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NOV 09 2010

King County Prosecutor
Appellate Unit

NO. 64264-2-I

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

In re Detention of James Aston, Jr.,

STATE OF WASHINGTON,

Respondent,

v.

JAMES ASTON, JR.,

Appellant.

FILED
COURT OF APPEALS
2010 NOV -9 11:14 AM

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

The Honorable William Downing, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH A RECENT OVERT ACT.

a. Private Conduct Does Not Establish a Recent Overt Act.

Proof of a recent overt act is required to establish current dangerousness when a person is not confined at the time of the commitment petition. RCW 71.09.020 (7); In re Young, 122 Wn.2d 1, 41, 857 P.2d 989 (1993). The statutory definition of a recent overt act is plain. It requires an “act, threat, or combination thereof” that either caused sexually violent harm or a reasonable apprehension of such harm. RCW 71.09.020(12). Aston did no such overt act or threat, much less a combination of the two.

The State cites his poor compliance with supervision, his stories, his purchase of a book, his fantasies, his watching movies, his masturbation, and his “sexually deviant thoughts.” Brief of Respondent (hereinafter “BOR”) at 16-17. None of these are overt. None of them are threats. And none of these establishes current dangerousness.

The State’s reliance on Aston’s “poor compliance with his release conditions” is particularly problematic. Community custody violators may be incarcerated for offenses that do not necessarily establish current dangerousness, such as “consuming alcohol, going to a park, or moving

without permission.” In re Detention of Albrecht, 147 Wn.2d 1, 11, 51 P.3d 73 (2002).

Conditions of parole, like conditions of community supervision, may include a host of requirements, where violations do not necessarily rise to the level of a recent overt act. Some of the conditions of Froats’s parole, for instance, required him to obey all court orders, comply with all rules and regulations in the work release program, successfully complete 120 days in the work release program, abstain from alcohol, take his medications, and undergo mental health counseling.

In re Detention of Froats, 134 Wn. App. 420, 433, 140 P.3d 622 (2006) (emphasis added).

The State argues that because each of the acts in Froats was considered a recent overt act, each of Aston’s should be as well. BOR at 17. But it is well established that alleged recent overt acts are not looked at in isolation, but in context of the surrounding circumstances and the person’s history and condition. In re Detention of Brown, 154 Wn. App. 116, 123, 225 P.3d 1028 (2010). Froats’ less overt conduct, such as possession of nude photographs of children, must be viewed in the context of his overt conduct, his harassment of a developmentally delayed fellow inmate. Froats, 134 Wn. App. at 438. Similarly, as the State notes, in In re Detention of Anderson, 134 Wn. App. 309, 323-24, 139 P.3d 396 (2006), aff’d, 166 Wn.2d 543 (2009), the recent overt act included “serial sexualized behaviors that exploited vulnerable adults.” In each of the cases the State cites, the

person to be committed actually engaged in conduct that was exploitive of another person. By contrast, in Aston's so-called recent overt acts, he never once actually contacted or interacted with another person.

The existence of inappropriate "urges" does not amount to a recent overt act because so long as those urges can be controlled, a person is not currently dangerous. But see Froats, 134 Wn. App. at 439-40. Commitment should not be permitted when a person is capable of controlling those urges by channeling them into solely private behavior. This court should reject any implication made in the Froats decision that the mere existence of "urges" justifies indefinite involuntary confinement.

The State also cites "the pancake house incident" and "the Kinko's incident." BOR at 16. In each of these so-called incidents, Aston admitted to urges that arose and explained how he controlled those urges using the techniques he learned in treatment. CP 556, 557. These are not "recent overt acts."

In interpreting a statute, courts must give meaning to every word in a statute. State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). To find a recent overt act in Aston's case is to render the word "overt" entirely meaningless. This court should reject the State's arguments that Aston's entirely private and internal conduct constitutes a recent overt act.

b. Without Proof of a Recent Overt Act, Aston's Commitment Violates Constitutional Due Process.

The purpose of the recent overt act requirement is to satisfy due process. "Proof of a recent overt act is necessary to satisfy due process concerns where an individual has been released into the community." Young, 122 Wn.2d at 41-42. Without sufficient evidence of a recent overt act, civil commitment of a person who has been released violates due process. Id.

Despite the clear language from Young, the State argues the recent overt act requirement does not implicate due process. BOR at 31. But the cases cited by the State do not support that assertion. First, the State cites Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), arguing it does not mention a recent overt act requirement in its discussion of due process. BOR at 31. But this omission is entirely understandable. Hendricks involved a constitutional challenge by an offender who was confined at the time the petition was filed. See Hendricks, at 352, 354 (discussing "The initial version of the Act, as applied to a currently confined person such as Hendricks" and noting that "shortly before his scheduled release, however, the State filed a petition in state court seeking Hendricks' civil confinement"). Thus, the question of whether due process requires a recent overt act when a person is not confined at the time

of the petition, as in Aston's case, was not before the court. Thus, the opinion in Hendricks can offer no support to the State's argument.

In footnote nine, the State cites numerous other cases, none of them from Washington and none of them addressing civil commitment under sexually violent predator laws. Nearly all of them predate the 1990 enactment of RCW chapter 71.09 and consider involuntary commitment solely on mental health grounds for very limited periods of time. See, e.g., Project Release v. Prevost, 722 F.2d 960, 972 (2d Cir. 1983) (recent overt act requirement unnecessary where statute served only to commit those unable to function independently); U. S. ex rel. Mathew v. Nelson, 461 F. Supp. 707, 712 n.10 (N.D. Ill. 1978) (average mental health commitment lasted four weeks); In re Maricopa County Cause No. MH-90-00566, 173 Ariz. 177, 840 P.2d 1042 (Ariz. App. 1992) (initial voluntary commitment was converted to involuntary; patient already released by time of appeal); In re Snowden, 423 A.2d 188, 189-90 (D.C. 1980) (mental health commitment); People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974) (same); In re Treatment of Albright, 17 Kan. App.2d 135, 836 P.2d 1 (1992) (same); In re L.R., 146 Vt. 17, 497 A.2d 753 (1985) (involuntary medication order).

Many involve the constitutionality of statutes that, unlike chapter 71.09 RCW, already required a current, immediate, or imminent danger before commitment. Colyar v. Third Judicial Dist. Court for Salt Lake

County, 469 F. Supp. 424, 432 (D. Utah 1979) (interpreting statute as requiring showing of “immediate” danger to comport with due process); People v. Stevens, 761 P.2d 768, 774 (Colo. 1988) (statute required “present danger to self or others”); Matter of Salem, 31 N.C. App. 57, 60, 228 S.E.2d 649 (1976) (statute required person be found “imminently dangerous”); In re Slabaugh, 16 Ohio App.3d 255, 256, 475 N.E.2d 497 (1984), (mental health commitment law required “grave and imminent risk” to self or others).

A number of the cited cases also involve persons who, like Hendricks, were already confined at the time of the petition. See United States v. Sahhar, 917 F.2d 1197 (9th Cir. 1990) (found incompetent to stand trial after being charged with making a threat against the President of the United States); Commonwealth v. Rosenberg, 410 Mass. 347, 349, 573 N.E.2d 949 (1991) (two year extension of mental health commitment); Matter of Sonsteng, 175 Mont. 307, 309, 573 P.2d 1149 (1977) (three month re-commitment under mental health statute); State v. Robb, 125 N.H. 581, 587-88, 484 A.2d 1130 (1984) (re-committal found unconstitutional under law providing for “irrebuttable presumption” of dangerousness); In re Scopes, 59 A.D.2d 203, 398 N.Y.S.2d 911 (1977) (extension of mental health commitment after assault conviction); Matter of Giles, 657 P.2d 285, 286 (Utah 1982) (conversion of criminal to civil commitment of person found not guilty of aggravated assault by reason of insanity). Thus, these

cases are necessarily of extremely limited value in this case. Additionally, if this court reverses Aston's commitment due to insufficient evidence of the statutorily required recent overt act, there is no need to consider whether that absence also violates Aston's due process rights. See State v. Speaks, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992) (noting it is well-established that courts do not reach constitutional questions when the issue can be decided on statutory grounds).

2. UNANIMITY IS REQUIRED AS TO WHICH ACT OR THREAT OR COMBINATION FORMS THE BASIS OF THE RECENT OVERT ACT FINDING.

a. The Plain Language of the Statute Requires the State to Identify Which Act, Threat, or Combination of an Act and a Threat It Relies On.

This is a multiple acts case, not an alternative means case, as the State argues. Here, the State relies on various separate, multiple acts to argue Aston committed the requisite recent overt act. The individual acts are not alternatives presented in the statutory language like the alternative means of "mental abnormality or personality disorder" discussed in In re Detention of Halgren, 156 Wn.2d 795, 809, 132 p.3d 714 (2006) and In re Detention of Sease, 149 Wn. App. 66, 201 P.3d 1078 (2009). The situation in this case is much more analogous to the multiple acts that potentially formed the basis for criminal liability in State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) and State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

The plain language of the statute does not encompass a continuing course of conduct. RCW 71.09.020(12). The definition includes any “act, threat, or combination thereof.” Id. Thus, it presents three possible alternatives: one singular act, one singular threat, or one combination of one of each. The newest version of the statute merely added a third option (the combination) to the two possibilities (an act or a threat) presented in the prior version of the statute. See former RCW 71.09.020 (2008). It does not permit a jury to rely on an entire course of conduct, none of which individually rises to the level of an overt act or a true threat, as constituting the recent overt act.

This case stands in contrast to Froats, where the court found that each individual act would, alone have been a recent overt act. 134 Wn. App. at 439-40. In this case, at least some of the acts the state relied on (such as poor compliance with release conditions) are legally insufficient to constitute a recent overt act. Albrecht, 147 Wn.2d at 11. There is no way to tell which act or acts or thoughts or fantasies the jury actually relied on, and reversal is required under a multiple acts analysis. State v. King, 75 Wn. App. 899, 900, 878 P.2d 466 (1994).

b. Alternatively, There Is Insufficient Evidence of At Least One Alternative Means.

If this Court agrees with the State that an alternative means analysis is appropriate, a unanimity instruction was still required. Where a jury does not express unanimity, a criminal conviction must be reversed when there is insufficient evidence on any of the alternative means. State v. Green, 94 Wn.2d 216, 219, 616 P.2d 628 (1980); see also State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010). Here, the alternative means would be the “act, threat, or combination thereof.” RCW 71.09.020(12). A unanimity instruction was required because there was not sufficient evidence to prove each alternative.

Even assuming the court concludes that one or more of the acts the State relies on constitutes an “overt act” for purposes of the statute, none of those acts was combined with any threat. Therefore, there is insufficient evidence that the necessary apprehension of harm was caused by a combination of an act and a threat. Because the statute must be limited to true threats (as discussed in section A.3, infra and the opening Brief of Appellant), Aston’s statement acknowledging the possibility of reoffense does not qualify as a threat. Therefore, even if this court should find an overt act, and should conclude an alternative means analysis is appropriate, there was insufficient evidence of two out of the three alternative means. Without

a unanimity instruction, Aston's commitment must be reversed. Green, 94 Wn.2d at 219.

3. ASTON'S CANDID STATEMENT ACKNOWLEDGING HE MIGHT REOFFEND IS NEITHER A TRUE THREAT UNDER THE FIRST AMENDMENT NOR A THREAT UNDER THE STATUTE.

The recent overt act requirement is designed to ensure that only those who are currently dangerous are subjected to indefinite confinement. Anderson, 166 Wn.2d at 557 (noting legislature added recent overt act requirement after Young); Young, 122 Wn.2d at 41-42. Initially, the statute defined an act as "an act." Anderson, 166 Wn.2d at 557 (citing Laws of 1995, ch. 216, § 1(5)). This definition made sense because overt acts generally have implications for the safety of others. However recent amendments have greatly expanded the scope of a recent overt act by including speech, *i.e.* threats. No amount of pure, protected speech should qualify as establishing the requisite dangerousness. Even without a first amendment analysis, Aston's statement to his CCO acknowledging the possibility of reoffense was not a threat under the plain language of the statute. See Brief of Appellant at 15. Moreover, only a true threat reflects the constitutional requirement of current dangerousness.

This case is unlike the hate crimes cases the State cites because Aston's language is not evidence of the motive behind already criminal

conduct. See BOR at 27 (citing State v. Talley, 122 Wn.2d 192, 210, 858 P.2d 217 (1993)). It is also unlike phone harassment, again because as the State notes, speech is only a component of the criminal conduct of phone harassment. See BOR at 27 (citing State v. Dyson, 74 Wn. App. 237, 243, 872 P.2d 1115 (1994)). Here, Aston's statement was not part and parcel of adjacent criminal conduct. Hate crimes and phone harassment are similar to each other, and distinguishable from Aston's statement, in their intent to influence others.

The fact that this case involves civil commitment rather than criminal sanction is immaterial. Protected speech cannot be the basis for civil legal penalties either. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 902, 928, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982). In Claiborne, black citizens held a rally urging a boycott of white-owned businesses. Id. at 889-90. White business owners filed a civil lawsuit seeking injunctive relief and damages for loss of business. Id. The United States Supreme Court held the rally organizers could not be held liable for their speech because it did not constitute "fighting words" or a "true threat." Id. at 902, 928. This was so even though the trial court found one speech included the statement, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." Id. at 902. Because there was no evidence that actual violence followed, the Court concluded, "The findings are constitutionally inadequate

to support the damages judgment.” Id. at 929. Therefore, the fact that Aston is technically suffering civil confinement rather than criminal incarceration is beside the point. He may not be sanctioned for constitutionally protected speech. Claiborne, 458 U.S. at 902, 928.

4. ASTON WAS PREJUDICED BY REPEATED MENTIONS OF IRRELEVANT AND INADMISSIBLE POLYGRAPH EVIDENCE.

a. The Polygraph Was Not Relevant to Any Element the Jury Was Required to Find for Commitment.

The State argues the polygraph was relevant to show the operative fact that such testing was administered as part of Aston’s community supervision. BOR at 35 (citing State v. Reay, 61 Wn. App. 141, 150, 810 P.2d 512 (1991)). But this case is nothing like Reay, where the thoroughness of the investigation was an issue. 61 Wn. App. at 144-45. Here, the competence or thoroughness of Aston’s supervision was not challenged. The fact that Aston was subject to polygraphs as part of his community supervision was in no way relevant to prove any element required for commitment. See RCW 71.09.020(7), (18). It does not show mental abnormality or personality disorder. It does not show a previous conviction for a sexually violent offense. And it does not show current dangerousness or a recent overt act. Contrary to the state’s assertion, the expert’s assessment of his dangerousness did not rest in any way on the polygraph.

See BOR at 38 (citing RP 647, 677-79). There simply was no need to bring it up.

The State argues State v. Descoteaux, 94 Wn.2d 31, 38, 614 P.2d 179 (1980), is distinguishable because in a 71.09 proceeding, unlike a criminal trial, past misconduct is generally relevant to the elements required for commitment. BOR at 43. This is correct as far as it goes. But this does not ameliorate the prejudice of repeated references to inadmissible and unreliable polygraph results.

- b. Repeated Mention of the Polygraph Prejudiced Aston Because It Unfairly Bolstered His CCO's Interpretation of His Statement and Undermined Aston's Interpretation.

Regardless of whether the results of the polygraph were explicitly stated each time, they were clearly implied in the context of the prior mentions of the results. BOR at 47; RP 272, 314, 360-61. The State argues that, because Aston admitted writing the stories, his credibility did not matter. BOR at 41-42, 48. This could not be farther from the truth. The jury had a decision to make about recent overt acts and current dangerousness. Those determinations depended largely on whether they believed Aston's stories and statements were attempts (misguided or not) to learn to control his deviant thoughts, or were threats and precursors to further

crimes. His credibility mattered and the repeated references to the failed polygraph were prejudicial.

The State argues Aston “essentially” admitted he lied because he later revealed more fantasies than he initially disclosed. BOR at 42. But “essentially” admitting to partial truth is very different from being caught lying in a polygraph test. The repeated mention of the polygraph results demonstrated to the jury that Aston was a proven liar who would not admit anything until caught by the test. This is prejudicial, even if he later admitted having not being completely up front with his CCO.

The repeated mentions of the polygraph, and the court’s refusal to redact it, also denied Aston necessary impeachment of CCO Austin. CCO Austin testified he did not believe on November 6 that Aston had committed a violation for which he could be jailed. RP 401. The crucial point defense counsel wanted to bring out was that on November 6, when Aston made the statement recognizing he could reoffend, CCO Austin knew he had authority not just to “violate” Aston, but to *jail* him. He chose not to do so, indicating he did not take Aston’s statement as a threat. The inability to bring out this crucial information without further mention of the inadmissible polygraph rendered Aston’s trial unfair.

Aston did not seek to cross-examine about inadmissible evidence. The fact that CCO Austin had authority to jail Aston on November 6 but

chose not to do so was admissible, relevant, and essential. The court's refusal to permit redaction of the inadmissible polygraph from the statement prejudiced Aston. This was not a valid discretionary call. The court recognized the polygraph was inadmissible and the results should not be mentioned, even going so far as giving an instruction to the jury to disregard. There was no reason not to permit redaction of the mention of the polygraph to permit full cross-examination on a point crucial to the defense.

The state also argues the polygraph did not reinforce the credibility of state's witnesses because the CCO's did not offer opinions on Aston's current dangerousness. This is correct but immaterial. The polygraphs bolstered CCO Austin's testimony regarding Aston's statement that he could reoffend. How Austin interpreted that statement, whether as a threat or as a pragmatic recognition of reality, was important to both the jury's determination and to Dr. Judd's assessment of his risk.

c. Mary Aston's Status as a Witness Hostile to the State Has No Bearing on This Issue.

In regards to Mary Aston's mentions of the polygraph, the State argues the court should not hold the actions of a hostile witness against the State. BOR at 32. But this issue is not about fairness to the State. It is about the fairness of the trial at which Aston's liberty was at stake. Courts have repeatedly recognized the threat that the polygraph represents to the fairness

of a trial. See, e.g., State v. Sutherland, 94 Wn.2d 527, 529-30, 617 P.2d 1010 (1980); Descoteaux, 94 Wn.2d at 38-39;

There is absolutely nothing in the record to suggest Aston's mother calculatedly attempted to "manufacture a mistrial." BOR at 50. First, as a witness, Aston's mother was excluded from the courtroom during the prior testimony. 1RP 35-36. Thus, she was not present for the previous mistrial motions and was not likely to be aware of that potential. Second, the prosecutor was aware the parents had lower than average mental faculties and were prone to blurting out inappropriate and excluded items. See 1RP 76-79. Nevertheless, the State made no attempt to warn them about the court's polygraph ruling. RP 462, 467-68.

Prejudice resulted because Mary Aston's testimony served to further reinforce the idea that Aston was caught lying in a polygraph. The State argues that Mary Aston's credibility was already shaky, given her devotion to her son. BOR at 51. But this argument misapprehends Aston's concern. It is not his mother's credibility that is prejudiced by the repeated mention of his failing the polygraph test. It is Aston's own. It is nearly a cliché to say that some bells, once rung, cannot be unring. See State v. Easter, 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996) ("A bell once rung cannot be unring") (citing State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)). But this case goes beyond that. The polygraph result "bell" was rung

repeatedly. At some point, the judge's careful instruction was unlikely to be heeded over the nigh incessant pealing of the bell.

The defense objection was clear from the numerous objections and motions for mistrial. RP 458-60. Aston was not required to ask the court to ring that bell again to preserve the error. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction regarding ER 404(b) evidence was a tactical decision not to reemphasize damaging evidence). The purpose of requiring objection is so that the opposing party has an opportunity to respond to an issue that has arisen and the trial court has an opportunity to correct the error. In re Audett, 158 Wn.2d 712, 725, 147 P.3d 982 (2006) (quoting 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.5(1), at 192 (6th ed.2004)). Aston's objections served this dual purpose.

5. UNREASONABLE TIME LIMITS ON VOIR DIRE DENIED ASTON'S RIGHT TO INQUIRE AS TO SOURCES OF JUROR BIAS.

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The abuse of discretion standard is not a rubber stamp for whatever the trial court chooses to do. "[D]iscretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). There is no published Washington case

considering how much a trial judge may limit the time for voir dire before that limitation becomes “manifestly unreasonable.” The cases cited by the State are not on point.

In State v. Davies, 141 Wn.2d 798, 10 P.3d 977 (2000), the Washington Supreme Court considered whether a trial judge was required to, sua sponte, inquire about potential racial prejudice during voir dire. The court did not consider whether or how much a trial judge could restrict a party’s ability to do so. Id. at 826. Crucially, the court noted, Davies “does not contend he was denied or otherwise limited in the exercise of this right.” Id. By contrast, Aston *was* limited in his exercise of this right. The court’s discussion in Davies actually supports Aston’s position because the court noted Davies had the “right to carefully examine prospective jurors on voir dire to an extent necessary to afford the accused every reasonable protection.” Id.

The state also relies on State v. Brady, 116 Wn. App. 143, 64 P.3d 1258 (2003), in which the court abused its discretion in eliminating a round of questioning without prior warning. BOR at 56-57. But Brady is merely one example of unreasonable limitation on voir dire. It does not establish that other unreasonable limitations are somehow permissible. The Brady court did not consider whether an unreasonably short time for voir dire and insistence upon expedition in the face of reasonable requests for more time

could be an abuse of discretion because that question was not before it. It should also be noted that the voir dire in Brady had already spanned nearly three days when the court cut it short – far more than in this case, where the court cut off questioning at 10:00 a.m. on the second day. Brady, 116 Wn. App. at 146. That period of slightly more than one day included both the time the jury spent filling out questionnaires and the only time counsel had to review those questionnaires. 2RP 37, 49.

The State appears to have misunderstood Aston's argument regarding jurors who answered, "yes" to question 31. BOR at 58 n. 17. Aston does not argue the jurors' answers to question 31 automatically established bias. However, the answers indicated a source of potential bias that Aston should have been permitted sufficient time to inquire about individually. See Brief of Appellant at 48.

The State argues that unless the record shows a biased juror actually sat on the case, there can be no prejudice.¹ BOR at 58-59. This is patently false under Brady. The Brady court considered the defense's claim that it

¹ In support of this assertion, the State cites State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001) and United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), relied on in Fire. BOR at 59. The Fire court considered whether "where a defendant exercises a peremptory challenge to remove a juror who should have been excused for cause and the defendant subsequently exhausts all of his peremptory challenges, the remedy is automatic reversal without a further showing of prejudice." 145 Wn.2d at 154. Because Fire did not argue there were other biased jurors he would challenge, the court held there was no prejudice. Id. at 165. Fire did not argue, as Aston does in this case, that unreasonable restrictions on voir dire prevented him from even inquiring into potential sources of bias. Fire does not resolve the issue in Aston's case.

had reserved certain topics for a session of voir dire that was abruptly cancelled. 116 Wn. App. at 148. The court reasoned, “the case involved at least one issue that requires “specific voir dire questions because of a real possibility of prejudice” because of the racial overtones in that case. Id. The court also noted “the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact.” Id. Because counsel had no chance to inquire on these topics, and because of the great potential for bias, the court found Brady was prejudiced by the restrictions on voir dire and reversed his conviction. Id. at 144, 148.

Civil commitment under chapter 71.09 raises a similar “real possibility of prejudice.” See, e.g., State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (prior acts of sexual misconduct must be carefully evaluated under ER 404(b) due to great risk of prejudice). The court’s unreasonable restrictions on the time for voir dire in this case similarly precluded relevant inquiry into potential sources of strong bias. Reversal should be the result in this case as well.

D. CONCLUSION

For the foregoing reasons and for the reasons contained in the opening Brief of Appellant, Aston requests this court reverse his commitment order.

DATED this 9th day of November, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant