

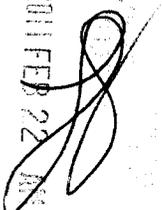
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No. 63732-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
 DIVISION I

IN RE THE DETENTION OF RANDY TOWN

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STATE'S RESPONSE BRIEF

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ORIGINAL

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I. INTRODUCTION

Randy Town is a prolific pedophile who focuses on young boys and infants. He offended for nearly 25 years without being detected. He continued to offend even though it cost him his friends, his family, and eventually, his freedom. On appeal, he over claims the record to argue that the State's expert, Dr. Phenix, somehow vouched for the State's filing standards by disclosing her balanced record of making positive and negative findings in SVP cases. Despite overwhelming evidence that Town continued to reoffend even when facing prison, Town claims that being allowed to present extensive evidence of a recent overt act filing (beyond what is allowed by current law) would have somehow changed the trial outcome. Because neither claim is sufficient to disturb the jury's verdict, this court should affirm Town's order of civil commitment.

II. ISSUES

- A. Did the trial court abuse its discretion by allowing the State to inform the jury of Dr. Phenix's unbiased record after the defense opened the door with similar testimony from the defense expert?
- B. Did the trial court abuse its discretion by excluding evidence of a recent overt act, beyond testimony from Town on his own motivation to reoffend, and if so, was any error harmless?

III. FACTS

A. PROCEDURAL HISTORY

On October 23, 2007, pursuant to RCW 71.09, the State filed a Sexually Violent Predator Petition against the Appellant, Randy Town. CP 1-2, 52-54. Prior to filing the petition on November 5, 2006, Town was evaluated by the State's expert, Amy Phenix, PhD. In her report, Dr. Phenix opined that Town met the criteria for RCW 71.09 commitment. CP 4-45.

Town motioned pretrial that he be allowed to testify that if released into the community the State's ability to file another SVP petition if he committed a Recent Overt Act (ROA) was a method of intervention or motivation not to reoffend. CP 99-102. As part of his motion Town never indicated that an ROA was remotely significant in reducing his risk of reoffense. *Id.* His motivation, according to the motion was premised on his identification of his offense cycle. CP 101.

Following trial, a jury of Town's peers found that he met the commitment criteria beyond a reasonable doubt. Consequently, he was committed to the Department of Social and Health Services. CP 599, Supp. CP 601.

B. SUBSTANTIVE FACTS

Town's relevant sexual history began between the ages of six and eleven. In a 1989 interview with Marsha Macy, he reported that his first memory of sexual contact with a minor occurred during this period in his life when he touched the sexual organs of a girl, Karen, who was between two and seven years old. 5RP 1074-1075.

At age 18, while involved in an intimate relationship with his 16 year old girlfriend, Town, in the presence of his girlfriend and another teenage couple, pulled down an eight or nine year old boy's pants and exposed his penis. 8RP 76 -77. Town then picked up the boy, named Johnny, hoisted him up onto his shoulders and asked whether anyone wanted to suck the young boy's penis. *Id.* at 78. When his friends declined, Town took the boy into a bedroom and fondled him. *Id.* at 78-79.

According to Town, his first offending against minors as an adult commenced when he was about twenty-two. He recalled that he performed oral sex on a friend's three-year-old son. The abuse, which spanned some one-and-a-half years, occurred daily and progressed to mutual masturbation and an attempt at digital-anal penetration. 5RP 1076-1077. Town says he molested the boy simply because the boy was there. 9RP 1862. Later, when the boy was about four years of age, Town

victimized his three year old sister as well. He recalls the little girl watched as he molested her brother. She then asked him to do that to her as well, and he obliged. 9RP 1867.

Town recounted sexually abusing numerous victims, ranging in age from three months to ten years old. CP 21-27; 5RP 1077-1085. Town admits to sexually abusing 50 to 100 children. 6RP 1229. Although he has a particularly strong deviant attraction to prepubescent boys, his victims also included minor girls, infants and babies. CP 21-27; 5RP 1077-1085, 6RP 1282.

Town himself does not dispute that he is a child molester. At trial, he acknowledged that he has been one for approximately thirty years. 8RP 62. For twenty five of those years, however, Town was never accused, confronted or investigated by the authorities about sexually abusing children until the night he babysat his three year old godson, Noah, the son of his best friend, John Baird. 4RP 758, 760, 773, 6RP 1228 - 30.

On October 19, 1995, as Town sat on the couch watching television with the three year old boy, he put his hand on Noah's crotch, above his clothing, and rubbed his penis. 8RP 47. Town asked Noah if it felt good. When Noah said it did feel good, Town pulled the boy's training pants down and continued to masturbate him. *Id.* Town then tried to orally copulate the little boy but as his tongue touched Noah's penis the

boy backed away and said, "No." *Id.* Town stopped. But, later that evening, when Town put Noah to bed, Town exposed himself to Noah and had Noah masturbate him. *Id.* at 48.

When Kelli and John Baird learned what Town had done to their son, they did what they thought was the compassionate thing to do for their friend. They told him to get treatment. If he did not get treatment, they told him, they would call the police. 4RP 763-765. The Bairds even referred Town to someone with whom they had spoken with about what he had done to their son. 4RP 766. Town enrolled in drug and alcohol treatment instead of sex offender treatment, however. After attending a few classes, he quit. *Id.* at 767. When John Baird confronted him about dropping out of treatment, Town laughed at him. Mr. Baird felt that Town was behaving as if they whole thing was a joke because the Bairds were not going to do anything to him. *Id.* at 788. He was wrong.

The Bairds did call the police and Town was arrested by Deputy Juchmes on January 18, 1986. 8RP 44. At the time of his arrest, Town confessed to a long history of undetected sexual offending. 48. When Town was 22 years of age he moved in with a family and he molested their five year old son almost everyday for approximately nine months. 8RP 49. He molested a nine year old boy at a house that he was helping his brother roof. *Id.* He confessed to molesting over 50 children at the Christian Faith

Center where he worked as a Sunday school teacher in 1981. *Id.* at 50. In 1983, Town molested the four year old daughter of a friend of his that lived in Seattle on at least five occasions. *Id.* at 50-51. He would make her rub his penis and he would push his penis against her vagina. *Id.* at 50. During the summer of 1985, just a few months before molesting his three year old godson, Town lived with friends in Tacoma and repeatedly molested their five year old son. *Id.* at 51.

On February 6, 1986, Town entered a guilty plea to one count of first degree statutory rape for sexually assaulting Noah and received a thirty-one month sentence. CP 8, 47-51. He was released from custody on November 15, 1987, and discharged from supervision on June 9, 1989. CP 8-9. Just three months later, after going to Sears to buy a shower curtain, Town was charged with Indecent Exposure. 9RP 1922.

As Town entered the Sears store that day, a ten to twelve year old, slim-built blonde boy playing a video game immediately caught his eye. 9RP 1923. Town says there was nothing else about the boy, except that he was just there, that caused Town to reach into his sweatpants and masturbate in the store aisle – despite the fact that he knew there were security cameras above him. *Id.* at 1925. Town pleaded guilty to Indecent Exposure and was court-ordered to undergo one year of sexual deviancy treatment. CP 10.

As part of the court-ordered sexual deviancy treatment, Town had to first submit to an intensive interview with his treatment provider, Marsha Macy. It was during this evaluation process that he revealed his extreme history of sexually offending minor children, beyond that which that he had previously confessed when arrested by Deputy Juchmes. CP 11; 5RP 1074-1094.

Town's victims were usually the young children of friends or family members. 5RP 1076, 1078-79. Some of his victims were infants. Jessie Pelligrini was a 3 to four month old infant when Town sucked his penis and put his finger into the baby's anus. 9RP 1903. TJ, or Teddy, Pelligrini was only six months old when Town sucked his penis. 9RP 1892. Town became so sexually aroused while changing Teddy's diaper he was about to penetrate the infant's anus with his penis when the parents came home. 9RP 1892. While babysitting a nine month old girl, Town fed her his penis instead of a bottle. 6RP 1232. Her natural instinct was to suck. *Id.*

Some of Town's victims were his brothers' young children. At age 21, Town sexually assaulted his seven year old niece, Heather. 9RP 1869. Heather is the daughter of his brother Jim. *Id.* He victimized her, he said, because she just happened to be there. *Id.* at 1870.

At age 27, Town repeatedly sexually assaulted another of Jim's children, Chris Town. 9RP 1880. At age 28, Town sexually assaulted his three year old nephew, Brent. *Id.* at 1882. Brent is the son of Town's other brother, Kurt. *Id.* at 1882.

While some of his sexual assaults victims were single contacts, others were ongoing, lasting several months to over a year. 5RP 1076-77. He raped three year old Curtis Hora daily for a year and half. 6RP 1230. He again acknowledged that as a Sunday school teacher at the Christian Faith Center for approximately six to nine months, he sexually victimized over 50 children. 9RP 1872. Town testified that he would often victimize more than one child each Sunday. *Id.* at 1878. Sometimes, he would sexually victimize the four or five boys at a time. *Id.* Town cannot recall a Sunday during those six to nine months that he did not sexually assault a child. *Id.* at 1879.

Town's fear of getting caught was subdued, he explained, because he felt three to six year olds were less likely to report the abuse. 9RP 1878. Even if they did tell, Town could find a way to justify it, shrug it off and move on. *Id.* at 1879. When his sister-in-law confronted him about sexually assaulting Chris, he says he denied whatever she accused him of and probably accused Chris of lying. *Id.* at 1881

Town brazenly victimized the young children of his friends and family. He fondled four year old Andrew's penis while he played cards with the boy's mother, father, and thirteen brothers and sisters. 9RP 1893. Despite the large number of people around Town, he was not afraid of getting caught because he "didn't think that anyone was going to see what I was doing. . . ." *Id.* at 1894. While watching television with the same family, Town put his hands down Andrew's pants, fondled his penis, gave the boy an erection, and no one ever noticed. *Id.* at 1895.

Town also took Andrew into the trailer that he was living in while staying with the family. He carried him into the bedroom, laid him on the bed, put his knees up, pressed his legs apart and sucked and licked his penis. *Id.* at 1895. Town tried to sodomize the young boy but stopped because he did not have any Vaseline. *Id.* at 1895-96

Town confessed to a host of other deviant behaviors, including peeping at boys in bathrooms and shower stalls, exhibitionism, fantasizing about boys and using magazine photographs and television images as stimuli to masturbate. 5RP 1091, 1104. Town reported to Ms. Macy that at age 28, he masturbated his cat. 9RP 1914. After the cat was hit by a car and killed, Town got a dog. 9RP 1915. Town performed oral sex on the dog. *Id.* He put his finger in the dog's anus and, after putting Vaseline around the dog's anus, he tried to have anal sex with the dog, but was

unsuccessful. *Id.* When asked to explain how or why he attempted to have sex with animals, Town says he was looking for a sexual outlet and wanted to do something different. The animals were just what happened to be there. 9RP 1916

While on probation for Indecent Exposure, Town, on at least four occasions over a period of one to two months, walked around his neighborhood masturbating in nothing more than a t-shirt. 8RP 85 - 86. Town admits he knew this was a violation of his probation but did it anyway and never reported it until going to see Marsha Macy months later. 8RP 87.

Town also disclosed to Marsha Macy, perhaps not realizing the consequences, that in 1983 at age 30 and prior to sexually assaulting Noah Baird, he repeatedly sexually assaulted five-year-old Cassidy. 9RP 1887. Cassidy was the oldest daughter of the Pelligrini family, whom he met through church (where he had molested over 50 children). *Id.* For six months, Town repeatedly exposed himself and masturbated in front of the five year old. *Id.* at 1888 – 89. Town would lie on top of her, naked, pushing his penis up against her clad vagina. *Id.* On at least one occasion, Town pushed her underwear to the side and licked her vagina. 7RP 57, 60. He also made Cassidy sit on his lap when he was naked as well. 9RP at 1899. He says that he pushed his penis between her legs while she pushed

his penis with her hand. *Id.* at 1889. He says she liked it. Ex. 161 p. RLT000241.

During the same six months, Town also repeatedly sexually assaulted Cassidy's six month old infant brother, Teddy. According to Town, every time he was alone with Teddy and Cassidy and while Cassidy watched, he sucked the infant's penis. 7RP 72, 9RP 1992.

When interviewed by Detective Quaade of the King County Sheriff Office on February 16, 1990, Town acknowledged that licking Cassidy's vagina was, indeed, a rape. 7RP 54, 63. But, because he did not have sexual intercourse with her he did nothing that caused her physical harm or pain and she never had any reason to scream. 7RP 63.

Town returned to the Pelligrini home in December 1985 and lived with them until January 1986, when he was arrested for molesting Noah Baird. 7RP 69-70, 9 RP1903. Town admits that after sexually assaulting Noah Baird and promising the Bairds that he would get treatment instead of being prosecuted, he sexually assaulted Jessie Pelligrini, Cassidy's youngest brother. 7RP 69-70, 9RP 1906. Like his brother Teddy, Jessie was just six months old when, during December 1985, Town sucked the infant's penis and put his finger in his anus. 7RP 69-70.

Mandated by law to report these disclosures, Ms. Macy contacted Child Protective Services, the police, and the King County Prosecutor's

Office. 5RP 1101-02. These disclosures led to Town entering guilty pleas to two counts of first degree statutory rape in 1990. He received an exceptional sentence of three hundred months confinement. CP 11-13, 52-57, 65.

While serving his sentence, Town had numerous sexual encounters with anywhere from six to eight inmates, two of which were his cellmates. 9RP 1916 - 17. Town readily admits he knew sex with inmates was against the rules and even received two violations for doing so. *Id.* at 1918.

During his prison sentence, Town entered into the Sex Offender Treatment Program (SOTP) in 2005 after failing to get in 1990 and again in 1994, largely due to the lack of available resources. CP 6-7, 4RP 809, 828, 846-847; 5RP 957-57. However, barely two months into SOTP, Town masturbated multiple times to images of children during a one week period. 9RP 1837. He acknowledged at trial, that contrary to treatment directives, he did not report these masturbatory violations as they occurred. *Id.* This type of treatment violation was not confined to just the SOTP.

In early 2007, while awaiting trial on the Sexually Violent Predator petition at the Special Commitment Center, Town entered into yet another sexual deviancy treatment program. Despite having learned by now of his offense cycle, his sexual deviancy triggers and intervention techniques,

Town once again masturbated to images of children on approximately two occasions. 9RP 1838-89. Like before, in direct violation of treatment protocols, Town failed to notify his treatment provider and counseling groups of his violations as they occurred. *Id.*

Town also failed to comply with another important recommendation of his pre-trial treatment: the maintenance of an arousal log. Despite acknowledging the treatment value of maintaining such a log, Town conceded that he declined to keep one. He explained that he was "focusing on other assignments." 9RP 1845. Besides, Town reasoned, if he kept such a log, its contents would very likely be used against him in a Sexually Violent Predator trial. 9RP 1845-46.

Town also admitted to having sex with a resident at the SCC. 9RP 1918. The sexual encounters occurred for a period two weeks, within the year of his June 2009 commitment trial. *Id.* Town, again, admits knowing that sex with residents is a violation of the institutional rules. *Id.*

Dr. Amy Phenix testified at trial that Town suffered from the mental abnormality of pedophilia, sexually attracted to males and females, non-exclusive type. Town's expert, Dr. Brian Abbott, agreed. CP 34; 6RP 1186-87; 12RP 2108. Dr. Phenix also testified that the Town suffered from three additional paraphilias - voyeurism, exhibitionism, and

frotteurism, as well as alcohol and cannabis dependence. CP 34; 6RP 1186-87.

Dr. Phenix opined that Town's diagnosed abnormalities caused him serious difficulty in controlling his sexually violent behavior. Her opinions were based on Town's lengthy history of offending, his inability to control his sexual deviance even after being caught by friends and/or family members and afforded many second chances in lieu of prosecution. 6RP 1296-97. Town, according to Dr. Phenix, was always under the treat of getting caught, but because he was not caught for more than 95 percent of his offending, it reinforced the idea that he would not get caught. 6RP 1300.

Her opinions were also based on Dr. Phenix, Town's inability to control his behavior in high risk/high detection or high visibility situations (Sears Department store), his failures during custodial treatment, his statements about the difficulties he experienced trying to maintain control over his behavior, and his relevantly recent masturbation to images of children while in custodial treatment. 6RP 1242, 1296-1302.

Dr. Abbott disagreed. 12RP 2126-27. Although he conceded that Town continues to suffer from deviant urges or thoughts about prepubescent children, Dr. Abbott believed Town is able to control them despite all the evidence to the contrary. *Id.*

Based, in part, on statistical analyses of the actuarials, Dr. Phenix further opined that Town was more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility. 7RP 47. Specifically, Dr. Phenix testified that on the Static-99, Town scored a 6, which equated to 16.7 to 37.3 percent probability of sexual re-offense over a ten year period. 6RP 1340. According to Dr. Phenix, the Static-99R is of only limited use in this case because the actuarial does not take into account the frequency of Town's sexual offending. 6RP 1341. Nor does it take into account the duration of his offending or the large number of victims. *Id.* The Static-99 only takes into account four victims out of the possible 100 or more victims. *Id.*

On the Static-2002, Town scored a 7 resulting in a 13.3 to 32.1 percent of re-offense in a ten year period. 7RP 13. It is Dr Phenix's experienced opinion that this instrument also underestimates Town's risk of reoffense. *Id.* .

Dr. Phenix scored Town as a 9 on the MnSOST-R 6RP 19. She explained that because Town does not have any community supervision remaining should he be released she used the high risk probabilities in determining Town had a 57 percent risk of reoffense over a six year period. 7RP 17-20. According to Dr. Phenix, those offenders that do not have supervision can stay under the radar. 7RP 22. In Mr. Town's case,

Dr. Phenix felt she absolutely had to consider the fact that most of his sex offending was undetected. 7RP 23.

Dr. Phenix scored Town as a 12 on the SORAG, which associates with a 59 percent probability of being rearrested for a sexual offense. 7RP 27.

However, Dr. Phenix's opinion was not based solely on the actuarial assessments. Her overall opinion regarding risk was also based on individual case factors. 7RP 22. In Mr. Town's case, he has more extreme sexual deviance than the sample populations in the actuarial instruments. *Id.* He has a greater number of undetected victims than most cases that she has evaluated. *Id.* at 23. She concluded beyond a reasonable doubt that his risk of re-offending was over 50 percent. 7RP 47.

Prior to trial, Town moved in limine to preclude Dr. Phenix from testifying regarding Washington's filing standards because it amounts to "vouching." 2RP 115-16, 182-85. The State agreed it would not introduce testimony regarding the prosecutor's filing standards through its expert. 2RP 115. The court then granted this motion. However, further argument continued regarding Town's belief that the court's ruling also precluded Dr. Phenix from testifying that, in evaluating his risk, she considered the fact that Town had been referred for an SVP evaluation. *Id.* The court ruled that this testimony is not about the State's filing standards and is therefore,

not vouching. 2RP 182. The court cautioned the State that before it deems this testimony admissible, it must lay proper foundation for this testimony. *Id.*

The State followed the court's directive throughout Dr. Phenix's testimony. However, within a minute of taking the stand, Town's counsel asked his expert questions that directly violated the court's order: 12RP 2079-80.

Q. All right. Let's get down to it. How many total of psychological evaluations have you performed?

...

Q. On whose behalf did you perform those evaluations?

Q. What sort of psychological evaluations have you done for defense attorneys?

...

Q. How many of those some 1400 evaluations that you have done in the past involved evaluating sex offenders I am not talking about SVP cases, but all cases

...

Q. How many of them were involved in evaluating the sex offenders for civil commitment proceedings?

12RP 2082-83. Dr. Abbott also testified that:

Generally, I do an all cases that I initially accept, I will do a document review to look at, are there any issues where I might be helpful in evaluating the client? Probably in about 25 to 30 percent of the cases that I review, I find that I would not disagree with the State evaluator opinion, in those cases there is really no reason for me to move to the full evaluation of the Respondent in those types of situation.

12RP 2100. The court noted that these were the exact questions it refused to allow the State to ask Dr. Phenix, because it was considered "vouching." 12RP 2117 - 2119. The court stated that its ruling "couldn't have been more clear" and ruled that by introducing the testimony Town has now opened the door to the testimony that it had previously excluded. 12 RP 2165.

Dr. Phenix returned to the stand in rebuttal to address the testimony that had previously been precluded. 13RP 2370-2381. She testified that the Department of Corrections requested that she evaluate Mr. Town. 13RP 2380. She testified that she has conducted 300 SVP evaluations since November 1995 and 37 of those have been in Washington. *Id.* Of the 300 evaluations she has conducted she determined less than 50 percent met SVP criteria. Of the Washington cases, 80 percent would meet criteria. *Id.* at 2381.

IV. LEGAL ARGUMENT

A. TOWN OVERCLAIMS THE RECORD WITH HIS CLAIM THAT DR. PHENIX "VOUCHED" FOR THE PROSECUTION'S FILING DECISIONS

After Town violated his own motion in limine by soliciting testimony from the defense expert regarding the expert's record of positive or negative SVP findings, the court allowed the State to elicit similar

testimony from Dr. Phenix. Making a number of broad claims, Town challenges the trial court's decision to admit Dr. Phenix's testimony.

At the outset, it is important to note that Town must overcome a highly deferential standard of review before he can prevail on appeal. A trial court's ruling on the admissibility of evidence is subject to the “abuse of discretion” standard. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Similarly, the decision to grant or deny a motion for a mistrial is reviewed for abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

A trial court abuses only its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 p.2d 775 (1971). Importantly, abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97 935 P.2d 1353 (1997). To state it more positively, a trial judge does not abuse his or her discretion when the decision falls within the broad range of decisions that any reasonable trial judge might adopt. “[T]he trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did.” *State v. Thomas*, 150 Wash.2d 821, 856, 83 P.3d 970 (2004).

The challenged testimony on Dr. Phenix's record of positive or negative SVP findings, which is fairly routine in any case involving the credibility of expert witnesses, allows a jury to weigh the expert's impartiality. In other words, does the expert always find that the SVP respondent meets criteria, or does the expert offer a balanced approach depending on the facts of the case? An expert who always finds that a person meets criteria for civil commitment, or always finds that a person doesn't meet criteria, is problematic.

In explaining her role in the Town case, Dr. Phenix testified that she was initially retained by the Department of Corrections. RP 13 at 2379. There was no expectation that she would find Town to meet criteria for civil commitment, but only that she offer "an independent opinion." *Id.* at 2380. She testified that she had completed 300 SVP evaluations, including 30 in Washington. *Id.*

The prosecutor asked Dr. Phenix to explain, of the 300, how many met criteria. The defense attorney objected, but only because he felt the question was "outside the scope" of his prior examination of Dr. Phenix. *Id.* Dr. Phenix pointed out that she finds "a little under 50 percent" satisfy the criteria for civil commitment. *Id.* at 2381.

She was asked about her record with regard to Washington cases. *Id.* The defense stated only "standing objection," which was again over

ruled. *Id.* Dr. Phenix testified that she "found about 80 percent of those cases would be positive and . . . 20 [percent] I did not recommend for commitment." *Id.* She pointed out that she had also testified on behalf of the defense in about 30 percent of her cases over the past few years. *Id.*

Given this testimony, Town's claim on appeal is puzzling. Citing the fact that Dr. Phenix tends to have a less balanced record in Washington (80% v. less than 50%), he broadly claims that:

this testimony had the effect of bolstering the State's case against Town by having its own expert vouch for the prosecutor's decision to seek the civil commitment of Town. This unfairly threw the prestige of the prosecutor's office into the mix of evidence for the jury's consideration.

Opening Brief at 17.

Town's argument in this regard is neither logical, nor supported by the record. First, the passages detailed above from which Town gathers his broad pronouncement do not mention the prosecutor. To the contrary, Dr. Phenix pointed out that the Department of Corrections retained her in the current case.¹ It is hard to conceive how any reasonable jury would construe this testimony as placing the "prestige of the prosecutor's office into the mix." There is no actual or apparent connection between Dr. Phenix and the "prestige of the prosecutor's office." The record is limited

¹ DOC undertook this function on behalf of the Joint Forensic Unit, which is an interlocal agreement between DOC and DSHS. The prosecutor is not a signatory to this interlocal agreement.

to what the jury actually heard, which fails to support the exceedingly broad inference claimed by Town on appeal.

Second, the 80% testimony is hardly favorable to either Dr. Phenix or the position of the State. If anything, the most natural inference logically drawn from this testimony is that Dr. Phenix is less fair and even-handed in her Washington practice.² Town has no argument that this passage somehow prejudiced his case.

Town's claim that this testimony violated "three of Town's motions in limine" finds a similar lack of support in the record.³ First, he cannot claim any violation related to testimony on Dr. Phenix's record of positive or negative findings. As Town admits on appeal, "[a]t trial, in the course of establishing Abbot [the retained defense expert] as an expert, Town's counsel *opened the door to the information regarding the number of times [Dr.] Phenix does or does not recommend commitment.*" Opening Brief at

² It is worth noting that the prosecutor did not address the reasons that Dr. Phenix has a higher positive opinion percentage in Washington than in other jurisdictions. Unlike many other jurisdictions, Washington has a more rigorous screening procedure and files civil commitment cases against a smaller percentage of sex offenders. *See generally* CP 87 (Dr. Phenix's deposition).

³ The general objection offered by defense counsel "of beyond the scope" was not sufficient to preserve the broad objections claimed on appeal. Objections must be made at the time the evidence is offered. *State v. Davis*, 141 Wash.2d 798, 850, 10 P.3d 977 (2000). Objections raised during motions *in limine* are not sufficient to preserve the error for appeal, even in cases where the court issues tentative pre-trial rulings. *Eagle*

18 (emphasis added). It is well-established that the prosecution is allowed greater latitude when responding to defense actions that open a previously barred door. *See State v. Prado*, 144 Wash.App. 227, 252, 181 P.3d 901, 914 (2008) ("Otherwise improper remarks are not grounds for reversal when they are invited, provoked, or occasioned by defense counsel, and when the comments are in response to counsel's acts or statements, unless they go beyond the scope of an appropriate response.").

Although the trial court likely erred in its initial decision to exclude this relevant evidence, it does not matter because Town clearly opened the door by eliciting the same testimony from his own expert. Town cannot simultaneously illicit testimony from his own expert in violation of his own motion in limine and then insist that the motion be enforced against the State.

His further claim that Dr. Phenix's testimony violated his motion in limine precluding "vouching of the State's filing standards by [Dr.] Phenix." lacks any record support. Opening Brief at 18. Town acknowledges that he made this motion fearing that Dr. Phenix, as she did in her deposition when questioned by the defense, would explain Washington's more rigorous screening and filing standards. *Id.* Her deposition, however, was never entered into evidence in the civil

Group v. Pullen, 114 Wash. App. 409, 416-17, 58 P.3d 292 (2003). The

commitment trial. The testimony that was offered to the jury mentions neither Washington's rigorous screening process or its heightened filing standards. Town cannot claim error on appeal based on deposition materials that the jury never heard from Dr. Phenix.

Finally, Town claims that Dr. Phenix's testimony violated Town's motion to preclude her from testifying about Washington's filing standard as a factor in classifying Town's risk. Opening Brief at 18. None of the testimony challenged by Town remotely contains the claim that Dr. Phenix based her opinion of Town's danger on the fact of his referral. To the contrary, she offered detailed testimony citing various actuarial instruments, other research and her clinical judgment in determining that Town was more likely than not to reoffend.

Even if Town had the record to support his claim that Dr. Phenix somehow vouched for the State's civil commitment filing decisions,⁴ any error would be harmless. The civil commitment case against Town was overwhelming. The testimony from Dr. Phenix that she found for civil commitment a higher percentage of the time in Washington, without the explanation offered in her deposition, carries the more natural inference that she is somehow more biased or less careful in Washington cases.

objection must be raised at the time the evidence is offered. *Id.* at 417.
4 With no support in the record, his citation to cases like *State v. Susan*, 152 Wn. 365, 278 P. 149 (1929) is inapposite.

Such an inference harms the State's case and does not help it. Thus, any error would not have prejudiced Town, which explains why his trial attorney determined not to ask any follow-up questions of Dr. Phenix. RP 13 at 2383.

The trial court properly exercised its discretion and should be affirmed on this issue.

B. ANY ERROR IN REFUSING ADMISSION OF OVERLY BROAD TESTIMONY REGARDING RECENT OVERT ACTS WAS HARMLESS

At the time of trial, this court's decisions in *State v. Harris*, 141 Wn.App. 673, 174 P.3d 1171 (2001) and *In re Post*, 145 Wn. App. 728, 753, 187 P.3d 803 (2008) precluded admission of evidence regarding the prospect of a speculative "recent overt act" filing at some time in the future. On review of *Post*, the Washington Supreme Court rejected a blanket rule against admission of such testimony, but indicated that trial court's were free to exercise their discretion in deciding whether to admit testimony on this topic. *In re Post*, ___ Wn.2d ___, 241 P.3d 1234 (2010). Here, the trial court did not abuse its discretion. In the alternative, any abuse of discretion in refusing the testimony was harmless error.

1. The Trial Court Did Not Abuse Its Discretion in Rejecting Testimony on Recent Overt Acts

Town argues that the trial court erred by not allowing broad admission of evidence surrounding a potential recent overt act filing at some point in the future should be detected engaging in seriously disturbing behavior in the community. Town reads the Supreme Court's decision in *Post* beyond its single point that the possibility of a recent overt act filing has "some relevance" to Town's personal motivation not to reoffend. Nothing in *Post* grants Town a license to produce extensive evidence claiming the prospect of a future recent overt act filing as an alternative to civil commitment, especially because this type of evidence would violate ER 403 (a matter specifically reserved by the *Post* majority) and invites jury nullification. Here, the trial court did not err by excluding evidence of recent overt acts because there was no proposed evidence -- in the form of an offer of proof -- that Town was at all concerned with a future recent overt act when it came to his motivations to avoid reoffense.

With the case already returning for remand proceedings, the Supreme Court determined that the *Post* trial court erred by refusing the SVP respondent's recent overt act testimony as a matter of law and without a balancing analysis under ER 403.5 In *Post*, the SVP respondent

⁵ A remand is not necessary in the current case because this court can directly examine the record to determine if the trial court abused its

challenged the trial court's "exclusion of evidence that Post could be subject to a new SVP commitment petition if he committed a recent overt act." 241 P.3d at 1241. The trial court had rejected Post's testimony on this subject because it was "hypothetical evidence" that lacked legal relevance under the statute. *Id.* at 1242. Under the terms of RCW 71.09.060, it was not a placement condition that "would exist" for Post.

The Supreme Court disagreed. It held that "[e]vidence that a respondent in an SVP proceeding who is subsequently released could be subject to another SVP proceeding if he commits a recent over act is relevant and is a condition that would exist upon placement in the community." *Id.* In determining the possibility of legal relevance, the court exclusively cited that "*Post's knowledge of the consequences for engaging in such conduct* may well serve as a deterrent to such conduct and, therefore, has some tendency to diminish the likelihood of his committing another predatory act of sexual violence." *Id.* (emphasis added). Thus, the sole theoretical relevance of recent overt act testimony was in the SVP respondent's motivation to avoid reoffense; the relevance was not strong as the testimony had only "some tendency" to inform the question of future risk. *Id.*

discretion.

Against the marginal relevance of the SVP respondent's claim that a potential future recent overt act would decrease his motivation to reoffend, the court emphasized that the testimony might well be inadmissible in most cases:

We do not decide whether the evidence was admissible, we merely correct the Court of Appeals' misapprehension and hold that the evidence is relevant and does not violate RCW 71.09.060(1). *ER 403 issues are best addressed in the first instance by the trial court, subject to review for abuse of discretion.*

Id. (emphasis added). Even in Mr. Post's own case, the testimony is admissible only with an ER 403 analysis that weights the prejudicial effect against the marginal ("some tendency") relevance of the proposed evidence.

Although the majority chose not to address the obvious ER 403 issues with such speculative testimony, Chief Justice Madsen did proceed to answer this question in her concurrence. The Chief Justice noted that "[b]ecause its potential to confuse and mislead the jury far outweighs its probative value, this evidence is inadmissible under Evidence Rule (ER) 403." 241 P.3d at 1243 . In accord with the majority's view, the Chief Justice points out that "[t]he probative value of this evidence is limited at best." *Id.* The Chief Justice further observes that: "the State's ability to bring such a petition is contingent on the State's detection of the 'recent overt act.' Because sex offenses often take place out of the public eye,

with no eyewitnesses, it is not at all clear that Post would be caught if he committed such an act upon release." *Id.* at 1244. In addressing the ER 403 issue that the majority was silent upon, the Chief Justice concludes that "evidence of the State's ability to bring a new SVP petition should Post commit a "recent overt act" has little bearing on his likelihood of reoffending, and it would lead to a substantial risk of confusing or misleading the jury." *Id.* at 1244-45.

The comments of the Chief Justice, while not binding authority, present valuable guidance against admission of recent overt act evidence due to ER 403 concerns. This court should follow the reasoning of Chief Justice Madsen.

The evidence proposed in Town's appellate brief goes beyond Town's personal motivations. Instead, Town appears to envision a broad collateral proceeding where he presents evidence from witnesses representing entities like the Department of Corrections, treatment providers, the police, community neighbors, etc. in order to bolster his claimed fear of committing a recent overt act. The State then presents similarly broad evidence demonstrating that the recent overt act doctrine is an uncertain and rarely utilized means of detaining sex offenders in the community. Because such collateral evidence goes well-beyond the

marginal relevance of testimony regarding his personal motivations, it is plainly inadmissible under ER 403.

Whereas the *Post* decision recognizes limited relevance in the SVP respondent's own testimony regarding the role of recent overt acts in decreasing his likelihood of reoffense, the decision nowhere authorizes an SVP respondent to bolster his motivation with collateral evidence from the prosecutor and others on the topic. Under ER 403, this court should not allow a side trial where respondent calls additional witnesses from DOC, the police, etc. to bolster his claims of fear and the State is forced to call witnesses demonstrating that the recent overt act provision is an uncertain deterrent. The only testimony necessary (or relevant) to support an SVP respondent's *own* motivation not to reoffend is his own testimony.

Further, any effort to present detailed testimony on the recent overt act process is merely a thinly veiled attempt at jury nullification. By presenting testimony of a recent overt act as an alternative to immediate civil commitment, Town seeks to argue that he need not be committed now because he can be committed later through the initiation of recent overt act proceedings. This is an improper argument.

The record in this case is important. There was no offer of proof that Town was personally motivated in any way by the prospect of a recent overt act filing. His attorney pointed out on several occasions that he

would not reoffend because he feared *criminal* incarceration. 2 RP 241-42. Although his attorney posits that his client *might* also fear a recent overt act, there is no offer of testimony from his client on this point. *Id.* Indeed, the defense did not even list Town as a potential witness in the case. CP 73-74. There is no testimony from Town in the record, from his deposition or otherwise, suggesting that the prospect of a recent overt act filing matters to him, or creates in him a motivation to avoid reoffense. *See also* CP 100-102 (setting out proposed recent overt act evidence). By failing to include Town on its witness list or making an offer of proof regarding Town's motivation not to reoffend due to the prospect of a recent overt act filing, Town has failed to preserve this issue for appeal. *See Saldivar v. Momah*, 145 Wash.App. 365, 400-401, 186 P.3d 1117, 1136 (2008) ("Because the Saldivars failed to make an offer of proof at the trial that she would have so testified, they did not properly preserve the issue for appeal.").

Rather than limit its evidence to Town's motivation not to reoffend due to the possibility of a recent overt act filing at sometime in the future (evidence that apparently was not available to the defense), on appeal, Town proposes that the trial court should have allowed him "to present evidence of the State's ability, should the jury find hew was not subject to civil commitment, to intervene and incarcerate Town if he were to commit

a "recent overt act." Supp. Brief at 2. This same broad evidence of "the State's ability to intervene and incarcerate Mr. Town if he commits a 'recent overt act'" was also proposed below. CP 100-102. Such evidence is clearly beyond the scope of the narrow *potential* relevance recognized in the Supreme Court's *Post* decision.

The evidence Town proposes on appeal and below goes well beyond addressing Town's personal motivation not to re-offend and progresses to the point of providing an alternative scenario to commitment. This is simply an argument for jury nullification. Certainly, if it is not proper for the prosecutor to offer commitment and eventual conditional release as a "better option" than unconditional release at the initial commitment trial, *see Post*, 241 P.3d at 1241, it is equally improper for the defense to argue a future recent overt act filing as a "better option" to immediate civil commitment. Both arguments are improper because they are not relevant to the statutory criteria for civil commitment as a sexually violent predator. With regard to recent overt acts, it is solely Town's *motive* to avoid reoffense due to the possibility of a recent overt act filing that has some limited relevance, not the recent overt act filing itself. The trial court would be fully justified in precluding Town's proposed recent overt act evidence because it goes beyond his risk to reoffend in

order to present the possibility of a future recent overt act filing as some kind of "better alternative" to civil commitment.

Town clearly wants more than the *Post* decision allows. Indeed, in proceedings below, the State made it clear that it would allow testimony from Town regarding his motivation not to reoffend due to his "fear of arrest" from a criminal incident or a recent overt act. When asked about this by the court, the deputy prosecutor responded that:

If they want to make that argument, go ahead. I don't think that any particular juror would be swayed or comforted by that notion. But fear of arrest, I think that maybe that can be argued, because that is a condition that will exist as soon as he is released.

Our argument that [it] certainly never prevent him before the prior 75 [victims] or even following his two sentencings, one sentencings, when he was reassessed on the indecent exposure.

That is, arguable, is admissible, because it is a condition that will exist upon release, immediate release.

RP 2 at 245. When the court inquired of the defense, they simply stated "that is not exactly what we are arguing." *Id.* The defense position was to go beyond a focus on Town's motivation to a focus on the recent overt act mechanism itself as an *alternative* to civil commitment.

Thus, the prosecutor's statement, on the record, makes it clear that the motion in limine was not meant to preclude testimony from Town regarding his personal motivations not to reoffend due to the prospect of a recent overt act. This position correctly anticipates the eventual holding

from the Supreme Court in the *Post* case. Because this is what *Post* allows, Town has no argument that any testimony was improperly excluded; Town, in accord with the prosecutor's representation to the court, was free to testify. Rather, in this case, Town seeks to expand *Post* beyond motivation testimony to present recent overt act testimony as an alternative to commitment. This court should reject Town's position and affirm the trial court's exercise of its discretion.

2. Any Error Was Harmless

When recent overt act evidence is properly limited -- as approved by the Supreme Court in *Post* -- to Town's personal motivation not to reoffend, any error in this case was harmless. In the SVP context, the harmless error doctrine precludes reversal where the evidentiary error did not materially effect the outcome of the trial:

We must next decide whether the error was harmless. "Evidentiary error is grounds for reversal only if it results in prejudice." *State v. Neal*, 144 Wash.2d 600, 611, 30 P.3d 1255 (2001). "An error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Neal*, 144 Wash.2d at 611, 30 P.3d 1255 (quoting *State v. Smith*, 106 Wash.2d 772, 780, 725 P.2d 951 (1986)). "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." *Neal*, 144 Wash.2d at 611, 30 P.3d 1255.

Post, 145 Wash.App. at 748. An erroneous evidentiary ruling "must

materially affect the outcome of the trial to warrant reversal." *In re Duncan*, 142 Wash.App. 97, 102-103, 174 P.3d 136, 138 (2007).

Here, the evidence supporting Town's commitment as a sexually violent predator was overwhelming. He had a long history of molesting boys, including infant children. He continued to act in a sexually deviant manner following treatment. He admitting sexual arousal to children, including masturbation to deviant fantasies of children during his time at the SCC. Even though he was facing a civil commitment trial, Town was unable to appropriately regulate his sexual behavior.

The jury heard testimony from Town that various sanctions failed to deter his sexually deviant activities. Even after being caught by friends and forced to engage in treatment on a threat of criminal prosecution, Town continued to reoffend. He was a religious man and yet he offended against his Sunday School charges. It is difficult to see how a jury -- when presented with a man who had no regard for his freedom or his soul -- would reasonable rely on the *possibility* of a recent overt act to determine that Town was not a sexually violent predator. After all, Town was so overwhelmed with his sexual deviance that he could not accomplish the simple task of buying a shower curtain at Sears without exercising his deviant impulses toward children.

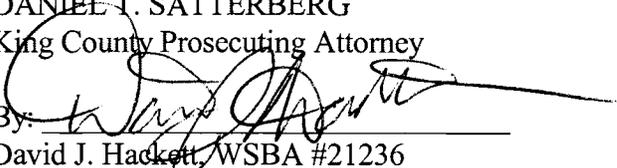
Indeed, as Town's defense counsel recognized, the deterrence offered by a recent overt act filing is uncertain, speculative and limited. *See* CP 102 (acknowledging that the State "will also argue that the likelihood of a recent overt act intervention is unlikely"). Even if Town were allowed to build up the recent overt act mechanism as a Potemkin Village designed to contain dangerous sex offenders, the State, in accord with Justice Madsen's concurrence, would introduce substantial evidence indicating that very few recent overt acts are discovered, reported, or otherwise used to justify an SVP petition. Town's own history of avoiding detection for 25 years is a good indication of how unlikely recent overt acts are to prevent a new sexual offense against a child. Given that the jury would hear both sides of the recent overt act story, it is unlikely that this evidence would have swayed the verdict in Town's direction. Any error was harmless.

V. CONCLUSION

For the foregoing reasons, the jury's decision and the Order of Commitment should be affirmed.

DATED this 18th day of February, 2011.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
David J. Hackett, WSBA #21236
Alison Bogar, WSBA #30380

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

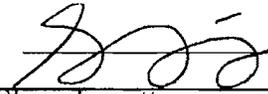
In Re the Detention of)
Randy Town,)
Appellant.)
No. 63732-1-I
DECLARATION OF SERVICE

Shara Lozott, being first duly sworn on oath, deposes and says:

On this day, I arranged for service of a copy of STATE'S RESPONSE BRIEF by ABC Messenger on the following:

Neilsen, Broman, Koch
1908 E. Madison St.
Seattle, WA 98122

DATED this 18th day of February, 2011.



Shara Lozott

2011 FEB 22 AM 10:05

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