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NO. 63263-9-1

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

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In re Detention of

CHARLES L. JOHNSON,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

(1) Was there sufficient evidence to support the jury's determination that Mr. Johnson remains likely to engage in predatory acts of sexual violence?

(2) A witness introduced hearsay in a non-responsive answer. Defense counsel raised no objection until after the witness had answered two further questions on the same subject. Did the trial court abuse its discretion in overruling this objection as untimely?

(3) The defense sought to impeach an expert witness with notes made by another person. The witness had not relied on the notes as the basis for his opinion. Did the trial court abuse its discretion in excluding cross-examination about these notes?

(4) Did the prosecutor's closing argument fall within his wide latitude to discuss inferences from the evidence?

## **II. STATEMENT OF THE CASE**

Charles Johnson (appellant here, respondent below) has been committing sexual offenses since he was 12. 3 RP 32. He has committed sexual crimes against at least 14 victims. 5 RP 73. His last offense was against a two-year-old girl in 1992. 3 RP 41. At that time, Mr. Johnson was 55 years old. Ex. 3.

Mr. Johnson was committed to the Special Commitment Center (SCC) in 1998. 3 RP 9. He never successfully completed a treatment program. 5 RP 183. He once remarked that “he couldn’t see much reason to be in treatment, except to look good for court.” 6 RP 31.

By the time of trial, Mr. Johnson was 72 years old. 3 RP 53. He was still diagnosed with pedophilia and anti-social personality disorder. 5 RP 81-82. On one actuarial risk assessment (the Sex Offender Risk Assessment Guide or SORAG), persons with scores similar to Mr. Johnsons had an 89% chance of committing a violent offense or sex offense within 10 years. 5 RP 107. On another assessment (the Static-99), he scored in the highest risk category of sex offenders. Only 12% of offenders scored this high. 6 RP 15-16.

There was conflicting testimony concerning what the score on the Static-99 meant with regard to likelihood of recidivism. The statistics that were originally published for this instrument indicated that 52% of persons in this category would be repeat offenders within 15 years. 5 RP 103-04. (These were referred to at trial as the “old norms.”) A few months before trial, however, the developers of the instrument published statistics involving a

different comparison group (the “new norms”). These statistics provided lower recidivism predictions. They no longer gave any prediction for a period as long as 15 years. 5 RP 117-19.

Expert witnesses testified concerning several factors that increased Mr. Johnson’s risk of re-offense above the levels predicted by these actuarial assessments. These included his diagnoses of pedophilia and anti-social personality disorder, the number of his victims, his dropping out of treatment, his young age at the time of his first offense, his failure on probation, and social stressors that he would be exposed to on release. 6 RP 17-19; 4 RP 154-55.

Notwithstanding all of these factors, an expert witness testified that he did not believe that Mr. Johnson was more likely than not to re-offend sexually. 5 RP 132. He primarily based this opinion on Mr. Johnson’s health issues. 5 RP 130. Mr. Johnson suffers from end-stage liver disease. There was testimony about his health from Randall Griffith, a nurse practitioner who had been Mr. Johnson’s primary care provider for five years. 4 RP 65. He testified that Mr. Johnson was “functioning just fine” and “[y]ou really would not think that he was sick.” 4 RP 67.

There was also testimony from Dr. Jorge Reyes, a surgeon who had extensive experience with liver transplants. 4 RP 14-18. Dr. Reyes testified that if Mr. Johnson stopped drinking, his liver disease would stabilize or even improve. If this occurred, his lifespan would be similar to someone without liver disease. 4 RP 28.

There was conflicting testimony concerning the effect of age on the likelihood of recidivism. Studies indicate that the risk of re-offense declines after age 60. 5 RP 43. These studies are not, however, adequate to predict the recidivism of atypical offenders. 5 RP 32-33. Someone who re-offends at age 55 (as Mr. Johnson did) is atypical. 5 RP 45. In 2005 (when he was 68), Mr. Johnson admitted that he was still masturbating to fantasies of young girls. 5 RP 81.

There was also testimony that age at time of first offense is more significant than age at time of assessment. 4 RP 150. Mr. Johnson was only 12 at the time of his first offense, which is a high risk factor. 6 RP 18.

The jury was instructed that, to be a sexually violent predator, the defendant must suffer from a mental abnormality or personality disorder that makes him likely to engage in predatory

acts of sexual violence. 1 CP 18, inst. no. 4. It returned a verdict that the defendant is a sexually violent predator. 1 CP 10. The trial court upheld this verdict as supported by the evidence. 3/25 RP 27.

### **III. ARGUMENT**

#### **A. EXPERT TESTIMONY ESTABLISHED NUMEROUS FACTS SUPPORTING AN INFERENCE THAT MR. JOHNSON REMAINS LIKELY TO COMMIT SEXUALLY VIOLENT OFFENSES.**

Twelve jurors unanimously found that the State proved all elements of the petition, beyond all reasonable doubt. In denying a post-trial motion to dismiss, the court said, "I think there was enough evidence that a rational fact finder weighing all of the evidence could reach the decision that the jury in this case reached." 3/25 RP 27. Despite this, Mr. Johnson claims that there was insufficient evidence to support a conclusion that he remains a sexually violent predator.

Mr. Johnson has now been found to be a sexually violent predator twice, and 24 jurors have unanimously found that the State proved all elements of the petition, beyond all reasonable doubt, as Mr. Johnson was first committed as a sexually violent predator, upon a jury verdict, in 1998.

To properly evaluate the evidence in this case, it must be remembered that only a tiny percentage of released sex offenders in Washington State are subject to the sexually violent predator (hereafter SVP) review<sup>1</sup>. As stated in RCW 71.09.01: “The legislature finds that a small but extremely dangerous group of sexually violent predators exist...” The purpose of this legislation was to seek to identify those who by their history, their mental abnormality and/or personality disorder and other relevant factors, are able to be adjudicated as being more likely than not to engage in predatory acts of sexual violence.

Mr. Johnson was so adjudicated in 1998. The legislature acknowledged in its legislative finding “that the prognosis for curing sexually violent offenders is poor.” RCW 71.09.01. Thus it should be no surprise that jurors who were well educated by expert witnesses about the factors which should be considered in a risk assessment would conclude that Mr. Johnson continues to have

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<sup>1</sup> Approximately 5% of those sex offenders whose cases are eligible to be reviewed by the End of Sentence Review Board are deemed to meet the statutory criteria for SVP referral. Of those referred, nearly 67% were rejected for consideration of filing by prosecuting authorities. Milloy, Six-Year Follow-Up of Released Sex Offenders Recommended for Commitment Under Washington’s Sexually Violent Predator Law, Where No Petition Was Filed. Washington Institute of Public Policy, 2003.

the history and characteristics of someone who is at very high risk to sexually reoffend. The very factors which made Mr. Johnson a SVP in 1998 are, by their nature, unlikely to change.

Two significant things, however, have changed since Mr. Johnson was first committed as a SVP:

First, the legislature recommitted itself to a policy that the pathway out of the Special Commitment Center (SCC) was through treatment. “For purposes of this section, a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. As used in this section, a single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.” RCW 71.09.090(4)(c). The validity of this statute was upheld in In re Detention of Reimer, 146 Wn. App. 179, 190 P.3d 74 (2008). During his time at the SCC, Mr. Johnson has not completed any sex offender treatment. 5 RP 183.

The science regarding risk assessment has evolved. Actuarial instruments have been adopted as an integral component of the “more likely than not” assessment. 4 RP 146; see In re Detention of Thorell, 149 Wn.2d 724, 753-56, 72 P.3d 708 (2003);

In re Detention of Sease, 149 Wn. App. 66, 79, 201 P.3d 1078, review denied, 166 Wn.2d 1029 (2009). These tools have been helpful in discriminating sex offenders into categories of risk: High – medium – low. 5 RP 129. As became clear in this trial, however, an interpretation beyond such categorization is an exercise in false precision.

For example, Dr. McClung noted that one of the actuarial instruments he relied on placed Mr. Johnson in the “High risk” group. That is, of individuals with characteristics like Mr. Johnson, he was in a group of those with the highest likelihood to sexually offend. 6 RP 15-16. He noted specifically that a strict reliance on actuarials would lead to a conclusion that Mr. Johnson is more likely than not to reoffend.

Q [I]f we took a strict actuarial approach, we would say that he’s more likely than not to reoffend, correct?

A Correct.

5 RP 111.

Dr. McClung nevertheless relied on his perception of the respondent’s liver condition to conclude that Mr. Johnson’s life expectancy was “shortened by his end stage liver disease”. 5 RP 112. This conclusion was refuted by the more qualified Dr. Reyes. 4 RP 28. In fact Dr. McClung assumed that Mr. Johnson only had

three years to live. 5 RP 114. This approach appears to have no scientific or medical basis.

At the time Dr. McClung conducted his tests, the authors of the Static-99 had calculated that those in the high risk group sexually reoffend at 52% over a 7-year period of time. 5 RP 103-04. Dr. McClung explained that a subsequent reanalysis modified that 52% figure downward. 5 RP 115-17. That merely shows that reexamination of data can lead to a review of how many people within each group sexually reoffended. Based upon the study, that number can go up or down, making a strict reliance on the statistic transient and potentially misleading. Mr. Johnson remained in the highest risk class. 5 RP 170.

Dr. McClung further clarified that what also remained steady were Mr. Johnson's static, unchanging characteristics which placed him in the highest risk group. Dr. McClung further explained that placed Mr. Johnson in the top 12% of the highest risk offenders. 6 RP 16.

Adherence to a fixed linkage between a Static-99 scoring "norm" and a "more likely than not" evaluation is a statistical fallacy. The actuarial instruments are part of an assessment and other factors are properly to be considered. Trying to draw a fixed linkage

would become a fool's errand: By the very nature of these instruments, the "norms" are likely to continue to be adjusted (perhaps up; perhaps down) based upon developing research.

What the actuarially ascertained percentages do provide – and what the actuarials did provide in this case – is one piece of information for the jurors' evaluation in their conclusion of whether Mr. Johnson is more likely than not to engage in predatory acts of sexual violence. Here they learned he was in a group of people identified as such:

Q So of all the sex offenders, he's in the top 12 percent of the highest risk guys?

A Right.

6 RP 16.

This jury was taught that there are *many other* factors which should be considered in appraising Mr. Johnson's risk to reoffend. Dr. Richards and Dr. McClung together identified a number of factors which should be considered in assessing the risk to sexually reoffend:

**1. Current diagnosis of pedophilia.** This is not incorporated specifically into the actuarial instruments and is an independent factor demonstrating high risk to reoffend. 6 RP 17. Mr. Johnson self-reported ongoing attraction to minors. 6 RP 32.

Dr. McClung educated the jurors that the very definition of pedophilia is “the chronic, recurrent urges to...chronic sexual urges regarding children.” Dr. McClung identified this as an “independent” and important factor for making someone a higher risk offender. 5 RP 95. Despite Mr. Johnson’s condition, he thought it necessary to recommend “prohibiting his access to minors.” 5 RP 97.

**2. The diagnosis of antisocial personality disorder.** This is not incorporated specifically into the actuarial instruments and is an independent factor demonstrating high risk to reoffend. 6 RP 17.

**3. Number of victims.** Dr. McClung testified that he could identify at least 14 prior victims of sex crimes at the hands of Mr. Johnson. 5 RP 73. Dr. McClung educated the jury that this number of victims is an independent factor demonstrating high risk to reoffend. 6 RP 18; 5 RP 184.

**4. Dropping out of treatment.** Dr. McClung noted that this is an independent factor demonstrating high risk to reoffend. 6 RP 18. He testified that Mr. Johnson had *twice* dropped out of treatment. 5 RP 182-83. Mr. Johnson has never successfully participated in treatment at the SCC. 6 RP 30.

**5. Age at time of first offense.** Mr. Johnson started to sexually offend when he was 12 years of age. 3 RP 32. Dr. McClung explained that starting to sexually offend at that young age was an independent factor demonstrating high risk to reoffend. 6 RP 18. Dr. Richards was more assertive in his evaluation of age of first offense. He believed that “that age at first conviction is more important variable for risk prediction” and that is more important than the current age of the individual. 4 RP 150.

**6. Failing on probation.** Dr. McClung acknowledged that failure on probation was an independent factor demonstrating high risk to reoffend. He told the jury that Mr. Johnson had failed on probation or supervision “three different times.” 6 RP 19. In two of those failures he molested children again. 3 RP 40.

**7. Exposure to social stressors.** This was identified as an independent factor demonstrating high risk to reoffend. Dr. Richards explained that there were a variety of potential psychosocial stressors which could increase Mr. Johnson’s risk to sexually reoffend. 4 RP 154-55.

Of course, Dr. McClung noted that Mr. Johnson’s health was another factor which was not taken into account by the actuarial risk assessments. 5 RP 133.

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. 5 RP 129.

There was conflicting evidence concerning whether Mr. Johnson was truly in poor health and the consequences that his condition might have on his functioning, his cognitive abilities, his life span, and his ability to offend against children. His primary care provider noted that Mr. Johnson had suffered severe reactions from the usage of ibuprofen after sustaining a broken bone. 4 RP 88. He indicated that made his health particularly poor for a period of time, which unfortunately was during the time frame when Dr. McClung interviewed him for his assessment. Mr. Johnson recovered nicely from that bout of ill health. At trial, Mr. Griffith said that Mr. Johnson was “doing very well.” “You really would not know that he was sick.” 4 RP 67. Dr. Reyes was called to clarify that the symptoms attributed to Mr. Johnson for what the respondent called “end stage liver disease” were not necessarily all that dire and that if Mr. Johnson merely stopped drinking he would likely enjoy a healthy natural life span. 4 RP 28.

Mr. Johnson did not require much strength to carry out his crimes. He claimed a preference to children about 6-7 years of age. 3 RP 47. Each of his last three victims was progressively younger. 3 RP 35-37, 41.

The jury was free to draw any conclusions as to how sick or infirm Mr. Johnson was, and how his medical condition did or did not impact his behavior. They heard from Mr. Johnson himself that he felt strong enough to build chimneys or work on and even pilot a tuna boat. 3 RP 52. This might have been the most persuasive testimony about how ill and incapacitated he perceived himself.

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. The purpose of expert testimony is to provide some technical or specialized *knowledge* to assist the trier of fact to understand the evidence or to determine a fact in issue. ER 702. Mr. Johnson appears to confuse the need for expert testimony to educate a jury with the need for expert conclusions. What is key to understanding and using expert testimony wisely is not the blind acceptance of an expert’s opinion, but an understanding of the reasons for an opinion and the factors which should go into a particular analysis.

WPIC 6.51 directs jurors that they “are not ... required to accept” the opinions of an expert witness. Instead, jurors are instructed to consider “the reasons given for the opinion” of an expert and the sources of the expert’s information.

Mr. Johnson complains that the jurors appeared to have followed this instruction. The jurors heard the facts, information, knowledge and analysis presented by various expert witnesses. They chose to accept certain facts, to adopt certain teachings, and to reject others. The jurors obviously chose to rely on the reasons for the witness’ opinions, and did not succumb to the easy route of merely accepting a particular witness’ ultimate conclusion.

Jurors here did precisely what intelligent jurors should do: Become educated about factors which go into an evaluation and make their own assessment, instead of being led by expert witnesses. As the Supreme Court of Hawaii once cautioned: “Scientific and expert testimony with their ‘aura of special reliability and trustworthiness’... courts the danger that the triers of fact will ‘abdicate [their] role of critical assessment’ and ‘surrender...their own common sense in weighing testimony.’” State v. Batangan, 799 P.2d 48, 51 (Haw. 1990). This jury resisted that temptation.

In an SVP proceeding, the evidence is sufficient if any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the alleged predator. In re Detention of Ross, 102 Wn. App. 108, 119, 6 P.3d 625 (2000).

Mr. Johnson's argument is based on a fundamental misconception: that the State failed to introduce an expert conclusion in support of the commitment. He seems to believe that only an expert's opinion on the ultimate issue constitutes "expert testimony," while everything else constitutes "impeachment." There is no basis for this belief. Under ER 702, an expert witness may testify "in the form of an opinion or otherwise." Under some circumstances, it may be preferable to offer expert testimony in the form of data and principles, rather than conclusions. 5B Teglund, Evidence § 702.49 (4th ed. 1999). As noted by the committee that drafted the Federal Rules of Evidence:

[Fed. R. Ev. 702] ... recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable

and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference.

Federal Advisory Committee note to Rule 702.

Even when expert testimony is required, there is no requirement that the expert agree with the ultimate conclusion advocated by the plaintiff. For example, in a medical malpractice action, expert testimony is ordinarily needed to establish the standard of care. The expert need not, however, believe that the relevant standard was violated — that fact can be shown by other evidence. Douglas v. Freeman, 117 Wn.2d 242, 250-51, 814 P.2d 1160 (1991).

In Douglas, the defendant dentist testified, as an adverse witness, that it would be improper to perform a surgical extraction without an assistant. The plaintiff testified that the defendant operated on her without an assistant. This was sufficient to establish malpractice, notwithstanding the defendant's claim that an assistant was present. The defendant's expert testimony thus constituted adequate expert testimony to support the verdict, notwithstanding his rejection of the ultimate fact that the plaintiff sought to prove.

Here, the State presented evidence by expert testimony establishing the following facts:

1. Mr. Johnson still suffers from pedophilia and anti-social personality disorder. 5 RP 81-82.

2. According to both actuarial assessments, Mr. Johnson is in the highest risk categories to reoffend. In one he is similar to those individuals with characteristics who on average reoffend 79% (7 years) to 89% levels. 5 RP 103-07.

3. He is within the highest 12% of high risk offenders. 6 RP 16.

4. His number of victims (14) is an enhanced risk factor, separate and apart from the actuarials. 6 RP 18; 5 RP 184.

5. His dropping out of treatment is an enhanced risk factor, separate and apart from the actuarials. 6 RP 18.

6. His offending at an early age (starting at 12) is an enhanced risk factor, separate and apart from the actuarials. 6 RP 18.

7. He still suffers pedophilia meaning he has recurrent and chronic sexual urges regarding children. 5 RP 73-74. Dr. McClung cautioned he should not be permitted access to minors. 5 RP 97.

8. He had repeatedly failed on probation, which is an enhanced risk factor, separate and apart from the actuarials. 6 RP 19.

9. He was not as medically infirm or with a shortened life span as psychiatrist McClung perceived. 4 RP 28; 5 RP 112-13.

Based on this expert testimony, a jury could reasonably infer the following: Mr. Johnson has the requisite criminal convictions, has Pedophilia and Antisocial Personality Disorder. Actuarial assessments indicate a high likelihood that he will commit a violent offense over his remaining lifetime. Other factors concerning Mr. Johnson's past and his behaviors make him more likely than not to engage in predatory acts of sexual violence.

The defense argued that the only thing that could mitigate this risk would be his age and health. There was conflicting evidence about how sick Mr. Johnson was; and there was conflicting evidence of the importance of Mr. Johnson's current age on his risk to reoffend; especially in consideration with the evidence that age at first offense (here 12) is a more meaningful and powerful predictor.

A fact finder can accept or reject an expert's testimony in whole or in part. Group Health Cooperative v. Dept. of Revenue,

106 Wn.2d 391, 399, 722 P.2d 787 (1986). In this case, the evidence provided excellent reasons for jurors to accept the experts' conclusions that Mr. Johnson's static risk factors and the entire list of factors which demonstrate high risk, separate and apart from the actuarial instrument categorization, renders him more likely than not to commit acts of predatory sexual violence, while rejecting the conclusion that his age and health has mitigated that danger. As a result, there was sufficient evidence for the jury verdict.

The court discussed the concept of the burden of production in relation to the test for substantial evidence to support a verdict, in In re Dependency of C.B., 61 Wn. App. 280, 810 P.2d 518 (1991) "[I]n criminal cases, the State meets its burden of production by introducing evidence from which a rational trier of fact could find beyond a reasonable doubt the facts required by the substantive criminal statute." Id. at 285, citing Jackson v. Virginia, 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "[The burden of production] is that of producing evidence, satisfactory to the judge, of a particular fact in issue." 2 McCormick on Evidence, 409 (5th ed. 1999); see C.B., 61 Wn. App. at 282-83 (citing McCormick).

The State met its burden of presenting certain facts before the jury from which they can reach the conclusion that Mr. Johnson is a sexually violent predator. The jury was given that opportunity. They followed the court's instructions about evaluating expert testimony and obviously chose to rely on certain facts and reject others, even rejecting expert opinion in favor of expert education.

That is all that is required. This court should affirm the trial court's conclusion that there was sufficient evidence from which a jury could – and did – conclude that Mr. Johnson remains a sexually violent predator.

**B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN OVERRULING AN OBJECTION THAT WAS MADE AFTER THE WITNESS HAD ANSWERED TWO SUBSEQUENT QUESTIONS ON THE SAME SUBJECT.**

The defendant next challenges the court's overruling of an objection to hearsay. The court overruled the objection because it was untimely. This ruling was within the court's discretion.

In general, a party should object to a question before the witness answers. In re Luntsford, 24 Wn. App. 888, 890, 604 P.2d 195 (1979). There is an exception to this requirement if it was not apparent from the question that the answer would be inadmissible. State v. Gallo, 20 Wn. App. 717, 728, 582 P.2d 558 (1978). Under

such circumstances, the error is preserved if the party objects “as soon as he could reasonably be expected to comprehend the purport of the un-responsive answer and formulate and state his objection thereto.” Lundberg v. Baumgartner, 5 Wn.2d 619, 625, 106 P.2d 566 (1940).

The applicable standards are summarized in Seth v. Dep’t of Labor & Industries, 21 Wn.2d 691, 693, 152 P.2d 976 (1944):

As to when an objection to the testimony of a witness, or a motion to strike it, must be made in order to be timely, may depend upon the situation presented in a given case, and neither the trial court nor this court should adopt any strict rule; but certainly the due and proper administration of the law demands that such action must be taken before the case gets beyond recall. . .

In order to preserve the question for appellate review, generally a party must object to improper questions and inadmissible evidence at his earliest opportunity. When a question is asked by opposing counsel, a party may not remain silent, speculate upon an answer being favorable, and when disappointed, make a motion to strike out the answer. When, however, there is no opportunity to interpose an objection, or if it is not apparent from the question propounded that the response thereto will be inadmissible, a motion to strike is necessary and sufficient.

In the present case, the challenged evidence was elicited by a series of three questions:

Q Have you, in the last couple of weeks, had a conversation with Mr. Johnson when he's talked about taking his meds in preparation for trial?

A Yes. On Monday we talked about that.

...

Q [1] 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 [2] So if he didn't take his meds, he may look sicker?

A Yes, sir.

Q [3] And may have some good implications for him?

A That was the impression that I got.

At this point, defense counsel objected. 4 RP 91.

As Mr. Johnson correctly points out, question [1] does not call for hearsay. Since the inadmissible nature of the answer was not apparent from the question, his attorney was not required to object to that question. The *answer*, however, clearly indicated that it was based on hearsay. Consequently, defense counsel was required to raise an immediate objection to the answer and move to strike it.

Counsel did not do so. Rather, she allowed two more questions to be asked and answered before she objected. She thus missed four opportunities to raise a hearsay objection: (1) When the hearsay was first brought out in a non-responsive answer; (2) When another question was asked to elicit details of the hearsay; (3) When that question was answered; (4) When a third question was asked to elicit further details. The objection did not come until after the third question was answered. The court believed that by this time “the bell was rung” and it was “too late for me to [undo] the damage.’ 4 RP 101. This ruling was not an abuse of discretion.

Mr. Johnson claims that the admission of this testimony violated his right to confrontation under Const., art 1, § 22 (amend. 10). That right applies “in criminal prosecutions.” Since sexually violent predator proceedings are not criminal proceedings, the right to confrontation is inapplicable. In re Stout, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). Under some circumstances, Due Process may require the availability of witnesses for cross-examination. Id. at 369-72. Mr. Johnson does not, however, argue that his Due Process rights were violated.

**C. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING CROSS-EXAMINATION THAT WAS CUMULATIVE, BASED ON HEARSAY, AND WOULD NOT HAVE SIGNIFICANTLY IMPEACHED THE WITNESS.**

Mr. Johnson contends that the trial court improperly limited his cross-examination of nurse practitioner Griffith. He claims that he should have been allowed to cross-examine this witness about statements contained in nursing notes prepared by other people. This is because the witness purportedly relied on these notes to formulate his opinions. The record does not substantiate this claim.

On direct examination, Mr. Griffith testified concerning Mr. Johnson's physical condition. Mr. Griffith based this testimony on his own observations and on statements made by Mr. Johnson:

**Q** Has [Mr. Johnson] made any comments to you about feeling better now than he has been feeling in a long time?

**A** *He has said* that if he didn't know better, he – feels too good to think that he's sick on a lot of days.

**Q** *From your observations*, appear to be functioning just fine?

**A** Yes, sir. That's true.

...

**Q** *From the way you've been observing him over the last couple of months*, have your [treatment] interventions been helpful?

**A** I think they've been very helpful.

...

Q *Based on your observations of him over this time, do you have an opinion as to whether Mr. Johnson, if he had close proximity to a young child, ... would have the physical ability to molest that child?*

...

A Mr. Johnson has the physical strength to control the actions of someone who is smaller and weaker than he is.

Q [D]o you have an opinion as to whether he has the cognitive ability to do that?

A As a 72-year-old male, most days he has your average cognitive abilities.

4 RP 67-69 (emphasis added).

On cross-examination, Mr. Griffith was asked about his reliance on the nursing notes. He said that he placed some reliance on those notes in determining how he would *treat* Mr. Johnson. 4 RP 96 (cross-examination in presence of jury), 103 (cross-examination in absence of jury). Mr. Griffith's *treatment* decisions had little if any relevance. He never testified that he relied on the notes in forming his opinions concerning Mr. Johnson's physical and mental status. Consequently, the notes were not admissible to impeach those opinions.

If an expert witness has not relied on another person's conclusions, those conclusions may not be used for impeachment.

Irrigation & Development Co. v. Sherman, 106 Wn.2d 685, 688,724 P.2d 997 (1986). Even when an expert has placed some reliance on another expert's report, the court should not allow that report to be used as substantive evidence under the guise of impeachment. Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541, 546 (5<sup>th</sup> Cir. 1978); see Sherman, 106 Wn.2d at 689 (citing Bryan with approval). "The cross-examiner should not be allowed to use cross-examination as a vehicle for the introduction of hearsay ... to strengthen the cross-examiner's own case, under the guise of proving the expert's underlying facts and data." 5B Teglund, Evidence § 705.7 (2007).

Even if this evidence had some marginal impeachment value, the court properly exercised its discretion in excluding it. "The scope of cross examination lies in the discretion of the trial court and will not be disturbed unless there is a manifest abuse of discretion." State v. Campbell, 103 Wn.2d 1, 20, 692 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985). The nursing notes indicated that Mr. Johnson appeared confused at 3:30 a.m. on two successive days. 4 RP 104-05, 107. Mr. Griffith testified that Mr. Johnson was likely to appear confused shortly after being awakened. 4 RP 94. The

notes also reported an occasion when Mr. Johnson “fell” or “stumbled” in his room, but they apparently gave no details. Without hearing testimony from the person who made the notes, the jury would have no way of determining what these incidents showed about Mr. Johnson’s level of health.

The notes also added nothing meaningful to Mr. Griffith’s testimony. On cross-examination, he acknowledged that Mr. Johnson’s condition varied:

[O]n a good day, he’s very clear and has very few symptoms of [hepatic encephalopathy]. If he’s having a rough time, retaining more fluid, his levels go up, for example, then he gets more mentally clouded. . . [S]o the encephalopathy is a big issue because that can affect balance, coordination, his ability to take care of himself.

4 RP 75. Mr. Griffith thus testified that Mr. Johnson sometimes exhibited mental confusion and lack of balance. The nursing notes reflect occasions when Mr. Johnson might or might not have been confused and suffered poor balance. Even if the jury somehow discerned what happened on those occasions, they would still not know any more than Mr. Griffith acknowledged.

In short, the witness had placed little if any reliance on the notes. Interpreting them would require the jurors to draw conclusions about disputed events, without hearing from anyone

who had observed those events. And even if the jurors could somehow draw those conclusions, all of the facts would still be consistent with the witness's testimony. Under these circumstances, the trial court properly exercised its discretion in excluding the cross-examination.

The defendant claims that the limitation on cross-examination violated due process. Even in criminal cases, the right of confrontation is not absolute. "Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative." State v. Darden, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002). Since the limitation imposed here was a proper exercise of discretion, it was not a due process violation.

#### **D. THE PROSECUTOR'S CLOSING ARGUMENT WAS PROPER.**

Mr. Johnson challenges several arguments made by the prosecutor. A prosecutor has wide latitude to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Even if an argument was improper, it will lead to reversal only if it was prejudicial. The question is whether, in light of the whole record, there is a

substantial likelihood that the misconduct affected the verdict, thereby denying a fair trial. State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984).

Mr. Johnson identifies five alleged areas of misconduct. None of the challenged arguments was improper.

**1. “Mischaracterization” Of Testimony Concerning Actuarial Assessment.**

The first alleged misconduct involves the purported “mischaracterization” of the testimony of an expert witness. Dr. McClung testified concerning an actuarial assessment using the Static-99. Under this instrument, offenders similar to Mr. Johnson had a 52% recidivism rate over a 15-year period. 5 RP 103-04.

On cross-examination, Dr. McClung testified that Dr. Hanson, the developer of the Static-99, had recently released “new norms.” This means that Dr. Hanson had tested the results of the assessment against a different group of offenders. These new norms led to lower estimates of recidivism for most offenders. 5 RP 115-17.

Mr. Johnson claims that “Dr. McClung unambiguously testified that the makers of the Static-99 had indicated the old norms were not to be used *and that he agreed.*” Brief of Appellant

at 44 (emphasis added). In fact, Dr. McClung only testified concerning the recommendation of the developer. He did *not* express *his own opinion* on which norms were preferable:

Q And, in fact, there are actually new norms that Dr. Hanson, developer of Static-99, has indicated should be used?

A Yes.

...

Q And [Dr. Hanson] actually instructs – he actually says that people scoring the Static-99 should no longer use the old norms, correct?

A Yes.

5 RP 116-17.

Q And you've also testified that the 52 percent in the old norms should not be applied to Mr. Johnson, correct?

A According to Mr. – according to Hanson, they're suggesting at this point, no.

5 RP 167. Dr. McClung testified that the new information released by Dr. Hanson provided "lots of new stuff to digest." 5 RP 172.

On re-direct examination, Dr. McClung testified that the comparison sample used in the "old norms" contained a higher percentage of child molesters and a lower percentage of rapists. This is significant because rapists tend to "burn out" faster than child molesters. To make accurate predictions about Mr. Johnson's

likelihood of recidivism, he should be compared to child molesters.

6 RP 13-14.

Dr. Richards also testified to the differing recidivism patterns of rapists and child molesters. For rapists, the offenses tend to happen when they are “fairly young.” For child molesters, “there’s a big bump in the mid years, followed by a decline to age 60.” 5 RP 8.

In closing argument, the prosecutor discussed this evidence as follows:

Dr. McClung pointed out and I think Dr. Richards pointed out the rapists which are part of this group they do tend to burn out earlier. But the child molesters, they can endure because it doesn’t take much force. It doesn’t take much because being the dirty old man does allow the children to come near you, doesn’t take much effort. Look how much effort it took [Mr. Johnson] to molest the last two girls in the blackberry bushes or in the car putting his hands in their pants.

One instrument, 52 percent. Now, [defense counsel], I’m sure is going to tell you it’s bad to use the old numbers. You ought to use the new numbers. Who the heck knows, except Dr. McClung says, you know, the old numbers more child molesters in that group.

...

So when you get a pile of old – of more child molesters like him the numbers are higher what does that teach us, the rapists and what not may burnout.

7 RP 32-33.

This argument is an accurate summary of the evidence. There was testimony about two sets of norms, but no testimony about which one was more accurate. 5 RP 116-17, 167. There was testimony, however, that the comparison group used in the “old numbers” contained a higher percentage of child molesters. 6 RP 14. There was testimony that rapists “burn out” at a younger age. 6 RP 13; 5 RP 8. There was testimony that “[i]f we really care about the recidivism of Mr. Johnson, we want to compare him to similar child molesters.” 6 RP 14. In light of this testimony, the prosecutor’s argument fell within his wide latitude to express inferences from the evidence.

## **2. Argument Concerning Timing Of Re-Offense.**

Mr. Johnson next claims that the prosecutor argued facts outside the evidence. The prosecutor discussed studies dealing with recidivism among elderly offenders. He pointed out that the most dangerous offenders in these studies were never released, so they had no opportunity to recidivate. He then argued

What do we know about guys who get released? Because, again, guys with this type of history, similar thing, often are incarcerated. Don’t get out. When they do get out, what do we know? Well, we have the one research article, Dr. Hanson, remember his name. The oldest risk factors in the sample was released at age 72, Mr. Johnson’s age. Hey, how did

he do? Reconvicted for sex offenses 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 reconvicted.

7 RP 34-35.

Mr. Johnson claims that this argument related to his prior release. Brief of Appellant at 44. It did not. The prosecutor was talking about an individual in a research study who was released at age 72. That was Mr. Johnson's age at the time of trial, not at the time of his last offense. 3 RP 53.

A prosecutor can make arguments based on common sense. State v. Barrow, 60 Wn. App. 869, 874, 809 P.2d 209 (1991) (upholding argument that "anybody knows that if you don't want to get caught [dealing drugs], you don't carry more than you absolutely have to"). Any reasonably-well-informed citizen knows that conviction for a crime does not result instantly after the crime is committed. Various legal procedures have to occur in between.

With regard to Mr. Johnson, the record contains information about the amount of time between the commission of some of his offenses and his convictions for them. Ex. 3 (crime committed 8/15/92, found guilty 4/19/93, sentenced 7/9/93); ex. 4 (crime

committed 5/23/68, sentenced 9/3/68); ex. 2 (pled guilty 11/21/83, sentenced 3/9/84). The prosecutor could properly ask the jury to infer that similar delays may have occurred with the 72-year-old offender in Dr. Hanson's study. The argument was proper.

### **3. "Mischaracterization" Of Testimony Concerning Mr. Johnson's Health.**

Mr. Johnson claims that the prosecutor "mischaracterized" testimony concerning his physical condition. The prosecutor discussed the testimony of Dr. Reyes. He said that Dr. Reyes had testified that Mr. Johnson would "likely live a normal life." 4 RP 37. In fact, Dr. Reyes testified that if Mr. Johnson stopped drinking, his "liver disease will stabilize or even improve." If that happened, "he would likely live out lifespan that would be similar to somebody else without liver disease." 4 RP 28. Additionally, Mr. Griffith testified that Mr. Johnson was "functioning just fine" and "[y]ou really would not think that he was sick." 4 RP 67. The prosecutor's argument was a reasonable characterization of this testimony.

### **4. Argument Concerning Mr. Johnson's Denial Of Guilt.**

Mr. Johnson claims that the prosecutor made an argument unsupported by the record. The prosecutor stated:

The thing with [victim A.C.] also tells you he's a manipulative guy is remember what he said I think it was in his deposition that was read to you. He said at

first I denied doing it. Thought I could beat the charge. . . Later, subsequent evaluation he admitted to the evaluator that he had done it, hoped he could just beat the rap.

7 RP 39-40.

Dr. McClung had testified to the incident involving this victim:

In 1992, [Mr. Johnson] was with a woman, Ms. [C.] and her two-year-old daughter [A.]. He asked the daughter to go off with him to pick berries, they went into the woods together. And ... Mr. Johnson was found by the girl's mother kneeling in front of her with the girl's pants down. And ... her vaginal area exposed.

He told the mother that the little girl had to go to the bathroom, and that's why he was there with her. However, but the records I was reading from the time of the incident suggested that he had told another inmate that he had engaged in oral sex with the child at that time.

3 RP 41. In his deposition in 1998, Mr. Johnson denied sexually abusing this girl. 6 RP 81-84. In his trial testimony, however, he admitted that Dr. McClung's description of this offense was accurate. 3 RP 46-47.

This evidence supports the prosecutor's argument. Mr. Johnson did initially deny this offense, before ultimately admitting it. Although Mr. Johnson did not expressly say that he tried to "beat the rap," the jury could infer that this was the objective of his false denial.

## 5. Argument Concerning Possibility Of Future Offenses.

Finally, Mr. Johnson claimed that the prosecutor improperly appealed to passion and prejudice. The prosecutor argued:

If you find that we haven't proven this thing, he gets unconditionally released. Unconditional. He can go to the park. He can give kids candy. He can take them for rides. Take them in the bushes.

7 RP 40. The circumstances described in this argument are those in which Mr. Johnson molested some of his victims. 3 RP 37-38, 41.

In an ordinary criminal case, it is improper for a prosecutor to refer in argument to the possibility that the defendant will commit future crimes. See, e.g., State v. Kroll, 87 Wn.2d 829, 835-36, 558 P.2d 173 (1977). Such an argument is, however, proper if the defendant's dangerousness is an issue in the case. For example, a jury is entitled to consider a defendant's dangerousness in deciding whether to impose the death penalty. Consequently, the prosecutor may argue the possibility that the defendant will commit further crimes, if that argument is supported by the evidence. Campbell v. Kincheloe, 829 F.2d 1453, 1457-58 (9<sup>th</sup> Cir. 1987), cert. denied, 488 US. 948, 109 S. Ct. 380, 102 L. Ed. 2d 369 (1988); see State v. Buttry, 199 Wash. 228, 251-52, 90 P.2d 1026 (1939).

In the present case, Mr. Johnson's dangerousness was the primary issue in the case. It was therefore proper for the prosecutor to argue that Mr. Johnson was likely to commit more crimes if released. The prosecutor also needed to explain the conditions under which Mr. Johnson's dangerousness had to be evaluated. An expert witness had testified that Mr. Johnson should have limited access to minors. 5 RP 97. There was, however, no legal basis for imposing such a restriction, absent a jury finding that the defendant was likely to commit further crimes. The issue was not whether the defendant was likely to commit more crimes if released under appropriate conditions, but whether he was likely to commit more crimes if released unconditionally. The prosecutor was entitled to point this out to the jury. Such an argument was not an improper appeal to passion or prejudice.

**IV. CONCLUSION**

The order determining that Mr. Johnson is a sexually violent predator and remanding him to the Special Commitment Center should be affirmed.

Respectfully submitted on February 4, 2010.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:

A handwritten signature in black ink, appearing to read 'Paul Stern', written over a horizontal line.

PAUL STERN, WSBA # 14199  
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