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

In re the Detention of:		
	)	No. 28417-4-III
	)	
SHAWN D. BOTNER,	)	
aka SHAWN BOWER,	)	
	)	UNPUBLISHED OPINION
Appellant.	)	
	)	

Siddoway, A.C.J. — Shawn Botner appeals his civil commitment as a sexually violent predator (SVP) on multiple grounds. We conclude that (1) the trial court was authorized under RCW 71.09.040(4) and corresponding Department of Social and Health Services (DSHS) regulations to order penile plethysmograph (PPG) testing of Mr. Botner, (2) Mr. Botner's constitutional challenge to that testing is improperly raised in the absence of DSHS as a party, (3) Mr. Botner was not entitled to a unanimity instruction, (4) the trial court did not err in admitting evidence of a pedophilia diagnosis and a Washington recidivism study, and (5) the trial court did not err in declining to instruct the jury to limit its risk assessment to the foreseeable future. Because the evidence was insufficient to establish two of the alternative means relied upon by the State to establish

that Mr. Botner had committed a recent overt act, however, particularly in light of the Washington Supreme Court's intervening decision in *In re Detention of Danforth*, 173 Wn.2d 59, 264 P.3d 783 (2011), we reverse the order of commitment and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

In August 2006, a community custody officer assigned to supervise Shawn Botner asked that a warrant be issued for Mr. Botner's arrest for community custody violations, after receiving information raising concern that Mr. Botner may be planning a sexual assault and learning that Mr. Botner had moved from his last known address. Mr. Botner, then age 33, had been convicted of one sexually violent offense, attempted rape in the first degree, when he was 19. He had also been convicted of other sexual crimes: two counts of indecent liberties committed against his 7- to 9-year-old cousin when Mr. Botner was 14 to 15, and unlawful imprisonment after he grabbed and choked a woman in a park restroom when he was 18. Much later, Mr. Botner admitted to a therapist that the assault in the park restroom was sexually motivated. Mr. Botner had a long history of other offenses, as a juvenile and an adult, principally for malicious mischief and theft.

Mr. Botner underwent 17 months of sex offender treatment while incarcerated for the attempted rape and was released from custody for that crime in April 2001. He had most recently been incarcerated after pleading guilty to third degree theft and third degree

assault, for stealing $1,299 from his employer and pulling a knife on the supervisor who pursued him in an attempt to recover the cash. He committed that crime in November 2003 and was released from custody in January 2005. His sentence for the theft included 18 months' community custody, which he was still serving at the time of the events that precipitated initiation of this SVP proceeding. During the period following the January 2005 completion of incarceration for the theft, he had been jailed for violating terms of his community custody, but none of those violations involved sex offenses.

The arrest and initiation of civil commitment proceedings against Mr. Botner was triggered by two events. On July 7, 2006, campus security officers for Gonzaga University were investigating a report of women's clothing seen alongside a riverside trail on the campus when they found two duffle bags in an area that appeared to them to be an encampment. One of the duffle bags was labeled "Shawn B" and contained an envelope addressed to "Shawn Bower," a longstanding alias for Mr. Botner, as well as sexual paraphernalia, women's clothing, and a spiral notebook that contained a handwritten description of a plan to rob a sexual novelty shop or adult bookstore staffed by a female clerk, kidnap and rape the clerk, and dispose of her body. The community custody officer (CCO) assigned to supervise Mr. Botner learned about discovery of the bags from a roll call bulletin provided by Spokane police and the sheriff's department, indicating that Mr. Botner was a person of interest based on the bags' contents.

Three weeks later, Mr. Botner was stopped shortly after 2 a.m. by Spokane police officers for riding a bicycle without a headlight or rear reflector. Upon being signaled to pull over, he discarded a hammer that he had been carrying, which the officers retrieved. He was wearing a bra, no shirt, and a nylon stocking over his hair, of the sort worn under a wig. He consented to a search of his backpack, which contained a blond wig, French maid costume, women's underwear, a folder containing pornographic pictures, a dildo, and a black case containing rope, rubber gloves, and condoms. As the officers were looking at the items contained in the backpack, Mr. Botner made the unsolicited statement, "'You'd be surprised what could be traced back to you by forensic evidence.'" Report of Proceedings (RP) (Aug. 13, 2009) at 322. Although Mr. Botner's appearance and the contents of his backpack were characterized by the officers as odd, they had no basis to arrest him. A warrant check had revealed that he was a registered sex offender presently serving community custody. The officers notified his CCO of the stop the next day.

Based on the incidents, Mr. Botner's CCO attempted to contact Mr. Botner, whom he learned had moved from his last known address without notice to the Department of Corrections. The CCO requested that an arrest warrant be issued for Mr. Botner's failure to report his last address. The CCO also visited sexual novelty shops and adult bookstores in the Spokane area to provide them with a photograph of Mr. Botner, warn of

his possible planned assault, and ask that store personnel contact law enforcement immediately if they saw him. He also notified downtown security personnel to be on the lookout for Mr. Botner. Mr. Botner was arrested on the warrant in a downtown park several weeks later.

Following his arrest, the State commenced this SVP civil commitment action. The parties stipulated to the existence of probable cause, and the court entered an order in February 2007 requiring Mr. Botner to submit to evaluation by forensic psychologist Dr. Harry Hoberman.

A hearing was conducted in May 2009 to determine the parameters of Dr. Hoberman's evaluation. Dr. Hoberman wanted to interview Mr. Botner face-to-face; to perform tests during the course of the interview, including a mental status examination, the Minnesota Multiphasic Personality Inventory II, and the Millon Multiaxial Inventory II; to perform a sexual history polygraph exam; and to conduct PPG testing.

Mr. Botner objected to the PPG testing, a procedure that involves placing a pressure-sensitive device around a man's penis, presenting him with sexual images of women and children of various ages involved in sexual activity, and determining his level of sexual attraction by measuring minute changes in his erectile responses. *In re Det. of Halgren*, 156 Wn.2d 795, 800 n.1, 132 P.3d 714 (2006); *United States v. Weber*, 451 F.3d 552, 554 (9th Cir. 2006). Mr. Botner had participated in PPG testing twice in

November 2000 as a part of his earlier sex offender treatment. He argued that the trial court lacked the authority to compel his participation in PPG testing for purposes of the pretrial evaluation because the procedure was not authorized by chapter 71.09 RCW or DSHS regulations. He also argued that court ordered testing would violate his substantive due process rights.

The trial court disagreed and ordered Mr. Botner to submit to the PPG testing. Mr. Botner nonetheless refused. To avoid a finding of contempt requested by the State, Mr. Botner stipulated that the jury "may infer from [his] refusal that he is deviantly aroused by forcible, non-consensual sexual contact with females." Clerk's Papers (CP) at 594 (boldface omitted).

At trial, the State offered the testimony of the three victims of Mr. Botner's sexual crimes and the community custody and the law enforcement officers familiar with discovery of Mr. Botner's duffle bags and with the 2 a.m. stop in late July. Mr. Botner had admitted in connection with the civil commitment proceedings, and admitted at trial, that the duffle bags belonged to him and that he had written the notebook entry.

The State also offered the expert opinion testimony of Dr. Hoberman. Dr. Hoberman testified to his record review, interview, and testing of Mr. Botner. He testified that he had reviewed the results of Mr. Botner's PPG tests from November 2000, which revealed that, particularly during testing for reactions to audio stimuli, Mr. Botner

demonstrated much higher levels of arousal to forced sex than consensual sex. The 2000 test results also revealed that during video testing, Mr. Botner demonstrated stronger arousal in response to females between the ages of 10 to 17 than to the adult females. Dr. Hoberman testified that he had requested current PPG testing and it had been court ordered, but that Mr. Botner refused to participate. At the request of the prosecutor, Dr. Hoberman read to the jury Mr. Botner's stipulation that current testing would have revealed his arousal to forcible sexual contact.

Dr. Hoberman expressed his opinion to a reasonable degree of psychological certainty that Mr. Botner was suffering from sexual sadism that, in his case, was a mental abnormality. He diagnosed Mr. Botner with pedophilia, antisocial personality disorder, and psychopathy, all pursuant to the guidelines contained in the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* (4th rev. ed. 2000) (DSM-IV-TR).

Finally, Dr. Hoberman testified that he conducted an assessment of Mr. Botner's risk of committing a predatory sex offense if released, using four actuarial instruments designed to measure the relative likelihood of future offenses based on factors that have been empirically determined to be associated with future sex offending. Dr. Hoberman was also permitted to testify, over Mr. Botner's objection, to a 2007 Washington Institute of Public Policy study known as the Milloy study,[1] which found a high rate of recidivism

among Washington sex offenders recommended but not pursued for civil commitment.

Based upon his evaluation of Mr. Botner and application of the actuarial tests, Dr. Hoberman expressed his opinion that Mr. Botner's mental abnormality made him more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility.

Mr. Botner testified, when questioned about his handwritten scenario of abducting, raping, and murdering a store clerk, that he had written it because writing out a fantasy was a way of getting it out of his mind; his explanation was, "That is a way to make it no longer a thought. It's real, and it's kind of ugly." RP (Aug. 17, 2009) at 372-73. The defense called as its expert Dr. Theodore Donaldson, who generally disputed Dr. Hoberman's analysis and opinions.

The State was required to prove that Mr. Botner had committed a recent overt act. The jury received the following instruction on the meaning of that element, which tracked the statutory definition at RCW 71.09.020(12):

> "Recent overt act" means any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

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[1] Cheryl Milloy, Wash. State Inst. for Pub. Policy, Six-Year Follow-Up of 135 Released Sex Offenders Recommended for Commitment Under Washington's Sexually Violent Predator law, Where No Petition Was filed (2007) (No. 07-06-1101), *available at* http://www.wsipp.wa.gov/rptfiles/07-06-1101.pdf.

CP at 479 (Instruction 8).

In its closing argument to the jury, the prosecutor reminded the jury of the court's instruction on "recent overt act" and went on to say, "[Y]ou'll have to evaluate if [Mr. Botner's] time in the community meets this definition" and that "you have to decide if his acts, any threats that are contained in that note or a combination of those behaviors cause you reasonable apprehension." RP (Aug. 25, 2009) at 1077, 1078. The prosecutor then argued:

> So look at his behavior in the community, and it's not limited to just one thing. It's not limited to just the note.

Id. at 1078-79. After elaborating on the pornography and other items from Mr. Botner's duffle bags and backpack admitted into evidence, the prosecutor argued that in deciding whether the State had proved a recent overt act that caused the jury reasonable apprehension:

> [I]t's not just the note. It's not just the duffle bags. It's not just being stopped on the bicycle. It's everything about him. It's his constant refusal to comply with supervision, his failure to register, his use of drugs in the community.
>
> All of those things play into it. It's his continuing and acknowledged engagement in bondage situations with girlfriends. All of these things play into who he is, and you have to identify which of those things constitute risk factors for Mr. Botner to start going down that offense cycle and engage in the behaviors that he outlined in that plan.

Id. at 1080. The defense did not object to this argument.

The jury found Mr. Botner to be a sexually violent predator, resulting in his commitment to the Special Commitment Center (SCC) located on McNeil Island. He timely filed this appeal.

ANALYSIS

I

Mr. Botner first contests the trial court's statutory authority to order him to submit to PPG testing, placing substantial reliance on *In re Detention of Hawkins*, 169 Wn.2d 796, 238 P.3d 1175 (2010), in which our Supreme Court construed RCW 71.09.040(4) to prohibit the State from compelling a person to undergo a sexual history polygraph examination as part of a pretrial evaluation in an SVP commitment proceeding. The superior court relied on the same statute and a related regulation in ordering Mr. Botner to submit to PPG testing by Dr. Hoberman. Mr. Botner argues that the Supreme Court's reasoning in *Hawkins* compels a conclusion that the statute does not authorize compulsory PPG testing. He argues alternatively that if DSHS regulations enacted pursuant to the statute permit such an order (which Mr. Botner disputes), then DSHS exceeded its rulemaking authority by promulgating such a rule.

The interpretation of the sexually violent predator statute and its implementing regulations is a question of law that we review de novo. *In re Det. of Aston*, 161 Wn. App. 824, 842, 251 P.3d 917 (2011), *review denied*, No. 86237-1 (Wash. Apr. 24, 2012);

see Kruger Clinic Orthopaedics, LLC v. Regence BlueShield, 157 Wn.2d 290, 298, 138 P.3d 936 (2006). When engaging in statutory interpretation, the court's fundamental objective is to ascertain and carry out the enacting body's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979) (applying same rules of construction to administrative regulations).

When a petition is filed, a judge must determine ex parte if "probable cause exists to believe that the person named in the petition is a sexually violent predator." RCW 71.09.040(1). If probable cause is found, the respondent is taken into custody and transferred to a facility for evaluation pursuant to rules developed by DSHS, thus beginning a process that will culminate in a jury trial to determine whether he or she is in fact an SVP. *Hawkins*, 169 Wn.2d at 806 (Stephens, J., dissenting). Because civil commitment proceedings commenced pursuant to chapter 71.09 RCW are special proceedings within the meaning of CR 81, examination by the State's experts is limited to the evaluation required under RCW 71.09.040(4). *In re Det. of Young*, 163 Wn.2d 684, 689, 185 P.3d 1180 (2008); *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

The Legislature Has Not Prohibited PPG Testing

We agree with Mr. Botner that some of the reasoning in *Hawkins* supporting its conclusion that RCW 71.09.040(4) implicitly forecloses use of polygraph tests as part of

a pretrial evaluation has equal application to the PPG. We nonetheless read the court's opinion in *Hawkins* as ultimately based on a unique disfavor for the polygraph.

In *Hawkins*, the respondent challenged a court order requiring him to submit to a polygraph examination as a part of the pretrial evaluation process, requiring the court to address "what the legislature intended with respect to polygraph examinations when it authorized 'an evaluation as to whether the person is a sexually violent predator.'" *Hawkins*, 169 Wn.2d at 802.

The *Hawkins* court held that "[a]s civil commitment is a 'massive curtailment of liberty,' we must narrowly construe [RCW 71.09.040(4)]," *id.* at 801 (citation omitted) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)), and that the statute must be construed bearing in mind that polygraph examinations are invasive, "both physically and of one's private affairs." *Id.* at 802. For these reasons and others, it inferred that the legislature intends to prohibit compulsory polygraph examinations unless it expressly allows for their use, an inference supported by the fact that compulsory polygraph examinations are expressly included as a condition that may be imposed upon an SVP released to a less restrictive alternative, RCW 71.09.096(4), but are not expressly authorized as part of the pretrial evaluation by RCW 71.09.040(4). It found the distinction to have "intuitive appeal," for "those subject to RCW 71.09.096(4) are persons who have been found, beyond a reasonable doubt, to be SVPs, while those

subject to RCW 71.09.040(4) have not." *Id.* at 803. The court also noted:

> At a minimum, the express allowance of polygraph examinations in RCW 71.09.096(4) demonstrates that when the legislature desires to permit a compelled polygraph examination it knows how to do so. Our conclusion, particularly given our duty to strictly construe the statute, is that because the legislature declined to specifically permit compelled polygraph examinations in RCW 71.09.040(4), the statute prohibits such examinations.

Id.

Finally, the court observed that its holding would not unduly impair the ability of evaluators to assess whether an individual is an SVP for several reasons: evaluators can still *request* such an assessment, consent to which might be granted; because many respondents will have undergone polygraph examinations while incarcerated, including as part of voluntary sex offender treatment, testing results might already exist and "[n]othing in RCW 71.09.040(4) prohibits evaluators from considering existing polygraph examinations as part of their evaluations"; and the lack of any polygraph examination would not prevent the expert from reaching an opinion. *Id.* at 804.

Mr. Botner argues that all of the foregoing reasoning applies equally to PPG testing. First, PPG testing is invasive, physically and of one's private affairs; indeed, Mr. Botner argues that it is more invasive than a polygraph examination, characterizing PPG testing as "forced sexual conduct." Reply Br. of Appellant at 12. In contexts involving a higher expectation of privacy, Washington decisions support Mr. Botner's objection;

Division One of our court has characterized PPG testing as "'involv[ing] bodily manipulation of the most intimate sort,'" and held that compelled testing of fathers in child custody disputes was an abuse of discretion where the father has never been convicted of a sex offense. *In re Marriage of Parker*, 91 Wn. App. 219, 225, 957 P.2d 256 (1998) (quoting *Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992)); *accord In re Marriage of Ricketts*, 111 Wn. App. 168, 173, 43 P.3d 1258 (2002).

But in the context of identifying and assessing sex offenders, Washington courts and DSHS have recognized PPG testing as "an effective method for diagnosing and treating sex offenders," and have authorized its use incident to sex offender treatment and imposing it as a condition of community placement. *State v. Riles*, 135 Wn.2d 326, 343-44, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Sanchez Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010); WAC 246-930-310(7)(c) (describing physiological assessment measures such as PPG as "useful in assessing baseline arousal patterns and therapeutic progress"); *In re Det. of Halgren*, 124 Wn. App. 206, 221-22, 98 P.3d 1206 (2004) (upholding admissibility of evaluator's reliance on PPG results as a variable in assessing risk in SVP proceeding), *aff'd*, 156 Wn.2d 795. Even Mr. Botner's expert, while characterizing the PPG as "far from perfect," characterized it as "one of the best things we have for indicating sexual preference." RP (Aug. 10, 2009) at 838. Washington case law specifically recognizes the reduced privacy interests of sex

offenders, including in SVP proceedings, recognizing that the "'substantial public safety interest outweighs the truncated privacy interests of the convicted sex offender.'" *In re Det. of Williams*, 163 Wn. App. 89, 97, 264 P.3d 570 (2011) (quoting *In re Det. of Campbell*, 139 Wn.2d 341, 356, 986 P.2d 771 (1999)). We are therefore not persuaded that we can infer a limitation on evaluative use of PPG testing from privacy concerns.

Mr. Botner argues that the textual analysis that caused the *Hawkins* court to conclude that polygraph examinations are not legislatively authorized in pretrial evaluations compels the same conclusion as to PPG testing. As with polygraph examinations, PPG testing is expressly identified as a condition that may be imposed on release as a less restrictive alternative under RCW 71.09.096(4)[2] but is not expressly authorized as part of the pretrial evaluation under RCW 71.09.040(4). As with polygraph examinations, PPG examinations can be consented to by a respondent and, as in Mr. Botner's case, prior examinations undergone during incarceration may be available. A PPG, as with a polygraph examination, is not essential to an expert's ability to arrive at an opinion whether a respondent is an SVP.

But while PPG testing is treated identically to polygraph testing in these respects,

[2] The statutory subsection provides that "conditions [to release] shall include . . . participation in a specific course of inpatient or outpatient treatment that may include monitoring by the use of *polygraph and plethysmograph*." RCW 71.09.096(4) (emphasis added).

Mr. Botner ignores the *Hawkins* court's repeated reliance on the uniquely problematic nature of polygraph examinations. The *Hawkins* decision begins its analysis by noting Mr. Hawkins' own emphasis on "the unique status of polygraph examinations in the law, owing to their unreliability and invasiveness, and the fact that the legislature elsewhere specifically allows for compelled polygraph examinations." 169 Wn.2d at 801. At the conclusion of the court's textual analysis of whether the legislature intended that polygraph examination be a permitted part of the pretrial evaluation, it cautions that challenges to other examinations might not be available by analogy:

> This conclusion, as the foregoing analysis makes clear, applies only to polygraph examinations; *the failure of the statute to enumerate other methods of conducting an examination does not necessarily preclude their use.*

Id. at 803-04 (emphasis added).

Finally, a dissenting opinion joined in by two justices would have held that polygraph examinations may be compelled as part of the pretrial evaluation, given legislative intent that DSHS should determine how to evaluate SVPs and had issued regulations identifying polygraph testing as a permitted part of the evaluation. *Id.* at 806-15 (Stephens, J., dissenting). And the dissenting opinion reads the majority opinion, as we do, as construing RCW 71.09.040(4) to prohibit only polygraph examination. *Id.* at 810 (characterizing the majority's approach as one that "ceases to search for legislative

intent and instead applies a general dislike of polygraphs as the rule of decision").

For all of these reasons, we hold that RCW 71.09.040(4) does not prohibit PPG testing.

DSHS Regulations Validly Permit PPG Testing

Mr. Botner argues alternatively that DSHS regulations cannot, or do not, permit PPG testing. He asks us to interpret RCW 71.09.040(4) as delegating to DSHS limited authority to regulate only *who* may perform evaluations, not how the evaluations should or may be performed. If we read DSHS's authority more broadly, he argues that we should interpret its regulations as not including PPG testing as a permitted part of a pretrial evaluation. Similar arguments were raised in *Hawkins* in challenging whether polygraph examinations were authorized by DSHS regulations. The arguments were not reached by the majority's opinion, which deemed them irrelevant. 169 Wn.2d at 804. The dissenting opinion did reach the arguments, however, and we find the reasoning of the dissenting opinion persuasive.

First, Mr. Botner argues that RCW 71.09.040(4) permits DSHS to regulate who is qualified to perform the evaluations but not the conduct of the evaluation—in effect, an ultra vires challenge. He relies on the statement in the statute that

> [t]he evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services.

RCW 71.09.040(4). He argues that the "pursuant to rules" clause modifies "deemed" rather than "conducted."

The dissenting opinion in *Hawkins* conceded that the statute is ambiguous because the "pursuant to rules" clause could be read to modify "by a person deemed professionally qualified to conduct such an examination." 169 Wn.2d at 807 (Stephens, J., dissenting). It identifies three reasons for nonetheless concluding that the legislature intended to grant DSHS the broader authority to prescribe the conduct of evaluations of alleged SVPs. First, unless the statute relies on DSHS to prescribe how evaluations shall be conducted, it leaves participants in the commitment process with a complete lack of guidance as to acceptable evaluation procedures, since the statute itself sheds no light on the evaluation process. Second, the fact that DSHS is directed to consult with the Department of Corrections in addition to the Department of Health indicates that the scope of its guidance is intended to be more than professional qualifications, since the Department of Corrections could not be expected to provide helpful guidance on that score, while its input would be important if DSHS were charged with regulating the conduct of the examination. Third, DSHS is afforded similar and complementary regulatory power elsewhere in the SVP law. *Id*. at 807-09. These reasons are persuasive. Mr. Botner offers no countervailing support for his limited construction of the statute's delegation of authority to DSHS.

Mr. Botner argues alternatively that DSHS's rules do not allow for PPG testing. Former WAC 388-880-034 (2003) provides that the evaluation "must be based on" an examination, addressed by its subsection (1), and a record review, addressed by its subsection (2). The first subsection, dealing with the required examination, provides that the evaluation must be based on

> [e]xamination of the resident, including a forensic interview and a medical examination, if necessary.

Former WAC 388-880-034(1). The second subsection, dealing with the record review, provides that the evaluation must be further based, in pertinent part, on

> [r]eview of the following records, tests or reports relating to the person:
>
> . . . .
>
> (e) Medical and physiological testing, including plethysmography and polygraphy;
>
> . . . .
>
> (i) Other relevant and appropriate tests that are industry standard practices;
>
> (j) All evaluations, treatment plans, examinations, forensic measures, charts, files, reports and other information made for or prepared by the SCC which relate to the resident's care, control, observation, and treatment.

Former WAC 388-880-034(2). Because the records review portion of the regulation expressly mentions PPG testing while the examination section does not, Mr. Botner argues that by implication PPG testing is not a permitted part of an examination. His argument ignores the fact that "examination" in the first subsection is undefined and

"includes" a forensic interview and medical examination without being limited to those components.

For these reasons, DSHS regulations, reasonably construed, permit PPG testing to be ordered as part of the pretrial evaluation upon a qualified evaluator's request, as occurred here. The trial court did not exceed its authority by ordering Mr. Botner to comply with the evaluator's request for PPG testing.

II

Mr. Botner next argues that even if we construe the applicable statutory and administrative provisions to permit court ordered PPG testing, the court's order cannot survive constitutional scrutiny. He claims that compulsory PPG testing violates his federal and state constitutional privacy rights as well as his right under the Fourth Amendment to be free of unreasonable searches.

Because DSHS was not made a party to this appeal, Mr. Botner's challenge to the constitutionality of former WAC 388-880-034 is not properly before us. "In an action challenging the validity of a rule, the agency shall be made a party to the proceeding." RCW 34.05.570(2)(a); *City of Bremerton v. Spears*, 134 Wn.2d 141, 164, 949 P.2d 347 (1998).

Perhaps in an effort to avoid this problem, Mr. Botner argues that it is RCW 71.09.040 rather than the DSHS regulation that violates his constitutional privacy rights.

But we do not construe RCW 71.09.040(4) to authorize PPG testing, we construe it as doing no more than delegating authority to DSHS to determine what sort of pretrial evaluation should or may be conducted in SVP commitment proceedings. The substance of Mr. Botner's constitutional challenge is to the DSHS regulations, not the enabling legislation. Since DSHS is not a party, we will not address it.[3]

III

Mr. Botner next argues that he was denied his right to a unanimous jury verdict because the jury was not instructed that it had to agree upon a particular recent overt act from the numerous choices offered by the State during its closing argument. Alternatively, he argues that if the recent overt act requirement is found to instead be subject to an alternative means analysis, substantial evidence does not support each of the alternative means alleged.

The State raises a threshold objection that Mr. Botner did not raise these issues below and may not raise them for the first time on appeal. RAP 2.5(a). But the failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error. *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); *State v. Fiallo-Lopez*,

[3] We also note that Mr. Botner's state constitutional claims as well as his Fourth Amendment search and seizure claim were not raised below, and therefore need not be considered by this court. RAP 2.5(a). He has also failed to support these contentions with adequate argument. RAP 10.3(a)(6); *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). These are additional reasons for declining to review these untimely and inadequately argued constitutional claims.

78 Wn. App. 717, 725, 899 P.2d 1294 (1995). And sufficiency of the evidence "'is a question of constitutional magnitude and can be raised initially on appeal.'" *State v. Alvarez*, 128 Wn.2d 1, 10, 904 P.2d 754 (1995) (quoting *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989)).

Unanimity Instruction Versus Alternate Means Analysis As Safeguards

Where a respondent in an SVP commitment proceeding elects trial by jury, commitment must rest upon a unanimous verdict. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 48, 857 P.2d 989 (1993); RCW 71.09.060(1). In criminal cases, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

In criminal cases, the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged, *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Washington law likewise requires the State to prove each element required for civil commitment of sexually violent predators beyond a reasonable doubt. *In re Det. of Turay*, 139 Wn.2d 379, 407, 986 P.2d 790 (1999); RCW 71.09.060(1).

The manner in which the law safeguards these requirements at trial and on appeal

depends upon where a particular determination fits in a hierarchy of the jury's decision process. On the ultimate issue of whether the crime charged has been committed, Washington law provides that jury unanimity must be protected in any case in which the State presents evidence of several distinct criminal acts but the defendant is charged with only one count of criminal conduct through the State either electing the act on which it will rely for the conviction, or through instructing the jury all 12 must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *Petrich*, 101 Wn.2d at 569.

When it comes to the elements themselves, however, it is now well settled that the jury need not agree on the particular evidence that satisfies the element or, if the legislature has provided that the element can be satisfied by alternative means, the jury need not agree on the means. While the matter was not without controversy given *Winship*'s requirement that due process mandates proof beyond a reasonable doubt of "every fact necessary to constitute the crime with which [the defendant] is charged," 397 U.S. at 364,[4] the United States Supreme Court has held that it is impossible to determine as an a priori matter whether a given combination of facts is consistent with their being

[4] *See, e.g.*, *Schad v. Arizona*, 501 U.S. 624, 652, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (White, J., dissenting); *and see State v. Arndt*, 87 Wn.2d 374, 387, 553 P.2d 1328 (1976) (Brachtenbach, J., dissenting); *State v. Franco*, 96 Wn.2d 816, 830, 639 P.2d 1320 (1982) (Utter, J., dissenting).

only one offense. Accordingly,

> [d]ecisions about what facts are material and what are immaterial, or, in terms of *Winship*, what "fact[s] [are] necessary to constitute the crime," and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court.

Schad v. Arizona, 501 U.S. 624, 638, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (alterations in original) (citation omitted) (quoting *Winship*, 397 U.S. at 364). In short, the jury need only be unanimous that the State has proved what, under the applicable law, it had to prove. And if the legislature has defined a crime to include an element that may be established by alternative means, then the jury must only be unanimous that the defendant committed the crime in one or another of the alternative ways provided for by the legislature. *See id.* at 630. Individual jurors need not agree upon the means. The only limitation on the legislature's authority to define a single offense to encompass different courses of conduct or states of mind, thereby permitting conviction without jury agreement as to which actually occurred, are the constitutional bounds of fundamental fairness and rationality. *Id.* at 632, 645. In Washington, we rely upon the factors identified in *State v. Arndt*, 87 Wn.2d 374, 379, 553 P.2d 1328 (1976) to determine whether the legislature intended to define multiple crimes, or to define only one crime and state different ways in which it might be committed.

The manner in which the law safeguards the requirements of unanimity and proof

beyond a reasonable doubt for jury determinations of simple elements is by requiring that the jury be instructed on all essential elements of the crime charged, *State v. Van Tuyl*, 132 Wn. App. 750, 758, 133 P.3d 955 (2006) (citing U.S. Const. amend. VI; Const. art. I, § 22), and through substantial evidence review. Jurors are not required to agree on the evidence supporting the element; "'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" *Schad*, 501 U.S. at 631-32 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 449, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) (Blackmun, J., concurring)).

For elements that the legislature has provided may be proved by alternative means, the State is not required to elect a means nor does the jury need to be instructed that it must agree on the means. And as with simple elements, the jury is not required to agree on the evidence supporting a particular means. Unanimity and proof beyond a reasonable doubt are again safeguarded by instruction on the elements and by substantial evidence review; in the case of these elements, however, we test whether the evidence was sufficient to prove each of the alternative means because we cannot know the means that individual jurors relied upon. *Arndt*, 87 Wn.2d at 378.

The foregoing review of how unanimity is safeguarded in the hierarchy of jury

decision making may be unnecessarily detailed, but is provided to more clearly explain our decision on the unanimity challenges that are raised by Mr. Botner. The analyses can be difficult to translate to a civil commitment proceeding and our own analysis accepts and rejects aspects of the positions taken by Mr. Botner and the State. We therefore want to provide a thorough explanation.

Petrich *Requirements Do Not Apply*

Mr. Botner's first argument is that because the State argued that there were a number of acts that could satisfy the required element of a recent overt act, this is a "multiple acts" case subject to the alternatives required by *Petrich*: State election of a specific act, or a unanimity instruction. But the alternatives required by *Petrich* have no application here. The purpose of those alternatives is to safeguard unanimity as to the ultimate verdict where the State charges only one count but presents evidence of multiple crimes.

The ultimate verdict the jury was required to reach in this case was whether a basis existed for civilly committing Mr. Botner. While there was certainly the possibility that jurors would be persuaded by different pieces of evidence presented by the State, there was no risk that they would decide whether the State had proved the essential elements for civil commitment with reference to entirely different subject matters.

The State's "Course of Conduct" Rationale Does Not Apply

The only viable unanimity and sufficiency issue that is presented by the State's evidence and argument on the recent overt act element, then, is Mr. Botner's second argument: that reversal is required because substantial evidence does not support each of the alternative means. Br. of Appellant at 36. In response to that assignment of error, the State argues here, as it did in *Aston*, 161 Wn. App. at 842, that the alternative means analysis does not apply because the legislature's 2009 amendment of the definition of "recent overt act" (adding the words "or combination thereof" to follow "any act or threat") in RCW 71.09.020(12) encompasses all of a respondent's behavior in a single act. We agree with *Aston* that language added by the 2009 amendment does not support the State's position. We also find the State's position contrary to the history and purpose of the recent overt act element.

In *In re Detention of Harris*, 98 Wn.2d 276, 654 P.2d 109 (1982), our Supreme Court reviewed several challenges to the constitutionality of the longstanding statute authorizing detention of persons under Washington's general involuntary commitment provisions at chapter 71.05 RCW. It concluded that in order to provide a constitutional basis for detention the statute must be interpreted

> as requiring a showing of a substantial risk of physical harm as evidenced by a recent overt act. This act may be one which has caused harm or creates a reasonable apprehension of dangerousness.

98 Wn.2d at 284-85. The court noted that "such evidence must be recent to be

meaningful." *Id.* at 284.

As originally enacted eight years later, in 1990, the sexual predator commitment law, chapter 71.09 RCW, did not include an explicit requirement that the State prove that a respondent had committed a recent overt act. When our Supreme Court reviewed the constitutionality of this and other aspects of the SVP commitment law in *Young*, it held that for sexually violent predators incarcerated at the time the State petitioned for commitment, a requirement of a recent overt act would create a standard the State could not possibly meet. 122 Wn.2d at 41. But where an individual has been released from incarceration and is living in the community when SVP proceedings are initiated, the court interpreted the SVP law to require proof of a recent overt act. *Id.* The recent overt act requirement "directly and specifically speaks to a person's dangerousness and thus satisfies the dangerousness element required by due process." *In re Det. of Albrecht*, 147 Wn.2d 1, 11, 51 P.3d 73 (2002). The United States Supreme Court has held that a person must be both mentally ill and dangerous for a civil commitment to be permissible under the due process clause of the U.S. Constitution. *Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). In 1995, the legislature amended RCW 71.09.020 to provide that proof that a person was likely to engage in predatory acts of sexual violence "must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030." Laws of 1995, ch. 216,

§ 1.

The State's position—that the legislature's enlarging the definition of "recent overt act" allows the jury to consider Mr. Botner's behavior throughout the period following his release from incarceration—conflates the reason that the legislature excused the State from proving an incarcerated respondent's recent overt act with the reason that proof of a recent overt act is otherwise required. The State is only required to prove a recent overt act if the respondent has been free in the community, because it would be impossible to prove such an act if he has been in prison. But the purpose of requiring proof of a recent overt act is to establish current dangerousness. That purpose is best served by giving the definition its plain meaning.

And a related rationale offered by the State—that allowing proof of overall behavior following release better reflects the approach of mental health professionals, who do not focus on discrete actions—risks turning the element of a recent overt act into a variant of what are already two expert-oriented elements the State is required to prove: that a respondent "suffers from a mental abnormality or personality disorder which causes serious difficulty in controlling the respondent's sexually violent behavior," and that "the mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined to a secure facility." *See* 6A Washington Practice: Washington Pattern Jury Instructions: Civil 365.10 (5th ed. 2005);

CP at 473 (Instruction 2). We believe that the recent overt act element requires, and was intended to require, something different.

Applying Alternate Means Analysis

For these reasons, we, like the *Aston* court, believe that act, threat, and combination thereof are three distinct means of establishing what is a distinct recent overt act element in SVP commitment cases. In applying the *Arndt* alternative means test, we ask whether a rational trier of fact *could* have found the requisite harm or reasonable apprehension to have been proved by each means that was argued by the State—act, threat, or combination of act or threat. *See Halgren*, 156 Wn.2d at 811 (quoting *Kitchen*, 110 Wn.2d at 410-11). We do not ask, as Mr. Botner suggests, whether a rational trier of fact could have found the requisite harm or reasonable apprehension to have been proved by each and every act pointed to by the State. That would be means-within-a-means unanimity analysis of the sort not required by Washington cases. *In re Det. of Sease*, 149 Wn. App. 66, 77, 201 P.3d 1078 (2009) (where State relied on two personality disorders to establish the required element of a mental abnormality or personality disorder, the court was not required to review the sufficiency of evidence to establish both disorders).

Applying alternative means analysis, there is sufficient evidence that Mr. Botner committed an "act" creating the reasonable apprehension of harm required to constitute a recent overt act. He admitted to writing the notebook entry recording either a plan or his

fantasy of raping, murdering, and disposing of the body of a woman. In *Aston*, the court found sufficient evidence of an "act" where an individual wrote deviant sexual fantasies for his sexual gratification. 161 Wn. App. at 834. While the jury might not find this to be a recent overt act as defined by the statute if it believed Mr. Botner's testimony that writing out his fantasy was in an effort to put it out of his mind, consistent with what he claimed had been his sex offender treatment, the jury was entitled to believe the contrary testimony of the State's experts. Mr. Botner's actions on the night of July 30 (cruising the streets at 2 a.m.; "loaded on dope" by his own account; armed with a hammer, rubber gloves, a rope, and sexual paraphernalia; and commenting to the officers about what can be traced by forensic evidence) also suffice. RP (Aug. 10, 2009) at 976.

But the evidence of a "threat" is insufficient, particularly in light of the Washington Supreme Court's decision in *Danforth*, 173 Wn.2d 59, a decision entered after the parties completed their briefing, which they brought to our attention supplementally. The issue in *Danforth* was whether a jury could have found that Mr. Danforth, a registered sex offender, committed a "threat" within the statutory definition of recent overt act when he traveled to the King County Sheriff's Office and admitted to detectives that he feared he would reoffend and wanted to turn himself in. The *Danforth* plurality construed "threat" as having its common and ordinary meaning of "'an expression of an intention to inflict evil, injury, or damage on another,'" or "'expression

of an intention to inflict loss or harm on another.'" 173 Wn.2d at 68 (quoting Webster's Third New International Dictionary 2382 (2002)). In reasoning that Mr. Danforth's statements were a threat, the plurality attached significance to the fact that he "explicitly described to the detective at the King County Sheriff's Office" his plan, and "repeatedly said that he would act on his plan if he was not committed as a sex offender." *Id.* at 69. In explaining how "recent overt act" was defined with sufficient definiteness, the plurality emphasized that giving "threat" its common and ordinary meaning as "an expression of intent to inflict loss or harm" was a sensible, meaningful, and practical interpretation, enabling ordinary people to understand the conduct that can amount to a recent overt act. *Id.* at 73. The plurality concluded:

> A reasonable jury could find that Danforth committed a threat when he gave explicit descriptions of his plans to molest boys at a bus stop and have intercourse with a child at a mall video arcade. *Danforth repeatedly said that he would act on his plan if not committed as a sex offender.*

Id. at 75 (emphasis added).

Moreover, we note that while the majority, concurring, and dissenting opinions agree on this definition of "threat" as far as it goes, five of the justices—Justice Chambers, who concurred in part and dissented in part, and four dissenters—construe the SVP law to require a "true threat" within the meaning of First Amendment jurisprudence. 173 Wn.2d at 77 (Chambers, J., concurring in part/ dissenting in part), at 82-88 (Wiggins,

J., dissenting). A true threat is "'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.'" *Id.* at 87 (Wiggins, J., dissenting) (internal quotation marks omitted) (quoting *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010)).

Here, by contrast, Mr. Botner did not express an intention to anyone. We do not suggest that his characterization of his handwritten entry as merely therapeutic must be accepted at face value for any other purpose in the civil commitment proceeding. We recognize only that there was no evidence that his fantasy or plan—whatever it was—was ever intentionally communicated to anyone. Rather, the undisputed evidence is that it became evidence because it was in a notebook found by campus security officers, who removed it from a duffle bag found in a remote location.[5] In light of *Danforth*'s construction of "threat," the evidence below is insufficient to establish a threat or a combination of an act and a threat, two of the means argued to the jury. We therefore reverse, but because the evidence was sufficient to establish an act, we remand for a new trial. *State v. Wright*, 165 Wn.2d 783, 794 n.6, 203 P.3d 1027 (2009) (retrial necessary

[5] And inferentially, a closed duffle bag. The officer who testified at trial twice described a second duffle bag as being unzipped, suggesting that the duffle bag in which the spiral notebook was located was zipped shut at the time it was discovered. RP (Aug. 13, 2009) at 301-02.

when jury may have relied on legally insufficient alternative means (citing *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994))).

IV

With the exception of Mr. Botner's argument of cumulative error, his remaining assignments of error raise issues that are likely to arise on remand. We therefore address them.

Mr. Botner challenges two evidentiary rulings as reversible error: the admission of Dr. Hoberman's pedophilia diagnosis, which Mr. Botner argues lacked sufficient foundation and was prejudicial to an extent outweighing its probative value, and the admission of a 2007 Washington sex offender recidivism study for the same reasons, as well as a lack of relevance. The objections were preserved through motions in limine. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Abuse of discretion means that "the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable." *In re Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58 (1999). The trial court likewise has broad discretion in balancing the probative value of evidence with its potentially prejudicial impact. *State v. Stenson*, 132

Wn.2d 668, 701-02, 940 P.2d 1239 (1997). We review the admissibility of expert opinion under ER 702, the trial court's balancing of probative value against prejudicial effect under ER 403, and the relevance of evidence under this standard. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (ER 702); *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001) (ER 403); *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995) (relevance).

Pedophilia Diagnosis. Mr. Botner contends that Dr. Hoberman's pedophilia diagnosis was improperly admitted because it lacked an adequate factual basis, given Dr. Hoberman's reliance on (1) the results of Mr. Botner's 2000 PPG examinations, explaining that it reflected arousal to minor females aged 10 to 17, but as to which Dr. Hoberman had no knowledge of the particular images used or how many depicted females over the age of puberty, and (2) Mr. Botner's indecent liberties conviction for inappropriately touching his 7- to 9-year-old cousin at times when he was age 14 and 15. As Mr. Botner points out, the DSM-IV-TR provides that "[t]he paraphilic focus of Pedophilia involves sexual activity with a prepubescent child (generally age 13 years or younger)" and "[t]he individual with Pedophilia must be age 16 years or older." DSM-IV-TR, *supra*, at 571.

The introduction to DSM-IV-TR provides, however, that "[t]he specific diagnostic criteria included in DSM-IV are meant to serve as guidelines to be informed by clinical

judgment and are not meant to be used in a cookbook fashion. For example, the exercise of clinical judgment may justify giving a certain diagnosis to an individual even though the clinical presentation falls just short of meeting the full criteria for the diagnosis as long as the symptoms that are present are persistent and severe." *Id.* at xxxii. As pointed out by the State at the hearing on Mr. Botner's motions in limine, Mr. Botner was over age 16 at the time of the 2000 PPG examinations and Dr. Hoberman's diagnosis. In testifying that he believed Mr. Botner met the diagnostic criteria for pedophilia, Dr. Hoberman acknowledged that Mr. Botner had been age 14 and 15 at the time of the conduct resulting in the indecent liberties convictions and that the diagnostic criteria of DSM-IV-TR limit the diagnosis to individuals at least 16 years of age. He nonetheless explained, "There's a significant enough age discrepancy between Mr. Botner and his cousin that in my opinion he would still meet the criteria for pedophilia." RP (Aug. 18, 2009) at 436. Dr. Hoberman was extensively cross-examined on his pedophilia diagnosis, on these and other grounds.

A trial court has broad discretion in admitting expert evidence and a party may introduce expert testimony if the expert is properly qualified, relies on generally accepted theories, and is helpful to the trier of fact. ER 702; *Philippides*, 151 Wn.2d at 393. While an expert must have a sufficient factual foundation for his or her opinion, *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 104, 882 P.2d 703

(1994), and conclusory or speculative expert opinions that lack an adequate foundation are inadmissible, *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), the trial court did not abuse its discretion in concluding that Dr. Hoberman was properly qualified to exercise his clinical judgment to deviate from the DSM-IV-TR without being second-guessed by the judge. A full opportunity to cross-examine Dr. Hoberman, not exclusion, was an appropriate response to Mr. Botner's objection. Given the clear relevance of the diagnosis to the State's case, its probative value could reasonably be found to outweigh its admittedly highly prejudicial effect.

Milloy Study.[6] Mr. Botner also contests the court's admission of Dr. Hoberman's testimony concerning the Milloy study, which was one of many bases for his conclusion that Mr. Botner was more likely than not to reoffend if not confined to a secure facility. This 2007 study tracked 135 Washington sex offenders recommended for civil commitment but against whom no further action was taken for six years following release. Dr. Hoberman testified that the study found that during that six-year time frame, 29 percent had been arrested for another sex offense, 23 percent had been convicted of another violent sex offense, and at least 10 percent had been reconsidered for civil commitment. The jury was presented with evidence that Mr. Botner had been considered for civil commitment in 2000, prior to his release from incarceration for attempted rape,

[6] *See* note 1.

but that SVP commitment proceedings had not been initiated at that time.

Mr. Botner complains that the study was inappropriately used as a means for "norming" actuarial instruments such as the Static-99 for current Washington populations. But the record reveals that Dr. Hoberman never explicitly relied on the Milloy study to "norm" other actuarial instruments. Mr. Botner appears to infer such use from the fact that after Dr. Hoberman was questioned about actuarial instruments, the prosecutor turned to questioning him about the Milloy study with the question, "[W]hat does the Milloy study tell us about Washington offenders?" RP (Aug. 18, 2009) at 510. The segue does not appear designed to suggest that the Milloy study provided cross validation for the other actuarial instruments testified to by Dr. Hoberman and we seriously doubt that it was understood to do so by the jury. The State responds that it was used solely to establish that even those Washington sex offenders whom the State does not seek to civilly commit prior to their release—like Mr. Botner—have a high recidivism rate.

Mr. Botner points to deficiencies of the Milloy study, such as its limited sample size. Those shortcomings go to the weight of the evidence, rather than its admissibility. *In re Det. of Strauss*, 106 Wn. App. 1, 9, 20 P.3d 1022 (2001), *aff'd sub nom. In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003); *Halgren*, 156 Wn.2d at 807. And Mr. Botner's challenge under ER 403 is not well taken. Washington cases recognize that in

light of the determination a jury is asked to make in an SVP commitment proceeding, evidence bearing on the future dangerousness of sex offenders has a high probative value in relation to its unquestionably prejudicial effect. *Thorell*, 149 Wn.2d at 758.

V

Mr. Botner argues that due process requires that the jury be instructed to limit its risk assessment to the foreseeable future. He acknowledges that this argument was expressly rejected by our Supreme Court in *In re Detention of Moore*, 167 Wn.2d 113, 125, 216 P.3d 1015 (2009) ("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."). He explains that he seeks only to preserve the issue for possible federal review. Br. of Appellant at 49. The error is preserved; we reject the argument.

We reverse the order of commitment and remand for a new trial.

A majority of the panel has determined that 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.

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Siddoway, A.C.J.

WE CONCUR:

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Brown, J.

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Kulik, J.