SC95975

In the Supreme Court of Missouri

In the Matter of the Care and Treatment of

Jay T. Nelson,

Appellant

Appeal from the Circuit Court of Jackson County
The Honorable Kathleen Forsyth, Judge

Respondent's Brief

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STATEMENT OF FACTS

Jay Nelson was committed to the custody of the Director of the Department of Mental Health for care, control, and treatment as a sexually violent predator ("SVP") following a jury trial in the Circuit Court of Jackson County, Probate Division, the Honorable Kathleen Forsyth presiding (L.F. 108). The jury committed Nelson upon the following facts:

Nelson's Offending History

In 1988, Nelson committed a violent rape. Nelson broke in to the home of a woman he had lent money to by breaking a window and crawling inside (Tr. 250). Nelson argued with the woman (Id.). Nelson beat her, and told her "you are about to take your last breath, I'm going to kill you." (Id.). Nelson then began to rape the woman on the broken glass (Tr. 250). The woman needed a total of 27 stitches after Nelson raped her on the broken glass (Id.). When Nelson committed the rape, he was engaged, had put rings on layaway, and his fiancée was four months pregnant (Tr. 518, 560).

While in the Department of Corrections, Nelson received 55 conduct violations for sexual misconduct (Tr. 330–31). During many of these violations, Nelson would masturbate so female staff at the Missouri Department of Corrections could see him (Tr. 254). His masturbatory behavior was "targeted" at certain individuals (Tr. 329). Nelson would also make violent threats while masturbating (Tr. 252–53). These sexualized

threats included statements such as: "I'm going to kidnap you" (Tr. 255), "I'm going to get you. I'm going to do this again" (Tr. 289), "I'm going to keep this dick in your face" (Id.), and that he was going to "stick a broom up her pussy" (Tr. 322). Nelson would sometimes elaborate by saying "I didn't make a threat it was a promise" (Tr. 255). Nelson also degraded the female staff by calling them "bitch," "sluts," and "whores" (Tr. 255). Nelson also made threats that he would kill staff members at the Missouri Department of Corrections (Tr. 322).

Nelson also sexually assaulted female staff at the Missouri Department of Corrections. For example, in one instance, he grabbed the buttocks of a female staff member, grinned, and said "Excuse me" (Tr. 325). On another occasion, Nelson brushed his hands against the pubic bone of a female staff member (Tr. 326). Later, Nelson grabbed a female staff member's crotch so forcefully that she had to "slam" the chapel door closed to keep Nelson at bay (Tr. 327–28).

Nelson's Treatment History

Nelson did not complete the Missouri Sex Offender Program (Tr. 264). Nelson was terminated from treatment "because of his continued masturbation and exposure of himself to the corrections officers" (Tr. 264–65). Nelson was not terminated immediately; he was "offered [ ] all kinds of opportunities to work through that and talk about that and help him identify

why he's engaging in those behaviors." (Tr. 265). Nelson was offered a second opportunity to participate in treatment, but Nelson refused to participate (Tr. 265).

Dr. Nena Kircher

Dr. Nena Kircher, a licensed psychologist, evaluated Nelson to determine if he was an SVP (Tr. 312–13). She testified that she reviewed Nelson's medical history, mental health records, and probation and parole records, and she testified that she interviewed Nelson (Tr. 314–15).

Dr. Kircher first testified that Nelson had been convicted of a sexually violent offense (Tr. 317).

Dr. Kircher next testified that she looked for a mental abnormality (Tr. 319). Dr. Kircher testified that Nelson suffered from antisocial personality disorder (ASPD) and that it was a mental abnormality in Nelson's case (Tr. 320–21). Dr. Kircher testified that Nelson's ASPD caused him serious difficulty controlling his sexual behavior (Tr. 321). Dr. Kircher also testified that Nelson's exhibitionism contributed to his serious difficulty controlling his behavior (Tr. 360). Dr. Kircher explained that Nelson's sexually violent offense, and his long history of conduct violations supported her diagnosis (Tr. 321–329). Dr. Kircher explained that Nelson's masturbation history in the Department of Corrections supported an inference that Nelson was

targeting certain staff members because Nelson would often "stand on something in the cell so that he [could] be more easily seen" (Tr. 329).

Dr. Kircher also testified that she performed a risk assessment (Tr. 334). Dr. Kircher scored Nelson on the Static-99R and the Stable-2007 (Tr. Id). She scored Nelson a four on the Static-99R (Tr. 275). A score of four is in the moderate/high risk category (Tr. 341). Dr. Kircher also scored Nelson on the Stable-2007 (Tr. 342). She scored Nelson as a seventeen (Tr. 343). A score of seventeen is in the high-risk category (Id). Dr. Kircher explained that when the Static-99R and the Stable-2007 are considered together in Nelson's case, he is in the high risk range because the dynamic risk factors demonstrate that the static risk factors underestimate his risk (Tr. 343–44).

Dr. Kircher also testified that she considered additional risk factors from the literature (Tr. 344). Dr. Kircher found that Nelson's risk was increased by his sexual preoccupation (Tr. 350), by Nelson's grievance and hostility (Tr. 346), by Nelson's non-compliance with supervision (Tr. 347), by Nelson's poor cognitive problem solving (Id.), by Nelson's impulsivity (Tr. 348), by Nelson's offense supportive attitudes (Tr. 349), and by Nelson's lack of emotionally intimate relationships (Tr. 350). Dr. Kircher did find that Nelson's age decreased his risk (Tr. 352). However, Dr. Kircher testified that Nelson was not entitled to a risk reduction for successfully completing treatment or a risk reduction for a serious health issue (Tr. 352). After

considering the actuarials and the additional risk factors, Dr. Kircher opined that Nelson was more likely than not to commit another sexually violent offense unless placed in a secure facility (Tr. 354).

Dr. Kircher's opinion was that Nelson "met the criteria within the Missouri statute as a sexually-violent-predator" (Tr. 314).

Dr. Jeannette Simmons

Dr. Jeannette Simmons, the chief operating officer at the Center for Behavioral Medicine, evaluated Nelson to see if he was an SVP (Tr. 277). Dr. Simmons is a licensed psychologist from the Missouri Department of Mental Health (Tr. 277–78). Dr. Simmons testified she had done 28 sexually violent predator evaluations (Tr. 232). Dr. Simmons testified that she finds that a referred individual meets criteria under Missouri's law 55% of the time (Id.). Dr. Simmons testified that Nelson had a mental abnormality, specifically paraphilia not otherwise specified as defined in the Diagnostic and Statistical Manual of Mental Disorders (Tr. 239–40). That mental abnormality, according to Dr. Simmons, causes Nelson serious difficulty controlling his behavior (Tr. 244). Dr. Simmons explained that paraphilia not otherwise specified, in Nelson's case, manifested as an excitement over sex and as excitement over a non-consenting partner (Tr. 251–52). Dr. Simmons also testified that she found that Nelson suffered from Exhibitionism and ASPD (Tr. 242–43; 257–59).

Dr. Simmons also performed a risk assessment (Tr. 266–67). Dr. Simmons scored Nelson on the Static-99R (Tr. 267). Dr. Simmons also considered Nelson's additional risk factors from the literature (Tr. 268–69). Dr. Simmons was asked if she had formed an opinion whether Nelson was "more likely than not to engage in predatory acts of sexual violence in the future if he's not confined to a secure facility" (Tr. 245). Dr. Simmons testified that she had formed an opinion, and that Nelson was more likely than not to commit another act of sexual violence unless confined to a secure facility (Id.). Dr. Simmons further testified that it was her opinion that Nelson "seeks out individuals that he would like to prey upon" (Tr. 256–57). Dr. Simmons confirmed on cross-examination that it was her opinion that Nelson was more likely than not to commit a future act of predatory sexual violence unless confined to a secure facility (Tr. 302).

Dr. Simmons' opinion was that Nelson is an SVP.

Branetta Cooper

Nelson called Cooper to testify (Tr. 402). Cooper is Nelson's sister (Id.). Cooper testified about Nelson's life as a child, including that Nelson's mother subjected him to physical abuse as the result of religion (Tr. 402–04). Cooper testified that Nelson never exposed himself to his sisters (Tr. 409). The State objected before Cooper gave the answer, but the objection was sustained at the bench out of the hearing of the jury, and the jury was never instructed to

disregard the answer (Tr. 409–411). Although the State sought to limit Cooper's ability to testify to Nelson's good character (Tr. 411), Cooper was allowed to testify that Nelson would bring her food, and that Nelson worked several jobs to support family members (Tr. 413–14).

Wendy McCurry

Nelson called McCurry to testify (Tr. 191). McCurry testified that Nelson "treated [her] like a queen" (Tr. 420). McCurry testified that she was pregnant with Nelson's child when Nelson raped the woman on broken glass (Tr. 423–24).

Dr. Luis Rosell

Nelson also called Dr. Rosell, a forensic psychologist (Tr. 428). Dr. Rosell agreed that Nelson had ASPD (Tr. 445). Dr. Rosell also testified that paraphilia not otherwise specified was "controversial" and that he did not believe that paraphilia was a valid diagnosis (Tr. 449–50).

Dr. Rosell agreed that Nelson "put his hands on women in prison" (Tr. 473). Dr. Rosell was asked if a female staff member had to "lock herself in the Chapel to get away from Mr. Nelson" and he agreed that was true (Tr. 475). Dr. Rosell also agreed that Nelson made sexualized threats to female staff members while in prison (Tr. 480).

Dr. Rosell testified that in his opinion, Nelson was not an SVP (Tr. 462).

Sgt. John Cox

Nelson also called John Cox to testify (Tr. 502). Cox is an officer at the Crossroads Correctional Center (Id.). Cox testified about his experience supervising Nelson at Crossroads Correctional Center (Tr. 506–07).

Nelson

Nelson testified on his own behalf (Tr. 514). Nelson testified about his childhood (Tr. 514). Nelson also testified that he learned to read in the Missouri Department of Corrections because of a desire to read the Bible (Tr. 516). Nelson also described his rape of the woman in 1988 (Tr. 519–521). Nelson described his experience living in prison (Tr. 522–23). Nelson testified that he would masturbate and threaten the guards so he could be placed in administrative segregation because he did not feel safe (Tr. 526–27). Nelson also testified that if released he would not commit any more sexual assaults (Tr. 533). Nelson also testified that the staff at the Department of Corrections knew that his threats were not serious (Tr. 549).

Officer Samantha Loucks

In rebuttal, the State called Officer Loucks (Tr. 564). Loucks testified that she could remember Nelson specifically because Nelson threatened to kill her when he was released from the Department of Corrections (Tr. 564–65). Loucks testified that she took his threats seriously because Nelson's treats were made with "fury" and "pure hatred" (Tr. 565). Nelson's threats

made the hair on the back of Loucks' neck stand up (Tr. 566). At the time of trial, Loucks had been a corrections officer for seven years (Tr. 564).

Probate Court's Judgment

The jury found that Nelson was an SVP (Tr. 609). On June 11, 2015, the probate court issued its Judgment and Commitment Order finding that Nelson was an SVP and committing him to the custody of the Department of Mental Health for control, care, and treatment until such time as Nelson's mental abnormality had so changed that he was safe to be at large (L.F. 108).

ARGUMENT I

The probate court did not err in refusing to grant Nelson's pre-trial motions to dismiss (1) because the SVP Act is not punitive; (2) because the Due Process Clause does not require the SVP Act to offer unconditional release; (3) because Nelson did not make his arguments about the SVP Act's release procedures to the probate court; and (4) because even if Nelson is correct about the release procedures, that only entitles Nelson to proper application of the release procedures.

In his first point, Nelson presents two separate arguments about why the probate court should have granted his pre-trial motions to dismiss (Nelson Br. 26–36). Nelson first argues that the SVP Act is unconstitutional because the purpose of the act is punitive in violation of the *Ex Post Facto* and Double Jeopardy Clauses (Nelson Br. 26–29). Nelson next argues that the SVP Act violates the Due Process Clause and the Equal Protection Clause because it does not allow for unconditional release (Nelson Br. 29–32).

Standard of Review

On questions of whether a state statute violates the federal constitution, this Court is not bound by the decisions of a United States District Court or the United States Court of Appeals. *See State v. Mack*, 66 S.W.3d 706, 710 (Mo. 2002) ("general declarations of law made by lower

federal courts do not bind this Court"). Instead, this Court is bound only by decisions from the United States Supreme Court. *Hanch v. K.F.C. Nat. Management Corp.*, 615 S.W.2d 28, 33 (Mo. 1981).

Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. 2007). All doubts are resolved "'in favor of the act's validity'" and this Court will "'make every reasonable intendment to sustain the constitutionality of the statue.'" *Id.*, *quoting Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. 1984).

Discussion

Nelson's first argument is that the SVP Act is unconstitutional because the purpose of the act is punitive in violation of the *Ex Post Facto* and Double Jeopardy Clauses (Nelson Br. 26–29). Nelson is mistaken. This Court has already explained that the SVP Act *is not punitive*. Nelson's second argument is that the SVP Act violates the Due Process Clause and the Equal Protection Clause because it does not allow for unconditional release (Nelson Br. 29–32). But the SVP Act does not have to allow for unconditional release. Nelson also alleges throughout this point that the SVP Act release procedures are being applied unconstitutionally, and he complains that the probate court did not grant his motions to dismiss. But Nelson *never* presented any evidence about

the release procedures to the probate court. Nelson cannot convict the probate court of error based on a legal argument Nelson never presented.

A. The SVP Act is not punitive in nature and therefore does not violate the *Ex Post Facto* Clause or the Double Jeopardy Clause.

In his first argument, Nelson contends that the United States District Court's decision in *Van Orden v. Schafer*, 129 F.Supp.3d 839 (E.D. Mo. Sept. 11, 2015, *modified* Dec. 22, 2015), means that the SVP Act violates the *Ex Post Facto* Clause and the Double Jeopardy Clause. Nelson's argument is not persuasive because *Van Orden v. Schafer* is not applicable in this case, and because Nelson has confused the *purpose* of the SVP Act with the *alleged implementation* of the SVP Act.

The *Ex Post Facto* and Double Jeopardy Clauses do not apply to SVP acts unless the act is criminal, not civil, in nature. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). This Court has previously held that "[a]lthough the proceedings involve a liberty interest, *they are civil proceedings*." *In re Van Orden*, 271 S.W.3d 579, 585 (Mo. 2008) (emphasis supplied). So, the SVP Act is civil, not criminal in nature. Under this Court's ruling in *Van Orden*, Nelson's argument fails. Nelson attempts to avoid this Court's ruling in *Van Orden* by relying on the federal case of *Van Orden v. Schafer* (Nelson Br. 27), and by arguing that this Court may not question the federal *Van Orden v. Schafer*'s holding (Id).

In *Van Orden v. Schafer*, a group of sexually violent predators filed suit against Missouri, and alleged, among other things, that the SVP Act was facially unconstitutional, and unconstitutional as applied to them. *Van Orden v. Schafer*, 129 F.Supp.3d at 843. *Van Orden v. Schafer* is not a final decision, but instead represents the United States District Court's findings of fact and conclusions of law after a bench trial on liability. *Id.* Nelson relies on *Van Orden v. Schafer*'s non-final holding that the release provisions were being unconstitutionally implemented because the Department of Mental Health was making it too difficult to progress through the treatment program. The remedy phase is still on-going. The district court rejected the facial challenge to the SVP Act. *Id.* at 865. The district court also rejected the plaintiff's as-applied challenge to the SVP Act's treatment provisions. *Id.* at 867.

However, the district court did sustain the challenge to the SVP Act's release procedures as-applied to the plaintiffs. *Id.* at 867–870. The district court has not ordered the release of the plaintiffs, but has ordered Missouri to apply the SVP Act in a constitutional manner to the plaintiffs. *Id.* at 871.

The non-final holding in *Van Orden v. Schafer* does not support Nelson's argument for relief. Nelson summarily concludes that the SVP Act violates the *Ex Post Facto* and Double Jeopardy Clauses because of the holding in *Van Orden v. Schafer* (Nelson Br. 28). Even if the district court is correct that the SVP Act is being improperly implemented, that does not

mean that the act is punitive. The United States Supreme Court has held that the party challenging an SVP act as punitive must provide "the clearest proof that the scheme is so punitive in purpose or effect as to negate" the state's intention to deem it civil. *Hendricks*, 521 U.S. at 361. In this case, Nelson has not provided "the clearest proof." *Van Orden v. Schafer* is not final. Missouri is actively engaged in efforts to comply with the district court's order. Nelson is silent about what developments have happened since the *Van Orden v. Schafer* order was issued in 2015. For instance, Nelson's brief does not mention that there are at least nine pending petitions for conditional release. *In re Richard Berg*, 312P05-00088 (Greene County Cir. Ct.); *In re Stephen Elliott*, 7PR204000306 (Clay County Cir. Ct); *In re George Evans*, 04PR72330 (St. Francois County Cir. Ct.); *In re Claude Hasty*, 12DE-PR00001 (Dent County Cir. Ct.); *In re Larry Lusby*, 39P049900137 (Lawrence County Cir. Ct.); *In re Lou Martineau*, 05NW-PR00096 (Newton County Cir. Ct.); *In re Jessie Moyers*, 02PR323155 (Cole County Cir. Ct.); *In re Charles St. Clair*, 02PR610339 (Washington County Cir. Ct.); *In re Wade Turpin*, 17P020100226 (Cass County Cir. Ct.). Moreover, Nelson's brief does not mention that four petitions for conditional release have recently been granted. *In re Clifford Boone*, 21PR00135062 (St. Louis County Cir. Ct.) (conditional release granted Aug. 30, 2016); *In re Adrian Blanton*, 06E4-PR00063 (Franklin County Cir. Ct.) (conditional release granted Sept. 30,

2016); *In re David Seidt*, 43P040300031 (Daviess County Cir. Ct.) (conditional release granted Aug. 25, 2016); *In re Steven Richardson*, 06PS-PR00236 (St. Louis County Cir. Ct.).

There is not sufficient evidence, let alone "the clearest proof" that Missouri's SVP Act is a criminal law. The non-final nature of *Van Orden v. Schafer* and the lack of any evidence about what has happened in the months since *Van Orden v. Schafer* demonstrates that this Court cannot rely on the district court's decision.

Without evidence, Nelson has failed to prove that Missouri's SVP Act is anything other than a civil law. And because Missouri's SVP Act is civil in nature, it cannot violate the *Ex Post Facto* or Double Jeopardy Clauses. Therefore, this Court should reject Nelson's first argument.

B. Nelson has not shown that the Due Process Clause and Equal Protection Clause require the SVP Act to offer unconditional release.

In his third argument, Nelson asks this Court to find that the SVP Act is facially unconstitutional under the Missouri Constitution's due process and equal protection guarantees (Nelson Br. 29–32). This Court should reject Nelson's argument to find the SVP Act facially invalid because Nelson has not demonstrated that he is eligible for conditional or unconditional release

and because Nelson has not shown that the SVP Act is required to offer unconditional release.

In this Court's decision in *In re Van Orden*, two concurring judges and one dissenting judge questioned whether Missouri's SVP Act was constitutional because it did not explicitly provide for unconditional release. *Van Orden*, 271 S.W.3d at 586 n.5. However, the majority pointed out that issue was not before the Court because the SVPs had failed to "show that they were entitled to unconditional releases." *Id.*

Moreover, Nelson has not shown that the burdens of conditional release are so great that due process requires the State to use the beyond-a-reasonable-doubt standard at trial. Both the State and Nelson agree that conditional release encumbers Nelson's liberty interest. However, Nelson has the burden to prove that conditional release imposes such a burden that beyond a reasonable doubt is the necessary standard of proof. If Nelson has raised a facial challenge, his claim fails because he has not demonstrated that every SVP will be entitled to an unconditional release. If Nelson has raised an as-applied challenge, his claim fails because he has not shown how *his* liberty would be impacted.

For instance, Nelson alleges that *if* he is conditionally released, then his commitment will never be reviewed (Nelson Br. 34). Not so. The SVP Act permits Nelson to file a petition for review of his conditional release. Section

632.505(6) RSMo ("The court may modify conditions of release upon its own motion or upon the petition of the department of mental health, the department of corrections, *or the person on conditional release*").

Moreover, Nelson has not demonstrated that he would be entitled to unconditional release. Nelson's complaint is with the release procedures. If Nelson wants to assert he is entitled to unconditional release, he can raise that claim when he files a petition for conditional release. Nelson's claim is not ripe on direct appeal because Nelson *has not* filed any petitions for release. Nelson cannot attack the commitment procedures in his case by asking this Court to assume that the State will act unconstitutionally in the future.

Nelson also alleges that the *In re Van Orden* dissent was correct when it claimed that the act is punitive in nature (Nelson Br. 31). But, as the State pointed out in point I.A., *supra*, *Van Orden v. Schafer* does not represent the way the SVP Act is currently being implemented. For instance, less than one month ago, an SVP was conditionally released with the Director of the Department of Mental Health's support. *In re David Seidt*, 43P040300031 (conditional release granted with Director's support). Nelson fails to show why, in his view, the SVP Act will always be implemented in an unconstitutional manner.

Nelson's main authority, the non-final federal *Van Orden v. Schafer*, decision also undercuts his argument. The United States District Court for the Eastern District of Missouri held that Section 632.505(6) can be interpreted to mean that a Missouri court could remove all pre-conditions on an SVP's conditional release. *Van Orden v. Schafer*, 129 F.Supp.3d at 865. Nelson offers no compelling reason why that provision of his main authority is mistaken. If the United States District Court's analysis is correct, then the SVP Act *does* offer a pathway to unconditional release.

C. This Court should deny Nelson's complaints about the SVP Act's release procedures because Nelson's complaints were not preserved for appellate review.

In his fourth argument, Nelson asserts that the SVP Act is unconstitutional "as written" because the release procedures are unconstitutional as applied to other individuals (Nelson Br. 32–36). This argument was not presented to the probate court, and so has not been preserved for appellate review.

In order to preserve a constitutional claim for appellate review, the claim must be made at the earliest opportunity and the claim must be preserved throughout the entire proceeding. *State v. Liberty*, 370 S.W.3d 537, 546 (Mo. 2012), *quoting State v. Wickizer*, 583 S.W.2d 519, 523 (Mo. 1979).

In this case, Nelson now complains that the statutory release process is unconstitutional both facially and as-applied (Nelson Br. 32–36). Specifically, Nelson complains about how long it takes to progress through the treatment program (Nelson Br. 32), Nelson complains about how the Department of Mental Health conducts the review for release (Nelson Br. 33), Nelson complains about the annual review process (Nelson Br. 34), the process to petition for conditional release (Nelson Br. 34–35), and the burden of proof in the conditional release process (Nelson Br. 35). But Nelson never raised those complaints in a pre-trial motion to dismiss (*See* L.F. 15–53). And, Nelson never raised those complaints in his motion for new trial (L.F. 94–107). Under the rule in *Liberty* and under Rule 78.07, the claim is not preserved for review because it was not raised in the motion for new trial.

But even if Nelson had preserved these claims, they would be meritless because an unconstitutional application of the SVP Act's release procedures only entitles Nelson to a constitutional application of the release procedures, not an immediate discharge.

D. Nelson is not entitled to a new trial or immediate discharge because if Nelson's complaints about the SVP Act's release procedures are well-founded, then Nelson is only entitled to proper application of the release procedures.

Even if Nelson had placed facts in the record concerning how the release procedures are administered, and even if this Court found a constitutional violation, then the correct remedy would not be to discharge Nelson. The correct remedy would be to order the Department of Mental Health to carry out the release procedures in a constitutional fashion. In *State v. Hart*, 404 S.W.3d 232 (Mo. 2013), this Court considered a claim that the appellant should have his first-degree murder conviction vacated because he was a juvenile sentenced to a mandatory life without parole sentence. *Hart*, 404 S.W.3d at 238.[1] This Court found a constitutional violation—the mandatory imposition of a life without parole sentence—but remanded the case to the trial court for a new sentencing hearing. *Id.* at 238. This Court explained that the constitutional violation was that the sentence did not

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[1] The appellant asked the Court to impose a second-degree murder conviction and sentence. *Id.* at 237. But this was an alternative request for relief. The appellant's primary request was for complete discharge. *See* Appellant's Br. at 68, *State v. Hart*, SC93153.

conduct the individualized analysis required by the constitution. *Id.* at 238–39. Accordingly, this Court explained, the proper scope of relief was to remand for re-sentencing so that the trial court could correct the unconstitutional application. *Id.*

The premise in *Hart*—that the scope of relief should only remedy the wrong—means that Nelson is not entitled to discharge. Nelson's claim is that the release procedures are unconstitutionally applied (Nelson's Br. 30–36). The remedy for that alleged wrong is not to invalidate the commitment trial. Instead, if this Court agrees with Nelson, the proper relief would be an order that the Department of Mental Health properly apply the release procedures.

Conclusion

The probate court did not err in refusing to grant Nelson's pre-trial motions to dismiss (1) because the SVP Act is not punitive; (2) because the Due Process Clause does not require the SVP Act to offer unconditional release; (3) because Nelson did not make his arguments about the SVP Act's release procedures to the probate court; and (4) because even if Nelson is correct about the release procedures, that only entitles Nelson to proper application of the release procedures. Nelson is not entitled to relief.

ARGUMENT II

The probate court did not err when it denied Nelson's motion to dismiss because Nelson is not required to be placed in the least restrictive environment.

In his second point, Nelson argues that the probate court should have granted his motion to dismiss because the SVP Act does not allow placement in the least restrictive environment (Nelson Br. 37). This Court should reject Nelson's argument because nothing requires the SVP Act to offer the least restrictive environment. And, even if there was a less restrictive environment, Nelson would not qualify.

Standard of Review

Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell*, 215 S.W.3d at 102. All doubts are resolved "'in favor of the act's validity'" and this Court will "'make every reasonable intendment to sustain the constitutionality of the statue.'" *Id.*, *quoting Westin Crown Plaza Hotel*, 664 S.W.2d at 5.

Analysis

In his second point, Nelson asserts that Missouri's SVP Act violates the Due Process Clause and the Equal Protection Clause because the Act does not allow for SVP's to be placed in the least-restrictive environment (Nelson Br. 37–49). This Court has rejected the least-restrictive-environment

argument and Nelson fails to distinguish this Court's opinion. Moreover, because of Nelson's past performance in a secure environment, Nelson would not qualify for a less restrictive environment.

A. This Court has held that the Due Process Clause does not require the SVP Act to consider the least restrictive environment.

In *In re Norton*, this Court found that "secure confinement of persons adjudicated to be SVPs, as provided in sections 632.480 to 632.513, is narrowly tailored to serve a compelling state interest." *In re Care and Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. 2003). This Court explained that the State has a compelling interest in protecting the public from crime. *Id.*[2] The *Norton* Court then explained that the State's interest in protecting the public from crime justified treating SVPs differently from other mental health patients. *Id.*

Moreover, the *Norton* Court found that an SVP is further protected by procedural safeguards such as (1) the right to a preliminary hearing; (2) the right to contest an adverse probable cause determination; (3) the right to counsel at that hearing, and to appear in person at that hearing; (4) the right to present evidence and cross-examine witnesses at the hearing; (5) the right

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[2] This Court has since reaffirmed that protecting the public from crime is an important state interest. *State v. McCoy*, 468 S.W.3d 892, 897 (Mo. 2015).

to a jury trial; and (6) the right to a unanimous verdict before commitment. *Norton*, 123 S.W.3d at 174–75. Nelson received all those rights. It is true that the *Norton* Court also identified the beyond-a-reasonable-doubt standard as a procedural safeguard. *Id.* at 174. But this Court has subsequently held that an SVP's rights are sufficiently protected by the clear-and-convincing-evidence standard used at Nelson's trial. *In re Van Orden*, 271 S.W.3d at 586.

The *Norton* Court also found that there were statutory provisions for court review and "dismissal from secure confinement." *Norton*, 123 S.W.3d at 175. It is true that after *Norton*, the Missouri General Assembly replaced the dismissal provision with a conditional release provision. *In re Van Orden*, 271 S.W.3d at 586. But, conditional release can function like a dismissal, in that some SVPs have been released to the community. *See, e.g., In re James Fennewald*, 06B7-PR00024 (Boone County Cir. Ct.) (July 13, 2016) (Order revoking conditional release and specifying that SVP be returned to physical custody in a secure facility after having been released to the community).

On balance, the SVP Act has not changed since the *Norton* decision in a way that would require this Court to overrule *Norton*. Nelson's arguments are grounded in the statutory language that was affirmed in *Norton*. This Court should reject Nelson's argument.

B. Nelson's history of sexually assaulting guards, "open and deliberate" masturbation, and violent threats means he does not qualify for a less restrictive environment.

In the alternative, even if the statute was unconstitutionally applied to men who were entitled to a less restrictive environment, Nelson could not receive relief because he is not one of those men.

At trial, all the witnesses testified that Nelson had a long and demonstrated history of sexual misconduct violations while in prison. For example, Dr. Simmons testified that despite the fact that Nelson was confined in a secure environment (the Department of Corrections) he still received 55 sexual misconduct violations (Tr. 253). Dr. Simmons also explained that as a result of his sexual misbehavior, Nelson was "repeatedly placed in administrative segregation for his behaviors" (Id.). Dr. Simmons also explained that Nelson's practice of standing on objects to make sure female staff could see him represented a "drive, a sexual focus" even in the secure administrative segregation environment (Tr. 254). And, as Dr. Simmons also explained, when Nelson was confronted with these inappropriate actions Nelson would respond by making "sexualized threatening remarks" including threatening to kidnap female staff while masturbating (Tr. 255). Dr. Kircher provided similar testimony, including the three occasions when Nelson was able to put his hands on female staff

members while in the secure environment of the Department of Corrections (Tr. 324–328). Dr. Kircher also testified that these assaults were sexually motivated (Tr. 331). Even Nelson's own expert, Dr. Rosell, testified that Nelson engaged in "open and deliberate" masturbation while in the secure environment of the Department of Corrections (Tr. 497). Dr. Rosell also agreed that Nelson made sexualized and violent threats (Tr. 470). Finally, Officer Loucks testified about what it was like to be threatened by Nelson. She testified that she took his threats seriously because Nelson's threats were made with "fury" and "pure hatred" (Tr. 565). Nelson's threats made the hair on the back of Loucks' neck stand up (Tr. 566). At the time of trial, Loucks had been a corrections officer for seven years (Tr. 564).

So, even if Nelson's description of his Department of Mental Health facility is accurate, Nelson has not shown that the SVP Act is unconstitutional as applied to him. Nelson's history of open and deliberate masturbation in conjunction with making violent and sexualized threats while masturbating, and Nelson's history of assaulting female staff members make it clear that Nelson is not entitled to a less restrictive environment.

Conclusion

Nelson's claim that the SVP Act is unconstitutional because it does not consider the least restrictive environment is meritless for two reasons. First, as a matter of law, this Court has previously held that the SVP Act does not need to consider a less restrictive environment. Second, based on the facts at trial, it is not a constitutional violation for Nelson not to be placed in a less restrictive environment because of his past history in a secure environment.

ARGUMENT III

The probate court did not err when it denied Nelson's motion to dismiss because the SVP Act is not punitive and it provided Nelson with sufficient procedural safeguards.

In his third point, Nelson again argues that the SVP Act is punitive in nature and that the SVP Act does not provide sufficient procedural safeguards (Nelson Br. 40–43). As explained in Point I, *supra*, the SVP Act is not punitive in nature. Nelson also contends that the SVP Act violates the Equal Protection Clause because the SVP Act does not provide for a definite term of confinement, because the SVP Act does not provide a statutory right to silence, and because the SVP Act allows the State to demand a jury trial. Nelson did not raise these complaints before trial, and Nelson did not seek to remain silent nor force a bench trial. But even if Nelson's concerns were preserved, the Act does not violate the Due Process Clause or the Equal Protection Clause.

Standard of Review

Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell*, 215 S.W.3d at 102. All doubts are resolved "'in favor of the act's validity'" and this Court will "'make every reasonable intendment to sustain the constitutionality of the statue.'" *Id.*, *quoting Westin Crown Plaza Hotel*, 664 S.W.2d at 5.

Analysis

In his third point, Nelson asserts again that the SVP Act is unconstitutional because it is punitive in nature and does not provide due process (Nelson Br. 40). This point appears to be repetitive of points I and II. The other thrust of Nelson's argument in this point appears to be that the SVP Act violates the Equal Protection Clause because it treats putative sexually violent predators differently than involuntary civil commitments under Chapter 632 (Nelson Br. 41–43). But this Court has previously held that sexually violent predators are not entitled to "exactly the same rights as persons committed under the general civil standard." *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. 2007), *citing Bernat v. State*, 194 S.W.3d 863, 868–69 (Mo. 2006).

Nelson complains, in addition to his complaints in points I and II, that the SVP Act does not provide for a definite term of confinement, that the SVP Act does not provide a statutory right to silence, and that the SVP Act allows the State to demand a jury trial (Nelson Br. 41–42). First, Nelson never asserts that he wanted to remain silent—in fact he testified at trial (Tr. 514). And, Nelson never asserts that he did not want a jury trial. Nelson cannot raise an equal protection challenge to procedures he did not challenge at trial.

But, even if Nelson could raise these challenges, they would be meritless.

First, it is not an equal protection violation for the SVP Act to provide that confinement will continue until the SVP's mental abnormality "has so changed that the person is not likely to commit acts of sexual violence if released." Section 432.498. This Court has held that the State has a compelling interest in protecting society from persons who are likely to commit sexually violent crimes if not committed. *Coffman*, 225 S.W.3d at 445. The standard for release is narrowly tailored to achieve that end. Committed SVPs are "distinctively dangerous." *Id. citing In re Norton*, 123 S.W.3d at 174. The requirement that an SVP be held until he is not likely to commit an act of sexual violence is narrowly tailored to the State's interest in preventing SVPs from committing sexual violence against citizens.

Second, the fact that the SVP Act does not provide a statutory right to silence is narrowly tailored to achieve a compelling state interest. Again, the State has a compelling interest in protecting society. *Coffman*, 225 S.W.3d at 445. This Court has also recognized that "securing the cooperation of an alleged SVPs in diagnosis and treatment" is a compelling state interest. *Bernat*, 194 S.W.3d at 869. And, this Court has found that the State has a compelling interest in providing as much accurate information as possible to the fact finder so that the fact finder can make "a reliable determination of

whether the person sought to be committed is an SVP." *Id.* at 870. As a result, the Court of Appeals has recognized that the State has a compelling state interest in calling a putative SVP to testify during the State's case-in-chief. *In re Berg*, 342 S.W.3d 374, 385 (Mo. App. S.D. 2011), *citing Bernat*, 194 S.W.3d at 870. The absence of a right to silence is narrowly tailored to achieve these compelling interests. It is true that *Bernat* held that commenting on an SVP's silence and requesting an adverse inference is not narrowly tailored to achieve a compelling state interest. *Bernat*, 194 S.W.3d at 869. But, the decision not to grant an SVP the right to silence *is* narrowly tailored because—unlike in *Bernat*—there was no attempt by the State to draw an adverse inference in this case. Although *Bernat* and *Berg* concern testimony at trial, the compelling state interest they identified is equally applicable to the pre-petition end-of-confinement interview. Moreover, the absence of the right to silence without the additional comment or adverse inference when the State did not call the SVP is proper and narrowly tailored to achieve that interest.

Third, the fact that the SVP Act allows the Court or the State to select a jury trial is narrowly tailored to achieve a compelling state interest. The Missouri Court of Appeals has held that this provision survives rational-basis review. *State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 842 (Mo. App. W.D. 2000). In *Askren*, the Missouri Court of Appeals determined that there was

no fundamental right to insist on a bench trial in a civil case. *Id*. at 842. And in fact, the SVP Act's provision allowing the State the right to a jury trial does not take away or limit any rights granted to a putative SVP. And, in *Askren*, the State identified a rational basis for a nonconsensual jury trial: both sides have a great deal at stake, and therefore each side has an interest in having the case adjudicated by a jury because a jury is "traditionally regarded as the most likely to provide a fair trial." *Id*. 842. In fact, because the State has a compelling interest in protecting the public from crime, including sexually violent predators, there is a compelling state interest in allowing the public to make the decision. The SVP Act is narrowly tailored to achieve this goal: the petitioner, the respondent, and the judge each have the power to require the case to be heard by a jury.

Conclusion

Nelson has not demonstrated that the SVP Act violates the Equal Protection Clause. Therefore this Court should deny relief.

ARGUMENT IV

The probate court did not err when it denied Nelson's motion to dismiss because the SVP Act does require the State to prove that a putative SVP has serious difficulty controlling his behavior.

In his fourth point, Nelson contends that the SVP Act violates the Due Process Clause and the Equal Protection Clause because the SVP Act does not always require the State to prove that a putative SVP has serious difficulty controlling his behavior (Nelson Br. 44–46). This Court should reject Nelson's argument because this Court has previously found that Missouri's SVP Act *does* require the state to prove that a putative SVP has serious difficulty controlling his behavior.

Standard of Review

Questions of law are reviewed *de novo*, but this Court presumes statutes are constitutional. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. 2007). All doubts are resolved "'in favor of the act's validity'" and this Court will "'make every reasonable intendment to sustain the constitutionality of the statue.'" *Id.*, *quoting Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. 1984).

Analysis

In *Thomas v. State*, 74 S.W.3d 789 (Mo. 2002), two putative SVPs argued that Missouri's SVP Act was unconstitutional because Missouri's

statute did not define "mental abnormality" so as to include the requirement that the mental abnormality causes "serious difficulty in controlling his behavior." *Thomas*, 74 S.W.3d at 791. This Court agreed that the jury instructions given at the trials did not comply with the United States Supreme Court's instructions in *Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Kansas v. Crane*, 534 U.S. 407 (2002). So, this Court remanded the case back to the probate court with the requirement that the probate court include a jury instruction that read, "As used in this instruction, 'mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior." *Thomas*, 74 S.W.3d at 792 (emphasis removed).

In Nelson's case, the *Thomas* jury instruction was given (L.F. 486). Nelson's main argument seems to be that the Missouri General Assembly did not amend the SVP Act to require "proof of serious difficulty controlling behavior" after this Court decided *Thomas* (Nelson Br. 45). There was no need for the General Assembly to modify the statutory language of the SVP Act because this Court rejected the argument that the SVP Act was constitutionally infirm. *Thomas*, 74 S.W.3d at 791 n.1. The argument that

Nelson makes now was made by the dissent, and properly rejected by the majority. *Id.* at 793 (Limbaugh, C.J. dissenting).

Nelson also contends that this Court must consider if it is permissible for the definition of mental abnormality to include "emotional or volitional capacity" as a disjunctive test (Nelson Br. 45–6). Nelson argues that neither *Hendricks* nor *Crane* considered this question (Nelson Br. 45). The disjunctive construction of the statute does not present a problem for three reasons.

First, the United States Supreme Court found that an identical definition satisfied substantive due process concerns. *Hendricks*, 521 U.S. at 356. Nelson has not advanced a compelling reason to disregard the *Hendricks* decision.

Second, even if an individual had a condition that affected only the putative SVP's "emotional capacity," Missouri law still requires that condition to cause the putative SVP "serious difficulty controlling his behavior." *Thomas*, 74 S.W.3d at 792. In other words, even if the problem is emotional in nature, Missouri's law still requires the result to be serious difficulty controlling behavior. *Id.* Under that formulation, the definition of mental abnormality passes constitutional muster because it requires a lack of volitional capacity, which Nelson admits would satisfy constitutional concerns.

Third, in this case there was overwhelming proof that Nelson had serious difficulty controlling his behavior. Dr. Simmons testified that Nelson's conduct in prison demonstrated he had serious difficulty controlling his behavior (Tr. 252–53). Likewise, Dr. Kircher explained that Nelson's conduct in prison demonstrated that Nelson had serious difficulty controlling his behavior (Tr. 321). In fact, even Nelson's own expert, Dr. Rosell, agreed. Dr. Rosell testified that Nelson said seven times that he would stop his improper behavior in prison to avoid further sanctions (Tr. 486–87). And, Dr. Rosell admitted that Nelson was "unsuccessful" in stopping his improper behavior (Tr. 488). This evidence demonstrates a lack of a volitional capacity. And, even if the jury disbelieved all this evidence—which it did not—there was *no* evidence of a lack of emotional capacity. So, even if the statute was drafted improperly, Nelson cannot receive relief because he has not shown that he was prejudiced by the statute's inclusion of emotional capacity.

Conclusion

The Missouri General Assembly did not need to amend the definition of mental abnormality after this Court's decision in *Thomas*. Under *Thomas*, the SVP Act requires the State to prove that a putative SVP has serious difficulty controlling his behavior. And, here, the State overwhelmingly proved that Nelson had serious difficulty controlling his behavior. Accordingly, Nelson has not demonstrated a constitutional violation, and he is not entitled to relief.

ARGUMENT V

It was not error for the probate court or the parties to use the phrase "sexually violent predator."

In his fifth point, Nelson contends that the probate court violated his right to a fair trial because the probate court and the parties used the phrase "sexually violent predator" (Nelson Br. 47–52). The term "sexually violent predator" does not violate Nelson's right to a fair trial.

Standard of Review

In a civil case, there is a right to a fair trial. *Fleshner v. Pepose Vision Institute, P.C.,* 304 S.W.3d 81, 87 (Mo. 2010), *citing Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868, 875 (2009). In a criminal case, the right to a fair trial is violated by comments that "so infected the trial with unfairness" that the result is a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

Analysis

In this point, Nelson asserts that the use of the term "sexually violent predator" is so inflammatory that it deprived him of his right to a fair trial (Nelson Br. 50–51). Nelson is mistaken. The General Assembly has designated that people who meet the statutory criteria are sexually violent predators, in the same way that people who commit murder are murderers. Because the term "sexually violent predator" corresponds to the elements the

State must prove, the use of the term did not violate Nelson's right to a fair trial.

Nelson argues that the phrase "sexually violent predator" is inflammatory (Nelson Br. 50–51). This Court has reviewed many allegedly inflammatory statements and found that they did not deprive a criminal defendant of his right to a fair trial. For example, in *State v. Perry*, the prosecutor asked the jury to find the defendant was guilty of first-degree child molestation, and argued:

> Now, look, a sexual predator is not going to immediately started with a rape. They're going to start small and see what they can get away with. That's why he started with his foot to that vagina.
>
> ...
>
> This was a bad touch in the wrong spot. This was a touch done by a child molester.

State v. Perry, 275 S.W.3d 237, 245–46 (Mo. 2009). In *Perry*, this Court explained that it was proper for the prosecutor to call the defendant a child molester because the defendant was charged with child molestation and because "the whole premise of the prosecution was that [the defendant's] touch was done by a child molester for the purpose of sexual gratification." *Id.* at 246. In contrast, this Court explained that it was improper to call the defendant a sexual predator because the defendant "had not been found to be

a sexual predator." *Id.* at 246. This Court also observed that the term was pejorative, in part because a sexual predator is "a person that either sexually preys on or is disposed or shows a disposition to sexually exploit others." *Id.* at 247 n.6. Even then, this Court did not find a violation of the defendant's right to a fair trial. *Id.* at 248.[3]

When *Perry* is applied to the facts of this case, the term "sexually violent predator" is not so inflammatory that it deprived Nelson of his right to a fair trial.

Nelson cannot prove that the use of the term "sexually violent predator" infected his trial with error to such an extent that it violated due

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[3] This Court also did not find a violation of a defendant's right to a fair trial in *State v. Sloan*, 756 S.W.2d 503, 509 (Mo. 1988). In *Sloan*, the prosecutor asked the jury to impose the death penalty, and argued:

> And if [soldiers] died honorably so that we can be free from fear, why should not the law apply and those people like Jeffery Sloan, who murder children, die dishonorably for the same reason? Is it that Jeffery Sloan's blood is more valuable than people who honorably give their lives so that we can be free from fear? I think not.

Sloan, 756 S.W.2d at 509.

process. In Nelson's case, the State had to prove that Nelson was more likely than not to commit a future act of *predatory sexual violence*. Nelson's argument essentially is that the State must prove that he is more likely than not to commit a predatory act, and that the act must be one of sexual violence, but that the State may not say that such a person is a sexually violent predator. That argument is illogical, and that argument does not follow this Court's precedents. This Court has explained that it is permissible to say that someone accused of sexually touching a child is a child molester. *Perry*, 275 S.W.3d at 246. This Court has explained that it is permissible to say that someone accused of an unlawful homicide is a murderer, but not a "mass murderer or serial killer" unless the evidence shows that the accused has committed past homicides "of this character." *State v. Whitfield*, 837 S.W.2d 503, 513 (Mo. 1992). Unlike the case in *Whitfield*, the State adduced proof that Nelson had committed—and is more likely than not to commit—predatory acts of sexual violence. Because that is the ultimate issue in the case, and because the term "sexually violent predator" reflects the evidence, Nelson's trial was not unfair and his due process rights were not violated.

Conclusion

The probate court did not err in allowing the use of the term "sexually violent predator" and Nelson's right to a fair trial was not violated. This Court should deny relief.

ARGUMENT VI

The probate court did not err in committing Nelson to the custody of the Department of Mental Health as a sexually violent predator because there was sufficient evidence that Nelson suffered from a mental abnormality that caused him serious difficulty controlling his behavior and that predisposed him to commit sexually violent offenses.

In his sixth point, Nelson asserts that the probate court erred in overruling his motion for directed verdict because, according to Nelson, there was insufficient evidence to prove any mental abnormality (Nelson Br. 53–66). Nelson is mistaken. The State presented sufficient evidence to prove that Nelson suffered from paraphilia not otherwise specified and that Nelson suffered from ASPD.

Standard of Review

This Court has previously held that the standard of review for a sufficiency of the evidence claim is the same standard of review as in a criminal case. *Murrell*, 215 S.W.3d at 106. Accordingly, the Court must view the evidence in the light most favorable to the verdict and disregard all contrary evidence and inferences. *Id*. "When the sufficiency of the evidence is the issue, this court 'does not act as a 'super juror' with veto powers,' *State v. Grim*, 854 S.W.2d 403, 414 (Mo. 1993), but instead, gives great deference to

the trier of fact." *State v. Butler*, 24. S.W.3d 21, 24 (Mo. App. W.D. 2000) (quoting *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. 1998)).

Analysis

Nelson was diagnosed with ASPD (Tr. 320–21; 257–59; 445), Exhibitionism (Tr. 242–43; 366), and paraphilia not otherwise specified (Tr. 239–40). Nelson argues that ASPD and paraphilia not otherwise specified are not mental abnormalities in his case because the State did not produce sufficient evidence that showed a linkage between Nelson's sexual offending and Nelson's ASPD and paraphilia not otherwise specified (Nelson Br. 58–61). But to reach this conclusion, Nelson does not review the evidence in the light most favorable to the verdict, and Nelson completely ignores the evidence that he assaulted female staff members while in the Missouri Department of Corrections. The State presented sufficient evidence that Nelson is a sexually violent predator.

A. ASPD

At trial, the State's evidence, when viewed in the light most favorable to the verdict, showed that Nelson had ASPD. Dr. Kircher testified that Nelson had ASPD based on "his criminal history in the community and his conduct in the Department of Corrections" (Tr. 321). Dr. Kircher also explained that Nelson's ASPD was a mental abnormality because it made "it difficult for him to control his behavior" (Tr. 320–21). Dr. Kircher testified

that Nelson's sexual misconduct violations—coupled with the violent threats to the staff made during the masturbation—was part of the basis for her expert opinion that Nelson had ASPD and that it was a mental abnormality in his case (Tr. 322). The jury also heard evidence about how Nelson violently raped a woman on broken glass (Tr. 250). The State also produced testimony that Nelson did not complete sex offender treatment (Tr. 264). And, the State produced considerable detail about Nelson's masturbation, including testimony from Nelson's own expert that Nelson was "unsuccessful" in stopping that behavior (Tr. 488). Dr. Kircher also testified that Nelson was more likely than not to commit a future act of sexual violence based on her review of actuarial scores and additional risk factors from the literature (Tr. 354).

That testimony was sufficient evidence for a reasonable juror to find that Nelson had ASPD, and that Nelson's ASPD is a mental abnormality. In *Murrell*, this Court considered whether ASPD could be a mental abnormality, and whether it was in the appellant's case. *Murrell*, 215 S.W.3d at 107. In that case, the jury heard testimony from two experts that the appellant had ASPD and that it predisposed appellant to commit sexually violent offenses. *Id*. Here, the jury heard testimony from an expert witness that Nelson's ASPD was a mental abnormality (Tr. 320–21). In *Murrell*, the jury heard testimony about the appellant's sexual crimes. *Id*. Here, the jury heard

testimony about Nelson's sexually violent offense, and the jury heard considerable testimony about Nelson's masturbation and violent threats, in addition to testimony about Nelson's hands-on offending against female staff members (Tr. 325–328). In *Murrell*, the jury also heard that the appellant had never completed sex offender treatment. *Id.* at 108. In this case, the jury heard that Nelson had not completed sex offender treatment (Tr. 264).

This Court found that the State had adduced sufficient evidence in *Murrell* to prove that the appellant's ASPD was a mental abnormality. *Id.* at 108. Because the State provided the same type of evidence in Nelson's case, this Court should reach the same conclusion.

Nelson attempts to distinguish *Murrell* by relying on *In the Matter of the State of New York v. Donald DD*, 21 N.E.3d 239 (N.Y. App. Div. 2014). (Nelson Br. 59–61). But *Donald DD* is not controlling on this Court and does not provide a compelling reason to overrule *Murrell*. Moreover, Nelson's argument relies on an interpretation of the evidence at trial that is not in the light most favorable to the verdict. For example, Nelson argues that there was no evidence of other hands-on, sexually violent offending (Nelson Br. 59). But that is not true. Nelson grabbed the buttocks of a female staff member (Tr. 325). Nelson touched the pubic bone area of another female staff member (Tr. 326). And, Nelson grabbed another female staff member's crotch so forcefully that she had to lock herself in the prison chapel to get away (Tr.

327–28). That is compelling evidence that even in a secure environment, Nelson could not control his behavior, and that Nelson is pre-disposed to commit sexually violent offenses. This Court must accept as true Dr. Kircher's testimony that she considered Nelson's behavior in prison when she diagnosed ASPD and found that it was a mental abnormality in Nelson's case. Simply put, the testimony from Dr. Kircher coupled with the testimony about Nelson's offending history and conduct in prison was sufficient evidence for a reasonable juror to find Nelson has ASPD and that it is a mental abnormality in his case.

B. Paraphilia Not Otherwise Specified, Non Consent

At trial, the evidence, when viewed in the light most favorable to the jury verdict, showed that Nelson had paraphilia not otherwise specified, non consent, and that it is a mental abnormality in Nelson's case. Dr. Simmons testified that Nelson became aroused by non-consenting sexual partners (Tr. 241). Dr. Simmons further explained in her opinion that paraphilia not otherwise specified, non consent, is a mental abnormality in Nelson's case (Tr. 245–46). Dr. Simmons explained that her diagnosis was based on Nelson's offense history—specifically that Nelson broke into a woman's home, violently beat her, threatened her life, and then became aroused by this activity and the fact that the woman was not consenting to sex with Nelson (Tr. 250–51). Dr. Simmons also found that Nelson's behavior continued while

he was incarcerated, in that he exposed himself to unwilling participants and made violent threats to the guards he made watch (Tr. 251–52). Dr. Simmons also explained that Nelson's behavior demonstrated a lack of impulse control and that Nelson wanted specific individuals to see him masturbate, even though those individuals did not consent to the activity (Tr. 254, 256). This behavior, according to Dr. Simmons, demonstrated that Nelson would seek out individuals "that he would like to prey upon" (Tr. 256–57).

The Missouri Court of Appeals has found that paraphilia not otherwise specified, non consent, qualifies as a mental abnormality under the SVP Act. *In re Cozart*, 433 S.W.3d 483, 491 (Mo. App. E.D. 2014); *Dunivan v. State*, 247 S.W.3d 77, 78 (Mo. App. S.D. 2008). In this case, the State produced sufficient evidence that Nelson had paraphilia not otherwise specified, non consent. Dr. Simmons explained that Nelson's rape in 1988 was part of what qualified him for the disorder. Dr. Simmons also testified that Nelson's behavior in prison—the masturbating while making violent threats—further supported the diagnosis.

Nelson again disputes Dr. Simmons' testimony, but fails to view the testimony in the light most favorable to the jury's verdict. Nelson argues that his behavior in prison was "hands-off" and "not sexually violent" (Nelson Br. 63). Not so. One reasonable inference from the testimony about Nelson's prison behavior is that he would have engaged in more hands-on behavior *if*

he were not in a secure environment. Nelson argues that this is impermissible speculation (Nelson Br. 64). Nelson is wrong because, in fact, Nelson did place his hands on female staff while in prison. In fact, one episode was so intense that the officer had to take shelter in the prison chapel to stop Nelson from continuing to touch her (Tr. 327–28). It is also a reasonable inference that Nelson's masturbation and violent threats were motivated by his mental abnormality because when he committed the rape he was also making violent threats.

Nelson also argues that his prison masturbating was merely because he wanted to be punished and placed into segregation (Nelson Br. 64). But that is evidence that assists the State, not Nelson, under this standard of review. Nelson testified that he masturbated and exposed himself so he would be placed in administrative segregation (Tr. 526–27). But Nelson was committed. That means the jury must have found his testimony where he denied the charges to be untruthful, and a jury "is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *State v. Woods*, 284 S.W.3d 630, 641 (Mo. App. W.D. 2009), *quoting Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *see also United States v. Jocic*, 207 F.3d 889, 893 (7th Cir. 2000).

Finally, Nelson also argues that Dr. Simmons' opinion was not supported by the record and therefore is not admissible (Nelson Br. 64).

Again, Nelson is mistaken. The jury heard the details of Nelson committing the rape—including that it took place on broken glass and testimony from Nelson that once he broke in and started beating the victim "one thing lead to another" (Tr. 521). That is clear and direct evidence that Nelson's paraphilia not otherwise specified, non consent, is directly linked to his sexual offending and that it predisposes him to commit acts of sexual violence.

When viewed in the light most favorable to the verdict, the State provided sufficient evidence that Nelson suffered from paraphilia not otherwise specified, non consent. Moreover, the State also provided sufficient evidence that demonstrated that Nelson's paraphilia not otherwise specified, non consent is a mental abnormality because it is linked with his sex offending and because it predisposes him to commit acts of sexual violence.

C. Exhibitionism

In his brief, Nelson also argues that exhibitionism cannot be a mental abnormality that qualifies under Missouri's statute (Nelson's Br. 57). But the State never argued that exhibitionism was Nelson's mental abnormality. Instead, as Dr. Simmons testified, Nelson's exhibitionism increased his future risk of committing a predatory act of sexual violence (Tr. 243–44). Or, as Dr. Kircher testified, exhibitionism "places [Nelson] into that pattern" (Tr. 360). A reasonable inference from Dr. Kircher's testimony is that Nelson's history of exhibitionism manifested as a part of his pattern of sexually acting

out—motivated by his ASPD—and that the exhibitionism only manifested when Nelson was unable to place his hands on a victim. But at any rate, whether exhibitionism is a mental abnormality under Missouri's SVP Act is not a question that this Court needs to reach.

Conclusion

When viewed in the light most favorable to the verdict, the State presented sufficient evidence to prove that Nelson had two mental abnormalities: ASPD and paraphilia not otherwise specified, non consent. Accordingly, this Court should deny this point.

ARGUMENT VII

The probate court did not err in committing Nelson to the custody of the Department of Mental Health as a sexually violent predator because there was sufficient evidence that Nelson was more likely than not to commit a future predatory act of sexual violence unless confined to a secure facility.

In his seventh point, Nelson asserts that the probate court erred in overruling his motion for directed verdict because, according to Nelson, there was insufficient evidence to prove that Nelson would commit a future *predatory* act of sexual violence (Nelson Br. 67–78). Nelson is mistaken. The State presented sufficient evidence to prove that Nelson was more likely than not to commit a future predatory act of sexual violence.

Standard of Review

This Court has previously held that the standard of review for a sufficiency of the evidence claim is the same standard of review as in a criminal case. *Murrell*, 215 S.W.3d at 106. Accordingly, the Court must view the evidence in the light most favorable to the verdict and disregard all contrary evidence and inferences. *Id*. "When the sufficiency of the evidence is the issue, this court 'does not act as a 'super juror' with veto powers,' *State v. Grim*, 854 S.W.2d 403, 414 (Mo. 1993), but instead, gives great deference to

the trier of fact." *State v. Butler*, 24. S.W.3d 21, 24 (Mo. App. W.D. 2000) (quoting *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. 1998))

Analysis

In his brief, Nelson argues that neither of the State's witnesses discussed predatory acts (Nelson Br. 69). Nelson is mistaken, the State's witnesses did testify that Nelson was more likely than not to commit future acts of *predatory* sexual violence. In this context, predatory means "acts directed at individuals, including family members, for the primary purpose of victimization." Section 632.480(3).

During cross examination, Dr. Simmons was asked:

> Q: You know, you talked about the fact that in your opinion you arrived at the conclusion that Mr. Nelson was more likely than not to commit new acts of predatory sexual violence if not confined to a secure facility; correct?
>
> A: Correct.

(Tr. 302). That exchange alone is sufficient evidence. But the State presented additional evidence. For example, Dr. Simmons provided details about the rape Nelson committed in 1988, including that Nelson raped the victim on broken glass while choking her and saying "you're going to die, get ready to take your last breath" (Tr. 251). Dr. Simmons also testified that in the controlled environment of the Department of Corrections, Nelson would

masturbate while making threats, and that he would direct this behavior at particular individuals (Tr. 254–55). In fact, according to Dr. Simmons, Nelson would "seek out individuals that he would like to prey upon" (Tr. 256–57). Dr. Kircher agreed; she testified that Nelson would "target" his behavior at particular individuals (Tr. 329).

Moreover, Nelson testified that:

> The reason I say I wasn't no sexual predator, a predator women and victims I don't stalk women I don't go and break in houses and do all that. I can go out with a woman that's why I said I don't feel like I'm no sexual dangerous predator because a predator stalks his women, I don't stalk no women, and go and burglarize houses down and snatch them up, I don't do that. That's not me.
>
> I can meet a woman and get to know a woman and go out with a woman; that's why I said I feel I'm no dangerous sexual predator because a predator stalks -- it's like a eagle up in the sky, stalks his prey and go down on them. I don't do that.

(Tr. 539–40). Because Nelson was committed, this Court can—and must—presume that the jury found his testimony untruthful and that the jury relied upon Nelson's untruthful testimony as evidence. *Woods*, 284 S.W.3d at 641.

Additionally, the State's questions to the experts always included the caveat that the State was only asking about *predatory* acts (Tr. 245, 442). And, the State argued that the jury could find that Nelson was more likely than not to commit a future act of predatory sexual violence in closing, in part, because Nelson's conduct of raping the woman in 1988 was an act directed at an individual for the primary purpose of victimization (Tr. 581).

These sources of information—Nelson's rape in 1988, his targeted masturbation coupled with violent threats, and his own untruthful testimony—form sufficient evidence for the jury to find that Nelson was more likely than not to commit a future act of predatory sexual violence unless confined to a secure facility.

Nelson disagrees, and argues that the experts never gave an opinion that Nelson "would reoffend in a predatory and violent way" (Nelson Br. 73). But as demonstrated *supra*, that is not true. Nelson also argues that the expert testimony never established that the proper legal standard was used, and the expert's opinions were not supported by the record (Nelson Br. 68). Again, Nelson is mistaken. The experts were asked if Nelson was more likely than not to commit a future act of predatory sexual violence, and they said yes. Dr. Simmons was directly asked if it was her opinion that Nelson was more likely than not to commit a future act of predatory sexual violence and she responded, "Correct." (Tr. 302).

To support his argument, Nelson relies on *Lee v. Hartwig*, 848 S.W.2d 496 (Mo. App. W.D. 1992). In *Lee*, the expert witness was not asked to define the term "negligent" during his testimony. *Lee*, 848 S.W.2d at 499. As a result, the trial court sustained an objection during cross-examination, and did not allow examination of what the term meant. *Id*. On appeal, the Court of Appeals affirmed because "the trial judge is in the best position to determine the risk that the jury will be confused." *Id*. In this case, Nelson asked for a directed verdict and the trial court denied the motion (Tr. 393). Nelson has not provided a sufficient reason to disturb the ruling of the trial court on this issue.

Finally, Nelson also complains that the State relied upon his prison conduct to prove that he would commit future predatory acts (Nelson Br. 74). Nelson contends that his prison behavior "only proved that [he] was viewed masturbating" (Nelson Br. 74). Again, Nelson misunderstands the standard of review. Nelson again argues that the evidence shows he was only masturbating so that he could be sent to administrative segregation (Nelson Br. 74). But Nelson was committed. That means the jury must have found his testimony where he denied the charges to be untruthful, and a jury "is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *Woods*, 284 S.W.3d at 641.

Further, Nelson's brief does not mention his hands-on offending. Nelson grabbed the buttocks of a female staff member (Tr. 325). Nelson touched the pubic bone area of another female staff member (Tr. 326). And, Nelson grabbed another female staff member's crotch so forcefully that she had to lock herself in the prison chapel to get away (Tr. 327–28). When the State's experts considered this behavior, in addition to his penchant for masturbating while making violent threats, it was described as proof that Nelson "seeks out individuals that he would like to prey upon" (Tr. 256–57). Nelson attempts to avoid that testimony by pointing out that testimony based on assumptions is not admissible, and Nelson cites to *McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo. 2004). But *Seltsam* is inapposite to this case. In *Seltsam*, the doctor testified that they *assumed* that records they did not read would support the diagnosis. *Id.* This Court pointed out that such "circular logic" was not a reliable basis for an opinion. *Id.* But in this case, the experts did not need to make an assumption based on information they did not have. Instead, the experts considered the facts and circumstances surrounding Nelson's violent rape of a woman, the facts and circumstances surrounding Nelson's history of masturbating while making violent threats at prison staff, and the facts and circumstances surrounding Nelson's sexual touching of prison staff, and determined that these were acts directed at individuals for the primary purpose of victimization. That is permissible. And the expert's

conclusion, based on his history and his mental abnormality, that Nelson was more likely than not to commit a future act of *predatory* sexual violence was reasonable.

Conclusion

In sum, the State produced sufficient evidence that Nelson was more likely than not to commit a future act of predatory sexual violence. Nelson's point should be denied.

ARGUMENT VIII

The probate court did not err in committing Nelson to the custody of the Department of Mental Health as a sexually violent predator because there was sufficient evidence that Nelson was more likely than not to commit a future predatory act of sexual violence unless confined to a secure facility.

In his eighth point, Nelson asserts that the probate court erred in overruling his motion for directed verdict because, according to Nelson, there was insufficient evidence to prove that Nelson was *more likely than not* to commit a future predatory act of sexual violence (Nelson Br. 79–88). In other words, Nelson is arguing that the State did not produce sufficient evidence to prove that he is risky enough to be confined. Nelson is mistaken. The State presented sufficient evidence to prove that Nelson meets the statutory risk threshold.

Standard of Review

This Court has previously held that the standard of review for a sufficiency of the evidence claim is the same standard of review as in a criminal case. *Murrell*, 215 S.W.3d at 106. Accordingly, the Court must view the evidence in the light most favorable to the verdict and disregard all contrary evidence and inferences. *Id*. "When the sufficiency of the evidence is the issue, this court 'does not act as a 'super juror' with veto powers,' *State v.*

Grim, 854 S.W.2d 403, 414 (Mo. 1993), but instead, gives great deference to the trier of fact." *State v. Butler*, 24. S.W.3d 21, 24 (Mo. App. W.D. 2000) (quoting *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. 1998))

Analysis

In his brief, Nelson is essentially arguing that the State failed to produce sufficient evidence that Nelson is "more likely than not" to commit a future act of sexual predatory violence unless confined to a secure facility because the experts did not define the term "more likely than not" and because the experts did not testify that Nelson had a risk greater than 51% (Nelson Br. 79–88). But the State is not required to have its experts define the term "more likely than not" nor is the State required to produce experts that will testify that Nelson had over a 51% chance to reoffend.

A. More likely than not means more likely than not

For his first argument, Nelson asserts that the SVP Act's use of the term "more likely than not" must be the same as the terms used as a burden of proof (Nelson Br. 79–82). For instance, Nelson cites to *Wollen v. DePaul Health Center*, 828 S.W.3d 681 (Mo. 1992) for the proposition that "more likely than not" must mean over 50% (Nelson Br. 80). But *Wollen* uses that term in context of the burden of proof. *Wollen*, 828 S.W.3d at 685. The burden of proof in a sexually violent predator case is clear and convincing evidence, not "more likely than not."

The term "more likely than not" simply means more likely than not. The jury was properly instructed that terms that are not defined are to be given their plain and ordinary meaning. Nelson never asked for a jury instruction that defined more likely than not.

The Court of Appeals considered this question, and determined that "more likely than not" merely requires the State to adduce evidence that distinguishes the respondent from the typical sex offender. *In re Coffel*, 117 S.W.3d 116, 127 (Mo. App. E.D. 2003). Specifically, *Coffel* requires the State to "identify some variable that would change the expectation" of the rate of re-offense. *Id*. at 127. In other words, the statutory language does not require the State to prove some specific probability of reoffending, but instead the State must prove that the putative SVP has a higher than average risk, and that the total level of risk must make the putative SVP more likely to reoffend than likely to not reoffend.

What Nelson is really trying to do is to ask this Court to require that the State prove a percentage of risk over 50% so that Nelson can then argue that his static score correlates to a risk of less than 50% (Nelson Br. 85–86). In other words, Nelson is asking this Court to invalidate the State's identification of a variable (the additional risk factors) that would change the expectation of Nelson's rate of reoffending. This Court should decline Nelson's invitation. "More likely than not" is not a technical legal standard, but a

series of words that are given their plain and ordinary meaning. It was not necessary for the State to define the phrase using a percentile.

B. The State provided sufficient evidence of Nelson's future risk.

Nelson contends that the State's evidence was not sufficient because it did not define the legal standard that Nelson argues should have been defined (Nelson Br. 82–88). The State demonstrated *supra* that the term does not need to be defined. And, the State's experts testified about Nelson's score on the actuarials and how that score, when considered with additional risk factors, meant that Nelson was more likely than not to reoffend. That testimony was sufficient.

Dr. Simmons testified that she scored Nelson on the Static 99-R (Tr. 267). Dr. Simmons also testified that the Static 99-R is a foundation for completing the risk assessment, and that she considered additional risk factors (Tr. 268). Dr. Simmons testified that Nelson had multiple paraphilia, which increased his risk (Tr. 269). Dr. Simmons also identified general self-regulation problems, impulsivity, cognitive problems, childhood behavioral problems, and non-compliance with supervision (Tr. 269–271). All of these factors increased Nelson's risk. Dr. Simmons also considered factors that decrease risk, like Nelson's age, but determined that he was not entitled to

the benefit of that factor (Tr. 271). Dr. Simmons testified that these factors were empirically validated (Tr. 268).

Dr. Kircher testified that she scored Nelson on the Static 99-R and the Stable 2007 (Tr. 335). Nelson scored a 4 on the Static 99-R which is in the moderate/high risk category (Tr. 341). Dr. Kircher explained that Nelson was a moderate/high risk "when we compare him to other sex offenders scored on the Static 99R" (Tr. 341). Dr. Kircher scored Nelson a 17 on the Stable 2007, which is the high-risk category (Tr. 343). Dr. Kircher considered the instruments together, which placed Nelson in high risk range (Tr. 343–44). Dr. Kircher explained that the Stable 2007 demonstrated that the Static 99-R's static risk factors underestimated Nelson's risk (Tr. 343–44). Dr. Kircher also testified she considered additional risk factors from the literature (Tr. 344). Dr. Kircher found that Nelson's risk was increased by his sexual preoccupation (Tr. 350), by Nelson's grievance and hostility (Tr. 346), by Nelson's non-compliance with supervision (Tr. 347), by Nelson's poor cognitive problem solving (Id.), by Nelson's impulsivity (Tr. 348), by Nelson's offense supportive attitudes (Tr. 349), and by Nelson's lack of emotionally intimate relationships (Tr. 350). Dr. Kircher did find that Nelson's age decreased his risk (Tr. 352). However, Dr. Kircher testified that Nelson was not entitled to a risk reduction for successfully completing treatment or a risk reduction for a serious health issue (Tr. 352). After considering the actuarials

and the additional risk factors, Dr. Kircher opined that Nelson was more likely than not to commit another sexually violent offense unless placed in a secure facility (Tr. 354).

This testimony was sufficient because the testimony identified variables that distinguished Nelson from the typical sex offender. The Missouri Court of Appeals determined that "more likely than not" merely requires the State to adduce evidence that distinguishes the respondent from the typical sex offender. *In re Coffel*, 117 S.W.3d at 127. In *Coffel*, the State sought to commit a woman as a sexually violent predator. *Id*. at 117. But, the State was unable to present any competent scientific evidence that the respondent was more likely than not to reoffend sexually. *Id*. at 129. Specifically, the State was unable to produce any expert witness who could testify as to the general rate that women reoffend and identify any scientifically supported factor that would increase or decrease a woman's risk. *Coffel*, 117 S.W.3d at 127–28. One of the State's witnesses had no experience in assessing the risk of re-offense. *Id*. at 127. The other witness used factors that she created and that were not based on scientific research. *Id*. at 128. Thus, the Court of Appeals concluded that the State was unable to "identify some variable that would change the expectation" of the rate of re-offense. *Id*. at 127.

In Nelson's case, unlike in *Coffel*, the State adduced sufficient evidence for a reasonable juror to find that Nelson was more likely than not to commit a future act of predatory sexual violence unless confined in a secure facility. Unlike in *Coffel*, the State adduced testimony—through Dr. Kircher—that Nelson was in the moderate/high risk category *when compared to other sex offenders*. And, the State also adduced testimony from Dr. Kircher that the Static 99-R underestimated Nelson's risk. That testimony must be believed under the standard of review. Moreover, the State presented evidence about scientifically validated additional risk factors (Tr. 344). In all, Dr. Kircher found seven factors that increased Nelson's risk beyond the risk presented in the actuarial instruments (Tr. 345).

When Dr. Simmons' and Dr. Kircher's testimony is considered in the light most favorable to the verdict, it is apparent that the State presented sufficient evidence of some variables that increase Nelson's risk beyond that of the average sex offender. And, after reviewing thousands of pages of records, using the actuarials, and consulting the literature, both of the State's experts opined that Nelson was more likely than not to commit a future act of predatory sexual violence unless confined to a secure facility. That was sufficient evidence.

Conclusion

In sum, the State produced sufficient evidence that Nelson was more likely than not to commit a future act of predatory sexual violence. Nelson's point should be denied.

ARGUMENT IX

The probate court did not abuse its discretion by excluding Cooper's character evidence about Nelson because it was not relevant.

In Nelson's ninth point on appeal, Nelson complains that the probate court erred when it sustained the State's objection to Cooper's testimony that she never saw Nelson expose himself to his other sisters (Nelson Br. 89–95). Nelson's point is without merit because Nelson was attempting to elicit character evidence, and because the jury heard the testimony.

Standard of Review

Nelson asserts that this Court must presume prejudice from the exclusion of evidence in a sexually violent predator case (Nelson Br. 90). Nelson relies on *State v. Walkup*, 220 S.W.3d 748 (Mo. 2007), a death-penalty case. But *Walkup*'s holding is expressly limited to criminal cases. *Walkup*, 220 S.W.3d at 757. Nelson argues that *Walkup* should be extended to the current case because he had a constitutional right to present a defense (Nelson Br. 90). But Nelson's due process right in this case is not the same as the constitutional right to present a complete defense in a criminal case.

Moreover, this Court has explained that the standard of review for exclusion of evidence in a sexually violent predator case is for abuse of discretion. *Murrell v. State*, 215 S.W.3d 96, 109–10 (Mo. 2007). The probate

court has broad discretion to admit or exclude evidence, and appellate courts will not reverse the probate court's ruling absent an abuse of discretion. *Id.* at 109. An abuse of discretion occurs when a probate court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. *Id.* Because review is for prejudice, not mere error, the probate court's ruling should be affirmed unless it had a material effect on the outcome of the trial. *Id.* at 109–110.

Discussion

Nelson argues that his Due Process Clause rights and his rights under the SVP Act were violated because he was entitled to present evidence that Cooper never saw him expose himself to his other sisters or get into fights, and that the probate court could not refuse this evidence because "the State opened the door" (Nelson Br. 90–92). Neither argument is persuasive.

A. The probate court did not abuse its discretion by excluding Cooper's testimony that she had not seen Nelson expose himself to his sisters or get into fights.

Relevance has two tiers, logical and legal. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. 2002). "Evidence is logically relevant 'if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it

tends to corroborate evidence which itself is relevant and bears on the principal issue of the case.'" *State v. Dennis*, 315 S.W.3d 767, 768 (Mo. App. E.D. 2010), *quoting State v. Tisius*, 92 S.W.3d 751, 760 (Mo. 2002)). If logically relevant evidence is legally relevant, it is admissible. *Anderson*, 76 S.W.3d at 276. "Legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id*. If the costs of logically relevant evidence outweigh its benefits, the evidence is excluded. *Id*. Whether a piece of evidence is relevant depends, in part, on the issues in the case.

"The Missouri legislature created a mechanism to civilly commit sexually violent predators; i.e., 'any person who suffers from a mental abnormality [that] makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." *In the Matter of the Care and Treatment of A.B.*, 334 S.W.3d 746, 752 (Mo. App. E.D. 2011). "The law seeks, above all else, the protection of society against a particularly noxious threat: sexually violent predators." *In the Matter of the Care and Treatment of Holtcamp v. State*, 259 S.W.3d 537, 540 (Mo. 2008). Section 632.480(5), defines a "sexually violent predator" as:

> Any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who:
>
> (a) Has pled guilty or been found guilty, or been found not guilty by reason of mental disease or defect . . . of a sexually violent offense[.]

Section 632.492 provides that "the court shall conduct a trial to determine whether the person is a sexually violent predator."

Thus, for an offender to be committed, the state must satisfy a three-prong test: (1) the offender must have committed a sexually violent offense; (2) the offender must suffer from a mental abnormality; and (3) that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. *In the Matter of the Care and Treatment of A.B.*, 334 S.W.3d at 752 (describing a two-step test when the offender has plead guilty to a sexually violent offense).

Nelson suggests that his rights were violated because Cooper's testimony that he did not expose himself to his sisters and that he did not get into fights would have, according to Nelson, counteracted the State's evidence that he had a mental abnormality (Nelson Br. 92).

Cooper's testimony was not legally relevant. Cooper's testimony that she never saw Nelson expose himself to his sisters was not probative on the

issue of whether Nelson had a mental abnormality. Nelson argues that a paraphilia like Exhibitionism "generally" presents in adolescence (Nelson Br. 92–3). In other words, Nelson has admitted that even if he did not expose himself as an adolescent that would not prevent an Exhibitionism diagnosis. Moreover, Cooper's testimony was cumulative. On cross-examination, Nelson had Dr. Simmons testify that there was no evidence that Nelson exposed himself before going to prison (Tr. 284). Likewise, Nelson himself testified that he did not expose himself before going to prison (Tr. 524). Accordingly, similar testimony from Cooper would have been cumulative.

The probate court did not abuse its discretion even if Cooper's testimony about whether Nelson got into fights as a child or whether Nelson exposed himself as a child was legally relevant. An abuse of discretion requires prejudice, which in turn requires that the excluded evidence had a material impact on the outcome of the trial. *Murrell*, 215 S.W.3d at 110. In this case, there was overwhelming evidence that Nelson was a sexually violent predator. Even if Cooper had testified that Nelson did not get into fights or expose himself before age 15, the evidence at trial firmly established that he had a mental abnormality that caused him serious difficulty controlling his behavior. Dr. Simmons testified that Nelson's conduct in prison demonstrated he had serious difficulty controlling his behavior (Tr. 252–53). Likewise, Dr. Kircher explained that Nelson's conduct in prison

demonstrated that Nelson had serious difficulty controlling his behavior (Tr. 321). In fact, even Nelson's own expert, Dr. Rosell, agreed. Dr. Rosell testified that Nelson said seven times that he would stop his improper behavior in prison to avoid further sanctions (Tr. 486–87). And, Dr. Rosell admitted that Nelson was "unsuccessful" in stopping his improper behavior (Tr. 488). Given the overwhelming evidence that Nelson had serious difficulty controlling his behavior, the exclusion of Cooper's testimony did not prejudice Nelson.

B. Cooper's testimony was impermissible character evidence.

The probate court excluded Cooper's testimony as improper character evidence (Tr. 410). In a civil case, the general rule is that a party may not introduce evidence of his good character. *Haynam v. Laclede Elec. Co-op., Inc.*, 827 S.W.2d 200, 205 (Mo. 1992). This is the rule even in a civil assault and battery case. *Parker v. Wallace*, 431 S.W.2d 136, 140 (Mo. Div. 2 1968).

Nelson attempts to argue that his evidence that he did not get into fights or expose himself before age 15—e.g. that he was a good person—was not character evidence but evidence that contradicted the State's witnesses (Nelson Br. 94). But Nelson cannot impeach the State's witnesses' reliance on records and Nelson's grandmother by introducing conflicting testimony from Nelson's sister (Cooper).

Simply put, Nelson has not demonstrated that the probate court's ruling was wrong, let alone an abuse of discretion.

C. Even if the State "opened the door" to the evidence, the probate court properly excluded additional irrelevant evidence.

Nelson also argues that because the State "opened the door" to evidence about Nelson's childhood, it was improper for the probate court to exclude Nelson's evidence about his childhood (Nelson Br. 93). Nelson is mistaken because the rule of curative admission gives the probate court discretion about whether to admit or exclude the evidence.

Nelson relies on *Lewey v. Farmer*, 362 S.W.3d 429 (Mo. App. S.D. 2012), for his contention that his evidence about his childhood "cannot be excluded." In *Lewey*, the plaintiff "opened the door" to inadmissible evidence about plaintiff's lower-back pain. *Id.* at 434. The defendant then cross-examined about the lower-back pain. *Id.* Ultimately, the plaintiff prevailed on liability, but appealed the amount of damages as unfairly reduced by the testimony on the lower-back pain. *Id.* at 431. The Court of Appeals found that the trial court did not abuse its discretion when it allowed the defendant to adduce more evidence because the plaintiff was the first party to put in evidence on lower-back pain. *Id.* at 434.

Assuming, *arguendo*, that Nelson is right that the State "opened the door," that does *not* mean the probate court committed an error of law by refusing to allow his to be admitted. Under Missouri law, the probate court has discretion about whether to allow curative admission. *See, e.g.* 22 Mo.

Prac. Evid. §106.1 n.36 (4th ed.); *see also Daniel v. Indiana Mills & Mfg., Inc.*, 103 S.W.3d 302, 314 (Mo. App. S.D. 2003) (curative admission "is an issue within the sound discretion of the trial court"). Nelson has not demonstrated that the probate court abused its discretion by excluding Cooper's testimony.

Conclusion

The probate court did not abuse its discretion by preventing Nelson's sister—Cooper—from testifying that she did not see Nelson get into fights or expose himself before the age of 15. Accordingly, Nelson's point is without merit, and this Court should deny relief.

ARGUMENT X

The probate court did not err by excluding testimony about Nelson's release plan because evidence of external constraints was not relevant.

In his tenth and final point, Nelson argues that the probate court erred when it excluded evidence about his plan to live with his sister if he was not committed as a sexually violent predator (Nelson's Br. 96–100). Nelson is not entitled to relief because he did not preserve this claim by making an offer of proof. Further, Nelson's claim is meritless because the trial court did not abuse its discretion by excluding irrelevant evidence.

Standard of Review

In order to raise a claim on appeal that a trial court erroneously excluded testimony, the party seeking admission of that testimony must offer the testimony and must make a sufficient offer of proof. *State v. Hunt*, 451 S.W.3d 251, 263 (Mo. 2014) (criminal), *citing Moore v. Ford Motor Co.*, 332 S.W.3d 749, 766 (Mo. 2011) (civil). An offer of proof must show (1) what the evidence is, (2) the purpose of the evidence, and (3) all facts necessary to establish admissibility of the evidence. *Hunt*, 451 S.W.3d at 263, *citing Karashin v. Haggard Hauling & Rigging Inc.*, 653 S.W.2d 203, 205 (Mo. 1983).

"When a motion *in limine* is sustained, its propriety is judged by the admissibility or inadmissibility of the excluded evidence." *Brown v. Hamid*, 856 S.W.2d 51, 53 (Mo. 1993). The probate court has broad discretion to admit or exclude evidence, and appellate courts will not reverse the probate court's ruling absent an abuse of discretion. *Id.* at 56. An abuse of discretion occurs when a probate court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. *Murrell*, 215 S.W.3d at 109. Since review is for prejudice, not mere error, the probate court's ruling should be affirmed unless it had a material effect on the outcome of the trial. *Id.* at 109–110.

"The test for relevancy is whether an offered fact tends to prove or disprove a fact in issue or corroborates other relevant evidence." *Hamid*, 856 S.W.2d at 56. "'Exclusion of evidence of collateral matters is demanded when the evidence introduces many new controversial points and a confusion of issues would result.'" *Id.*

The jury in a civil commitment trial must find, by clear and convincing evidence, that the person named in the petition is a sexually violent predator. Section 632.495.

Discussion

Nelson argues that his Due Process Clause rights and his statutory rights under the SVP Act were violated because the probate court excluded evidence that Nelson would live with his sister if he was not committed as a sexually violent predator (Nelson Br. 99–100), and that the probate court could not refuse this evidence because "the State opened the door" (Nelson Br. 100). Nelson did not make an offer of proof. And, this evidence is not relevant. Nelson's point should be denied.

A. Nelson has not preserved his claim because he did not attempt to introduce the evidence or make an offer of proof.

During the pretrial conference, Nelson argued that the probate court should allow his sister (Cooper) to testify that Nelson would live with Cooper if Nelson was released (Tr. 47). Nelson did not present Cooper for an offer of proof at the pretrial conference. When Cooper testified, Nelson did not attempt to elicit testimony from Cooper that Nelson could live with her if released (Tr. 401–417).

Under the rule in *Hunt* and *Moore*, Nelson has not preserved this claim for review. Nelson did not attempt to offer the testimony that he now complains the probate court should not have excluded. But to preserve the claim for review, Nelson was required to attempt to present the testimony at

trial. *Hunt*, 451 S.W.3d at 251. Moreover, Nelson was required to make an offer of proof. *Id*. Nelson did not. Accordingly, Nelson's claim is not preserved.

B. The probate court did not err when it excluded evidence that was not relevant.

Relevance has two tiers, logical and legal. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. 2002). "Evidence is logically relevant 'if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case.'" *State v. Dennis*, 315 S.W.3d 767, 768 (Mo. App. E.D. 2010), *quoting State v. Tisius*, 92 S.W.3d 751, 760 (Mo. 2002)). If logically relevant evidence is legally relevant, it is admissible. *Anderson*, 76 S.W.3d at 276. "Legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id*. If the costs of logically relevant evidence outweighs its benefits, the evidence is excluded. *Id*. Whether a piece of evidence is relevant depends, in part, on the issues in the case.

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Section 632.492 provides that "the court shall conduct a trial to determine whether the person is a sexually violent predator."

Thus, for an offender to be committed, the state must satisfy a three-prong test: (1) the offender must have committed a sexually violent offense; (2) the offender must suffer from a mental abnormality; and (3) that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. *In the Matter of the Care and Treatment of A.B.*, 334 S.W.3d at 752 (describing a two-step test when the offender has plead guilty to a sexually violent offense).

Nelson suggests that his rights were violated because Cooper's testimony would have countered the State's evidence of Nelson's future risk (Nelson Br. 99). Not so. Nelson attempted to present this evidence so the jury could draw an inference that Cooper would watch over Nelson to help Nelson control his behavior.

In *In the Matter of the Care and Treatment of Lewis*, 152 S.W.3d 325, 330–32 (Mo. App. W.D. 2004), the SVP argued that the probate court had abused its discretion when it prohibited evidence that the SVP would still be under supervised probation even if he were released following the SVP hearing. *Lewis*, 152 S.W.3d at 330. The SVP contended that the evidence was relevant because the safeguard of rigorous supervision during probation would make it less likely that he would engage in predatory acts of sexual violence if not confined in a secure facility. *Id*. at 330. The Court of Appeals rejected his argument, holding that the question was whether the SVP suffered from a mental abnormality that made him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. *Id*. at 332. The question was not whether some "external constraints" make it less likely that he would engage in such acts. *Id*. at 332.

In *In the Matter of the Care and Treatment of Cokes*, 183 S.W.3d 281, 285 (Mo. App. W.D. 2005), the SVP argued that the probate court erred when it excluded evidence about his proposed medication arrangements in the

event he was released from secure confinement. The SVP also argued that his case was distinguishable from *Lewis* because he did not seek to present evidence about potential supervision if released, but instead that the evidence regarding his medication arrangements would have allowed the jury to consider whether he had a mental disorder that left him unable to pursue treatment voluntarily and therefore made him more likely to reoffend. *Id.* The Court of Appeals disagreed "that the evidence had any relevance in determining the existence of a mental disorder," as the excluded testimony of a prescribing psychiatrist and family member were "precisely the type of 'external constraints'" that *Lewis* had deemed irrelevant in an SVP proceeding. *Id.*

Here, Nelson attempts to distinguish *Lewis* and *Cokes* by arguing that in those cases the SVP was attempting to introduce external-constraints evidence as "independent, substantive evidence" but Nelson merely wanted to introduce testimony about external-constraints because the experts considered it (Nelson Br. 98). Even if that is true, the evidence is still not relevant to any of the issues in the case.

Nelson's argument is not persuasive. In effect, Nelson is arguing that evidence that would be inadmissible on its own becomes admissible merely because an expert considers it. That is not the law. Under Nelson's rule, if an expert relied upon a polygraph examination, then the results of that

examination could be discussed in court. That cannot be the rule. And, the Missouri Court of Appeals has held that admitting external-constraints evidence "might well confuse and mislead a jury," and that a jury might mistakenly base its determination on "an assessment of the likely effectiveness" of external constraints rather than relevant evidence pertaining to the offender's actual mental condition. *Lewis*, 152 S.W.3d at 332, *quoting People v. Krah*, 7 Cal.Rptr.3d 853, 860 (Cal. App. 2003). Nelson does not plausibly explain why *Cokes* and *Lewis* should be overturned.

Nelson also relies on this Court's opinion in *In re Brasch*, 332 S.W.3d 115 (Mo. 2011). Nelson argues that, because *Brasch* cited the absence of parole supervision, testimony about parole supervision must be admissible (Nelson Br. 98–9). But *Brasch* does not say that external-constraints evidence is admissible. The portion of *Brasch* that Nelson relies on does not say if the evidence was admitted over the State's objection. If the State had objected, then the State would have had no way to contest the evidence on appeal because the State prevailed at trial. Moreover, *Brasch* was decided in 2011, while *Cokes* and *Lewis* were decided in 2004 and 2005. If this Court had intended to overrule *Cokes* and *Lewis*, it would have said so. *See, e.g., State v. Honeycutt*, 421 S.W.3d 410, 422–23 (Mo. 2013) (holding that the Missouri Supreme Court disfavors *sub silenco* rulings). Yet, *Brash* does not say that

external constraints evidence is admissible. *Brasch* does not support Nelson's position.

At bottom, Cooper's testimony that Nelson could live with her was not relevant to any issue in the case and was properly excluded.

C. Even if the State "opened the door" to the evidence, the probate court properly excluded additional irrelevant evidence.

Nelson also argues that because the State "opened the door" to external-constraints evidence, it was improper for the probate court to exclude Nelson's additional external-constraints evidence (Nelson Br. 100). In fact, Nelson argues that such evidence "cannot be excluded" when the State opens the door (Nelson Br. 100). Nelson is mistaken because the rule of curative admission gives the probate court discretion about whether to admit or exclude the evidence.

Nelson relies on *Howard v. City of Kansas City*, 332 S.W.3d 777 (Mo. 2011), for his contention that the State "opened the door," so, the "evidence could not be excluded" (Nelson Br. 100). But *Howard* is a case about rebuttal evidence, not curative admission. *Howard*, 332 S.W.3d at 777. Under Missouri law, the probate court has discretion about whether to allow curative admission of evidence. *See, e.g.* 22 Mo. Prac. Evid. §106.1 n.36 (4th ed.); *see also Daniel v. Indiana Mills & Mfg., Inc.,* 103 S.W.3d 302, 314 (Mo. App. S.D. 2003) (curative admission "is an issue within the sound discretion

of the trial court"). Nelson has not demonstrated that the probate court abused its discretion by refusing the evidence.

Conclusion

Because Nelson did not attempt to offer the evidence and because Nelson did not make an offer of proof, this claim is not preserved for appeal. But even if it were preserved, then it would still be meritless. The probate court did not abuse its discretion in sustaining the state's motion *in limine* and in excluding evidence regarding Nelson's potential living arrangements if he were to be released because that evidence is irrelevant. The exclusion of the evidence, in the court's exercise of its discretion, did not violate Nelson's due process rights or his rights under the SVP Act. This claim should be denied.

CONCLUSION

The probate court did not err. The jury's determination that Appellant was a sexually violent predator and the probate court's order committing him to the custody of the Department of Mental Health should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 19,395 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on December 21, 2016, to:

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