SUPREME COURT NO. 95389-9

NO. 74770-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Detention of Gregory Cooley,

STATE OF WASHINGTON,

Respondent,

v.

GREGORY COOLEY,

Appellant.

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

The Honorable Michael E. Rickert, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Gregory Eugene Coley, the appellant below, seeks review of the Court of Appeals decision in In re Detention of Coley, noted at 200 Wn. App. 1067, 2017 WL 4640320, No. 74770-3-I (2017) (Appendix), following denial of his motion for reconsideration on November 29, 2017.

B. ISSUES PRESENTED FOR REVIEW

1a. When the State's proffered race-neutral explanations for exercising a peremptory challenge against the sole black juror on the venire are unsupported by the record or legally incorrect (asserting a discriminatory pattern is required), is the State's peremptory challenge merely pretextual, motivated by racial animus, and in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)?

1b. Given the inadequacies of the Batson framework in addressing racial discrimination in jury selection, should the Washington courts adopt and should the Court of Appeals considered a more workable standard that sustains a Batson challenge whenever there is a reasonable probability that a juror's race was a factor in the prosecution's exercise of a peremptory challenge?

1c. The Court of Appeals refused to address Coley's proposal to alter the Batson framework out of deference to this court's ongoing rule-based

work. As an alternative, should this court stay consideration of this petition until its rule-based work on altering the Batson framework is complete?

2a. Did the trial court err in concluding that a defense expert's opinions must be limited to what he provided in a written report based on a discovery violation, thereby prohibiting the expert from testifying to his opinion that Coley did not have other specified paraphilic disorder with pedophilic, coercive, and sadistic traits as the State's expert had testified?

2b. If there was a discovery violation, did the trial court nonetheless err by failing to address whether a lesser sanction would suffice, the willfulness of the violation, and the extent of the prejudice as required by Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

C. STATEMENT OF THE CASE

1. Factual and procedural background

In 2002, Coley stipulated to commitment under chapter 71.09 RCW. CP 260-66. He agreed he was convicted of the sexually violent offense of child molestation in February 15, 1991, when Coley himself was 11 years old. CP 263. Coley also stipulated his conviction for unlawful imprisonment qualified as a sexually violent offense "since it was sexually motivated." CP 263. The State stipulated it would waive the RCW 71.09.090(2) show cause requirement on two occasions chosen by Coley. CP 261. The trial here was the first such occasion.

The State's expert (Dale Arnold) and Coley's expert (Richard Wollert) agreed Coley suffered from two personality disorders—antisocial personality disorder and attention deficit hyperactivity disorder. 3RP[1] 477, 479-80, 858-59. Arnold's principal diagnosis was other specified paraphilic disorder with pedophilic, coercive, and sadistic traits. 3RP 434-35, 441. As for these "traits" of other specified paraphilic disorder, Arnold opined Coley did not meet criteria for the standalone disorders. 3RP 434-35. Arnold believed Coley was "more likely than not to engage in acts of child molestation or rape if he's released to the community." 3RP 511.

The defense expert, Wollert, opined Coley did not suffer from any mental abnormality and was unlikely to engage in predatory acts of sexual violence if not confined. 3RP 882-83; Ex. 62 at 78. He described Coley's mostly juvenile criminal behavior as "reckless behavior kids engage in." 3RP 838. Wollert also believed Coley was a juvenile-only sex offender and had a lower recidivism risk of seven to 12 percent. 3RP 879-80, 883-84.

Coley also presented the testimony of several witnesses both inside and outside the Special Commitment Center who stated Coley had matured over the past few years and had better control over behavior. 3RP 608, 610-12, 636, 651, 655-56, 663-64, 709-10, 712, 717-19, 721, 728, 7444, 777-78.

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[1] Consistent with briefing below, Coley refers to the verbatim reports of proceedings as follows: 1RP—May 15, 2014; 2RP—January 5, 2016; 3RP—consecutively paginated proceedings of January 11, 12, 13, 14, 15, and 19, 2016.

2. *Batson* challenge

Coley is a black man. CP 163. The State peremptorily challenged the sole black venireperson on Coley's jury, Juror 5. 3RP 139-40. Defense counsel objected the next morning. 3RP 139-40.

In addition to arguing the challenge was timely, the State argued that Juror 5 "dominated a lot of parts of the conversation and the State . . . had concerns about his ability to deliberate with other jurors, how they would get along with him due to that demeanor." 3RP 142. The prosecutor also stated that because Juror 5 had used the term "brain chemistry" in relation to his view that racism in the justice system was a seemingly intractable issue, his "opinions were going to override his ability to listen to psychologists and take in that testimony." 3RP 142. The State also argued there was "not pattern of challenges." 3RP 142.

The trial court denied the Batson challenge based on a lack of discriminatory pattern and accepted the State's other explanations. 3RP 143-44. The court later entered findings unsupported by the record, including that Juror 5 was "one of two venireman who appeared to be African-American" but the "other venireman, who Respondent argues appeared to African-American, did not have a low enough number to be impaneled." CP 163. The findings also stated the strike was not based on race but "because the potential juror was very opinionated about several issues, including very strong

opinions about brain development and brain function." CP 163. The findings also stated Juror 5 was too talkative and dominating, which rendered him incapable of cooperating with other jurors. CP 163.

3. Exclusion of Wollert's opinion on other specified paraphilic disorder

In the middle of Wollert's testimony, the State asserted he was not permitted to give any opinion that rebutted the State's diagnosis of other specified paraphilic disorder with sadistic, pedophilic, and coercive traits. 3RP 850-51. The State couched its objection as a discovery violation, noting Wollert did not explicitly state in his report that he disagreed with the State's diagnosis. 3RP 851-53.

Defense counsel responded the State's arguments amounted to semantics given that Coley did not have paraphilia not otherwise specified, and that the only difference in diagnoses was a terminology change in the newer edition of the Diagnostic and Statistical Manual. 3RP 853.

The court disallowed Wollert to provide any opinion that was not stated directly in his report. 3RP 854-55. The court proceeded to sustain the State's objections that Wollert was testifying "outside the scope" of his report. 3RP 856, 864-65. The trial court's basis for exclusion of this evidence was the discovery rules, yet the trial court engaged in no analysis as to whether a lesser sanction might suffice, whether the violation was willful, and whether

the State was prejudiced by Wollert's opinion that Coley did not suffer from other specified paraphilic disorder.

4. Jury finding and appeal

The jury found Coley continued to meet 71.09 criteria. CP 269.

Coley appealed. CP 151. Among other things, he argued that the record did not support the State's proffered race-neutral explanations or the trial court's findings (drafted by the State) and that the trial court erred either in excluding portions of Wollert's testimony based on a discovery violation that did not exist or in failing to engage in the appropriate Burnet analysis before excluding the testimony. The Court of Appeals rejected all Coley's claims, often failing to address his actual arguments.

D. ARGUMENT IN SUPPORT OF REVIEW

1. NONE OF THE STATE'S REASONS FOR STRIKING JUROR 5 WAS SUPPORTED BY THE RECORD AND OTHERWISE DEMONSTRATE DISCRIMINATORY INTENT

The race-neutral explanations given by the State to peremptorily challenge Juror 5 were not supported by the record, which gives rise to an inference of discriminatory intent. Snyder v. Louisiana, 552 U.S. 472, 485, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008); Miller-El v. Dretke, 545 U.S. 231, 252, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005); State v. Saintcalle, 178 Wn.2d 34, 43, 309 P.3d 326 (2013) (lead opinion), abrogated in part on other grounds

by City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017). By refusing to meaningfully consider the record, the Court of Appeals endorsed the State's discriminatory intent.

a. Juror 5, the only black man on an all-white venire, did not "dominate" voir dire, nor was he incapable of "cooperatively deliberating with other jurors"

The State complained and the trial court and Court of Appeals agreed that the only black person aside from Coley in a room full of white people spoke too much, was too willing to express his opinions, and just wouldn't get along well enough to reach decisions with the other jurors. 3RP 143; CP 163 (finding of fact 6); Appendix at 8. This explanation is unsupported by the record. More importantly, the Court of Appeals' endorsement of this explanation tells prospective black jurors that they should not speak unless spoken to and, when speaking, ensure that nothing said could be perceived as the least bit controversial.[2] In other words, black jurors who do not act like mild-mannered white people are too uppity, are incapable of being good jurors, and the State therefore has a valid basis to strike them. Under all RAP

[2] It is both troubling and telling that the Court of Appeals refused to acknowledge the racial composition of the jury, leaving Coley's assignments of error to findings of fact 3 and 4 completely unaddressed. CP 163 (findings indicating Juror 5 was one of two African American venirepersons); 3RP 142 (State making unsupported assertion, "There are other minorities on -- actually seated on our panel at this time"); Br. of Appellant at 1, 28-30 (assigning error to and arguing the baseless State-drafted findings regarding the composition of the venire were additional evidence of discriminatory intent); Reply Br. at 13 ("The State's need to resort to factual misrepresentations to support its race-neutral explanations speaks volumes to its true, racist motivations, and, on appeal, the State makes no attempt to explain or argue otherwise.").

13.4(b) criteria, this court should review the Court of Appeals' choice "to stigmatize as well as to perpetuate historical patterns of discrimination." J.E.B. v. Alabama, 511 U.S. 127, 139 n.11, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

Juror 5 did not dominate voir dire. The State and Court of Appeals fault Juror 5 for speaking too much, noting specifically he "spoke two times without being called on[.]" Appendix at 8, Br. of Resp't at 25-26. But Juror 5 spoke more than other jurors because he was asked more questions by counsel. See 3RP 24-25, 34-35, 78, 88-90. Although he did volunteer to talk about his view of jury service, instructions on mental abnormalities and personality disorders, and racism in the justice system, most of his discussion was driven by counsel. Out of the 115 pages of voir dire, Juror 5's words occupy not even five full pages. Compare 3RP 17-131 (all of voir dire) with 3RP 18-19, 25, 35, 78-80, 88-90 (pages on which Juror 5's words appear during only two out of six rounds of voir dire). And, Juror 5's lengthiest remarks pertained to whether a black man like Coley could be treated fairly in the court system—a topic that Juror 5, as one of two black people in the room, perhaps had pertinent feelings about—and he spoke only after other jurors had spoken on the topic first.[3] 3RP 88-90.

[3] The Court of Appeals noted, "the trial judge acknowledged, 'I had concerns myself after hearing some of his answers.'" Appendix at 8 (quoting 3RP 959). However, the Court of Appeals did not acknowledge that the trial court's concerns were based on its substantive

Aside from Juror 18 and Juror 29, all the other jurors ultimately seated in Coley's trial also volunteered to answer questions. See CP 286-87 (juror sheets indicating who was seated); 3RP 19, 28, 30, 52-54, 60, 64-65, 71, 74, 94-96, 107-08 (Jurors 6, 7, 11, 14, 15, 17, 18, 19, 21, 22, 25, 27, and 29 volunteering to answer questions during voir dire). "[I]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller-El, 545 U.S. at 241; see also Saintcalle, 178 Wn.2d at 43 (approving of comparative juror analysis); State v. Cook, 175 Wn. App. 36, 41, 312 P.3d 653 (2013) (same).

Though neither the Court of Appeals nor the State addressed it, Coley assigned error to finding of fact 6, which stated Juror 5 "was extremely talkative and dominated voir dire" and the State "had legitimate concerns about whether venireman #5 would be distracting to other jurors during the trial and deliberations and whether venireman #5 would be capable of cooperatively deliberating with other jurors." CP 163. This finding is based on hyperbole, not the record. The hyperbole the State felt the need to resort to betrays its racist motivation for the peremptory strike.

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but mistaken disagreement with Juror 5's discussion of statistics that black people from Skagit County were in prison at much higher rates per capita. 3RP 89, 143. The Court of Appeals' reliance on this as part of its racial animus analysis drips with irony.

Because the record does not support the trial court's findings that Juror 5 was too domineering to serve on the jury and because the Court of Appeals contrary decision conflicts with constitutional precedent of the United States and Washington Supreme Courts and the Court of Appeals on the important issue of racial discrimination in jury selection, review is warranted under every RAP 13.4(b) criterion.

b. Juror 5's mere utterance of the words "brain chemistry" does not supply a valid race-neutral explanation that he could not consider the opinions of psychological experts

Juror 5 used the term "brain chemistry" when explaining why he thought racism persists in the justice system: "brain chemistry of homo sapiens is still in the Stone Age although we live in the modern world. The rate at which civilization has progressed is much faster than evolution. So the brain chemistry is still chromatic or Stone Age." 3RP 88. Juror 5 made this statement in response to and in agreement with Juror 15's statement that it appeared "natural" for some people to be racists. 3RP 88. Juror 5 did not use the term "brain chemistry" to refer to psychological assessments or to actual scientific evaluations of the human brain. In other words, he did not use the term "brain chemistry" literally; he used it as a synonym for the human mindset or outlook specifically in the context of addressing issues of race in society. Juror 5 was not discussing "how individuals' brains work when trying

to remain objective," as the Court of Appeals concluded. Appendix at 8. Nor do his specific remarks about the seeming intractability of racism in the justice system validate the pretextual concern that Juror 5 might "have a rigid mindset on other aspects of mental functioning." Appendix at 8. Juror 5's mere utterance of the words "brain chemistry" does not provide a plausible race-neutral explanation when considered in context.

This conclusion is buttressed by the hyperbolic finding of fact 5 drafted by the State:

> Petitioner exercised a peremptory challenge against venireman #5 because the potential juror was very opinionated about several issues, including very strong opinions about brain development and brain function. Issues central to this case are mental illness and dangerousness, including serious difficulty controlling sexually violent behavior. Petitioner had concerns that venireman #5 would not be able to listen to and fairly evaluate opinions of mental health experts who were expected to provide opinion based on forensic psychological evaluations.

CP 163. The record does not support the description of Juror 5 being "very opinionated about several issues," let alone has having "very strong opinions about brain development and brain function." Juror 5 said nothing about brain development or function. And there was no basis to conclude from any of Juror 5's remarks that he could neither listen to nor evaluate expert psychological opinions. This proffered race-neutral explanation is not

supported by the record, meriting review under all RAP 13.4(b) factors, as discussed above.[4]

c. There need not be a pattern of racial discrimination to sustain a *Batson* challenge as the State argued and as the trial court concluded

The principal reason the trial court denied Coley's Batson challenge was that it agreed with the State that Coley failed to demonstrate a pattern of discrimination. 3RP 142-43. But the High Court in Batson explicitly held no showing of a pattern was necessary, noting such a "cripplingly burden of proof" made "prosecutors' peremptory challenges" "largely immune from constitutional scrutiny." 476 U.S. at 92-93; see also City of Seattle v. Erickson, 188 Wn.2d 721, 733, 398 P.3d 1124 (2017) (holding no showing of a pattern is necessary to sustain a Batson challenge); State v. Hicks, 163 Wn.2d 477, 491, 181 P.3d 831 (2008) (same).

The Court of Appeals pretended that the trial court's discussion of a lack of discriminatory pattern pertained to the first step of the Batson analysis. Appendix at 6. The record is clear, however, that the trial court relied primarily on the absence of a discriminatory pattern not in addressing a prima facie showing under Batson's first step but in denying the Batson challenge altogether, step three. Indeed, the trial court had already heard the State's

[4] Despite Coley's assignment of error to and argument about this written finding, the Court of Appeals decision never mentions it. See Br. of Appellant at 1, 26.

proffered race-neutral explanations when it relied primarily on the absence of a discriminatory pattern to deny the Batson challenge. 3RP 141-44. The trial court was not ruling on whether the State had made a prima facie showing. The Court of Appeals' fiction also necessitates review under RAP 13.4(b)(1), (3), and (4).

d. When an alternative to *Batson* is fully briefed by the parties, *Erickson* compels consideration of the alternative

The Court of Appeals sidestepped Coley's thoroughly briefed proposal to alter the Batson framework, which asks that challenges be sustained under article I, section 21 of the Washington Constitution when it is reasonably probable that race was a factor in the peremptory strike. Appendix at 9-10; Br. of Appellant at 36-48; Reply Br. at 16-18; Suppl. Br. of Appellant at 5-6. The Court of Appeals based its decision on Erickson, noting that, there, this court "did not adopt a change to the current standard of purposeful discrimination." Appendix at 10. But this court wasn't asked to adopt a new purposeful discrimination standard because the trial court in Erickson ruled that Erickson had not made a prima facie showing under Batson's first step, "terminated the analysis and allowed the trial to move forward." Erickson, 188 Wn.2d at 725. Unsurprisingly, this court didn't change a standard no one asked it to change.

Coley explicitly asked the Court of Appeals to change Batson's third step based on the state constitution. The State responded. Br. of Resp't at 34-40; Suppl. Br. of Resp't at 9-10. Because Coley "explicitly advocates for a change to the Batson test" and "[b]oth parties have briefed the issue and placed it squarely before [the court]," the Court of Appeals was compelled to address the issue. Erickson, 188 Wn.2d at 734; see also id. at 738 (Stephens, J., concurring) (despite alteration to Batson's first step, "[w]e are unlikely to see different outcomes unless courts are willing to more critically evaluate proffered race-neutral justifications in future cases"); Saintcalle, 178 Wn.2d at 51-55 (discussing need to alternative approaches to the Batson framework given its failure to address racial discrimination in jury selection and describing the "main problem" with framework is third step).

The Court of Appeals refusal to consider an alteration to the Batson framework conflicts with the constitutional decisions of this court on the important issue of racial discrimination in jury selection, warranting review under RAP 13.4(b)(1), (3), and (4).

As an alternative to reviewing his motion for reconsideration, Coley moved for a stay in the Court of Appeals, given the Court of Appeals believed it should not consider any alteration to the Batson framework because "our Supreme Court is the architect of efforts to address the inadequacies of Batson. Out of deference, we decline to adopt a new standard and potentially run afoul

of the ongoing work of our Supreme Court." Appendix at 10. Yet the Court of Appeals refused to stay consideration of Coley's motion for reconsideration until this court completed its ongoing work on proposed General Rule 37. The Court of Appeals' inaction makes review of Coley's proposed alternative all the more appropriate, as he has yet to receive judicial review. Alternatively, Coley asks that this court stay consideration of this petition for review until its work is complete with respect to the pending rule-based change to the Batson framework.

2. COLEY WAS DEPRIVED OF RESPONSIVE EXPERT TESTIMONY TO CHALLENGE THE STATE'S EXPERT'S PRINCIPAL DIAGNOSIS BASED ON A DISCOVERY VIOLATION THAT DID NOT EXIST

Without addressing Coley's argument, the Court of Appeals decision takes for granted that Coley committed discovery violation that warranted exclusion of his expert's testimony refuting that he had other specified paraphilic disorder with coercive, sadistic, and pedophilic traits. There was no discovery violation. But, even if there was, the trial court failed to engage in an analysis under Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997), before excluding evidence essential to Coley's defense. The Court of Appeals decision on this issue merits review under all RAP 13.4(b) criteria.

a. No discovery violation occurred to support any limitation on the testimony of Coley's expert

During the testimony of Richard Wollert, Ph.D., the State objected to opinions refuting the State's diagnosis of other specified paraphilic disorder with pedophilic, coercive, and sadistic traits. 3RP 849-52. The State claimed that Wollert could not opine on this diagnosis because Wollert had not discussed other specified paraphilic disorder in his report, only paraphilia not otherwise specified (NOS), which, according to the State, amounted to a discovery violation. The trial court agreed and repeatedly stated Wollert could not testify to anything that was not explicitly stated in his report. 3RP 854-55. However, the evidence rules expressly permit experts to respond to testimony of adverse experts based on what they observe at trial. And aside from a change in terminology from one edition of the Diagnostic and Statistical Manual to the next, there is no substantive difference between paraphilia NOS and other specified paraphilic disorder.

ER 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." (Emphasis added.) This "codifies the principle that an expert may base on opinion on either firsthand information or information presented to him at trial." Reese v. Stroh, 74 Wn. App. 550, 564, 874 P.2d 200 (1994) (emphasis added). ER 703 and Reese

clearly permit Wollert to express any opinion he wanted about what the State's expert said at trial. An expert's testimony is not limited to what is explicitly stated in the expert's report.

The Court of Appeals assumed a discovery violation occurred without addressing Coley's arguments. Compare Appendix at 14-15 (discussing when discovery sanctions become appropriate) with Br. of Appellant at 52-58; Reply Br. at 18-20 (arguing no discovery violation occurred). No discovery violation occurs when an expert renders an opinion he is allowed to render under the evidence rules. Because the Court of Appeals decision conflicts with the text of ER 703 (promulgated by this court) and Reese, review is appropriate under RAP 13.4(b)(1) and (2).

In addition, there is no substantive difference between an opinion rejecting paraphilia NOS and an opinion rejecting other specified paraphilic disorder. A basic comparison of other specified paraphilic disorder (from DSM-5[5]) and paraphilia NOS (from DSM-IV-TR[6]) shows that they are substantively the same. Paraphilia NOS is a category "included for coding Paraphilias that do not meet the criteria for any of the specific categories." DSM-IV-TR at 576. Other specified paraphilic disorder "applies to

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[5] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5TH ED., DSM-5 (2013).

[6] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4TH ED. TEXT REVISION, DSM-IV-TR (2000).

presentations in which symptoms characteristic of a paraphilic disorder that cause clinically significant distress or impairment in social, occupational, or other important areas of functioning predominate but do not meet the full criteria for any of the disorders in the paraphilic disorders diagnostic class." DSM-5 at 705. DSM-IV-TR and DSM-5 list identical examples of disorders that fall within these diagnoses. DSM-5 at 705; DSM-IV-TR at 576. As defense counsel pointed out, Wollert "talks about paraphilic coercive disorder. He talks about the old paraphilia [NOS]. He's talking about all these things that are the exact same thing. The only difference is we've got new terminology and that's it." 3RP 853.

This court has repeatedly agreed with defense counsel, holding changes in diagnostic terminology have little substantive import. See In re Pers. Restraint of Meirhofer, 182 Wn.2d 632, 643-44, 343 P.3d 731 (2015) (changes in diagnosis from pedophilia to paraphilia NOS hebephilia and nonconsent were not legally significant enough to warrant an evidentiary proceeding); State v. Klein, 156 Wn.2d 103, 119-21, 124 P.3d 644 (2005) (change in diagnosis from "psychoactive substance-induce organic mental disorder" to "polysubstance dependence" was not significant given that "the subjective and evolving nature of psychology may lead to different diagnoses that are based on the very same symptoms, yet differ only in the name attached to it"). Although the Court of Appeals provided no analysis of this issue, its

opinion tacitly suggests that the distinction between paraphilia NOS and other specified paraphilic disorder warranted exclusion of defense testimony regarding the latter because the expert only discussed the former in his report. This decision conflicts with Meirhofer and Klein, meriting RAP 13.4(b)(1) review.

Review of this issue is also warranted under RAP 13.4(b)(4). By endorsing the view that Wollert's responsive testimony constituted a discovery violation because he did not explicitly reject other specified paraphilic disorder diagnosis in his report, the Court of Appeals seemingly requires experts to affirmatively state their reasons for *not* reaching certain opinions in advance to be permitted to testify. But it is impossible to state every basis for *not* reaching a certain opinion. Wollert provided his diagnoses in his report and thereby also disclosed what he did not diagnose. If the State wanted to know why Wollert reached certain conclusions and not others, it should have asked him. Its failure to do so during discovery is not Coley's problem. The Court of Appeals decision would require experts not only to give the bases for their opinions, but also the bases for their nonopinions. This intolerable rule would limit admissible and responsive expert testimony, thereby keeping highly probative, important, and responsive information from

the trier of fact.[7] Because the Court of Appeals decision requires the impossible from expert witnesses, it should be reviewed under RAP 13.4(b)(4).

b. Even assuming a discovery violation, due process requires a meaningful inquiry and a narrowly tailored remedy, not wholesale exclusion of responsive testimony

If there was a discovery violation, then the trial court was required to "explicitly consider [1] whether a lesser sanction [to exclusion] would probably suffice, [2] whether the violation at issue was willful or deliberate, and [3] whether the violation substantially prejudiced the opponent's ability to prepare for trial." Jones v. City of Seattle, 179 Wn.2d 322, 338, 314 P.3d 380 (2013) (citing Burnet, 131 Wn.2d at 494; Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 688, 132 P.3d 115 (2006)). "[I]t is incumbent upon the trial court to make the requisite findings as to all three factors." In re Dependency of M.P., 185 Wn. App. 108, 117, 340 P.3d 908 (2014). This requirement is rooted in basic due process principles. Associated Mortgage Investors v. G.P. Kent Constr. Co., 15 Wn. App. 223, 227, 548 P.2d 558 (1976). The trial court failed to analyze any of these factors before excluding Wollert's testimony

[7] Notably, the trial court correctly ruled when it came to the issue of penile plethysmographs (PPGs). The State objected, "Dr. Wollert didn't mention the PPG in his report except for what Mr. Coley said to him about it. He didn't mention it." Inconsistent with its previous ruling, the trial court stated, "He may testify to this. We've talked about PPGs," and "He's testifying as an expert. He may testify." 3RP 875.

about other specified paraphilic disorder. Because the Court of Appeals endorsed this failure, which conflicts with constitutional precedent, its decision merits review. RAP 13.4(b)(1)–(3).

The Court of Appeals held Burnet's requirements did not apply because defense counsel did not provide a sufficient offer of proof before the trial court excluded Wollert's testimony. Appendix at 12-14. Although defense counsel could have provided a more explicit offer of proof, the substance of the excluded evidence is apparent from the record. See State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991) (no offer of proof necessary where context provides substance of evidence); see also ER 103(a)(2) (error may be predicated on exclusion of evidence if nature of excluded evidence apparent from context). According to the Court of Appeals, "it is not clear from the colloquy or context what specific testimony was being proffered" by Coley. Appendix at 14. The Court of Appeals was mistaken and its decision conflicts with Ray and ER 103. RAP 13.4(b)(1).

The basis for Wollert's dispute with other specified paraphilic disorder was clear from counsel's questions. Counsel began asking Wollert about how paraphilic diagnoses are rendered using the DSM and Wollert responded that for each diagnosis "they have a box of criteria." 3RP 862. He explained, "All of them have the box and they also have some text with it, except for the other specified paraphilic disorders." 3RP 863. Then counsel asked about the

specific criteria for diagnosing other specified paraphilic disorder and Wollert began to explain that there were no specific criteria for making this diagnosis, which drew the State's outside-the-scope-of-report objection. 3RP 864. Wollert then testified Coley did not meet criteria for a standalone sexual sadism diagnosis. 3RP 864. When counsel asked whether there was anything "less than sadism" as a valid DSM diagnosis, the State objected as "Outside the scope again," and the trial court sustained this objection. 3RP 864-65. Defense counsel stated, "all he's saying is there isn't anything less than sadism" and the trial court again stated, "Sustained." 3RP 865.

From this exchange, it is clear from context what the excluded testimony was. Wollert explained that diagnoses contain specific criteria listed in text boxes in the DSM. Defense counsel was attempting to elicit testimony that, if these criteria are not met, there is no valid DSM diagnosis. Wollert was to opine that a person cannot have mere traits of particular disorders that, mashed together, warrant an other specified paraphilic disorder diagnosis. Rather, a person either met criteria for the specific disorder or didn't. In other words, all Wollert was saying is that the State's expert was invalidly using the DSM when he diagnosed pedophilic, coercive, and sadistic

"traits" under the other specified paraphilic disorder umbrella when he could not diagnose these standalone disorders.[8]

Thus, the Court of Appeals was wrong to conclude that Coley "failed to identify what specific criticism Dr. Wollert would offer, especially as to Dr. Arnold's diagnosis of other specified paraphilic disorder with pedophilic, coercive, and sadistic traits." Appendix at 14. His criticism was clear based on the context of defense counsel's questions.[9] The Court of Appeals opinion is inconsistent with Ray, ER 103, and the Burnet line of cases and merits RAP 13.4(b)(1) review.

The Court of Appeals decision also assumes an offer of proof would have enabled the trial court to better rule on the exclusion of the evidence. Appendix at 16. Not so when the basis for the trial court's limitation on Wollert's opinion was that it was not made explicit in his report. As far as the trial court was concerned, even had Coley made an extensive offer of proof, none of the excluded opinions would be admitted because they were not in the written report. See 3RP 854-55. By focusing on the sufficiency of the offer

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[8] Had the objections not been sustained, Coley's attorney almost certainly would have elicited the same point with respect to pedophilic "traits." See 3RP 847 (counsel asking whether Wollert agreed there was "evidence of pedophilia" because of a specific incident). As for coercive "traits," Wollert was explicit in his report that "Paraphilic Coercive Disorder" was equivalent to paraphilia NOS nonconsent, which should be rejected because it medicalizes the crime of rape and the American Psychiatric Association has never accepted such a diagnosis. Ex. 62 at 74.

[9] Wollert's criticism was also clear because the State's expert agreed Coley did not have the standalone paraphilic disorders of sexual sadism or pedophilia; nor did he have paraphilia NOS nonconsent. 3RP 435-35.

of proof, the Court of Appeals decision just erects a straw man that has nothing to do with the basis for the trial court's rulings.

Finally, the Court of Appeals' claimed inability to "conduct a meaningful review concerning whether Coley suffered any prejudice" is not tenable. Coley was not permitted to respond to the State's principal diagnosis. In an area of law where everything comes down to the diagnoses rendered by psychological experts, the prejudice of such an exclusion is obvious: the opinion of the State's expert was not subjected to a meaningful adversarial testing. The Court of Appeals failure to make this commonsense connection merits RAP 13.4(b)(4) review.

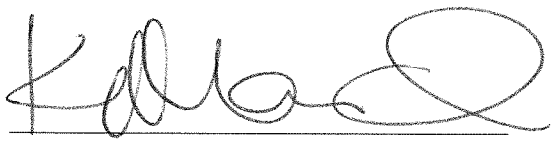
E. CONCLUSION

Because he satisfies all RAP 13.4(b) review criteria, Coley asks that this petition for review be granted.

DATED this 29th day of December, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

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

In the Matter of the Detention of GREGORY COLEY, Appellant.	No. 74770-3-I
STATE OF WASHINGTON, Respondent, v. GREGORY COLEY, Defendant.	UNPUBLISHED OPINION FILED: October 16, 2017

VERELLEN, C.J. — During voir dire in a sexually violent predator unconditional release trial, the State exercised a peremptory challenge against a black juror. The next morning, Gregory Coley objected based on Batson v. Kentucky.[1] Because the objection occurred before any evidence was presented, we conclude it was timely.

The State offered two race-neutral reasons for challenging juror 5. The trial court accepted those reasons and found that the State was not motivated by racial animus. Because the reasons are supported by the record and do not reveal pretext, we conclude the trial court's decision was not clearly erroneous.

[1] 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

At trial, the court excluded a defense witness because she was not timely disclosed. Because the testimony would have been cumulative, we conclude Coley was not prejudiced by the exclusion and his counsel was not ineffective.

The trial court limited the testimony of Dr. Richard Wollert, a defense expert witness. Dr. Wollert was not allowed to testify beyond his report. Because Coley did not make an adequate offer of proof as to the nature of Dr. Wollert's excluded testimony, we conclude the trial court was unable to conduct a harmless error analysis under the rules of evidence or Burnet v. Spokane Ambulance.[2] We decline to grant any relief on appeal.

Dr. Wollert was also precluded from relating a nontestifying expert's opinion consistent with his opinion that Coley was a juvenile-only offender. Because an expert should not act as a conduit to restate a nontestifying expert's opinions, we conclude it was within the discretion of the trial court to limit Dr. Wollert's testimony.

We conclude there was no cumulative error. Therefore, we affirm.

FACTS

Since 2002, Coley has been civilly committed at the Special Commitment Center (SCC) as a sexually violent predator. In 2016, a trial was held to determine whether Coley continued to be a sexually violent predator subject to continued commitment.

During voir dire, the State exercised a peremptory challenge against juror 5. Coley and juror 5 are both black. The next morning before opening statements,

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[2] 131 Wn.2d 484, 933 P.2d 1036 (1997).

Coley raised a Batson challenge to juror 5's dismissal and moved for mistrial. The trial judge denied the motion.

At trial, Coley called six witnesses from the SCC to discuss his positive behavioral changes. He also tried to offer testimony from a seventh SCC witness, but the trial court excluded the testimony because Coley did not timely disclose the witness.

The State's expert, Dr. Dale Arnold, diagnosed Coley with other specified paraphilic disorder with pedophilic, coercive, and sadistic traits under the *Diagnostic and Statistical Manual of Mental Disorders 5* (DSM-5) (American Psychiatric Association 2013).

Coley offered the expert testimony of Dr. Wollert. In his report, Dr. Wollert relied on the older DSM-IV and declined to diagnose Coley with paraphilia not otherwise specified nonconsent. When Dr. Wollert began to critique Dr. Arnold's diagnosis and his use of the DSM-5, the trial court limited Dr. Wollert's testimony to the opinions contained in his report. Dr. Wollert also testified that Coley was a juvenile-only offender with minimal risk to reoffend, but the court prohibited Dr. Wollert from bolstering his juvenile-only offender opinion with statements by another expert.

The jury found that Coley continued to be a sexually violent predator. As a result, the court entered an order of commitment to the SCC "until such time as [Coley's] mental abnormality and/or personality disorder has so changed that [he] is

safe to be conditionally released to a less restrictive alternative or unconditionally discharged."[3]

Coley appeals.

ANALYSIS

I. Batson Challenge

Coley argues the trial court erred in denying his Batson challenge.

A trial court's decision to deny a Batson challenge "will be reversed only if the defendant can show it was clearly erroneous."[4] To determine whether the State's peremptory challenge is discriminatory:

> First, the defendant must establish a prima facie case that 'gives rise to an inference of discriminatory purpose.' Second, if a prima facie case is made, the burden shifts to the prosecutor to provide an adequate, race-neutral justification for the strike. Finally, if a race-neutral explanation is provided, the court must weigh all relevant circumstances and decide if the strike was motived by racial animus.[5]

A. Timeliness

As a threshold matter, the State contends Coley waived any objection to the State's peremptory challenge by not raising it before the venire was dismissed.

A Batson challenge must "be brought at the earliest reasonable time while the trial court still has the ability to remedy the wrong."[6] In City of Seattle v. Erickson, the defendant did not object until after the jury had been impaneled and the venire had been dismissed for the day, but before the parties presented any evidence.[7] Our

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[3] Clerk's Papers (CP) at 152.

[4] City of Seattle v. Erickson, 188 Wn.2d 721, 727, 398 P.3d 1124 (2017).

[5] Id. at 726-27 (citations omitted) (quoting Batson, 476 U.S. at 94).

[6] Id. at 729.

[7] 188 Wn.2d 721, 729, 398 P.3d 1124 (2017).

Supreme Court concluded the timing was not ideal, but Erickson's challenge was timely.[8]

Here, Coley objected the morning after the jury had been impaneled and the venire dismissed, but before opening statements. Consistent with Erickson, Coley's objection was timely, even though he could have raised it earlier.

Because Coley's Batson challenge was timely, we need not address Coley's argument that his counsel was ineffective for failing to timely object.

B. Prima Facie Purposeful Discrimination

The State also argues Coley has failed to present a prima facie case of purposeful discrimination. "The trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury."[9] But a "prima facie showing is unnecessary once the State has offered a purported race-neutral explanation and the trial court has ruled on the ultimate question of intentional discrimination."[10]

In its oral ruling, the trial court mentioned it could not discern "a *pattern* by the State of excusing . . . minority candidates"[11] and concluded the State's peremptory challenge of juror 5 did "not constitute prima facie purposeful discrimination."[12] But the trial court still considered the State's race-neutral explanations and concluded the

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[8] Id. at 730.

[9] Id. at 734.

[10] State v. Cook, 175 Wn. App. 36, 39, 312 P.3d 653 (2013).

[11] Report of Proceedings (RP) (Jan. 12, 2016) at 143 (emphasis added).

[12] CP at 164.

challenge of juror 5 "was based on factors other than race which are adequate and neutral reasons for exercising the peremptory challenge."[13]

In Erickson, our Supreme Court determined the trial court improperly applied the first step of the Batson analysis when it required a pattern of discrimination to show prima facie purposeful discrimination.[14]

Here, the trial court's references to a "pattern" of discrimination relates to the first step of Batson. Although the trial court did not have the benefit of the 2017 Erickson decision, it was mistaken as to the standard for establishing a prima facie case of discrimination. But the court heard the State's reasons for striking the juror and reached the final step of Batson.

C. Race-Neutral Explanation

Under the second step in the Batson analysis, the court only considers the facial validity of the State's rationale.[15] This consideration "does not demand an explanation that is persuasive, or even plausible."[16] "A venireperson's specific responses and demeanor during voir dire may constitute neutral explanations for exercising a peremptory challenge."[17] Here, the State challenged juror 5 based on his specific response concerning brain chemistry and his demeanor during voir dire.

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[13] Id.

[14] Erickson, 188 Wn.2d at 732-33.

[15] Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (quoting Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

[16] Id. at 767-68.

[17] State v. Burch, 65 Wn. App. 828, 840, 830 P.2d 357 (1992).

D. Racial Animus

Coley's argument that the State's proffered rationale was a pretext for race concerns the third step of Batson—whether the State's reasons given for the peremptory challenge were motivated by racial animus.

The State's reasons must be supported by the record and not be a pretext or proxy for race; otherwise, the challenge is presumed to be motivated by discriminatory intent.[18] "[A] neutral explanation is one based on something other than the race of the juror and need not rise to the level justifying a challenge for cause."[19] The reviewing court considers the overall circumstances, including any "red flags" of a discriminatory motive.[20] The State's explanation may be a pretext for purposeful discrimination if the proffered reason for striking a minority panelist applies just as well to an otherwise similar nonminority panelist who is permitted to serve.[21]

Here, the State expressed concern about juror 5's ability to "listen to psychologists and take in that testimony" because he had strong opinions on brain chemistry. During voir dire, Coley's counsel posed the question, "[D]o you think there will be a day when race is not an issue[?]"[22] Juror 5 gave a comparatively lengthy

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[18] Batson, 476 U.S. at 98; see also Reed v. Quarterman, 555 F.3d 364, 368 (5th Cir. 2009); Purkett, 514 U.S. at 768 ("implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination").

[19] Cook, 175 Wn. App. at 43.

[20] Id. at 44 (prosecutor's peremptory challenge based in part on defense counsel's use of the term "brother" when speaking to an African-American juror and prosecutor's purportedly "confusing" one African-American juror with another "raises a red flag that there is some discriminatory intent").

[21] Id. at 41.

[22] RP (Jan. 11, 2016) at 87.

response, noting that the "brain chemistry of homo sapiens is still in the Stone Age."[23] When asked whether individuals can be objective, juror 5 stated individuals attempting to be objective resort to "Stone Age brain chemistry" when a topic touches their core issues.[24]

The State's case turned largely on expert testimony regarding Coley's mental impairments and his ability to overcome those impairments. A juror with a strongly held view on how individuals' brains work when trying to remain objective may also have a rigid mindset on other aspects of mental functioning. The State's concern did not equate to racial animus.

The State was also worried about juror 5's ability to deliberate with other jurors because he dominated the conversation during voir dire. Juror 5 spoke five separate times during voir dire. In one instance, Coley's counsel asked juror 5 about his feelings concerning jury duty, and juror 5 provided a narrative response about the history of sex abuse in his family. He also spoke two times without being called on, including the response about brain chemistry.

Other members of the venire actively participated and were not excused, but the record does reveal juror 5 responded and interjected more than other prospective jurors. And the trial judge acknowledged, "I had concerns myself after hearing some of his answers."[25] While demeanor has been recognized as a potential proxy for

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[23] Id. at 88.

[24] Id. at 88-90.

[25] RP (Jan. 15, 2016) at 959.

racial animus,[26] trial courts are still afforded "great deference" when it determines the credibility of the State's reasons.[27] The trial court was able to observe juror 5's demeanor, it shared the State's concern, and the record supports that there was a difference.

Viewing the State's challenge under the totality of the circumstances, the record does not raise a red flag of discriminatory intent. We conclude the record supports the trial court's ruling that the State did not have a discriminatory motive in exercising its peremptory challenge of juror 5.

E. New Standard to Replace Batson

Alternatively, Coley argues for a new "reasonable probability" standard to replace Batson. Our Supreme Court has repeatedly acknowledged its strong concerns that the existing standard of purposeful discrimination fails to remove racial discrimination from jury selection.[28] A proposed rule addressing these concerns is pending before our Supreme Court in its administrative rule-making capacity. In Erickson, our Supreme Court adopted a change to the first step in Batson "to ensure a robust equal protection guaranty."[29] The Supreme Court also confirmed it "has the

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[26] Proposed General Rule 37 (Wash. 2017), https://perma.cc/YB3Q-U4ZL (demeanor has "historically been used to perpetuate exclusion of minority jurors"). The rule was published as GR 36 but was renumbered as GR 37 after adoption of a court security rule numbered GR 36. Erickson, 188 Wn.2d at 738 n.5.

[27] State v. Evans, 100 Wn. App. 757, 764, 998 P.2d 373 (2000) (citing Burch, 65 Wn. App. at 840-41).

[28] State v. Saintcalle, 178 Wn.2d 34, 48-49, 309 P.3d 326 (2013), abrogated by Erickson; Erickson, 188 Wn.2d at 737-38 (Stephens, J. concurring) ("We are unlikely to see different outcomes unless courts are willing to more critically evaluate proffered race-neutral justifications in future cases.").

[29] Erickson, 188 Wn.2d at 734 (on remand for new trial, it appears the core of the existing Batson standard remains in place).

power to alter or replace the Batson framework" and did not adopt a change to the current standard of purposeful discrimination.[30]

If not clear before Erickson, it is clear now that our Supreme Court is the architect of efforts to address the inadequacies of Batson. Out of deference, we decline to adopt a new standard and potentially run afoul of the ongoing work of our Supreme Court.

II. Ineffective Assistance of Counsel–Witness Disclosure

Coley contends his trial counsel provided ineffective assistance of counsel by failing to timely disclose the SCC witness, Hudson.[31]

To establish ineffective assistance of counsel, a defendant must show

> (1) defense counsel's representation was deficient, *i.e.,* it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.,* there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.[32]

The likelihood of a different result must be substantial and not merely speculative.[33] "A reviewing court need not address whether counsel's performance was deficient if it can first say that the defendant was not prejudiced."[34]

Here, the State contends the exclusion did not prejudice Coley. Coley's counsel advised the trial court that Hudson had worked with Coley "significantly" over

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[30] Id. at 732.

[31] The record does not reveal Hudson's first name.

[32] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

[33] State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006).

[34] In re Pers. Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992) (citing Strickland, 466 U.S. at 697).

several years and was expected to testify concerning the positive changes in Coley's behavior. But Coley presented six other witnesses from SCC, including rehabilitation counselors and case managers who worked with Coley for several years and who testified concerning his positive behavioral changes. After the fifth witness, the court remarked, "[T]he SCC witnesses are getting a bit cumulative and monotonous . . . . They're all saying pretty much the same thing."[35] Coley does not establish that Hudson's testimony would not be cumulative given the testimony of the other six SCC witnesses.

We conclude that Coley did not receive ineffective assistance of counsel because Coley does not establish a reasonable probability that the result would have been different if Hudson had been allowed to testify.

III. Dr. Wollert's Expert Testimony

Coley argues the trial court abused its discretion when it limited the testimony of his expert witness, Dr. Wollert.

We review a trial court's decision to exclude expert witness testimony for abuse of discretion.[36] Even if a court's evidentiary decision is erroneous, the appellant must establish the error was prejudicial.[37] "Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial."[38] The

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[35] RP (Jan. 14, 2016) at 678.

[36] State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004).

[37] Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

[38] Id.

improper exclusion of evidence is harmless if the evidence was inconsequential or cumulative.[39]

"In order to obtain appellate review of trial court action in excluding evidence, there must be an offer of proof."[40] The burden is on the proponent of the evidence to make an adequate offer of proof.[41]

> An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.[42]

A formal offer of proof is not necessary if the substance of the excluded evidence is apparent from an extended colloquy on the record.[43] But an offer of proof, extended colloquy, or context must be "sufficient to advise the appellate court whether the party was prejudiced by the exclusion of the evidence."[44]

Here, the State's expert, Dr. Arnold, diagnosed Coley with other specified paraphilic disorder with pedophilic, coercive, and sadistic traits under the DSM-5. In his report, Dr. Wollert relied on the DSM-IV and stated:

> [Coley] does not meet the criteria for the *Paraphilia Not Otherwise Specified Nonconsent* because this term medicalizes the crime of rape, and the American Psychiatric Association has never accepted a proposed paraphilia that would allow rapists to argue that special legal exceptions should be made for them because they suffer from a mental

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[39] Id.; Holmes v. Raffo, 60 Wn.2d 421, 424, 374 P.2d 536 (1962).

[40] Jankelson v. Cisel, 3 Wn. App. 139, 143, 473 P.2d 202 (1970).

[41] ER 103(a)(2); Estate of Bordon ex rel. Anderson v. State, Dep't of Corrections, 122 Wn. App. 227, 246, 95 P.3d 764 (2004) (appellate court declined to determine admissibility of testimony by purported expert where proponent had made no offer of proof of what the expert would say if allowed to testify).

[42] State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991).

[43] Id. at 539.

[44] State v. Vargas, 25 Wn. App. 809, 817, 610 P.2d 1 (1980).

> illness. In the course of compiling DSM-5, for example, it rejected a proposed paraphilia called "Paraphilic Coercive Disorder" that was the equivalent of Paraphilia Not Otherwise Specified Nonconsent. Other proposals for the medicalization of rape were also rejected when DSM-III, DSM-IIIR, and DSM-IV were compiled.[45]

During Dr. Wollert's testimony, the State raised several objections to Coley's questions that went beyond the scope of Dr. Wollert's report. In colloquy, Coley argued, "[Dr. Wollert] talks about paraphilic coercive disorder. He talks about the old paraphilia not otherwise specified. He's talking about all these things that are the exact same thing. The only difference is we've got new terminology and that's it."[46] The trial court limited Dr. Wollert's testimony to the opinions in his report.

Dr. Wollert later testified about why he did not diagnose Coley with paraphilia or paraphilia not otherwise specified nonconsent. He also explained why he rejected other potential diagnoses, including paraphilic coercive disorder and sexual sadism. And he testified, without objection, that he did not find pedophilia as a diagnosis for Coley.

Dr. Wollert testified that Coley had changed and "his behavior is under his control."[47] Dr. Wollert also testified that he did not believe Coley had ever committed an adult sexually violent offense. And Dr. Wollert believed Coley's prior sexual misconduct was merely typical juvenile delinquent behavior and he was a juvenile-only offender in the context of risk assessment.

As emphasized at oral argument, Coley suggests the questions the State objected to reveal that Dr. Wollert would have testified that Dr. Arnold's diagnosis

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[45] Ex. 62 at 74 (emphasis added).

[46] RP (Jan. 15, 2016) at 853.

[47] Id. at 869.

was incorrect. But the record offers no articulation of the specific testimony Dr. Wollert would offer to address Dr. Arnold's use of DSM-5; it merely suggests Dr. Wollert's general disapproval of Dr. Arnold's diagnosis.

Dr. Wollert's proffered testimony was clear for some of the sustained objections, e.g., his opinion that paraphilias of a juvenile do not carry over into adulthood. But for most of the excluded testimony, Coley made no offer of proof and it is not clear from the colloquy or context what specific testimony was being proffered. Coley identified general topics he wanted to explore, but failed to identify what specific criticism Dr. Wollert would offer, especially as to Dr. Arnold's diagnosis of other specified paraphilic disorder with pedophilic, coercive, and sadistic traits.

Because the record does not include a formal offer of proof or other equivalent showing, the trial court was unable to assess the admissibility of the evidence. And on this record, we cannot conduct a meaningful review concerning whether Coley suffered any prejudice.

Alternatively, Coley argues the trial court failed to conduct a Burnet analysis when it limited Dr. Wollert's testimony as a sanction for a discovery violation.

"Discovery sanctions may be imposed under CR 26 or CR 37."[48] Before imposing one of the harsher sanctions allowed under CR 37, "the trial court must consider on the record (1) whether a lesser sanction would probably suffice, (2)

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[48] Carlson v. Lake Chelan Cmty. Hosp., 116 Wn. App. 718, 737, 75 P.3d 533 (2003).

whether the violation at issue was willful or deliberate, and (3) whether the violation substantially prejudiced the opposing party's ability to prepare for trial."[49]

Here, the trial court did not conduct a Burnet analysis. But accepting the limitations on Dr. Wollert's testimony implicate Burnet, Coley does not establish a basis for relief on appeal.

A lack of Burnet findings is harmless if excluded testimony is irrelevant, cumulative, or otherwise inadmissible.[50] The majority of cases applying Burnet involve the complete exclusion of witnesses rather than mere limitation of a permitted witness's testimony.[51] Our Supreme Court has acknowledged the policies underlying this distinction and reasoned an offer of proof is not necessary "when a key witness is struck as a sanction for a purported discovery violation," but an offer of proof is required "where a court refuses to admit a particular piece of testimony during trial."[52]

Here, the trial court did not completely exclude Dr. Wollert; the court limited particular pieces of his testimony. As discussed, Coley failed to make a sufficient offer of proof regarding the nature of the excluded testimony.

Additionally, most of the cases applying Burnet involve pretrial discovery rulings and not mid-testimony exclusion of particular testimony. Especially in the setting of a mid-testimony ruling on the scope of an expert's testimony, efficiency

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[49] Foss Maritime Co. v. Brandewiede, 190 Wn. App. 186, 194, 359 P.3d 905 (2015) (citing Burnet, 131 Wn.2d at 494), review denied, 185 Wn.2d 1012 (2016).

[50] See Jones v City of Seattle, 179 Wn.2d 322, 356-67, 314 P.3d 380 (2013) (lack of findings regarding exclusion of evidence as a discovery sanction is harmless where the proffered evidence is irrelevant, or cumulative.).

[51] See In re Dependency of M.P., 185 Wn. App. 108, 340 P.3d 908 (2014); Blair v. Ta-Seattle East No. 176, 171 Wn.2d 342, 254 P.3d 797 (2011).

[52] Blair, 171 Wn.2d at 352 n.5.

requires a sufficient offer of proof to avoid ongoing disruptions and scheduling conflicts for rebuttal and other witnesses. These concerns are not as pronounced in the pretrial context.

In Jones v. City of Seattle, late-disclosed witnesses were excluded mid-testimony.[53] Our Supreme Court recognized that a lack of Burnet findings was harmless.[54] But in Jones, the trial court was provided with enough detail concerning the proffered testimony to conduct a meaningful analysis of harmless error.

Here, in addition to a request for a new trial, Coley asks this court to speculate whether the limitations had any meaningful impact on the outcome of the trial. But Coley's proposition would reward a party who loses a motion to exclude evidence, does not mention Burnet, and does not make an offer of proof. Whether intentional or inadvertent, the party proffering evidence without an adequate offer of proof frustrates the appellate court's ability to conduct a meaningful Burnet analysis.

Consistent with recognized policies compelling a sufficient offer of proof, we conclude that in the context of mid-testimony exclusion of particular pieces of testimony, the proponent of the excluded evidence has an obligation to advise the trial court of the specific proposed testimony. The offer must be sufficient to allow meaningful appellate review whether an exclusion implicating Burnet is harmful or prejudicial. Because Coley has not made such an offer of proof, we decline to grant any relief on appeal.

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[53] 179 Wn.2d 322, 332-36, 314 P.3d 380 (2013).

[54] Id. at 356-57.

Coley also challenges the trial court ruling sustaining the State's objection that Dr. Wollert improperly bolstered his juvenile-only offender opinion by citing another expert's view that the prison system considered Coley a juvenile offender.

During direct examination, Coley asked Dr. Wollert, "In the records was there indication that the prison considered Greg a juvenile sex offender?"[55] Dr. Wollert referenced the opinion of Dr. Paul Daley, a Department of Corrections (DOC) psychologist who previously evaluated Coley's records. In his report, Dr. Wollert stated that Dr. Daley opined Coley did not meet the criteria for sexually violent predator status. Dr. Wollert also noted Dr. Daley's "observation that most of Mr. Coley's sexual-offense history occurred while he was a child."[56] The State objected to Dr. Wollert "testifying about what other experts have considered" because such testimony constituted bolstering.[57]

The briefing on this issue is not especially helpful. Although ER 702 and 703 allow an expert to identify facts and data that are the basis for his or her opinion, an expert should not act as a conduit to restate a nontestifying expert's opinions.[58]

On this record, we conclude it was within the discretion of the trial court to preclude Dr. Wollert from testifying that another expert had observed that the DOC treated Coley as a juvenile offender.

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[55] RP (Jan. 15, 2016) at 880-81.

[56] Ex. 62 at 15.

[57] RP (Jan. 15, 2016) at 881.

[58] DAVID H. KAY, DAVID E. BERNSTEIN, & JENNIFER L. MNOOKIN, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 4.7.1 (2nd ed. 2017) ("Rule 703 does not permit the bolstering of one expert's testimony with a showing that other prestigious experts concur.").

IV. Cumulative Error

Coley argues cumulative error resulted in an unfair trial, but he does not establish any cumulative error.[59]

We conclude Coley was not deprived of a fair trial. Therefore, we affirm.

WE CONCUR:

[59] In re Detention of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012) (citing State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) ("The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal.")).

NIELSEN, BROMAN & KOCH P.L.L.C.

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