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NO. 63263-9-I

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

In re Detention of Charles Lee Johnson,

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LEE JOHNSON,

Appellant.

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

The Honorable George Bowden, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT SHOULD HAVE GRANTED JUDGMENT IN JOHNSON'S FAVOR AS A MATTER OF LAW BECAUSE NO EXPERT TESTIFIED JOHNSON WAS A SEXUALLY VIOLENT PREDATOR. .

The State argues, as it did below, that the jury could commit Johnson by digesting the information offered by the State's expert witness and yet come to a completely different conclusion than the expert himself. Brief of Respondent (BOR) at 5-21. Not surprisingly, the State cites no cases that apply this logic to a Chapter 71.09 RCW commitment case. This is because, nationwide, no court has found that a jury can lawfully commit a predator when the State has not been able to find an expert witness who agrees the person qualifies for such commitment. Contrast Brief of Appellant (BOA) at 24-28 (citing, *inter alia*, In re Johnstone, 453 Mass. 544, 903 N.E.2d 1074 (Mass. 2009); Commonwealth v. Dube, 59 Mass. App. Ct. 476, 796 N.E.2d 859 (Mass. App. Ct. 2003); Commonwealth v. Bruno, 432 Mass. 489, 735 N.E.2d 1222 (Mass. 2000))

First, the State spends a great deal of time asserting generalities which have little to do with Johnson's case. For example, the State asserts that those committed under Chapter 71.09 are essentially the worst of the worst sex offenders (BOR at 6-7), or arguing that the treatment prognosis for sex offenders is poor (BOR at 6-7), or pointing out that Johnson has

been committed twice as an SVP (BOR at 5). The constitute an attempt at an emotional appeal and posturing inappropriate to an appellate court. Obviously, Johnson would not be before this Court if the jury had not committed him. This fact, however, does not change the standard of review described in the opening brief (BOA at 18-20), and the State wisely does not propose any different standard.

The State also argues briefly that Johnson should not be released – or given a new trial – on the basis of his advanced age. BOR at 7. Since a new trial was never at issue below, one must wonder why the State even mentions such an outcome. But the argument that Johnson’s age alone cannot support his release is plainly a straw man. Aging played only a minor part in Dr. McClung’s considerations. 5RP 130-33. In fact, although aging was discussed at length at trial, Dr. McClung stated that if Johnson were a healthy, robust 72-year old man, he would still meet SVP commitment criteria. 5RP 130-33; 6RP 33. It was Johnson’s extreme fragility and – even more to the point – his limited mental state that made him unlikely to ever reoffend. 5RP 140-46, 150-58, 175-79; 6RP 37, 62-64.

Moreover, although the State devotes considerable effort to discussing the length of Johnson’s likely remaining lifetime (BOR at 8-9), this was also only a minor issue at trial, and only briefly mentioned in the

facts section of the opening brief. BOA at 10-11. At trial, Dr. McClung did point out that the actuarials could not be considered accurate predictions over 5, 7, or 10 years, if a respondent was likely to die significantly before then, and Johnson's likely lifespan was discussed repeatedly in that context. 5RP 112-15, 119, 170. This testimony was never summarized in the opening brief because it was of relatively little weight for Dr. McClung; the doctor never testified that Johnson's arguably limited lifespan was a factor in his conclusions. Again, Dr. McClung stated that Johnson was unlikely to reoffend because he was extremely frail, intellectually incapable of planning an offense, and, indeed, really uninterested in offending because of both reduced libido and how comparatively difficult minor tasks of daily life had become. 5RP 140-46, 150-58, 175-79; 6RP 37, 62-64.

The State then argues that higher risk percentages of the actuarials should be applied to Johnson, and moreover argues that those actuarial risk percentages that avored Johnson should not be applied to release him, calling such application "a statistical fallacy." BOR at 8-9. Here the State raises yet another straw man and knocks it over. Some analyses of the actuarials favored Johnson in terms of risk percentages; others analyses did not. But both experts who testified about the actuarials agreed that

they could not be applied in a vacuum, and clinical judgment had to be exercised in all cases. 5RP 107, 128-29; 5RP 25.

Certainly, a person whose actuarials showed less than 50% likelihood to reoffend might be committed based expert testimony that the actuarials did not reflect the real risk. Johnson never argued otherwise.

Here, though, the expert witness testified Johnson was unlikely to reoffend. Some actuarials supported this testimony, and others arguably impeached it, but Johnson never argued on appeal, as the State implies, that he should be released because some portions of the actuarial data favor him. Johnson argues he should be released because the examining expert said he should be, and the only other expert called by the State did not directly contradict that conclusion.

The State then reviews several independent risk factors raised at trial, many of which do apply to Johnson. BOR at 10-12. The State argues that a lay juror could take these risk factors and apply them to the actuarials, thereby coming to a different conclusion from the State's own expert. But these risk factors were not associated with specific risk percentages, or quantified in any standardized formulas for the jury to use back in the jury room.

Instead, by gathering a number of risk factors together and claiming that the jury could use these un-weighted, unquantified risk

factors to contradict the only examining expert's judgment, the State is claiming that the jurors should be treated as experts themselves, capable of taking the complex data used by mental health professionals and applying it to reach a conclusion reached by no actual professional in the case.

Training to be a mental health professional generally requires years of graduate-level work, often followed by some form of field training, often followed by additional training after certification. See 2RP 12-13; 3RP 141-43 (Dr. Richards testifies to his professional/educational background); 3RP 10, 12-13; 5RP 119-121, 123-24 (similar, but for Dr. McClung). To assume that jurors could simply walk in, be told the factors considered by psychologists, and then permissibly come to a conclusion in contradiction to every actual professional in the case, is absurd.

The State next argues:

At trial, Mr. Johnson engaged in the very strategy he now seems to fault: urging the jury to consider and rely on factors outside of the actuarials. He asked the jury to rely on his alleged ill health to conclude that he was not more likely than not to sexually reoffend.

BOR at 13 (citing 5RP 129). First, of course, the State is citing closing argument, which has no place in a legal argument about sufficiency of the evidence. See, e.g., State v. Ford, 137 Wn.2d 472, 483 n.3, 973 P.2d 452 (1999) (noting that argument is not evidence). Second - and most importantly - Johnson did not ask the jurors to rely non-actuarial factors in

a vacuum – what Johnson was asking was that the jurors rely on the only expert testimony about Johnson which was before it, which was Dr. McClung's testimony that Johnson's ill health meant he would not reoffend.

There was certainly some conflicting evidence about Johnson's health. The expert who examined lab reports for Johnson taken some 18 months before Johnson's trial said that he was not sick enough for a transplant at that point. 4RP 4-7, 10-11, 21-27. The same expert was very clear that he had seen no more recent data, and certainly Johnson could have deteriorated in the intervening period. 4RP 29-32, 34-36.

The only other witness who supported this argument that Johnson was less ill than Dr. McClung perceived was Randall Griffith, a nurse practitioner working for the SCC. Griffith claimed Johnson was in relatively good condition for his 72 years. 4RP 67, 69. But Griffith had no ability to evaluate Johnson's risk to reoffend. 4RP 59, 61. Indeed, most of Dr. McClung's testimony relied on his observations that Johnson retained little or no libido or ability to plan, items simply not addressed by Griffith's testimony. 5RP 138-145, 147, 149, 151-52, 155, 158; 6RP 38-40. Indeed, Dr. McClung's reflected that Johnson was getting along better with staff because of his new lack of interest in causing trouble, which had

been replaced by such matters as his interest in getting to the commode in time. 5RP 150-52, 176-78; 6RP 35-38.

In yet another straw man argument, the State also argues an expert need not testify to final conclusions, but might instead simply educate a jury on principles relevant to the expert's field, and then let the jury draw its own conclusions. BOR at 16-17. While it is generally true that an expert might only educate a jury on general principles of a field and not make specific conclusions for the jurors, it is difficult to imagine it would be permissible in a Chapter 71.09 commitment case to have an expert come in, explain actuarial risk assessment and how he applies his own clinical judgment to the actuarials in a typical case, and then depart – thus leaving the entire risk assessment to a jury unqualified to make such a determination. This, nonetheless, is essentially what the State champions here. Here, the jurors took the items relied upon by the expert and, applying them like a quasi-mental health professional, came to a completely different conclusion than the only actual mental health professional who testified on the question.

In all seventeen pages of argument on this overall topic, the State appears to cite only two cases that it professes support a jury's rejection of all expert conclusions and substitution of its own. See BOR at 5-21. These cases - Douglas v. Freeman, 117 Wn.2d 242, 250-51, 814 P.2d 1160

(1991); and Group Health Cooperative v. Dept. of Revenue, 106 Wn.2d 391, 339, 722 P.2d 787 (1986) – are each reviewed briefly below.¹

In Douglas, a defendant dentist in a medical malpractice case testified that his duty of care that required him to have an assistant present during a wisdom tooth extraction. 117 Wn.2d at 250. The dentist believed he had an assistant present, but the factual testimony varied on this point. Id. at 250-51. The appellate court held that the jury was entitled to apply the uncontested duty of care (testified to by the defendant), to facts that it found from the testimony of other witnesses. Id.

The State claims Douglas is analogous to Johnson’s case. BOR at 17-19. Such a claim is preposterous. In Douglas, the jury was called upon to answer a yes/no question – was there a dental assistant present at the

¹ All other cases cited by the State in this section are only cited for minor, general principals not in dispute here. For example:

- Aging alone will not support release, In re Detention of Reimer, 146 Wn. App. 179, 190 P.3d 74 (2008) (BOR at 7);
- Actuarials can be used for risk assessment, In re Detention of Thorell, 149 Wn.2d 724, 753-56, 72 P.3d 708 (2003), and In re Detention of Sease, 149 Wn. App. 66, 79, 201 P.3d 1078, review denied, 166 Wn.2d 1029 (2009) (BOR at 7-8);
- Scientific testimony can have a “aura of special reliability,” State v. Batangan, 799 P.2d 48, 51 (Hawaii 1990);
- Reasonable inferences shall be drawn in favor of the State in sufficiency cases, In re Detention of Ross, 102 Wn. App. 108, 119, 6 P.3d 625 (2000); and
- The State meets its burden in a criminal case if it presents sufficient evidence from which a jury make the appropriate findings “beyond a reasonable doubt.” In re Dependency of C.B., 61 Wn. App. 280, 810 P.2d 518 (1991).

There is nothing wrong, of course, with citing any of these cases. They simply do not support the State’s specific contention here, which is that the jury can make its own determination of a conclusion normally only put to an expert, and can make that determination in direct contradiction to the only expert testifying on the subject.

relevant time? 117 Wn.2d at 250-51. From this yes/no question directly flowed the finding of liability, as the standard of care was as straightforward (and uncontested) as the factual questions. Id.

Compare the jury's simple, binary resolution in Douglas to Johnson's jury, which fulfilled the complex role of its own expert mental health professional, applying actuarials and non-actuarial factors to determine future dangerousness, specifically where that determination conflicted with the only real expert to testify to that question. There can be no real comparison to the simple, uncontested-in-relevant-part Douglas.

The State next cites the Group Health case for the proposition that a trial court can accept an expert's testimony in whole or in part. 106 Wn.2d at 399. While the case does (correctly) declare this, nowhere in Group Health does the court actually do so, so we do not see this activity in action.

Specifically in Group Health, Group Health Cooperative sought a finding that it was a "health or social welfare organization." 106 Wn.2d at 393. Group Health called an expert, who testified that salaries paid at Group Health were comparable to salaries of people in "public service" organizations providing similar services. Id. at 395-96, 395. Although in dicta the court states it could accept the expert testimony "in whole or in part," the Group Health Court in fact accepted the expert's testimony

fully, so the application of the dicta is led to the reader's imagination. Id. Nowhere, however, does Group Health imply that all of the complex data relied upon by the expert can be used by a non-expert to come to the opposite conclusion. The State's citation, therefore, is unhelpful in Johnson's case.

The State does not respond to Johnson's lengthy citations of Washington caselaw that imply a jury finding of future dangerousness must be predicated on some expert – any expert – making the same conclusion. See BOA at 20-24. Because the State has not responded, Johnson rests on those cases, but does not argued them further herein.

At one point, the State writes:

Mr. Johnson criticizes the verdict because the expert witnesses failed to utter certain perceived “magic words” in the form of their opinion. But such magic words are not needed.

BOR at 14.

Johnson does not care if the expert spoke “magic words.” This case does not, for example, present the issue that an expert misquoted some crucial passage from the SVP statute to support commitment (although perhaps that might be a valid issue in another case). This is a case where a jury acted as an unqualified expert itself, which was required of it in order to commit as it did.

What Johnson does care about is the fact that no expert recommended his commitment, and the jurors then applied technical, specialized data - actuarial and non-actuarial factors – to come up with a risk assessment which contradicted the only real risk assessment before it.

Absent any qualified expert's opinion that Johnson met the criteria for involuntary commitment under Chapter 71.09 RCW, the evidence was insufficient, as a matter of law, to continue Johnson's indefinite commitment as an SVP. This Court should therefore reverse.

2. THE TRIAL COURT DENIED JOHNSON DUE PROCESS WHEN IT REFUSED TO STRIKE INADMISSIBLE HEARSAY, AND SUCH HEARSAY WAS PREJUDICIALLY USED AGAINST HIM.

Correctly, the State does not argue that the statement by Griffith was not hearsay. Indeed, the nature of the statement is plain from the exchange. 4RP 91. The State also concedes that the prosecutor's question did not appear to call for hearsay, so the State seems to agree that the hearsay nature of the response was a surprise to all the parties. BOR at 23.

The State nonetheless argues that, as the defense attorney did not object to the testimony until two more questions had passed by, the objection was wholly waived, and the trial court could reasonable refuse to strike the testimony, and presumably, also allow the State to use the testimony in closing argument as it did. BOR at 23-24. The State cites

several elderly cases for this proposition, BOR at 21-22, but none of them support the trial court's actions, as explored individually below.

First, the State cites In re Luntsford, 24 Wn. App. 888, 890, 604 P.2d 195 (1979). BOR at 21. But in Luntsford, the objection was not made until "two lengthy sentences" after the offending statement, and defense counsel did not make a motion to strike, and, most importantly, the Court of Appeals found that the testimony in question was admissible, so the timeliness of the objection was in fact irrelevant to the case. Id at 890.

In contrast, Griffith's testimony was plainly objectionable, and the State wisely does not argue this point. Johnson's counsel did make the required motion to strike, and while the objection was made two questions after the offending answer, the questions were extremely short, as seen by the initial passage:

Q: What did he tell you?

A: I learned from the nursing staff that he had told them that he wasn't going to take his medications because he felt that if he were sicker at trial, things would go better for him.

Q: So if he didn't take his meds, he may look sicker?

A: Yes, sir.

Q: And may he some implications for him?

A: That was the impression that I got.

KAESTNER: Object to hearsay. It should be stricken, Your Honor.

4RP 91 (emphasis added).

Plainly Luntsford – where the testimony was admissible, the objection was more delayed, and no motion to strike was made – has little or no application to Johnson’s case.

The next case cited by the State is State v. Gallo, 20 Wn. App. 717, 728, 582 P.2d 558, review denied, 91 Wn.2d 1008 (1978). In Gallo, the Court found the underlying testimony was admissible, the objection was made too slowly, and the defense attorney failed to make a motion to strike. Id. at 728.² As in Luntsford, none of these considerations appear to be relevant here except for an extremely brief delay in objecting.

The third and final case cited by the State is Seth v. Dept. of Labor and Industries, 21 Wn.2d 691, 693, 152 P.2d 976 (1944). But in Seth, the appellant did not object to the offending testimony during the examination of the witness at all, or even at the end of the case in toto. Id. at 692-93. The Seth defendant instead objected to the testimony only during his appeal. Id. Not surprisingly, the Court noted:

We have held in many cases that an objection to the admission of testimony will not be considered by this court on appeal if it is not timely made in the trial court.

Id. Moreover, the Court in Seth specifically acknowledged that a defense attorney will not always be able to object:

² This brief does not review Lundberg v. Baumgartner, because in that case the objections were very immediate and the reviewing court so found. 5 Wn.2d 619, 625-26, 106 P.2d 566 (1940).

When, however, ...it is not apparent from the question propounded that the response thereto will be inadmissible, a motion to strike is necessary and sufficient.

Id. at 693 (emphasis added, internal citation omitted).

The State's own case therefore supports Johnson's proposition that when the objection could not be made in a timely manner because of the witness's surprise answer, quickly making a motion to strike the offending testimony will be sufficient. This, of course, is what Johnson's counsel did here.

The State, notably, does not examine prejudice at all. Of course, the prosecutor below stressed the hearsay twice in closing argument, calling it "overwhelming." 7RP 41. See also further argument at BOA at 32, 34-35. The prosecutor would therefore be hard-put to explain that the admission of Griffith's indisputably hearsay testimony was harmless. This Court should reverse based on this inflammatory error.

3. THE TRIAL COURT INAPPROPRIATELY LIMITED CROSS-EXAMINATION OF GRIFFITH, THEREBY DEPRIVING JOHNSON OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL

The State begins this section of its response with a lengthy discussion of Griffith's observations of Johnson. BOR at 25-26. This is perplexing as it has never been contended that Griffith did not personally observe Johnson at the SCC.

The State goes on to assert that the nursing notes by other caregivers were irrelevant to Griffith's testimony because other caregivers' observations were only relevant to Griffith's treatment of Johnson, not his observations of his general demeanor. This is incorrect for two separate reasons.

First, the extent of Johnson's necessary care at the SCC was reviewed quite thoroughly in this case. See, i.e., 4RP 70-74, 75-86; 5RP 156-58, 178-79. The defense carefully explained in its case and subsequent argument that Johnson's fragility – both physically and mentally – was a part of the reason he was unlikely to reoffend. If, for example, Johnson drank any alcohol (alcohol was described as a stressor that might raise the risk of reoffense), then his condition would deteriorate so quickly that he still would not be a threat. Because the nursing notes were – even as the State seems to acknowledge – relevant to Johnson's overall health and his treatment, and Griffith acknowledged that he considered them relevant to Johnson's treatment, then Johnson should have been permitted to use the content of those notes during cross-examination of Griffith, as Johnson's overall condition and care was a major issue in his case.

And second, the limitation the State places on the notes – that they were only relevant to Griffith as regarded Johnson's treatment – is not so

plain in the record as the State would have this Court believe. For example:

Q: But you do consider other nurses' notes in the record when you consider Mr. Johnson's entire picture?

A: Yes. The same way I consider the consultant notes....

4RP 103 (emphasis added); as well as:

STERN: The question that still hasn't been asked is do any of these notes impact your opinion about his cognitive – you know, about the fact that he's doing well?

THE WITNESS: Yes.

STERN: O.K.

KAESTNER: So that's what I would like to ask him in front of the jury.

4RP 108.

The State also argues that the notes were properly excluded because of their content – they indicated Johnson was confused on two successive days; that Johnson was likely to be confused upon awakening; and that he “fell” or “stumbled” in his room on at least one occasion. BOR at 27-28 (citing 4RP 94, 104-05, 107).³ This content, the State argues, would be confusing without hearing from the original reporter of the incidents.

But impeachment is an opportunity to test a witness's appropriate recollection and perspective on a situation. If a witness – based on a third

³ Nursing notes also indicate Johnson was having trouble finding words and was confused and disoriented, as well as very pale, but these were not specifically mentioned by the State. 4RP 103-06.

party's observations – seems to be minimizing one side of a story, the jury is entitled to understand that so that they know what weight to give the testimony:

An opposing party has the right to attack the credibility of an expert witness by exposing weaknesses in the expert's credentials or in the information upon which the expert's opinion is based.

Tegland, 5D WASH. PRAC., HANDBOOK WASH. EVID., ER 705 (Author's comments #10) (2009-10 ed.). This is, in fact, largely the premise of impeachment.

The witness would have ample opportunity to explain why the observations of his co-workers were unimportant in this case. See 4RP 103-05, 108 (outside the presence of the jury, Griffith indicates he takes the observations of some co-workers with “a little grain of salt”). The State was, of course, also entitled to a limiting instruction to the effect that such questions were intended to give the jury an idea of how to weigh Griffith's testimony, but should not be used for the truth of the matter asserted. See ER 105; WPIC 5.30; State v. Lui, 153 Wn. App. 304, 322-23, 323 n.20, 221 P.3d 948 (2009).

The heart of Johnson's case was his argument that he was too ill to reoffend. Griffith provided the most credible contradiction to Johnson's assertion that he was sick, testifying that Johnson was “functioning just

fine” and had “average cognitive abilities” despite his end-stage liver disease. 4RP 67, 169. Refusing to allow impeachment on this subject could not, because of the focus of the case, be harmless. This error therefore requires reversal.

4. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT, THEREBY VIOLATING JOHNSON’S CONSTITUTIONAL RIGHT TO A FAIR TRIAL

The State, like Johnson, examines the allegations of prosecutorial misconduct one by one. Johnson believes it is only necessary to respond to the second and fourth of these, in both of which the prosecutor argued facts not in evidence.

a. Inviting the jury to consider charging and trial procedures not in evidence.

The State argued in closing:

[Referring to someone’s prior release] Hey, how did he do? Reconvicted for sex offense the following year.

Now, keep in mind that’s reconvicted within the following year. You know how fast trials work. That means he did it, somebody told, he got caught, he got arrested, he got charged, and was convicted.

KAESTNER: Objection. This is improper argument.

COURT: Overruled.

7RP 35.

The State now argues that because the above passage apparently applied to the 72-year-old offender in one of the studies and not to

Johnson himself, it was acceptable to make the argument. BOR at 33-35.

This makes no sense.

Assuming this argument did apply to the 72-year-old in the former study and not to Johnson, it still does not have any basis in fact because we have no way of knowing how that unnamed case was charged or handled. For all we know, the 72-year old could have pled guilty at arraignment. There certainly was no evidence the 72 year old went to trial, something implied – or even just baldly stated – in the State’s argument.

This argument was meant to imply that this hypothetical 72 year old went out and immediately reoffended. This was a scare tactic to frighten the jury into keeping Johnson in jail. More importantly, it was a scare tactic that was not supported by any evidence in the record. Compare State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006). As such, it was inappropriate, and the trial court should have sustained the defense objection.

b. Arguing facts not in evidence anywhere in the record

The State concedes that nothing in the record indicates Johnson said he could “beat the rap” on his 1983 charge. BOR at 35-36. But the State tries to justify the “beat the charge” language by completely

confusing the facts of two completely different cases – the 1983 charge and the 1992 charge.

The State argued:

The thing with [name of the victim from the 1983 offense] that also tells you he's a manipulative guy is remember what he said I think I was in his deposition that was read to you. He said at first I denied doing it. Thought I could beat the charges. Later he's under evaluation that you heard. He admitted –

COURT: Just a second. There's an objection. Do you have any grounds for your objection?

KAESTNER: There's no basis in evidence that was presented regarding the [name of victim] offense.

COURT: Overruled.

STERN (continuing): Later, subsequent evaluation he admitted to the evaluator that he had done it, hoped he could just beat the rap.

7RP 39-40. The charge discussed above is a case from 1983 involving “victim A.C.,” as the State refers to her. BOR at 35-36.

The charge the State argues justified the “beat the rap” language (based on Johnson's initial denial that he did not molest the child) is a completely different one, which involved taking a two-year-old child to pick blackberries in 1992. BOR at 36. In the charge involving “victim A.C.” there was no such indication in the record. See 3RP 45-53; 6RP 66-86.

There is thus absolutely nothing in the deposition or in Johnson's testimony that supported the State's "beat the rap" argument. See 3RP 45-53; 6RP 66-86. The State itself even admits that the "beat the rap" language of the argument was wholly an invention of the prosecutor. BOR at 36. By arguing such a prejudicial fact that appears nowhere in the record, Mr. Stern thereby committed flagrant misconduct. Perez-Mejia, 134 Wn. App. at 916.

B. CONCLUSION

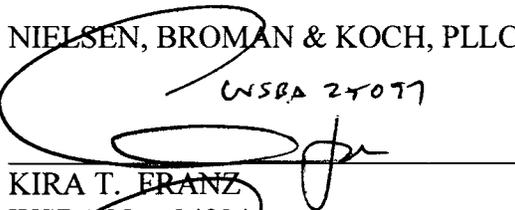
This Court should reverse and remand for entry of an order that Johnson no longer meets the criteria for indefinite commitment under Chapter 71.09 RCW because the State failed to prove either a lack of volitional control or that Johnson was likely to reoffend if not confined. In the alternative, this court should reverse and remand for a new trial because evidentiary errors and/or prosecutorial misconduct deprived Johnson of a fair trial.

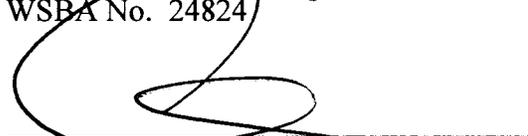
DATED this 17th day of March, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

WSBA 25097


KIRA T. FRANZ
WSBA No. 24824


CHRISTOPHER H. GIBSON,
WSBA No. 25097
Office ID No. 91051

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

IN RE DETENTION OF:)

CHARLES LEE JOHNSON,)

Appellant.)

COA NO. 63263-9-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

[X] CHARLES LEE JOHNSON
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF MARCH, 2010.

x Patrick Mayovsky

2010 MAR 18 PM 4:01
FILED
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA