004 commitment trial. Dr. Wollert opined Mr. Davenport no longer met the definition of an SVP because of (1) advances in diagnostic science, (2) new information regarding Mr. Davenport's sexual preferences, (3) advances in actuarial science, and (4) Mr. Davenport is at an age that makes him no longer likely to reoffend.

Pending the show cause hearing, Mr. Davenport moved under CR 60(b) to set aside the 2004 judgment/commitment order. He contended he was entitled to a new trial on four grounds: (1) "the American Psychiatric Association's grave concerns over the misuse of Psychiatry itself and its clinical diagnoses in the sexually violent predator commitment arena"; (2) "general scientific concerns" with the validity of the DSM diagnosis of Paraphilia NOS: Nonconsent; (3) specific errors relating to his 2004 commitment trial, "including Paraphilia NOS and the misuse of the DSM-IV-TR of Personality Disorder NOS label"; and (4) evidence that the actuarials used by the State's trial expert (Dr. Wheeler) have an error rate of 80 percent. Mr. Davenport indicated his materials submitted in support of the CR 60(b) motion were also intended to support his RCW 71.09.090 motion for new trial.

Mr. Davenport's materials included an additional Dr. Wollert declaration and one

[3] Delay in holding Mr. Davenport's annual review hearings is not now at issue.

from his other commitment trial expert, Dr. Halon. Dr. Wollert discussed post-2004 changes in the science of risk prediction for aging offenders. He concluded that Mr. Davenport's risk of reoffense as a 54-year-old was now slightly less than 14 percent. He also gave detailed reasons to support his opinion that Mr. Davenport had been improperly diagnosed with Paraphilia NOS: Rape, and that there was only a 6 percent chance he is positive for that condition. Dr. Halon likewise opined (as he did at the commitment trial) that the diagnosis of Paraphilia NOS: Nonconsent was improper.

Mr. Davenport submitted the deposition of Dr. Michael First, a psychiatrist who was text editor of the DSM-IV and IV-Text Revision (DSM-IV-TR). Based upon Dr. First's deposition, Mr. Davenport contended that his diagnosis of Paraphilia NOS was incorrect due to a drafting error in the DSM-IV and DSM-IV-TR.

The court heard argument on the show cause and CR 60(b) motions on March 24, 2008. The court denied Mr. Davenport's CR 60(b) motion, but granted his request for a new trial pursuant to RCW 71.09.090. The court reasoned the new information on the propriety of the underlying diagnosis and risk determination/actuarial processes presented new issues not considered at the commitment trial and established probable cause for a new trial under the 2005 amended version of RCW 71.09.090. The court reasoned the statute "has to be read – either the statute is unconstitutional or it has to be read . . . that there be a review . . . of the issue of whether the respondent does

suffer from a mental disorder." RP at 59.

The State objected to entry of an order for a new trial because Mr. Davenport's appeal of the 2004 commitment order was pending. An order for a new trial was entered on September 3, 2008. The State filed a notice of appeal, which this court redesignated as a motion for discretionary review. On May 18, 2009, our commissioner granted discretionary review and ruled the trial court committed obvious or probable error in its determination that Mr. Davenport's evidence met the probable cause requirements for a new trial under RCW 71.09.090. The new trial was stayed in January 2010 pending the decision in this appeal. Mr. Davenport did not cross-appeal from the denial of his CR 60(b) motion.

I. ANALYSIS – CIVIL COMMITMENT

A. Ineffective Assistance – Second SVP Petition

The issue is whether Mr. Davenport's counsel gave him ineffective assistance by failing to move to dismiss the second SVP petition as invalid because the first petition was still in effect when the second one was filed.

To establish ineffective assistance of counsel, Mr. Davenport must show his attorney's performance was deficient and he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Det. of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007) (*Strickland* standards apply in

SVP proceedings). There is a strong presumption counsel's performance was reasonable. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Mr. Davenport's argument is frivolous. Counsel performed effectively, albeit unsuccessfully, by seeking to dismiss the first petition with prejudice due to the belated probable cause hearing. The appropriate remedy was dismissal without prejudice, allowing the State to refile the petition. Thereafter, Mr. Davenport became subject to the current single SVP petition. Mr. Davenport was not prejudiced by any performance of counsel under the *Strickland* standards.

B. Due Process – Timeliness

The issue is whether Mr. Davenport's due process rights were violated by lengthy delays in the holding of his probable cause hearing and commitment trial.

RCW 71.09.040(2) states that the person must be provided a hearing to contest probable cause within 24 hours after being taken into custody. But the law is well settled that failure to hold the hearing within 72 hours does not require dismissal unless the person can show delay in the hearing adversely affected the outcome of the trial. *In re Det. of Campbell*, 139 Wn.2d 341, 351-52, 986 P.2d 771 (1999); *In re Pers. Restraint of Young*, 122 Wn.2d 1, 47, 857 P.2d 989 (1993); *see also In re Det. of Aqui*, 84 Wn. App. 88, 93, 929 P.2d 436 (1996).

This court previously addressed the various delays in the probable cause hearing attributable to Mr. Davenport and in part to the State. CP at 75-79 (*Davenport*, slip op. at 3-7). Based upon *Campbell*, *Young*, and *Aqui*, this court held:

> Because Mr. Davenport failed to show that the failure to hold his probable cause hearing within 72 hours adversely affected the outcome of his trial, the trial court did not err by dismissing the petition without prejudice, and allowing the State leave to file a new petition.

CP at 84-85 (*Davenport,* slip op. at 12-13). Nothing has changed in the meantime. Mr. Davenport makes no claim in this appeal (other than overall passage of time) that his trial outcome was prejudiced by delay in the probable cause hearing.

Mr. Davenport correctly notes RCW 71.09.050 requires that trial be held within 45 days after the probable cause hearing. But again, other than the passage of time, he does not point to any particular instance of delay by the State in bringing the matter to trial, much less articulate prejudice. It is not our duty to create such arguments for him. Nevertheless, the record is replete with requests for delays and waivers of speedy trial by Mr. Davenport, not the State. Even Mr. Davenport admitted in his own testimony at his commitment trial that most of the delay has been his own doing. None of his several cited cases holding that intentional prosecutorial delay or arbitrary government action implicates liberty interests and violates due process are applicable here.

C. Use of Dr. Wheeler's Prior SVP Evaluation

The issue is whether the State violated RCW 71.09.040 and Mr. Davenport's due process rights by using Dr. Wheeler's SVP evaluation obtained prior to filing the petition for civil commitment.

RCW 71.09.040(4) partly states:

> If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator.

Here, Mr. Davenport refused to participate in an evaluation despite Dr. Wheeler's attempt to interview him. Dr. Wheeler thus based his evaluation on his review of Mr. Davenport's records. This formed the basis for his expert trial testimony. A similar situation occurred in *Marshall*, where the State retained Dr. Amy Phenix to testify at trial as an expert witness. The court explained:

> [Dr. Phenix's] role in Mr. Marshall's commitment trial as an expert witness. She qualified as an expert witness based on her knowledge, skill, experience, training and education, and her knowledge assisted the trial judge in understanding the evidence and determining the facts at issue, i.e., whether Mr. Marshall suffered from a mental abnormality or personality disorder that made him likely to commit a predatory sexually violent act unless confined. *See* ER 702. RCW 71.09.040(4) simply does not address a psychologist's expert testimony at trial.

In re Marshall, 156 Wn.2d at 160.

Marshall contended that allowing Dr. Phenix to testify contravened *In re Williams,* 147 Wn.2d 476, 491, 55 P.3d 597 (2002), because that court held the State

could not obtain court-ordered mental evaluations under CR 35 in advance of their SVP commitment trials. *In re Det. of Marshall*, 156 Wn.2d 150, 160, 125 P.3d 111 (2005). The *Marshall* court rejected the argument, reasoning:

> Marshall was not compelled to submit to an evaluation by Dr. Phenix, whether under CR 35 or otherwise, and in fact Dr. Phenix did not interview Marshall in person. Nothing in *Williams* forecloses the type of evaluation conducted by Dr. Phenix or her expert testimony at the commitment trial.

Marshall, 156 Wn.2d at 160.

The same reasoning applies here. Mr. Davenport was not compelled to submit to an evaluation and *Williams* does not address the use of a pretrial records review by the State's expert. *Meints* is equally inapposite, as it held the trial court erred in denying Meints a trial expert after he refused to cooperate with a CR 35 exam. *In re Det. of Meints*, 123 Wn. App. 99, 105-06, 96 P.3d 1004 (2004).

D. Recent Overt Act

The issue is whether due process requires the State to plead and prove Mr. Davenport, an alleged SVP, committed a recent overt act.

This court rejected Mr. Davenport's recent overt act contention in the opinion denying discretionary review. CP at 86-88 (*Davenport*, slip op. at 14-16). Mr.

Davenport is entitled to raise the issue again on appeal. RAP 2.3(c). Even so, his statutory and due process arguments are now foreclosed by *In re Detention of Lewis*, 163 Wn.2d 188, 177 P.3d 708 (2008), where the Supreme Court held that neither RCW 71.09.030(1) nor RCW 71.09.030(5) require the State to allege a recent overt act in an SVP petition when the offender has been continuously confined since the predicate conviction and is about to be released. *Lewis*, 163 Wn.2d at 198-99, 202. Further, due process does not require the State to plead or prove a recent overt act when the offender has been continuously confined since his predicate conviction. *Id*. at 199-202. Requiring the State to plead and prove a recent overt act by an offender who has not been released from total confinement and spent time in the community would create an impossible standard to meet because incarceration precludes evidence of a recent overt act. *Id*. at 201-02. The court thus distinguished *In re Det. of Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002) and other cases in which the offender had been released from total confinement into the community prior to the State filing the SVP petition. *Lewis*, 163 Wn.2d at 200-01.

Mr. Davenport's arguments are further foreclosed by *In re Detention of Fair*, 167 Wn.2d 357, 367-68, 219 P.3d 89 (2009), where the court held that due process does not require proof of a recent overt act when the alleged SVP has remained continuously incarcerated, even if he has completed his sentence for the sexually

violent offense.

Accordingly, we do not consider Mr. Davenport's claim that his trial counsel gave him ineffective assistance under *Strickland* for failing to pursue this issue.

E. Due Process — More Likely Than Not Standard

The issue is whether the "more likely than not" standard for proving dangerousness in chapter 71.09 RCW fails the due process requirement that a statute must be narrowly tailored to serve a compelling state interest.

To pass constitutional muster, a State's law impinging on fundamental liberty interests must further compel State interests and be narrowly drawn to serve those interests. *See Young*, 122 Wn.2d at 26. Washington's SVP statute requires the trier of fact to determine "whether, beyond a reasonable doubt, the person is a sexually violent predator." RCW 71.09.060(1). An SVP is one who has been convicted of or charged with a crime of sexual violence and "who suffers 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." Former RCW 71.09.020(16). "Likely to engage in predatory acts of sexual violence" means "that the person more probably than not will engage in such acts." RCW 71.09.020(7). The combined effect of these provisions is to require the State to prove beyond a reasonable doubt that it is more likely than not that a person will engage in predatory acts of sexual violence if not

confined. *See In re Det. of Brooks*, 145 Wn.2d 275, 293-98, 36 P.3d 1034 (2001).

The same due process and narrow tailoring challenges that Mr. Davenport makes were rejected in *Brooks*, 145 Wn.2d 275. The *Brooks*' court reasoned that because relevant portions of Washington's SVP statute are identical to those in the Kansas statute and because the United States Supreme Court approved of the Kansas law in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), a challenge to the constitutionality of Washington's statute on due process grounds cannot be sustained on this issue. *Brooks*, 145 Wn.2d at 294; *see also In re Det. of Turay*, 139 Wn.2d 379, 407-08, 986 P.2d 790 (1999); *Young*, 122 Wn.2d at 59. Mr. Davenport's argument fails.

Mr. Davenport's arguments boil down to an evidence sufficiency challenge. Although an SVP proceeding is civil in nature, the criminal standard for reviewing an evidence sufficiency challenge applies. *In re Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). The evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could find each essential element beyond a reasonable doubt. *Id.* at 744-45. Disagreement between expert witnesses goes to the weight of the evidence and not its admissibility. *Id.* at 756; *see also State v. Walton,* 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied,* 119 Wn.2d 1011 (1992) (appellate court defers to trier of fact as to credibility of witnesses, conflicting testimony, and the

persuasiveness of the evidence).

The jury accepted Dr. Wheeler's testimony regarding Mr. Davenport's likelihood to reoffend and rejected the testimony of the defense experts. That determination is not disturbed on appeal. Moreover, the State presented testimony from several of his victims and evidence of his prior sex offense convictions. Mr. Davenport's narrow tailoring and burden of proof contentions lack merit.

F. Due Process – Current Dangerousness

The issue is whether chapter 71.09 RCW violates due process by allowing for lifetime commitment using a currently dangerous standard without requiring the State to prove that the individual poses a substantial risk of dangerous conduct within the "foreseeable future."

The Supreme Court rejected Mr. Davenport's arguments in *In re Detention of Moore*, 167 Wn.2d 113, 123-26, 216 P.3d 1015 (2009). In *Moore*, the court first stated "by properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact finder impliedly finds that the SVP is currently dangerous." *Id.* at 124. The court partly reasoned:

> While *Moore* may be correct that the "makes the person likely to engage" language in former RCW 71.09.020(16) and the "will engage" language in RCW 71.09.020(7) do not contain a specific temporal limitation, we believe that the "more probably than not" standard in RCW 71.09.020(7) includes a temporal component. For example, if an expert predicts that an alleged SVP will reoffend only in the far distant future, then there is less likelihood that the "more probable than not" standard

> has been legally satisfied. Whether that standard is satisfied depends on the facts underlying the SVP petition and the expert testimony. It also may depend on the statistical likelihood of reoffending. By properly finding a person to be an SVP, it is implied that the person is currently dangerous. We do not deem it necessary to impose on the State the additional burden that it prove the SVP will reoffend in the foreseeable future.

Id.[4]

The *Moore* holding is consistent with *Young*, where the Supreme Court summarily rejected the due process/foreseeability argument in its holding that "there are no substantive constitutional impediments to the sexually violent predator scheme." *Young*, 122 Wn.2d at 26; *see also In re Det. of Wright*, 138 Wn. App. 583, 585, 155 P.3d 945, *review denied*, 162 Wn.2d 1017 (2008) (applying *Young* to summarily reject claim that the State must prove likelihood of reoffense within a set time frame).

Here, Dr. Wheeler extensively testified that because of Mr. Davenport's mental abnormality and personality disorder, he will more likely than not commit a predatory act of sexual violence (most likely acts of child molestation and rape) if released into the community. Dr. Wheeler based this conclusion on actuarial instruments, known sex offense risk factors, and Mr. Davenport's individual characteristics including his

[4] The *Moore* court further noted that the annual evaluations required by RCW 71.09.070 ensure that the SVP's dangerousness remains current and to consider whether the person currently satisfies the definition of an "SVP" and whether a least restrictive alternative might be more appropriate at that point. *Moore*, 167 Wn.2d at 125 n.3.

recurring sexual activity with nonconsenting persons and serious difficulty in controlling his behavior. Based upon widely used actuarial instruments, Dr. Wheeler found the following likelihood of reoffense: Static 99 (40 percent chance within 15 years), the MnSOST-R (72 percent chance within six years), and the SORAG (58 percent chance within 7 years and 80 percent within 10 years). This evidence supports a finding of current dangerousness. Mr. Davenport's due process challenge fails.

G. Actuarial Risk Assessments – *Frye* Requirements

The issue is whether the court erred in admitting evidence of actuarial risk assessments without holding a *Frye* hearing.

The *Frye* standard requires a trial court to determine if a scientific theory or principle "'has achieved general acceptance in the relevant scientific community'" before admitting it into evidence. *Thorell*, 149 Wn.2d 724 (quoting *Young*, 122 Wn.2d at 56). "'The core concern . . . is only whether the evidence being offered is based on established scientific methodology.'" *Thorell,* 149 Wn.2d at 754 (quoting *Young,* 122 Wn.2d at 56). The *Thorell* court held that the actuarial instruments satisfy the *Frye* standard and that differences of opinion as to the appropriate methods for predicting future dangerousness, both clinical and actuarial, go "to the weight of the evidence rather than to its admissibility." *Id*. at 756 (citing *In re Det. of Campbell*, 139 Wn.2d 341, 358, 986 P.2d 771 (1999)). Consequently, the admissibility of evidence of future

dangerousness is to be assessed under ER 702 and 703. *Id*. at 756.

The court's decision not to conduct a *Frye* hearing is reviewed de novo. *State v. Gregory*, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006). The court's decision to admit evidence is reviewed for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The court abuses discretion when its decision is based upon untenable grounds or reasons. *Id*.

Under *Thorell*, no *Frye* hearing was required for admission of Dr. Wheeler's testimony based on actuarial risk assessments. Significantly, the Trowbridge article upon which Mr. Davenport relies was not published at the time of his trial and he makes no showing that the theories in that article pertaining to aging offenders have gained acceptance in the scientific community such that a *Frye* hearing would be required.

Mr. Davenport argues the trial court did not properly evaluate admissibility of "these particular" instruments under ER 702 and 703 and that conclusory or speculative opinions lacking proper foundation under ER 703 are inadmissible. *State v. Devries*, 149 Wn.2d 842, 848 n.2, 72 P.3d 748 (2003). Admissibility goes to weight. Other than his motion for a *Frye* hearing, Mr. Davenport points to nowhere in the record where he further objected to the admission of Dr. Wheeler's testimony. The issue is not preserved for appeal. *See State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004) (failure to raise evidentiary objection at trial precludes raising the issue on appeal).

H. Juror Osborn

The issue is whether Mr. Davenport was denied his constitutional right to trial by an impartial jury because Blake Osborn was seated on the jury.

A biased juror may be disqualified for cause. RCW 4.44.170(1), (2). "Implied bias" is present when a juror is related to or associated with either party, when a juror has previously served on a jury on the same or a related case, or when a juror has an interest in the outcome of the case. RCW 4.44.170(1), .180. The federal standard applied in Mr. Davenport's cited case, *Gonzalez*, is the objective inquiry whether an average person in the position of the juror in controversy would be prejudiced. *United States v. Gonzalez*, 214 F.3d 1109, 1112 (Cal 2000). "Actual bias" is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). Actual bias must be established by proof that the challenged juror has formed or expressed an opinion which would prevent him or her from trying the case impartially. RCW 4.44.190; *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

But challenges of juror bias not made at trial either for cause or by peremptory challenge are waived on appeal. *See Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 760, 812 P.2d 133 (1991); *State v. Crawford,* 21 Wn. App. 146, 151,

584 P.2d 442 (1978). Such is the case here; Mr. Davenport made no such challenge to Mr. Osborn at trial. The issues of implied and actual bias are therefore waived to the extent Mr. Davenport is claiming error by the court.

And, the record shows no implied or actual bias. In extensive colloquy, Mr. Osborn indicated slight, long ago acquaintances with the two named witnesses. For example, his contacts with D.B. were 40 years before. Mr. Osborn discussed two other individuals who had been charged with sex crimes and received jail sentences. Mr. Osborn indicated nothing about his previous experiences would affect his ability to be fair to Mr. Davenport. Defense counsel inquired about Mr. Osborn's siblings, but made no objections. Neither party challenged Mr. Osborn; he was selected for the jury. No bias is suggested by this record. The issue was waived, and lacks merit.

Mr. Davenport argues his counsel gave him ineffective assistance by failing to challenge Mr. Osborn for cause. But, as reasoned above, the record does not support a reason to suspect Mr. Osborn's impartiality because of a passing acquaintanceship some 30 to 40 years earlier. Mr. Osborn related he had not contacted them since, and said he probably wouldn't even recognize them. In these circumstances suggesting a lack of bias, no need existed for defense counsel to further inquire. And the questioning about Mr. Osborn's brother raises no inference of a connection between Mr. Davenport and Mr. Osborn. Mr. Davenport does not show his counsel performed

deficiently under *Strickland* by not challenging his selection, thus his ineffective assistance claim fails.

I. Evidence Sufficiency – Mental Abnormality or Personality Disorder

The issue is whether the State presented sufficient evidence that Mr. Davenport suffers from a mental abnormality or personality disorder causing him to be dangerous. Mr. Davenport contends the State failed under the *Thorell* sufficiency of the evidence standard, to prove he suffers from a mental abnormality or personality disorder.

Dr. Wheeler diagnosed Mr. Davenport with a mental abnormality, specifically the sexual disorder Paraphilia NOS: NonConsent/Rape. Numerous Washington cases have upheld civil commitment based upon diagnoses of Paraphilia NOS: Nonconsent/Rape. *See e.g., In re Det. of Stout*, 159 Wn.2d 357, 363, 150 P.3d 86 (2007); *In re Det. of Halgren*, 156 Wn.2d 795, 800, 132 P.3d 714 (2006); *Marshall*, 156 Wn.2d at 155; *In re Det. of Paschke*, 136 Wn. App. 517, 520, 150 P.3d 586 (2007); *In re Det. of Taylor*, 132 Wn. App. 827, 832, 134 P.3d 254 (2006); *State v. Hoisington*, 123 Wn. App. 138, 143, 94 P.3d 318 (2004); *In re Det. of Strauss*, 106 Wn. App. 1, 6, 20 P.3d 1022 (2001); *In re Det. of Mathers*, 100 Wn. App. 336, 337, 998 P.2d 336 (2000).

Dr. Wheeler additionally diagnosed Mr. Davenport with Personality Disorder NOS, with antisocial and narcissistic features.

Dr. Wheeler opined Mr. Davenport's paraphilia creates the urge to commit sexual acts and his personality disorder with antisocial and narcissistic traits impairs his capacity to decide not to do the act. Thus, he opined Mr. Davenport's mental abnormality causes him serious difficulty in controlling his behavior. And he ultimately concluded that because of Mr. Davenport's mental abnormality or personality disorder, he will more likely than not commit a predatory act of sexual violence if he is not confined in a secured facility.

Given the above, the State presented sufficient evidence showing Mr. Davenport suffers from the requisite mental abnormality or personality disorder to sustain a civil commitment. Although Dr. Halon offered that Dr. Wheeler improperly utilized the DSM-IV-TR to diagnose Mr. Davenport's personality disorder, he cited to no authority other than his own opinion. Disagreement between experts goes to the weight of the evidence, not its admissibility. *Thorell*, 149 Wn.2d at 756. Mr. Davenport's other arguments regarding personality disorder are not sufficiently supported by pertinent authority or reference to the record to command further review.

J. Evidence Sufficiency – Volitional Control

The issue is whether the State presented sufficient evidence under the *Thorell* standard to establish lack of volitional control by Mr. Davenport.

The State must provide some proof that individuals subject to the sexually

violent predator statute have a serious lack of control over their behavior. *Thorell*, 149 Wn.2d at 735-36 (citing *Kansas v. Crane,* 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). The existence of that proof together with a history of predatory behavior permits a finding of future dangerousness and justifies the civil commitment. *Id.* This distinguishes the sexually violent predator from dangerous but typical criminal recidivists. *Id.* No separate finding on lack of control is required. *Id.* at 742. Instead, "the jury's finding that [an SVP] suffers from a mental illness, defined under our statute as a 'mental abnormality' or 'personality disorder,' coupled with the person's history of sexually predatory acts, must support the conclusion that the person has serious difficulty controlling behavior." *Id.* "[T]his evidence need not rise to the level of demonstrating the person is completely unable to control his or her behavior." *Id.*; *see also In re Det. of Audett*, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006).

Here, Dr. Wheeler testified about Mr. Davenport's lack of volitional control. Throughout his free adult life, he has repeatedly engaged in sexual activity with non-consenting persons. Dr. Wheeler opined this sexual activity indicates the presence of uncontained, uncontrolled strong urges to continue engaging in that behavior despite being punished and the high likelihood he will be detected. Dr. Wheeler testified Mr. Davenport's paraphilia creates the urge to commit sexual acts and his personality disorder with antisocial and narcissistic traits impairs his capacity to decide not to do

the act. He concluded that Mr. Davenport's mental abnormality causes him serious difficulty in controlling his behavior.

The "to commit" instruction required the jury to find beyond a reasonable doubt that Mr. Davenport's mental abnormality or personality disorder caused him serious difficulty in controlling his sexually violent behavior. The jury accepted Dr. Wheeler's testimony over Dr. Halon's testimony that Mr. Davenport is a mere con man who can in fact control his behavior. The jury's determination is not disturbed on appeal. *Thorell*, 149 Wn.2d at 756.

K. Evidence of Dr. Halon's Discipline

The issue is whether the court violated the Full Faith and Credit Clause by admitting evidence of Dr. Halon's prior California discipline for impeachment purposes.

The trial court's decision to admit evidence is reviewed for abuse of discretion. *See State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A court abuses discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *Id*. Mr. Davenport essentially makes a legal challenge that the impeachment evidence is inadmissible under the Full Faith and Credit Clause. A judge abuses discretion if the decision to admit evidence is contrary to law. *See State v. Williamson*, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000).

The Full Faith and Credit Clause provides that "[f]ull faith and credit shall be

given in each State to the public Acts, Records and Judicial Proceedings of every other State." U.S. Const. art. IV, § 1. It precludes any further litigation of a question previously decided by another state's court. *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 2d 220 (1935). But a foreign state's judgment cannot reach beyond the settled controversy to control proceedings in other states by other parties asserting claims the merits of which the foreign state has not considered. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 238, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998). The foreign court also lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the foreign court's litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible. *Id*. The foreign state's court cannot determine evidentiary issues in litigation brought by parties who were not subject to the foreign state's court. *Id*. at 239.

Here, the disciplinary stipulation involved the California Board of Psychology and Dr. Halon. The issues and parties in this SVP proceeding are wholly unrelated to the California stipulation, which therefore cannot preclude a Washington court from determining whether evidence of that decision is relevant and admissible as impeachment evidence in the current proceeding. The Full Faith and Credit Clause does not preclude admissibility of the impeachment evidence. Mr. Davenport cites no authority to the contrary. His contention lacks merit.

Evidence offered for impeachment is relevant under ER 401 if it tends to cast doubt on the credibility of the person being impeached, and that person's credibility is a fact of consequence to the action. *See State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). ER 608(b) provides that specific instances of a witness's conduct, introduced for the purpose of attacking the witness's credibility, may not be proved by extrinsic evidence but may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness." In exercising its discretion, the court may consider whether the instance of misconduct is relevant to the witness's veracity on the stand or whether it is germane or relevant to the issues presented at trial. *State v. Gregory*, 158 Wn.2d 759, 798, 147 P.3d 1201 (2006); *see also State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980) (any fact going to the trustworthiness of the witness may be elicited if germane to the issue).

The court did not allow impeachment through extrinsic evidence. Instead, it ruled that inquiry into Dr. Halon's acts of dishonesty on cross-examination was relevant to refute his professional judgment and integrity, proper under ER 608(b). Mr. Davenport nonetheless points out that the case presented a classic battle between experts and the State gained an unfair advantage before the jury by impeaching Dr. Halon's credibility or qualifications. But he offers no analysis of how the evidence was unduly prejudicial under ER 403, and Dr. Halon first brought up the disciplinary

circumstances in his direct testimony. In sum, the court did not abuse its discretion.

L. Ineffective Assistance – Disciplinary Action Limiting Instruction

The issue is whether Mr. Davenport's trial counsel gave him ineffective assistance by failing to request a limiting instruction on use of the testimony regarding Dr. Halon's disciplinary action.

Impeachment evidence affects a witness's credibility and is not proof of the substantive facts encompassed in the evidence. *See State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). When such evidence is admitted, an instruction cautioning the jury to limit its consideration to its intended purpose is both proper and necessary. *Id*.; *see* ER 105 (court shall give instruction limiting evidence to its proper scope when requested by party). But when counsel does not request a limiting instruction, the court presumes the decision was reasonable trial strategy or tactics and hence not deficient performance under the *Strickland* standards. *State v. Price*, 126 Wn. App. 617, 648-49, 109 P.3d 27 (2005).

Such is the case here. The material used for impeachment was first introduced by the defense, presumably to downplay the evidence. Not drawing further attention to it with a limiting instruction is a tactic consistent with the defense strategy and does not give rise to an ineffective assistance claim.

Mr. Davenport's cited case, *Neal*, is inapt. There, a State's witness in a prosecution for false imprisonment denied a fact critical to the prosecution's theory and the State impeached her with her prior inconsistent statement to the police. Because defense counsel failed to request a limiting instruction and the jury could have used the prior statement as substantive evidence rather than solely for impeachment purposes, the court remanded the matter for further proceedings on an ineffective assistance of counsel claim. *Neal v. State*, 854 So.2d 66, 68-69 (Fl. App. 2003).

Mr. Davenport's cited case, *Hancock*, is also inapposite. There, the court alluded to possible jury confusion of impeachment evidence with substantive evidence in situations where prosecutors may abuse ER 607 by calling a witness they know will not provide useful evidence for the primary purpose of introducing hearsay evidence against the defendant. *State v. Hancock*, 109 Wn.2d 760, 763, 748 P.2d 611 (1988). The court concluded that the motivation in such instances is less to impeach the witness than to introduce hearsay as substantive evidence, contrary to ER 802. *Id*. Unlike in *Neal* and *Hancock*, the potential jury confusion between substantive and impeachment evidence is not present here.

M. Evidence of 1979 Case

The issue is whether the court erred in permitting the State to elicit testimony from Dr. Wheeler and Mr. Davenport concerning facts of the 1979 criminal case that

resulted in acquittal.

Collateral estoppel is a component of the constitutional protection against double jeopardy. *Ashe v. Swenson,* 397 U.S. 436, 445-46, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Thus, an issue of ultimate fact that has once been determined by a valid and final judgment cannot be relitigated between the same parties in any future lawsuit. *Id.* at 443, 446-47 (defendant acquitted of robbing one of a group of six men could not be retried for robbing another member of the group).

Here, to apply collateral estoppel against the State, Mr. Davenport must show:

> (1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication must have resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied.

In re Det. of Stout, 159 Wn.2d at 378 (citing *Clark v. Baines,* 150 Wn.2d 905, 913, 84 P.3d 245 (2004)).

Since the 1979 case was terminated with a final judgment on the merits and the party against whom the estoppel is asserted—the State—was a party to the prior suit, the focus is on whether the issue decided in the 1979 adjudication is identical to that presented in the current SVP proceeding. "We review the preclusive effect of a jury's verdict de novo." *State v. Stein*, 140 Wn. App. 43, 62, 165 P.3d 16 (2007).

The issue in the 1979 rape trial was whether the victim consented to intercourse.

The issue in the SVP proceeding was whether Mr. Davenport is an SVP who has a mental abnormality or personality disorder that makes him likely to reoffend in a sexually violent manner. In *Young*, albeit addressing admissibility of victim testimony pertaining to *convictions*, the court held that evidence of prior sexually motivated offenses was relevant because it had some bearing on the motivations and mental states of the petitioners and was pertinent to the ultimate question whether an individual is an SVP under the terms of the statute. *Young*, 122 Wn.2d at 53-54. The court further concluded, "In assessing whether an individual is a sexually violent predator, prior sexual history is highly probative of his or her propensity for future violence." *Id*. at 53.

Here, the alleged victim of the 1979 attack, R.G., testified as to the details of the encounter. She said Mr. Davenport made his way into her apartment, threatened that he had a gun, repeatedly raped her, and then "did all sort of perverted sexual things." RP at 930. She was terrified that he might kill her. She had never seen him before in her life. She did testify at his criminal trial but did not otherwise attend that trial. RP at 927-33. In the commitment trial, Mr. Davenport's counsel cross-examined R.G. to the effect that she had smoked marijuana with Mr. Davenport and told differing stories to the police. The State later questioned Mr. Davenport on direct-examination about the details of the 1979 incident; he said that he had consensual sex with R.G. Dr. Wheeler

also considered the circumstances of the 1979 incident when forming his diagnostic impression of Mr. Davenport. Mr. Davenport does not attack admission of the above testimony under ER 401, 402, 403, or under the above principles discussed in *Young*.

Dowling illustrates that collateral estoppel does not necessarily bar the later use of evidence that relates to alleged criminal conduct for which a defendant was acquitted. In *Dowling*, during the defendant's trial on armed bank robbery charges, the State introduced the testimony of a witness who identified him as the perpetrator of unrelated burglary and robbery crimes at her home and for which Dowling had previously been acquitted. *Dowling v. United States,* 493 U.S. 342, 344-45, 110 S. Ct. 668, 107 L. Ed. 2d. 708 (1990). Dowling contended his acquittal collaterally estopped the prosecution from introducing the disputed testimony. The Supreme Court disagreed, reasoning that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling,* 493 U.S. at 349. The court explained the defendant's prior acquittal proved only that a reasonable doubt existed as to that crime. And in the second robbery trial, the government sought to use the testimony regarding the acquitted burglary *as evidence* of the defendant's guilt of the second robbery. The standard for admitting "similar acts" evidence, under the Federal Rules of Evidence, is whether the jury can "'reasonably conclude that the act occurred and that

the defendant was the actor.'" *Dowling,* 493 U.S. at 348 (quoting *Huddleston v. United States,* 485 U.S. 681, 689, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)).

Thus, for the evidence to be admissible here, the State did not have to prove beyond a reasonable doubt that Mr. Davenport raped R.G. Instead, the evidence was admissible if the trial court found by a preponderance that he had probably committed sexually violent acts against R.G.—a matter relevant to the ultimate issue whether he is an SVP. *See Stein*, 140 Wn. App. at 63 (citing *State v. Kilgore,* 147 Wn.2d 288, 292, 53 P.3d 974 (2002)). The court did adequately apply that standard here, relying partly on the deposition of R.G.; Mr. Davenport makes no argument to the contrary. Accordingly, collateral estoppel does not preclude use of the evidence. *Dowling,* 493 U.S. at 349; *Stein*, 140 Wn. App. at 63; *see also In re Nau*, 153 Ill.2d 406, 425-27, 607 N.E.2d 134 (Ill. 1992) (applying *Dowling* in civil commitment proceeding). Mr. Davenport's arguments fail.

N. Evidence of *Alford* Plea

The issue is whether Mr. Davenport's 1992 second degree child molestation conviction based upon an *Alford* plea was improperly admitted in evidence as a predicate offense for SVP commitment when the underlying facts of the conviction were not established beyond a reasonable doubt.

In *Clark v. Baines*, 150 Wn.2d 905, 84 P.3d 245 (2004), the defendant Baines

entered an *Alford* plea to fourth degree assault with sexual motivation. The assault victim, Clark, subsequently filed a civil suit against Baines for sexual battery and outrage. Baines denied the allegations and counterclaimed for malicious prosecution. The trial court granted Clark's partial summary judgment motion to dismiss Baines's counterclaim on the basis the criminal case had not terminated on the merits in his favor. The court then gave the *Alford* plea preclusive effect to establish probable cause for Clark's civil action. The Supreme Court ultimately reversed, holding that "a defendant who pleads guilty pursuant to an *Alford* plea has not had a full and fair opportunity to litigate the issues in the criminal action." *Id*. at 917. The court explained that while an *Alford* plea is an admission, it may not be conclusive of guilt for purposes of a subsequent civil action. *Id*. at 915. Hence, the plea could not be used as a basis for collateral estoppel in a subsequent civil action. *Id*. at 913.

But as explained in *Stout*, the doctrine of collateral estoppel discussed in *Clark* is not necessarily germane to a commitment proceeding. *Stout*, 159 Wn.2d at 367. Specifically, in an SVP commitment proceeding, an individual cannot attack a conviction that is constitutionally valid on its face. *Id*. at 367 (citing *Young*, 122 Wn.2d at 54-55). The State need only prove that the individual was convicted of a crime designated in the SVP statute. RCW 71.09.020(16), .030; *Stout*, 159 Wn.2d at 367. In this setting, a challenge to the underlying facts is of no consequence to the *fact* of a

conviction. *Id*.

"'Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude.'" *Young*, 122 Wn.2d at 54-55 (quoting *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986)). A conviction based upon an *Alford* plea is no less constitutionally valid than one obtained by a straight plea so long as the plea is knowing, voluntary and intelligent, and the record before the judge contains strong evidence of actual guilt. *See In re Montoya*, 109 Wn.2d 270, 280-81, 744 P.2d 340 (1987); *see also In re McClendon*, 120 Wn.2d 761, 771, 845 P.2d 1006 (1993); *People v. Yartz*, 37 Cal. 4th 529, 542, 123 P.3d 604, 36 Cal.Rptr.3d 328 (2005) (conviction based upon *nolo contendere* plea does not undermine determination of defendant's suitability for SVP commitment).

Mr. Davenport points to no constitutional infirmity that would undermine the *fact* of his 1992 conviction. He does further argue that through the testimony of Dr. Wheeler the jury was improperly allowed to hear facts underlying the conviction that were not proven beyond a reasonable doubt. But Dr. Wheeler's testimony was not given collateral estoppel effect, as evidenced by Mr. Davenport's trial testimony in which he explained and disputed the facts underlying the 1992 child molestation conviction. *See Stout*, 159 Wn.2d at 367 n.7; *see also McClendon*, 120 Wn.2d at 771. The jury was entitled to believe Mr. Davenport's story, but chose not to.

Mr. Davenport next argues his 1992 *Alford* plea is unconstitutional on its face because the plea document makes no mention of community placement. In an SVP commitment proceeding, an individual cannot attack a conviction that is constitutionally valid on its face. *Stout*, 159 Wn.2d at 367 (citing *Young*, 122 Wn.2d at 54-55). The State need only prove that the individual was *convicted* of a crime designated in the SVP statute. RCW 71.09.020(16), .030.; *Stout*, 159 Wn.2d at 367. A judgment and sentence is facially invalid only if the defect is evident without further elaboration. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). If no defect is evident, the plea documents are not relevant to the facial validity determination. *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532-33, 55 P.3d 615 (2002).

Mr. Davenport does not contest the fact of the conviction, nor does he argue that the judgment and sentence is facially invalid. The judgment document correctly recites the two-year community placement term. Thus, failure of the plea form to apprise him of a mandatory community placement term does not implicate the facial validity of the judgment. *Hemenway*, 147 Wn.2d at 533. We do not look behind the face of the judgment. *Id.; Young*, 122 Wn.2d at 55. Moreover, as the State contends, Mr. Davenport was twice made aware of mandatory community placement prior to entry of the judgment and sentence. Mr. Davenport's arguments lack merit.

Mr. Davenport mentions he was not informed at the time of the plea that the

conviction could result in an SVP petition. But he makes no argument or citation to authority on this point. In any event, it is the fact of the conviction that is relevant for SVP purposes.

O. Cumulative Error In Civil Commitment Appeal

The issue is whether cumulative error denied Mr. Davenport a fair trial. Under this doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a fundamentally unfair trial. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Based upon the above, the cumulative error doctrine does not apply here.

We affirm the superior court's 2004 order civilly committing Mr. Davenport as an SVP.

II. ANALYSIS – NEW TRIAL ORDER

The issue is whether the court erred in ruling that Mr. Davenport established the necessary probable cause under the 2005 version of RCW 71.09.090 to obtain a new trial on his status as an SVP.

Preliminarily, Mr. Davenport incorrectly argues the 2001 version of RCW 71.09.090 applies, not the 2005 version. He focuses on *In re Detention of Elmore*, where the court addressed whether amendments to RCW 71.09.090 were retroactive and determined that "the triggering event for the amendment is the initial probable

cause determination, which already occurred in this case." *In re Det. of Elmore*, 162 Wn.2d 27, 35 n.7, 168 P.3d 1285 (2007). In *Elmore*, the show cause hearing to determine probable cause under RCW 71.09.090 occurred in March 2004, and while Elmore's appeal was pending, the legislature enacted the amended version effective May 9, 2005. The court made no reference in the opinion to the date of the initial probable cause hearing that occurred prior to the *commitment* trial. Rather, the proceedings arose solely in the context of whether Elmore was entitled to a full hearing to consider the validity of his continued commitment under RCW 71.09.090. In contrast to *Elmore*, Mr. Davenport's initial probable cause determination under RCW 71.09.090 was made in 2008—well after the effective date of the 2005 amendment. Mr. Davenport's interpretation of the term initial probable cause determination would produce the absurd result that the 2005 amendment would never apply to any SVP whose initial detention and pre-commitment-trial probable cause determination occurred prior to the May 9, 2005 effective date of the amendment. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (courts must avoid absurd results when interpreting statutes).

RCW 71.09.090 sets procedures for an SVP to be released from custody. RCW 71.09.090(2)(a) provides for a show cause hearing to determine whether probable cause exists to warrant a hearing on whether the committed person's condition has so

changed that he no longer meets the definition of an SVP. The show cause hearing is required unless waived. RCW 71.09.090(2)(a). The proceeding is limited to the submission of affidavits or declarations. RCW 71.09.090(2)(b). If the trial court at the show cause hearing determines that either (1) the State has failed to present prima facie evidence that the committed person continues to meet the definition of an SVP, or (2) probable cause exists to believe that the person's condition has so changed that the person no longer meets the definition of an SVP, then the trial court is required to set a hearing on either or both of these issues. RCW 71.09.090(2)(c). The conduct of such hearings is governed by RCW 71.09.090(3)(a)-(c).

In 2005, the legislature added subsection (4) to the statute to clarify its intent with regard to the "so changed" language in subsection (2). Laws of 2005, ch. 344, § 1. The added language provides:

> (4)(a) Probable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial, or less restrictive alternative revocation proceeding, of a substantial change in the person's physical or mental condition such that the person either no longer meets the definition of a sexually violent predator or that a conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed to adequately protect the community.
>
> (b) A new trial proceeding under subsection (3) of this section may be ordered, or a trial proceeding may be held, *only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding*:
>
> (i) An identified physiological change to the person, such as

> paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or
> (ii) A change in the person's mental condition *brought about through positive response to continuing participation in treatment* which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.
> (c) For purposes of this section, a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. As used in this section, a single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.

Laws of 2005, ch. 344, § 2 (emphasis added).

The legislature's findings for the amendment emphasize its intent that civil commitment address the "very long term" treatment needs of the SVP population. The legislature found that *Young,* 120 Wn. App. 753, and *Ward,* 125 Wn. App. 381, illustrate an unintended consequence of the "so changed" language triggering a new trial under RCW 71.09.090 by removing all incentive for successful treatment participation in favor of passive aging and distracting committed persons from fully engaging in sex offender treatment. Further, the legislature found a mere advance in age or a change in gender or some other demographic factor after the time of commitment does not merit a new trial proceeding under RCW 71.09.090. Moreover, the procedures in RCW 71.09.070 and RCW 71.09.090 provide for regular review of a committed person's status and permit the opportunity to present evidence of a relevant

change in condition from the time of the last commitment trial proceeding, but are not an alternate method for persons to collaterally attack their indefinite commitment for reasons unrelated to a change in condition. "Where necessary, other existing statutes and court rules provide ample opportunity to resolve any concerns about prior commitment trials." Laws of 2005, ch. 344, § 1.

Thus, under RCW 71.09.090, two ways exist for the trial court to find that probable cause exists to warrant a hearing on the merits: (1) the failure of the State to show that the committed person's condition has not changed, or (2) the committed person's affirmative showing that his condition has so changed that he no longer meets the definition of an SVP. *In re Det. of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002). Whether the committed person's evidence was sufficient to meet the probable cause standard under subsection (4) is a question of law reviewed de novo. *Savala*, 147 Wn. App. at 803; *see Petersen*, 145 Wn.2d at 799.

First, the State has clearly produced prima facie evidence under RCW 71.09.090(2)(b) that Mr. Davenport continues to meet the definition of an SVP. As discussed, his evaluations in 2005 through 2007 all indicate that he has refused to participate in any sex offender treatment and that he continues to suffer from mental conditions including Paraphilia NOS: Nonconsent and Personality Disorder NOS with Narcissistic and Antisocial Traits. The evaluators, Dr. Yanisch, and Dr. Coryell, both

opined that he continues to meet the definition of an SVP, and that placement in a less restrictive alternative is not appropriate.

In particular, Dr. Coryell noted in the 2007 report that Mr. Davenport had not engaged in any treatment for the past three years. Although he did participate in some treatment activities after his admission to the SCC in 1996, "his participation was marred by inconsistent attendance, a history of signing up and dropping out of classes, failure to complete assignments and lack of progression through the treatment phases. He has not participated in any treatment activities in the past three years and is considered in nontreatment status. . . . there is little indication that his risk for . . . reoffense has been mitigated by treatment." CP at 1654.

Dr. Coryell further observed that to the extent Mr. Davenport had ever participated in treatment, "the version he presents of his sex offenses is inconsistent with other records or documentation." CP at 1659. Dr. Coryell noted Mr. Davenport is an aging offender (age 54 in 2007) and he has some chronic medical issues that could affect his interests in sex. However, he recently told staff that he felt a revised policy toward sexually explicit material was "too broad and strict," thus suggesting he is still interested in sex or sexual material. CP at 1656. Finally, Dr. Coryell addressed the role of alcohol in Mr. Davenport's reoffending, and observed that despite repeated interventions, alcohol continued to be an issue for him. For example, in April 2007,

ethanol was found in a coffee pot in his room, resulting in the loss of his job. He was not participating in any chemical dependency treatment or AA program. Dr. Coryell thus concluded that he remained incapable of cooperating with supervision even in the secure environment of the SCC.

The trial court found the State carried its prima facie burden. Mr. Davenport does not contest any of this evidence, but for his arguments that he was misdiagnosed and never met the SVP definition in the first instance. We agree that the State carried its prima facie burden. RCW 71.09.090(2)(b).

Mr. Davenport's probable cause evidence derives from the several expert opinions forming the basis for Dr. Wollert's conclusions that Mr. Davenport no longer meets the SVP definition because of (1) advances in diagnostic science, (2) new information regarding his sexual preferences, (3) advances in actuarial science, and (4) Mr. Davenport's age makes him unlikely to reoffend. But Mr. Davenport concedes he has not participated in treatment, again excusing himself based upon his claims of misdiagnosis and advancing age.

The issue thus narrows to the scope of what evidence is relevant to the probable cause determination under RCW 71.09.090(2)(c) and (4). In essence, without ruling the statute unconstitutional, the trial court injected into subsection (4) a due process requirement that changes in science and the aging of a committed person be allowed

as probable cause evidence in the annual review setting.

Statutory interpretation is a question of law reviewed de novo. *State v. Watson,* 146 Wn.2d 947, 954, 51 P.3d 66 (2002). Our objective is to determine and give effect to legislative intent. *Id.* We look first to the language of the statute. If the language is clear on its face, its meaning is to be derived from the plain language of the statute alone. *Id*. An unambiguous statute is not subject to judicial construction. *Id.* at 955. Courts decline to insert words into a statute when the language, taken as a whole is clear and unambiguous. *Id*. We also do not add or subtract from the clear language of a statute unless an addition or subtraction is imperatively required to make the statute rational. *Id.* Finally, we avoid a literal reading of a statute that would result in unlikely, strained or absurd consequences. *Id. See also J.P.*, 149 Wn.2d at 450.

As applied to Mr. Davenport's case, subsection (4) states that a new trial under subsection (3) may be held only if, there is current evidence from a licensed professional since the last commitment trial proceeding, of a change in mental condition brought about through positive response to continuing participation in treatment. RCW 71.09.090(4)(b)(ii). Moreover, a mere change in a single demographic factor such as "a change in the chronological age" does not establish probable cause for a new trial proceeding under subsection (3). RCW 71.09.090(4)(c).

Thus, the language is a clear reflection of legislative intent to limit the grant of a

new hearing under RCW 71.09.090(3) to situations in which the SVP's status has changed due to participation in treatment. Indeed, the legislature's findings in enacting the 2005 amendment emphasize its intent that SVP's must engage in successful sex offender treatment in order to receive a new trial proceeding under RCW 71.09.090. Laws of 2005, ch. 344, § 1.

Mr. Davenport is correct that the court has inherent authority to supplement statutory provisions by requiring additional procedures to satisfy the requirements of procedural due process. *State v. Thorne*, 129 Wn.2d 736, 769, 921 P.2d 514 (1996) (citing *Young*, 122 Wn.2d at 46; *In re Harris*, 98 Wn.2d 276, 287, 654 P.2d 109 (1982)). But the argument is inapt because, as expressed in the legislature's findings for the 2005 amendment, the review procedures in RCW 71.09.070 and RCW 71.09.090 are not an alternate method for persons to collaterally attack their indefinite commitment for reasons unrelated to a change in condition. "Where necessary, other existing statutes and court rules provide ample opportunity to resolve any concerns about prior commitment trials." Laws of 2005, ch. 344, § 1.

Applying these principles, Mr. Davenport need not engage in treatment to make his misdiagnosis/advancement in science arguments in a personal restraint petition based upon new material facts or other grounds. RCW 10.73.090, .100; RAP 16.4(3), (5), (7). Other potential avenues for seeking relief are CR 60(b), and a writ of habeas

corpus in federal court. *See Elmore*, 162 Wn.2d at 41 (Bridge, J., dissenting). Thus, no need exists for us to supplement the statute with additional procedural due process requirements clearly not intended by the legislature in the RCW 71.09.090 setting. The trial court erred to the extent it did so here.

The above reasoning also coincides with the holdings in *Reimer* and *Savala*. *In re Det. of Reimer*, 146 Wn. App. 179, 190 P.3d 74 (2008); *Savala*, 147 Wn. App. 798. As in Mr. Davenport's case, the expert in *Reimer* disagreed with the initial diagnosis leading to Reimer's civil commitment and did not address the statutory requirement of change brought about through treatment. In affirming the trial court's denial of a full evidentiary hearing, the court first upheld the constitutionality of the 2005 amendment to RCW 71.09.090 (the trial court had ruled the statute unconstitutional but denied a new hearing under the 2001 version), and then held that because Reimer failed to demonstrate a change in his mental condition "*brought about through positive response to continuing participation in treatment*," he was not entitled to an evidentiary hearing. *Id.* at 199 (quoting from RCW 71.09.090(4)(b)(ii)). And in *Savala*, this court held that expert opinion of increase in age as a sole reason for a lower relapse rate is not sufficient to present a prima facie case of the change in condition required under RCW 71.09.090(4). *Savala*, 147 Wn. App. at 803-04.

Mr. Davenport's reliance on *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780,

118 L. Ed. 2d 437 (1992), is also misplaced. That case involved denial of conditional discharge of an insanity acquitee from a psychiatric hospital. The Supreme Court reversed lower court rulings that Foucha was required to prove he was not dangerous and held that the State may confine a person only if it proves by clear and convincing evidence that the person is both mentally ill and dangerous. *Foucha*, 504 U.S. at 72. The nature of the proceeding in *Foucha* was thus different from cases arising under Washington's SVP statute. In RCW 71.09.090, the legislature has specifically recognized the potential for long-term confinement with the requirement of rehabilitative treatment before an SVP may obtain a new hearing at which the State must prove continued commitment is warranted beyond a reasonable doubt. RCW 71.09.090(3)(b). Here, as discussed above, the State has carried its threshold burden under RCW 71.09.090(2)(b) of showing that Mr. Davenport continues to meet the definition of an SVP.

In sum, we conclude the trial court erred in ordering a new trial under RCW 71.09.090 to review Mr. Davenport's SVP status. Having so concluded we do not reach the State's alternative arguments that Mr. Davenport failed to present any new "evidence" of change not already presented to the jury in 2004.

The 2004 civil commitment order is affirmed and the 2008 order granting a new trial is reversed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Kulik, C.J.

Korsmo, J.