72392-8

FILED
November 25, 2015
Court of Appeals
Division I
State of Washington

NO. 72392-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DETENTION OF

GREGORY JAEGER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The issue before Gregory Jaeger's jury was whether he was more likely than not to commit a sexually violent act if not indefinitely confined. Before evidence was presented, three jurors opined to the venire that experts believe people like Mr. Jaeger reoffend. Then a jury member fainted during opening statement, indicating an extreme physical reaction to the State's description of the evidence against Mr. Jaeger. The cards were well stacked against him before any witness took the stand, requiring reversal and remand for a fair trial before an actually impartial jury.

The evidentiary trial was not without fault either, as the court's rulings hamstrung Mr. Jaeger on key pieces of evidence. In addition, in rebuttal closing argument, the prosecutor inserted his opinion, disparaged Mr. Jaeger's expert, shifted the burden to Mr. Jaeger, relied on facts not in evidence, inflamed the jury's prejudices, and misstated the law.

Constitutional infirmities also necessitate reversal because the commitment derives from conduct that occurred before Mr. Jaeger's volitional capacity had matured and because the statute lessens the constitutionally required burden of proof.

B. ASSIGNMENTS OF ERROR

1. Mr. Jaeger was denied his constitutional rights to a fair trial and impartial jury when a deputy sheriff shared his experienced conclusion that sexual offenders reoffend.

2. Mr. Jaeger was denied his constitutional rights to a fair trial and impartial jury when a prospective juror told the venire that when he worked in an institution, he oversaw a pedophile who was discovered the day after release with a young boy in the front seat of his car.

3. Mr. Jaeger was denied his constitutional rights to a fair trial and impartial jury when another prospective juror told the venire a law enforcement friend told him thieves can be rehabilitated but sex offenders are recidivists.

4. The trial court abused its discretion in denying Mr. Jaeger's motion for a mistrial in response to juror testimony.

5. Mr. Jaeger was denied his constitutional rights to a fair trial and impartial jury when a juror fainted during the State's opening statement.

6. The trial court abused its discretion in denying Mr. Jaeger's motion for a mistrial following the juror's fainting episode.

7. The trial court improperly limited Mr. Jaeger's expert's testimony by excluding relevant evidence.

8. The trial court abused its discretion in excluding any reference to the community protection program because some evidence was relevant and would exist upon release.

9. The prosecutor committed misconduct by disparaging and providing his personal opinion on Mr. Jaeger's expert witness during rebuttal closing argument.

10. The prosecutor committed misconduct by shifting the burden of proof to Mr. Jaeger during rebuttal closing argument.

11. The trial court abused its discretion when it overruled Mr. Jaeger's objections to the burden-shifting argument.

12. The prosecutor committed misconduct by misstating the law, relying on facts not in evidence, and inflaming the jury's prejudices in rebuttal closing argument.

13. Indefinite commitment based on conduct committed while Mr. Jaeger's volitional capacity continued to develop as a developmentally delayed juvenile violates substantive due process.

14. RCW 71.09.020 violates due process because it allows for commitment where a respondent will "likely" or "more probably than not" reoffend.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A respondent in a civil commitment trial is constitutionally entitled to a fair and impartial jury, due process, and a fair trial. A jury exposed to outside bias and influence may not be able to act impartially. Was Mr. Jaeger denied a fair trial by an impartial jury when three prospective jurors broadcast to the venire their experience-laden opinions that sexually violent offenders reoffend?

2. Was Mr. Jaeger denied a fair trial by an impartial jury when, in addition to the above, a juror fainted during open statements in response to the State's description of the evidence?

3. Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable. It is not harmless to exclude relevant evidence if there is a reasonable probability the improperly excluded evidence could have materially affected the outcome of the case. The court prevented Mr. Jaeger's expert from discussing her opinion of Mr. Jaeger's conduct at the SCC, a central part of the State's theory that Mr. Jaeger could not be safe in the community, and excluded evidence of Mr. Jaeger's release plan. Is Mr. Jaeger entitled to a new trial?

4. It is misconduct to make improper argument that offers a personal opinion, impugns credibility, shifts the burden of proof to the

respondent, misstates the law, inflames the jury's prejudices, or relies on facts not in evidence. Is it substantially likely the prosecutor's objected-to argument, which disparaged Mr. Jaeger's expert and shifted the burden of proof, and the unobjected to argument that misstated the law, inflamed the jury's prejudices and relied on facts not in evidence affected the jury's verdict in this closely contested case?

5. Principles of substantive due process require no individual be indefinitely committed absent proof of lack of volitional control. The frontal lobe of a juvenile's brain, which controls volitional capacity, continues to develop into the late teens and early twenties. Moreover, Mr. Jaeger's congenital disorders further inhibited development of the frontal lobe of the brain. Was Mr. Jaeger's right to substantive due process violated when his indefinite commitment was premised on conduct occurring prior to maturity of his volitional functioning?

6. Due process requires the State prove a person is mentally ill and dangerous by at least clear and convincing evidence. Does RCW 71.09.020 violate due process by allowing for the involuntary commitment of a person who is merely "likely" to reoffend?

7. Did the cumulative effect of trial errors deny Mr. Jaeger a constitutionally fair trial?

D. STATEMENT OF THE CASE

Gregory Jaeger's first year was tumultuous. His birth mother had Attention Deficit Hyperactivity Disorder (ADHD), low intellect, learning disabilities, possible borderline personality disorder, and abused alcohol and drugs. 7/16/14 RP 54-57; 7/14/14 RP 37.[1] She likely consumed alcohol while pregnant. 7/14/14 RP 37-38. She planned to give him up for adoption to Ronald and Catherine Jaeger, but changed her mind twice: first calling off the adoption from the maternity ward; days later she called the Jaegers to come pick up Gregory but took him back two weeks later. 7/16/14 RP 57-59. Thus, Mr. Jaeger spent most of his first 11 months with her under largely unknown conditions. 7/14/14 RP 37.

When Gregory was almost one year old, his birth mother told the Jaegers she wanted to return him to them. 7/16/14 RP 59-61. They adopted him. 7/16/14 RP 54, 59-61. He lived with them and their two other children, Derek and Micaela, from that time forward. 7/16/14 RP 53. Gregory arrived at their home overweight and with a bleeding rash. 7/16/14 RP 61-63. The rash likely derived from having had to sit in his feces for a long period of time. 7/16/14 RP 62-63.

[1] The verbatim report from the Pretrial Motions is referred to by volume number, e.g., "Motions Vol I RP." The remaining volumes are referred to by date, except if multiple volumes exist for a particular date they are referred to as DATE [a.m. or p.m.] RP.

The Jaegers provided Gregory a loving home, in which his differences were soon noticed. He is cognitively delayed. 7/16/14 RP 85 (mother testifies he lags about two to four years behind peers), 103; 7/17/14 a.m. RP 4; 7/10/14 RP 138-39. He had trouble crawling, holding a bottle, and developing motor skills generally. 7/16/14 RP 63-68; 7/17/14 a.m. RP 7. At age 12 or 13 he would still ask to use a "sippy cup." 7/16/14 RP 66-67. He was also resistant to being held or engaging with people. 7/16/14 RP 68-69. He is particularly sensitive to noise and light. 7/16/14 RP 69-70, 73, 86-87; 7/17/14 a.m. RP 12-13; 7/24/14 RP 122. From a young age he got frustrated and threw tantrums or acted out physically. 7/16/14 RP 69, 73, 81-82. His behavioral issues persisted in school. 7/16/14 RP 75. He was generally incapable of making friends. 7/16/14 RP 73-75, 81, 94; 7/17/14 a.m. RP 30-31. Meanwhile, he enjoyed art, which seemed to exert a calming influence. 7/16/14 RP 82-85; 7/17/14 a.m. RP 4-7. He clung to structure and rules. 7/16/14 RP 87-89; 7/24/14 RP 118-21. In high school, he realized he was homosexual. 7/17/14 a.m. RP 8-10; 7/17/14 p.m. RP 7-8; 7/9/14 RP 18.

Mr. Jaeger developed a couple uncommon habits that do not involve other people. He is interested in diapers, particularly soiled diapers. 7/16/14 RP 75-79; 7/17/14 p.m. RP 11-13, 106-11. He also inserts objects into his urethra. *See* 7/17/14 p.m. RP 38-39.

From a young age, Mr. Jaeger was enrolled in physical and speech therapy; he saw doctors and counselors. 7/16/14 RP 68, 78-79, 93, 94, 96-98, 128, 130. Over the years, he has been diagnosed with varying conditions and prescribed many different medications. Exhibit 214, pp.5-6 (listing evolving diagnoses); 7/16/14 RP 79-81 (prescribed Risperdal), 96-98 (medications changed), 129 (participated in medication trial), 132-34; 7/17/14 a.m. RP 3; 7/17/14 p.m. RP 161 (Jaeger describes medications as "dysregulated"); 7/21/14 RP 142-49 (prescriptions changed among aderall, ritalin, seroquel, concerta; medication changes at time of 16th birthday); 7/22/14 RP 37-39, 112-13; 7/24/14 RP 135.

It was not until he was 15 years old that Mr. Jaeger was able to form a few friendships, particularly with four kids from his special education class. 7/16/14 RP 98. Encouraged by his progress and interested in celebrating his new friendships, the Jaegers decided to throw Gregory his first birthday party for his 16th birthday at the Family Fun Center. 7/16/14 RP 98; 7/17/14 a.m. RP 13-15. Towards the end of the party, Mr. Jaeger excused himself to use the restroom, began looking for a diaper and ended up attempting to engage a nine-year-old male in oral sex, but the boy exited the restroom. 7/17/14 a.m. RP 15-24. Mr. Jaeger then approached a younger boy who entered the neighboring stall. 7/17/14 a.m. RP 25-26. He put his mouth on that boy's penis and then the boy exited

the stall. 7/17/14 a.m. RP 26-27. Mr. Jaeger said he did not have a particular plan when he went into the restroom. 7/17/14 a.m. RP 22.

After pleading guilty to attempted child molestation and child molestation, Mr. Jaeger was confined at Maple Lane for five years; during this time he engaged in various services, was motivated to do better, improved over time, worked hard and completed high school. 7/7/14 RP 104-06; 7/8/14 RP 14-21, 68, 72-73; 7/9/14 RP 3; 7/9/14 RP 115. Due to his mental deficits, physical appearance, and awkwardness in social interactions, he was easily picked on or bullied. 7/10/14 RP 140. He also engaged in some consensual sexual relationships with peers. 7/8/14 RP 27-28; 7/9/14 RP 10-13; *see* 7/9/14 RP 119-27 (engaged in age-appropriate relationships at SCC); 7/10/14 RP 41-42. Prior to his release from in 2010, the State filed a petition for indefinite commitment pursuant to Chapter 71.09 RCW and he has since been held at the SCC. CP 1-2.

Mr. Jaeger's parents have been very involved in and supportive of his recovery and hopeful release. *E.g.*, Motions Vol I RP 22-23, 27-28; 7/8/14 RP 38 (Maple Lane counselor "describe[s] them as being the best parents I have ever had to work with in my career."), 84-85. He is in daily contact with them. 7/16/14 RP 105-07; 7/17/14 a.m. RP 42-43.

The State and Mr. Jaeger agreed to a plan for release to a less-restrictive placement, but the potential settlement ultimately fell apart. CP 193-203; CP 227-28.

The commitment proceedings that followed were closely contested. At trial, the State and Mr. Jaeger's experts presented different diagnoses. On Mr. Jaeger's behalf, Dr. Natalie Novick Brown diagnosed Mr. Jaeger with alcohol-related neurodevelopmental disorder (part of the fetal alcohol spectrum disorder (FASD)). 7/23/14 RP 28-61, 71-72, 134-49; Exhibit 214. This congenital condition causes frontal lobe brain damage and, along with any autism spectrum disorder, accounts for Mr. Jaeger's executive functioning limitations. 7/23/14 RP 58-61, 71-72. According to Dr. Brown, "People with FASD are at risk of making sexual mistakes. Sexually offending is included among those sexual mistakes. . . . but the research does not indicate that those individuals are prone to repeating those sexual mistakes and reoffending essentially after they have made sexual mistakes and been sanctioned for it." 7/23/14 RP 63. Dr. Denise Kellaher diagnosed Mr. Jaeger with autism spectrum disorder (asperger's syndrome), fetishistic disorder (diapers), and a moderate level intellectual disability. 7/21/14 RP 50-51, 97-98. She found that none of these diagnoses make Mr. Jaeger more likely than not to reoffend if released. 7/21/14 RP 99, 101-116, 184-86.

The State's witness, Dr. Harry Hoberman, diagnosed Mr. Jaeger with ADHD, intellectual disability, borderline personality disorder, antisocial personality disorder, fetishistic disorder (diapers), sexual masochism disorder, other specified paraphilic disorder (coprophilic and urophilic), and pedophilia. 7/14/14 RP 18, 7/14/14 RP 59-101, 109-27; 7/15/14 RP 14-18. Dr. Hoberman testified these conditions make it more difficult for Mr. Jaeger to control his behavior, and he is more likely than not to reoffend if released from SCC. 7/14/14 RP 35-36, 118; 7/15/14 RP 27-45. Mr. Jaeger and his witnesses sharply disagreed with Dr. Hoberman's diagnoses. *E.g.*, 7/17/14 p.m. RP 28; 7/21/14 RP 32-34, 125-33, 146, 151-62, 165-80; 7/22/14 RP 65-70, 94-97; 7/23/14 RP 76-77.

Mr. Jaeger testified he now responds better to changes in his emotions and can better communicate with others; he has learned from his treatment and matured during his almost ten years in confinement. 7/17/14 a.m. RP 31-37, 46-48, 50-52; 7/17/14 p.m. RP 36. He has learned how to have friendships and wants consensual relationships. 7/17/14 p.m. RP 27-28, 31-32. It "tears [him] apart" that he committed the offenses in 2005. 7/17/14 a.m. RP 35; *see* 7/17/14 p.m. RP 62 ("I don't want to hurt another child ever again."). He still has an interest in diapers. *See* 7/14/14 RP 13-17; 7/17/14 p.m. RP 106-11.

Mr. Jaeger also presented evidence of a comprehensive release plan to show he could live in the community without reoffending. Exhibit 332; *see, e.g.*, 7/24/14 RP 47-49. Dr. Brown described the plan as "very conservative" and "probably the most comprehensive, focused, targeted treatment plan I have ever seen in my 20 years' experience in this field. It surpasses anything I have seen in DDA or anyplace else for that matter." 7/23/14 RP 80-81. Upon release from the SCC, Mr. Jaeger intended to return to his parents' home where his two nephews, Micah Manasseh, age 22, and Robert High, age 20, would also be living. 7/16/14 RP 52-53; 7/22/14 RP 123-25. The family worked with professionals to develop the plan that includes 24-hour supervision; alarming the house; steps to de-escalate situations; crisis management; individualized treatment; therapy and skills training in many areas; a weekly schedule and task list; and copious rules. *E.g.*, 7/16/14 RP 114-21; 7/17/14 p.m. RP 48-55, 145-49; 7/21/14 RP 47-48; 7/22/14 RP 137-41; 7/23/14 RP 82-89, 105-13; 7/24/14 RP 50-63, 154-61; 7/28/14 RP 29-33. Since Mr. Jaeger's offenses, Ron and Cathy Jaeger have spent countless hours developing skills and tools to work better with their son. 7/16/14 RP 54, 108-14, 140; 7/24/14 RP 142-54; Exhibits 250, 337, 347, 348. Mr. Jaeger testified "it's a more safer and smoother environment" for him now because "my parents and my support team know my specific issues and my struggles" and how to handle him

better. 7/17/14 a.m. RP 50; 7/17/14 p.m. RP 158-61; *accord* 7/22/14 RP 99-101 (testimony of Dr. Kellaher supporting release plan).

Mr. Jaeger was prevented from telling the jury that upon release he would live under these conditions while applying for fulltime housing from a residential housing provider for developmentally disabled persons through this state's community protection program. Mr. Jaeger showed he was eligible for the program and committed to applying and attending if admitted. Motions Vol I RP 18, 35-38, 46; Motions Vol II RP 207-09, 214. He also demonstrated the community protection program would conduct a risk assessment that took into account how he was doing in the community prior to admitting him. Motions Vol I RP 105. The State moved to exclude all evidence of the community protection program. CP 788-813; CP __ (Subs. 57, 131, 132, 141, 152[2]). The court granted the State's motion, ruling "that any evidence regarding community placements that are uncertain would not be admissible, however we characterize them." Motions Vol IV RP 392-402. Mr. Jaeger, therefore, could not offer evidence that he would apply to the community protection program upon release and that he would be motivated to comply with his release plan in order to gain admittance to the program.

[2] A supplemental designation of clerk's papers has been filed for those documents referenced by subfolder number.

Other errors arose during the commitment trial, the facts of which are addressed in the relevant argument sections below. The jury indefinitely committed Mr. Jaeger to the SCC. CP 956-57, 962-64.

E. ARGUMENT

1. **Mr. Jaeger was denied a fair trial by an impartial jury because several expert-like testimonials during voir dire tainted the panel on the ultimate issue and a juror fainted during the State's opening statement.**

a. A respondent is denied his constitutional right to an impartial jury when a panel is tainted by a juror's expert-like experience.

Alleged constitutional violations are reviewed de novo. *State v. Siers*, 174 Wn.2d 269, 274, 274 P.3d 358 (2012). Our constitutions guarantee the right to a fair and impartial jury in civil commitment proceedings. Const. art. I, § 22; U.S. Const. amend. VI; *State v. Roberts*, 142 Wn.2d 471, 517, 14 P.3d 713 (2000); *In re Det. of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), *superseded by statute on other grounds as recognized in In re Det. of Thorell*, 149 Wn.2d 724, 746, 72 P.3d 708 (2003). "The 'impartial jury' aspect of article I, section 22, focuses on the defendant's right to have unbiased jurors, whose prior knowledge of the case or their prejudice does not taint the entire venire and render the defendant's trial unfair." *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). "Indeed, an essential element of a fair trial is an impartial trier of fact—a jury capable of deciding the case based on the evidence

before it." *Id*. "Due process requires that the defendant be tried by a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 945-46, 71 L. Ed. 2d 78 (1982); *accord* U.S. Const. amends. VI, XIV; Const. art. I, § 22. The right to a fair trial includes the right to a presumption of innocence. *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999).

"Voir dire is a significant aspect of trial because it allows parties to secure their article I, section 22 right to a fair and impartial jury through juror questioning." *Momah*, 167 Wn.2d at 152. In *Mach v. Stewart*, the Ninth Circuit reversed a trial court's denial of a motion for a new venire. 137 F.3d 630 (9th Cir. 1997). The defendant was charged with sexual conduct with a minor and during voir dire, a prospective juror with a psychology background and employed as a social worker stated that, in her three years as a state-employed social worker, every allegation a child made about sexual abuse was true, which she repeated upon further questioning. *Id*. at 632-33. The trial court struck the juror but denied a motion for a new panel. *Id*. Reversing, the Ninth Circuit reasoned the statements made by the prospective juror were directly connected to guilt, and that "the court should have[, at a minimum,] conducted further voir dire to determine whether the panel had in fact been infected by [the prospective juror's] expert-like statements.'" *Id*. at 633.

"Even if 'only one juror is unduly biased or prejudiced,' [by the prospective juror's comments] the defendant is denied his constitutional right to an impartial jury." *Mach*, 137 F.3d at 633 (quoting *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979)). "Given the nature of [the prospective juror's] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, [the Ninth Circuit] presume[d] that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused." *Id*. at 634. Such a "bias violated [the defendant's] right to an impartial jury." *Id.* at 633. The remedy was to begin anew with a fresh jury pool.

b. Juror No. 61, a police officer, told the venire his twenty-five years of experience with sex offenders has jaded him into a belief that they are more likely to reoffend.

Juror 61 is a twenty-five year veteran police officer with the King County Sheriff. 7/1/14 RP 20. He told the venire he has investigated "hundreds of [sexual] abuse cases." 7/1/14 RP 25-26. During general questioning, the court inquired into venire members who had received a community notification letter that a registered sex offender was moving into the neighborhood. 7/1/14 RP 31. Juror 61 responded that he reacted very strongly to that information in a way that might affect him as a juror in this case. 7/1/14 RP 32. In front of the panel, he explained:

> Over the last twenty-five years, I've worked with our sexual assault unit, both in writing the letters we send out to the public as well as attending all the meetings we have for the public. In the districts I patrolled, it was common practice that we go by the registered sex offender's homes and check on them as part of my daily work.

7/1/14 RP 32- 33. Apparently, at this point Mr. Jaeger's counsel tried to subtly indicate the court should cease questioning this juror in public on the issue, but the court missed the signal. 7/1/14 RP 47. So the court continued by inquiring "whether this type of experience, exposure to registered sex offenders or hearing about registered sex offenders elicited such a strong feeling that it might affect your ability to be fair and impartial in this case." 7/1/14 RP 33. Juror 61 responded: "I would say yes, that has jaded me a little bit." The court prompted further elaboration, "When you say it's jaded you, can you explain what that means." To which Juror 61 responded, "I would say that the jading has made my [sic] cynical in my outlook and belief that, okay, they are more likely that they are going to band together and I need to watch out for these guys." 7/1/14 RP 33.

At the first break, Mr. Jaeger moved for a mistrial:

> You have a police officer who on several occasions has talked about his lengthy experience, his great knowledge and in this particular area and said that because of that great experience of twenty-five years of going and visiting sex offenders he believes they are more likely than not to re-

> offend, which is the question here. I don't think that bell can be unrung.

7/1/14 RP 45-46. The State did not "think he said anything that would warrant a mistrial[,]" but acknowledged Juror 61 said "he came to believe there was some likelihood of re-offense because of his work" and "was jaded by some of his work." 7/1/14 RP 46. The court denied the mistrial motion finding "It's one man's opinion. And I don't think that there's any indication that because one of the main jurors in the case, that he has a certain opinion that he is jaded, that it So prejudices the case that Mr. Jaeger cannot receive a fair trial." 7/1/14 RP 46-47. Juror 61 was removed for cause after individual questioning where he acknowledged he believes sex offenders are more likely to reoffend, he is jaded on this issue, and it would be difficult for him to let go of these assumptions. 7/1/14 RP 71-73.

The court failed to consider that this "one man" had also informed the jury he has been a deputy sheriff for 25 years working with sex offenders. His experience imbued his opinion with authority. *See Mach*, 137 F.3d at 633. The juror's statements contravened the principle that no witness may opine on guilt, directly or inferentially, because such opining "invade[s] the fact finder's exclusive province." *State v. Johnson*, 152 Wn. App. 924, 930-31, 219 P.3d 958 (2009). Even more egregiously, Mr.

Jaeger had no opportunity for cross-examination because Juror 61 was not a witness but a juror opining before any evidence had been offered.

c. After Juror 61, two other panel members broadcast their expert-like opinions to the venire.

After the deputy sheriff told the jury his twenty-five years of experience has caused him to believe that sexual offenders reoffend, two other panel members expressed a similar view based on similar expertise. First, juror 117 related a particularly disturbing experience with a repeat pedophile.

> I worked in an institution a number of years ago, and we worked with a man that was a pedophile, serial abuser. And he was in the institution for two to three years. . . . and he was discharged, released from the hospital. And within that week he was found with a boy, little boy in the front seat of his car ready to commit again.

7/2/14 RP 47-48. By relating this experience, juror 117 not only provided additional information about sex offenders' likelihood to reoffend, but it was related to pedophiles specifically and it painted an alarming picture of what reentry and harm to the community could look like.

But the venire's testimonials did not end there. One prospective juror informed the venire that a deputy sheriff friend "had said if someone, as a young person stealing cars, when they get older most likely won't be doing that and could quit. But he said when it's something sexual there is no cure for that. And I have always kind of held those feelings." 7/2/14

RP 66-67. Again, the jury heard that people who deal with sex offenders on a regular basis as part of their work have concluded that once a sex offender always a sex offender.[3]

d. Then a member of the jury fainted during the State's opening statement, again in front of the entire jury.

The jurors' ability to be fair was again tainted when Juror No. 5 fainted in response to the description of evidence during the State's opening statement. A mistrial was sought but denied. 7/7/14 RP 89-90. The juror was not excused. The court did not inquire whether the incident affected the impartiality of the other jurors, and the jury was not instructed to disregard their fellow juror's reaction to the description of the evidence.

The prosecutor described at length and in detail Mr. Jaeger's self-stimulating conduct in his opening statement:

> I'm going to summarize some of the sexually deviant behaviors in categories. . . .
>
> He would often insert objects into his penis, up his urethra. He found that causing himself pain in this was sexually pleasurable. He did this while masturbating.

[3] Mr. Jaeger did not renew his mistrial motion after these two additional comments. However, the court indicated he need not renew. 7/10/14 RP 14 (respondent has standing objection whenever court makes adverse ruling). Moreover, the seating of a biased jury is a manifest constitutional error that can be reviewed for the first time on appeal. RAP 2.5(a)(3); *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009) (manifest constitutional error where lay witness testimony invaded right to impartial jury).

> Among the things he inserted in his penis were pencils, the temple piece of his own eyeglasses, which he did repeatedly. On at least one occasion, inserted his eyeglass temple piece into his own anus and then pushed that down into his urethra.
>
> Once he inserted a corncob into his urethra. On one occasion, he inserted a crayon into his penis and it broke off. The school nurse was unable to resolve the situation and he had to be taken from the school to a hospital.
>
> He also caused pain to his penis that did not involve the insertion of foreign objects on at least -- while masturbating, he would bend his penis at a 90 - degree angle. On at least one occasion, he tied a sock around his penis while masturbating and while inserting a stress ball up his anus. . . .
>
> Rest assured that I'm not telling you about all of these deviate practices just for shock value. Dr. Hoberman will put all of this into a psychological context for you. He will tell you what all these behaviors means in terms of Mr. Jaeger's –

7/7/14 RP 31-32. At that point the proceedings were interrupted when Juror 5 fainted and the court called a recess. 7/7/14 RP 32-34. The court told the parties it would not be excusing Juror 5 "even if [he] were able to identify why he fainted and that these things would be difficult for him." 7/7/14 RP 33. Mr. Jaeger convinced the court to question the juror outside the presence of the jury, at which time he confirmed that he had fainted due to the State's description of the evidence. 7/7/14 RP 33-36. But despite Mr. Jaeger's requests, the court did not declare a mistrial or excuse Juror 5. 7/7/14 RP 33-36, 89-90.

While the court has discretion over the conduct of a trial, that discretion cannot interfere with the right to an impartial jury. If jurors can continue to act impartially after one of their own responds so emotionally to evidence, a mistrial may not be necessary. *See State v. Dais*, 206 S.E.2d 759, 762 (N.C. Ct. App. 1974) (no mistrial required where court "carefully examined the jurors to ascertain whether the incidents in question would undermine their ability to render an impartial verdict based only upon evidence presented at trial"). However, the court below failed to ensure the other jurors could remain impartial when it failed to inquire of them after Juror 5 fainted. Likewise, the court provided no instruction to the jury to disregard the conduct.

e. Mr. Jaeger was denied a fair trial before an impartial jury in light of all of these irregularities.

Like in *Mach*, each of the three jurors shared purported expertise on the very issue of whether Mr. Jaeger is likely to reoffend. Both the source and the content of the broadcasted information was highly prejudicial. *See State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) ("Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury.").

The infection went beyond the three panel members' statements. The jury who ultimately decided Mr. Jaeger's fate watched Juror 5's severe response to the State's description of Mr. Jaeger's conduct. Other jurors were likely influenced to interpret this evidence differently based on the physical reaction it induced on Juror 5. This one person's response should not infect the jury process at all, yet the court provided no such admonition and denied a mistrial. We can be certain at least one juror was biased by some or all of these irregularities. *See Mach*, 137 F.3d at 633 (constitutional violation if even one juror is biased or prejudiced by irregularity). Without providing an admonition or any inquiry into whether it impacted other jurors, this Court cannot be confident in the jury's verdict. A new trial is required.

2. **Mulitple evidentiary errors improperly tipped the scale in favor of the State.**

Although only relevant evidence is admissible, the threshold is low. "To be relevant, evidence need only have 'any tendency 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.'" *In re Det. of Post*, 170 Wn.2d 302, 311, 241 P.3d 1234 (2010) (quoting ER 401).

a. The trial court improperly limited Mr. Jaeger's expert's testimony.

The trial court was careful not to allow Mr. Jaeger to attack the conditions at the SCC, evidence held irrelevant to a commitment trial. *In re Det. of Turay*, 139 Wn.2d 379, 404, 986 P.2d 790 (2010). But the court's rulings were overbroad. Mr. Jaeger was prevented from presenting evidence relevant to his condition and behavior and necessary to rebut the State's evidence that he is a rule breaker. 7/23/14 RP 14-17.

The State presented much of Mr. Jaeger's behavior at the SCC to show he will fail in the community. 7/23/14 RP 14-15. Expert testimony from Dr. Brown that Mr. Jaeger's conditions make him "prone to be victimized by other inmates" and "susceptible to grooming" was relevant to show the jury he will not be subject to the same degree of victimization at home that he is at SCC. *See id*. It would have demonstrated he was reacting to the environment, which will change upon release.

Unlike *Turay*, Dr. Brown's opinion was not evidence of conditions at the SCC generally but of Mr. Jaeger's susceptibilities. *See* 139 Wn.2d at 403-04. His condition was the issue in the case, and his ability to remain safe in the community was an important factual issue for the jury to determine. He should have been allowed to present Dr. Brown's testimony that his condition makes him prone to victimization at the SCC.

b. The trial court improperly excluded evidence that Mr. Jaeger would apply for the community protection program if released because the evidence was relevant to Mr. Jaeger's motivation not to reoffend.

The trial court improperly excluded all evidence and reference to the community protection program at trial. *See* Motions Vol IV RP 392-402 (oral ruling). The court's intention was to comply with RCW 71.09.060(1), *In re Det. of Mulkins*, 157 Wn. App. 400, 237 P.3d 342 (2010) and *Post*, 170 Wn.2d 302 by allowing in only relevant evidence of conditions that "would exist" if Mr. Jaeger was actually released from the SCC. *See* Motions Vol III RP 366-79; Motions Vol IV RP 392-402. However, the court exceeded this line of authority when it excluded any reference to the community protection program.

Evidence a respondent who is subsequently released could be subject to another commitment proceeding if he commits a recent overt act is relevant evidence because the knowledge of the consequences of committing a recent over act "may well serve as a deterrent to such conduct." *Post*, 170 Wn.2d at 316-17. The evidence therefore "has some tendency to diminish the likelihood of [the respondent] committing another predatory act of sexual violence." *Id*. at 317. The likelihood of the respondent reoffending if released is a main question before the jury in RCW 71.09 cases, making the evidence relevant.

Like evidence of a recent overt act, which may well have a deterrent effect, evidence that Mr. Jaeger would be applying to the community protection program would have demonstrated his motivation to comply with his release plan. Mr. Jaeger could show he was eligible for the program, would apply if released, and would be subject to an additional risk assessment that would take into account his behavior in the community before being admitted. Motions Vol I RP 18, 35-38, 46, 105; Motions Vol II RP 207-09, 214. Thus the fact that Mr. Jaeger would apply for this program is relevant to the likelihood Mr. Jaeger would not reoffend but would comply with his release plan so as not to jeopardize his application to the community protection program. *See Post*, 170 Wn.2d at 313. The evidence is of a fact that "would exist" upon release because Mr. Jaeger testified he would apply if released. The trial court abused its discretion when it excluded this relevant evidence.

In *Mulkins*, this Court considered different evidence. In that case, Mr. Mulkins sought to admit evidence that the community protection program was an available placement option for him upon release. 157 Wn. App. at 401, 405. On appeal, he challenged the constitutionality of RCW 71.09.060(1). This Court held he did not have standing to assert that challenge because he did not show the community protection program was a placement option that "would exist" for him upon release. *Id*. at 405-07.

Mr. Jaeger argues that the fact that he would apply for the community protection program is a condition that "would exist" upon release and was relevant to the jury determination. Consequently, this Court's holding in *Mulkins* is consistent with Mr. Jaeger's argument here.

c. The evidence is admissible under a plain reading of RCW 71.09.060(1).

Evidence that Mr. Jaeger would apply for the community protection program if released is admissible without holding the statute unconstitutional. This Court reads a statute narrowly to avoid invalidating it. *Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990). Under the plain language of RCW 71.09.060(1), the Legislature precluded use of the community protection program "as a placement condition or treatment option" during commitment proceedings. RCW 71.09.060(1); *see State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (in statutory interpretation, courts look first to plain language of statute). In relevant part, that subsection provides,

> In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition. The community protection program under RCW 71A.12.230 may not be considered as a placement condition or treatment option available to the person if unconditionally

> released from detention on a sexually violent predator petition.

Mr. Jaeger did not seek to admit evidence of his application as a placement condition or treatment option; instead, it was relevant to show his incentive to comply with his release plan. Applying to the community placement program is plainly not part of treatment, and thus does not qualify as a "treatment option." Likewise, applying to the program is not included in Mr. Jaeger's release plan. It is not a condition of his placement in the community. Also, evidence of an application to the program does not require the jury to consider the community placement program itself, either as a placement condition or treatment option.

If the Court disagrees, then RCW 71.09.060(1) violates Mr. Jaeger's right to procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In determining what procedures must be followed prior to depriving a person of due process, courts consider: (1) the private interest at stake, (2) the risk of erroneous deprivation of that interest under current procedures, and the probable value of substitute procedures, and (3) the government's interest, including fiscal and administrative burdens, in providing substitute procedures. *Id*. at 335; *Young*, 122 Wn.2d at 43-44.

The private interest at stake here is paramount. *See Young*, 122 Wn.2d at 26 (liberty is important and fundamental interest). "[T]he most elemental of liberty interests [is] in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). In these proceedings, Mr. Jaeger was facing indefinite confinement. The private interest is extraordinarily high.

The risk of error presented by the categorical exclusion of evidence is also high. As discussed, the evidence that Mr. Jaeger would apply to the program is relevant to the main question before the jury—is Mr. Jaeger more likely than not to reoffend unless confined at the SCC. This evidence is at least as relevant as the recent overt act evidence held admissible in *Post*, 170 Wn.2d at 317. *See also Thorell*, 149 Wn.2d at 751 (evidence regarding details of release relates directly to whether the definition of sexually violent predator is met for initial commitment). Blanket exclusion of the evidence creates a high risk of erroneous deprivation of respondents' liberty.

Finally, there is virtually no fiscal or administrative burden. Minimal additional evidence was necessary to allow Mr. Jaeger to show he intended to apply to the community protection program upon release. Mr. Jaeger and his parents, who were already witnesses at trial, could have testified. Even if Mr. Jaeger chose to call an additional witness or present

additional documents, the burden would be inconsequential. On balance, to the extent RCW 71.09.060(1) precludes evidence of a forthcoming application to the program, it violates due process.

The exclusion of community protection program evidence also violates Mr. Jaeger's right to equal protection. RCW 71.09.060(1) singles out one type of voluntary treatment available only to people with developmental disabilities. *See* RCW 71.09.060(1); RCW 71A.12.210(2). The statute thus treats similarly situated persons, respondents in civil commitment proceedings, differently based on whether they have a developmental disability. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1986); U.S. Const. amend. XIV. This classification is constitutional only if it is rationally related to a legitimate state interest. *Id*. at 440. An application to the community protection program does not pose a threat to state interests in a way that evidence of other voluntary treatment programs does not.

d. Taken together these evidentiary errors were not harmless in this closely contested case.

Evidentiary errors are not harmless if it is within the range of reasonable probabilities that the improperly admitted evidence materially affected the outcome of the case. *Post*, 170 Wn.2d at 315. "[W]here there is a risk of prejudice and no way to know what value the jury placed upon

the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). The State's case was closely contested by Mr. Jaeger. He relied on expert witnesses who discredited the State's diagnoses and diagnosed Mr. Jaeger differently. He also presented extensive evidence of a release plan he and his experts contended would make him unlikely to reoffend. The court put its thumb on the scale in favor of the State when it precluded Mr. Jaeger from admitting relevant evidence from his expert and about his plan to apply for the community protection program. The effect of these errors requires reversal of the commitment order and remand for a new trial.

3. **Prosecutorial misconduct in closing argument denied Mr. Jaeger a fair trial.**

Every prosecutor is a quasi-judicial officer of the court, charged with the duty to seek verdicts free from prejudice, and "to act impartially in the interest only of justice." *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *accord State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). Prosecutors must ensure justice is done and the accused receive a fair and impartial trial. *E.g.*, *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Prosecutorial misconduct violates a respondent's right to a fair trial where the prosecutor makes an improper statement that has a prejudicial effect. *E.g.*, *In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009); *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). The misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *Sease*, 149 Wn. App. at 81.

In his rebuttal, the prosecutor made four improper arguments, each objected to. First, the court sustained Mr. Jaeger's objection to the prosecutor's disparaging of the respondent's expert. This part of the rebuttal argument began when the prosecutor offered his opinion on Dr. Kellaher's credentials and testimony: "That's the kind of thing that a professional witness does to fluff up a resumé, to get some credibility when she comes in here and gives those rather absurd opinions in a case like this." 7/28/14 RP 182. To contrast, the prosecutor bolstered his own expert's credentials: "Dr. Hoberman's credentials in comparison are stellar. He actually was a real professor at the University of Minnesota . . . . I didn't ask him if he got paid. I didn't think I had to." 7/28/14 RP 183. After summarizing evidence relating to a particular portion of Dr. Kellaher's report, which the State believed inaccurately reflected her notes, the prosecutor continued, "She cleaned that. She scrubbed that.

And she put it in her formal report. She disgraced herself in this courtroom by doing that." 7/28/14 RP 185.

"[W]hile [a prosecutor] may strike hard blows, [he or she] is not at liberty to strike foul ones." *Berger*, 295 U.S. at 88. A prosecutor cannot state a personal belief as to the credibility of a witness. *Monday*, 171 Wn.2d at 677; *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Misconduct occurs if, during closing argument, the prosecutor gives a personal opinion on the credibility of witnesses. *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). The prosecutor conceded outside the presence of the jury that his argument improperly reflected his opinion. 7/28/14 RP 190. But the misconduct went beyond just opining, the comments implied Dr. Kellaher's conduct was wrongful and dishonest. *See State v. Thorgerson*, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011) (misconduct where prosecutor impugned defense counsel's integrity and honesty). The argument was improper and, although the objection was sustained, the bell was rung when the jury heard the inflammatory argument.

In rebuttal the prosecutor also twice shifted the burden. While the State may properly comment on its own evidence, the prosecutor may not "comment on a failure of the defense to do what it has no duty to do." *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986). The

prosecutor may not imply that the respondent bore the burden of providing a reason for the jury not to commit him. *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). But, here, the deputy prosecutor did precisely that—twice. First, the prosecutor argued the respondent failed to present his own evidence to combat the State's sexual deviancy evidence:

> And I think the most glaring weakness in the defense case was their abject, complete refusal to face head on in any substantive way the enormous volume of evidence that the State presented in this case that establishes these tremendous sexual deviancies.
>
> Pedophilia, of course, being the most important, the diaper fetish being very important, but the coporphilia and urophilia ---
>
> Ms. Faller: Your Honor, I object.
>
> The Court: Overruled.

7/28/14 RP 177-78. Later the prosecutor argued that Mr. Jaeger did not even call to testify the professional who worked with the family to develop the release plan, Dr. Becker. 7/28/14 RP 186-87. Mr. Jaeger's objection was again overruled.

This line of argument implied Mr. Jaeger bore a burden not imposed by chapter 71.09 RCW. Improper burden-shifting argument "constitutes great prejudice because it reduces the State's burden and undermines a [respondent]'s due process rights." *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010). The court's overruling of

Mr. Jaeger's objections to the burden-shifting argument increased the likelihood that the misconduct affected the jury's verdict. *State v. Swanson*, 181 Wn. App. 953, 964, 327 P.3d 67 (2014). The court's overruling of Mr. Jaeger's objections "lent an aura of legitimacy to what was otherwise improper argument." *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

Following on the heels of the improper burden-shifting, the prosecutor committed further misconduct when he told the jury,

> And that just comports with your common sense. The more deviant somebody is, the more they dwell on these various deviant practices and urges, the more sick they are, the greater likelihood of reoffense. That's the connection.

7/28/14 RP 178. This argument is improper in several regards. It misstates the law. *State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015). Chapter 71.09 does not premise commitment on the amount of deviancies. Instead, likelihood of reoffense must be connected to the type of mental abnormality or personality disorder. RCW 71.09.020(18). The State cannot insulate the impropriety by claiming this argument is "common sense." *See* 7/28/14 RP 178. The argument also relies on facts not in evidence. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). There was no evidence that the greater number of deviancies a person has, the greater the likelihood they will reoffend. The argument is

also improper because it is inflammatory. *Id*. at 552-53. It relies on the jury's prejudices to provide a purported basis to commit Mr. Jaeger.[4]

By disparaging Mr. Jaeger's expert witness, implying Mr. Jaeger had a burden to dispute the State's evidence, and telling the jury the quantity of deviancy matters, there is a substantial likelihood the prosecutor's improper statements affected the jury's verdict. Mr. Jaeger closely contested the State's allegations. He presented two experts who concluded he suffers from diagnoses that do not render him more likely than not to reoffend. These diagnoses and the experts' testimony equally explained Mr. Jaeger's tumultuous conduct when young, unusual fetishes, prior offenses and purported rule-breaking while confined. The jurors had to decide who they believed—which witnesses they found credible and which evidence more persuasive. Moreover, the argument that the amount of deviancy was connected to likelihood of reoffense recalls the expert-like statements during voir dire. There three prospective jurors told the venire their experience taught them once a sex offender always a sex offender. The prosecutor's improper argument compounded the prejudice. It also drew a connection between Mr. Jaeger's unusal habits, which may

[4] Mr. Jaeger did not object to this last instance of misconduct, but inflammatory argument appealing to the jury's prejudices is generally not curable by an instruction, rendering the misconduct flagrant and ill-intentioned. *State v. Emery*, 174 Wn.2d 741, 763, 278 P.3d 653 (2014).

cause harm to himself but does not harm others, and reoffending, which requires harm to others. It is substantially likely that the verdict was influenced by the prosecutor's improper arguments.

4. **Indefinite commitment violates Mr. Jaeger's right to substantive due process because juveniles are scientifically less capable of volitional control.**

Substantive due process requires that indefinite civil commitment be premised upon a showing of sustained impairment of volitional control. A juvenile's mind does not fully develop until his or her late teens or early twenties. One of the last stages of development is volitional control. Developmental impairments can even further delay the development of volitional control. It follows that indefinite commitment cannot comport with due process if premised upon conduct that occurred when the respondent was in a state of continuing development because lack of volitional control almost certainly resulted from that temporary state rather than an entrenched impairment.

a. Substantive due process requires indefinite civil commitment be premised on a lack of volitional control.

The right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); U.S. Const. amend. XIV; Const. art. I, §

3. Indefinite civil commitment restricts this fundamental right. *Foucha*, 504 U.S. at 77; *Thorell*, 149 Wn.2d at 731-32. Principles of substantive due process therefore prohibit indefinite civil commitment except in the narrowest of circumstances. *See Kansas v. Hendricks*, 521 U.S. 346, 356-57, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

Mere dangerousness is insufficient to justify indefinite, involuntary civil commitment. *Id*.. at 358; *Kansas v. Crane*, 534 U.S. 407, 412, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). However, proof of volitional impairment (serious difficulty controlling behavior), which increases the risk of future harm, can constitute a sufficient basis to civilly curtail one's physical liberty. *Hendricks*, 521 U.S. at 358; *Crane*, 534 U.S. at 412; *Thorell*, 149 Wn.2d at 731-32, 735-36. The serious difficulty controlling behavior must derive from a mental illness that distinguishes the respondent from the "typical recidivist in an ordinary criminal case." *Crane*, 543 U.S. at 413. Due process requires volitional impairment be proved before an individual can be indefinitely confined. *Id.*

b. Juveniles, particularly developmentally delayed juveniles like Mr. Jaeger, are insufficiently mentally developed to exhibit a lack of volitional control.

Science now conclusively demonstrates that young adults as a class temporarily lack volitional control while their brain continues to develop. *State v. O'Dell*, 183 Wn.2d 680, --, 358 P.3d 359, 364 (2015).

"[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Indeed, "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992)). This is true for three reasons.

First, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). As even the State's expert admitted here, "[t]eenagers engage in more risky behavior than do some other groups of people." 7/15/14 RP 153-54. Dr. Hoberman continued, "generally speaking, teenagers are more impulsive." 7/15/14 RP 154. Second, they are more susceptible to outside pressures, negative influences, and psychological damage. *Roper*, 543 U.S. at 569; *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982). Third, a juvenile's character is not as "well formed" as an adult's; his traits are "less fixed." *Roper*, 543 U.S. at 570.

As one psychology professor analogized, "[t]he teenage brain is like a car with a good accelerator but a weak brake. With powerful impulses under poor control, the likely result is a crash." Michele Deitch et al., The Univ. of Tex. at Austin, *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, at 13 (2009) (quoting Temple University Professor Laurence Steinberg), available at http://www.campaignforyouthjustice.org/documents /NR_TimeOut.pdf. Because their brains are still developing, juveniles "react based on emotional impulses rather than by thoroughly processing thoughts and ideas." Deitch et al., *supra*, at 14; *accord* Marsha Levick, et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment through the Lens of Childhood and Adolescence*, 15 U. Pa. J. L. & Soc. Change 285 (2012) (discussing neuro-imaging research). Studies show that "even when adolescents are familiar with the law, they still act as risk takers who magnify the benefits of crime and disregard the consequences associated with illegal actions." *Id*. at 15. "[T]hese neurological differences make young offenders, in general, less culpable for their crimes." *O'Dell*, 358 P.3d at 365.

As a result, a juvenile's actions are less likely to be "evidence of irretrievabl[e] deprav[ity]." *Roper*, 543 U.S. at 570. Juveniles who demonstrate an inability to control their behavior or act in a risky manner

generally do so not because of an entrenched characteristic but because of developmental and hormonal changes that will subside with age. As Dr. Hoberman testified here, "Most of them grow out of it." 7/15/14 RP 155.

The lag in development of volitional control is even more exaggerated where the individual is developmentally delayed. 7/21/14 RP 130-31 (testimony of Dr. Kellaher). As Dr. Brown testified, research shows juveniles with FASD are even more prone to impulsivity, an inability to link cause and effect, poor boundary sense, memory and attention difficulties, and susceptibility to peer pressure all stemming from executive functioning damage in frontal lobe, the prefrontal cortex. 7/23/14 RP 59-61; *see also* 7/23/14 RP 101-05. In other words, 16-year-old Gregory Jaeger was facing both typical adolescent impairment to volitional control and congenital frontal lobe deficits.

Most youth outgrow the recklessness, impulsivity and heedless risk-taking of their youth. "'Only a relatively small proportion of adolescents'" who engage in illegal activity "'develop entrenched patterns of problem behavior.'" *Roper*, 543 U.S. at 570 (quoting Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

Though the law at times requires assessments be made of an individual's future character, such an assessment is particularly challenging when faced with a biologically developing subject. "Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'" *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012) (quoting *Graham*, 560 U.S. at 73 (internal quotation omitted)); *accord* Exhibit 335, pp. 2-3. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 573).

c. Because volitional impairment is a prerequisite for commitment and juveniles are insufficiently developed to exhibit chronic volitional impairment, due process prohibits the indefinite civil commitment of juvenile offenders.

Just as youth matters in sentencing, so does it matter in determining the constitutionality of indefinite civil commitment premised upon serious difficulty controlling behavior. *E.g.*, *Miller*, 132 S. Ct. at 2465; *Graham*, 130 S. Ct. at 2034; *Roper*, 543 U.S. at 578.

"The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime

committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570; *accord* Levick et al., *supra*, at 297-98 (reviewing empirical data showing the majority of youths who engage in delinquent acts desist as they mature). "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570; *accord* Steinberg & Scott, *supra* at 1014 ("Making predictions about the development of relatively more permanent and enduring traits on the basis of patterns of risky behavior observed in adolescence is an uncertain business."). "Combining the physical immaturity of the brain with the underdevelopment of cognitive and psychological skills, adolescents are at a severe disadvantage compared to adults." Deitch et al., *supra*, at 15.

Indefinite confinement must be premised upon a finding of serious difficulty controlling behavior to pass constitutional muster. Further, the serious difficulty controlling behavior must derive from a mental illness that distinguishes the respondent from the "typical recidivist in an ordinary criminal case." *Crane*, 534 U.S. at 413. But such a finding cannot be scientifically proven based upon conduct prior to mature brain development. Accordingly, this State cannot indefinitely confine

individuals whose predicate conduct derives from the period of time when their volitional capacity was immature or continuing to develop.

d. Mr. Jaeger's volitional capacity was still developing at the time of the predicate offenses alleged here and his commitment order does not comport with substantive due process.

As Dr. Kellaher opined, "The sexual urges of a hormone-surging 16 year old with Asperger's Disorder drove Mr. Jaeger's inappropriate behavior not a primary sexual arousal towards children." CP __ (Sub 85 at Ex. D, p.21). Mr. Jaeger's lack of volitional control at his 16th birthday party very likely stemmed from continuing brain development and hormonal changes experienced by all adolescents, which was only heightened by his congenital developmental delays. Sixteen-year-old Mr. Jaeger's difficulty controlling behavior was a temporary and evolving state; that is a constitutionally insufficient basis for indefinite commitment as a matter of law.

5. **The statutory preponderance of the evidence standard is constitutionally insufficient.**

A person may not be committed indefinitely unless the State proves beyond a reasonable doubt he is a sexually violent predator. RCW 71.09.060. A "sexually violent predator" is a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person

likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18) (emphasis added). "'Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7) (emphasis added). The issue clearly presented to the jury in this case was whether Mr. Jaeger was more likely than not to reoffend; in other words whether his chance of reoffense if not confined was greater than 50 percent. 7/21/14 RP 90 (testimony of Dr. Kellaher that more likely than not means greater than 50 percent); 7/28/14 RP 56 (State's closing argument that Dr. Hoberman's risk factors clearly show more likely than not to reoffend, greater than 50 percent); CP 941 (instruction 10). This is the preponderance of the evidence standard.

This statutory standard conflicts with the constitutionally required standard of proof. "[T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 427, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). The Constitution requires proof of present dangerousness by at least clear and convincing evidence. *Id*. at 433. "Clear and convincing evidence" means the fact in issue must

be shown to be "highly probable." *In re Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973). Thus, civil commitment is unconstitutional absent a finding that it is "highly probable" the person will reoffend. The statutory "more probable than not" standard violates due process.

Though our Supreme Court rejected this argument in *In re Det. of Brooks*, that opinion should be reexamined in light of subsequent caselaw. *See* 145 Wn.2d 275, 36 P.3d 1034 (2001). Since *Brooks* was decided, both the U.S. Supreme Court and Washington Supreme Court have held that involuntary commitment is unconstitutional absent a showing that a defendant has "serious difficulty" controlling dangerous, sexually predatory behavior. *Crane*, 534 U.S. at 413; *Thorell*, 149 Wn.2d at 735. The evidence must be sufficient to distinguish a sexually violent predator "from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413; *Thorell*, 149 Wn.2d at 731.[5]

The "serious difficulty" standard of *Crane* and *Thorell* is akin to the "highly probable" standard, not the "more likely than not" standard outlined in the statute. *See Thorell*, 149 Wn.2d at 742; *see also In re Commitment of Laxton*, 254 Wis.2d 185, 203, 647 N.W.2d 784 (2002) (upholding Wisconsin's civil-commitment statute following *Crane*

[5] In *Mulkins*, 157 Wn. App. 400, this Court rejected a similar argument. As discussed here, that opinion was wrongly decided and should not be followed.

because statute required showing of "substantial probability that the person will engage in acts of sexual violence," and "substantially probable" means "much more likely than not").

The elevated standard of proof is necessary to support the "requirement that an SVP statute substantially and adequately narrows the class of individuals subject to involuntary civil commitment." *Thorell*, 149 Wn.2d at 737 (internal citation omitted). The State must "demonstrate[] the cause and effect relationship between the alleged SVP's mental disorder and a high probability the individual will commit future acts of violence." *Id*. at 737 (emphasis added); *cf.* Sentencing Guidelines Commission, *Recidivism of Adult Felons 2007* at 1 (recidivism rate among adult male felons generally is 63.3 percent).

Thorell is consistent with the Washington Supreme Court's earlier pronouncements regarding the due process rights of those subject to civil commitment. In the seminal case of *In re Harris*, for example, the Court required "demonstration of a substantial risk of danger" to satisfy due process and "protect against abuse." 98 Wn.2d 276, 654 P.2d 109 (1982). "[I]nvoluntary commitment requires a showing that the potential for doing harm is 'great enough to justify such a massive curtailment of liberty.'" *Id*. at 283 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)). Thus, "[t]he risk of danger must be substantial .

. . before detention is justified." *Id*. at 284. Chapter 71.09 RCW violates due process because it requires only that the risk of danger be "likely" or "probable"—not substantial.

The fact that the statute mandates a "beyond a reasonable doubt" standard in one clause cannot save it because the standard is severely weakened in another clause by allowing for commitment only where it is "likely" a person will reoffend. A finding beyond a reasonable doubt that it is merely "likely" or "probable" that a person will reoffend creates a standard which, in the aggregate, is a mere preponderance standard.

To pass constitutional muster, the statute must mandate a showing by clear and convincing evidence that the defendant will reoffend if not confined to a secure facility—not a showing that he "might" reoffend, will "probably" reoffend, or is "likely" to reoffend. *See Addington*, 441 U.S. at 420 (trial court properly instructed jury it had to find, by clear and convincing evidence, that the defendant required hospitalization in a mental hospital for his own welfare and protection or the protection of others—not that he probably needed hospitalization). This Court should hold that the "likely" and "more probably than not" standards of RCW 71.09.020 are unconstitutional.

6. **Cumulative error denied Mr. Jaeger his constitutional right to a fair trial.**

Each of the errors discussed in the sections above require reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Jaeger a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g., Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *In re Det. of Coe*, 175 Wn.2d 482, 515, 286 P.3d 29 (2012) (applying same to civil commitment trial). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

The State presented the view that Mr. Jaeger is a "profoundly sexually deviant young man with mental conditions that make him incapable of controlling his deviant sexual urges." 7/28/14 RP 52-53. Mr. Jaeger, through several lay and expert witnesses, countered that he suffers from congenital conditions that cause intellectual and executive functioning disorders, has a diaper fetish, is homosexual, and broke the law one day when he was an adolescent at the height of hormonal, social and medication changes. He was not likely to commit a sexually violent offense against another person again. *E.g.*, 7/28/14 RP 121-30. Demonstrating the closeness of the question before them, the jury deliberated for almost three days and asked three questions during deliberations. 7/28/14 RP 189; 7/29/14 RP 3-8; 7/31/14 RP 2-3. The errors described above tipped the scales from a close contest to Mr. Jaeger's case resembling an uphill battle.

In the cumulative, these errors denied Mr. Jaeger the fair trial to which he was entitled. Mr. Jaeger's commitment should be reversed on this independent ground.

F. CONCLUSION

Mr. Jaeger's indefinite commitment should be reversed on the several independent or cumulative bases elaborated above.

DATED this 20th day of November, 2015.

Respectfully submitted,

__s/ Marla L Zink_____
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Washington Appellate Project
Attorney for Appellant

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

IN RE THE DETENTION OF	)	
	)	
GREGORY JAEGER,	)	NO. 72392-8-I
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF NOVEMBER, 2015.

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