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No. 64264-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

IN RE THE DETENTION OF JAMES ASTON

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I
2010 OCT 14 PM 4:28

STATE'S CORRECTED RESPONSE BRIEF

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I. INTRODUCTION

In this appeal, Aston asks the court to find that mere mention of the word "polygraph" is reversible error even though the operative fact of testing was relevant to explaining his community supervision. The polygraph testimony did not prejudicially affect the outcome of the trial, nor does Aston raise other errors that would justify reversing the jury verdict. This court should reject his arguments and affirm the jury's unanimous decision finding that Aston is a sexually violent predator.

II. STATEMENT OF THE CASE

A. FACTS

Aston, who was 29 years old at the time of his sexual violent predator trial, raped a five year old girl when he was 19 years of age. VRP 10/5/09 at 623, Ex. 40. Aston had dropped out of school when he was in the 9th grade. CP 578.¹ He did not work and he spent most of his day home alone viewing child pornography on the internet and engaging in sexual deviant fantasies. VRP 10/5/09 at 619, CP 579-580, 582.

On the day he raped MM, Aston said that he saw her in the playground being sexually assaulted by boys and that he "rescued" her.² CP 586. But, rather than taking MM home, Aston took her by the hand to

¹ Portions of the Aston deposition were read to the jury. These portions are found in the record at CP 543-596.

² This is a theme that resonates throughout Aston's writings in 2006.

the empty apartment he shared with his parents, led her into his bedroom, closed the door and told her to get onto his bed. CP 586-589. MM begged to go home, but Aston refused and told her to get undressed. CP 586-589. MM started to undress and Aston helped her. CP 588-590. Aston raped her with his finger and tongue as she lay rigid and crying on the bed. CP 590. Aston then took his clothes off and made her suck his penis. CP 591-592. Aston knew the girl was terrified as she backed up against the wall to escape him forcing his penis into her mouth. CP 590-592. But her fear sexually aroused him. *Id.* As he raped her, he thought "why didn't I try this sooner." CP 592-593.

Before he let MM go home he told her several times not to tell anyone. CP 592. When he saw her again a few weeks later he asked her if "she'd ever like to do that again." CP 593. MM ran away from him. *Id.* Aston also fantasized of raping MM.³ CP 584. But in his fantasy, the five year old MM eagerly has sex with him and enjoys it. *Id.*

Aston pleaded guilty to one count of Rape of a Child in the First Degree and was sentenced to 93 months at the Department of Corrections. Ex. 40. He was released from DOC into the community in January 2006, and subject supervision by Community Corrections Officer, Kevin Jones of the Department of Corrections until September 2006. VRP 9/30/09 at

³ Aston is not sure if he fantasized about raping MM before or after he actually

257. Officer Patrick Austin supervised him from September through December 2006. VRP 9/30/09 at 357.

As part of the court-ordered conditions, Aston was to have no contact with minors, to not go where minors congregate, to complete sex offender treatment, to not possess pornographic materials and to secure employment. VRP 9/30/09 at 270, Ex. 40. Aston was also subject to polygraph examinations under DOC supervision. Ex. 65 Officer Jones met with Aston prior to his release into the community and they discussed, at length, Aston's conditions of release as well as Officer Jones's expectations of Aston including his requirement to report, to disclose his sexual fantasies, to disclose potential violations, and to disclose incidental contact with minors. VRP 9/30/09 at 272- 276. When Aston would report as required, both Officer Jones and Officer Austin would ask him as a matter of course if he had anything to report. *Id.* at 307, 361.

Aston's overall compliance with his conditions of release was poor. VRP 9/30/09 298, 358. Not only did he resist and sabotage employment opportunities (VRP 9/30/09 300-306), he was arrested for writing sexual explicit stories involving young girls in sex acts -- a violation his conditions of release (possession of pornography) -- on three occasions: March 1, 2006, July 13, 2006, and December 8, 2006. *Id.* at 310, 317, 326.

raped her. CP 584.

With each violation, Aston's sexually deviant behavior was escalating. *Id.* at 327, 376.

When asked if he had anything to report on March 1, 2006, Aston said he had purchased a book knowing that it contained a sexual depiction of an adult male having mind control over a naked minor female. VRP 9/30/09 at 307. He then masturbated to fantasies of having power over a minor female and having sex with her. *Id.* at 309.

Aston also reported that while in a parking lot with his father he saw an adult female and a minor child and that he fantasized about having sex with the child. *Id.* at 309. Aston did not report anything further to Jones about the incident. During his August 28 2009 deposition, Aston talked about the incident in further detail. CP 555-556, 560-564.

Apparently, as Aston's father parked the car outside a pancake house Aston saw a mother pick up her daughter, whom Aston estimates to be approximately four years of age, and in doing so inadvertently exposed the little girl's floral panties. CP 555-556, 560-564. Within seconds, Aston became so sexually aroused that he could not leave the vehicle. *Id.* Aston says at that moment he felt sexual desire for the little girl and later he fantasized about having sex with her. CP 556, 562-564. When asked whether the little girl's mother was part of his deviant fantasy, Aston said that if she had been part of the sexual fantasy it was in a subjected role

where she would have been consenting to him having sex with her little girl. CP 562-563.

Aston was sanctioned to 45 days of confinement for possessing books sexually depicting an adult's mind control over a naked minor female.⁴ Despite the violation, Aston continued to have sexually deviant fantasies involving children when he returned to the community. VRP 10/1/09 at 313.

When he reported to the Department of Corrections on July 13, 2006, Aston told Officer Jones that he had nothing to report. Then, after taking a polygraph, Aston sat down with Officer Jones to talk and eventually told him that he been writing approximately ten sexually deviant fantasies that he had not reported to either Officer Jones or his sex offender treatment provider. VRP 9/30/09 313- 316. Aston told Officer Jones that he wrote about the following: (1) giving a 15 year old a ride and having sex with her as payment for the ride; (2) giving an eight-year old minor female a bath and playing with her genitals; (3) watching an adult female having sex with her younger daughter; and, (4) forcibly raping a six year old anally, orally, and vaginally. VRP 9/30/09 313- 316. Aston knew it was wrong to be writing these sexual fantasies, but did it

⁴ Aston was not sanctioned for reporting his sexually deviant fantasy involving the girl in the parking lot. VRP 9/30/09 at 310.

anyway because it seemed to him to be a better alternative than offending against a little girl. CP 559.

Aston's descriptions of forcibly raping little girls caused Officer Jones to be concerned about Aston's presence in the community. VRP 9/30/09 at 317. He placed Aston under arrest for violating his conditions of release by writing and possessing pornographic stories.⁵ *Id.* Aston was not violated for failing to report the fantasies to either him or his treatment provider. He was sanctioned to 90 days confinement. *Id.* at 317- 318

When Aston was released in September 2006, Officer Patrick Austin took over Aston's supervision. VRP 9/30/09 at 324. Officer Austin thought he could help Aston stop violating his conditions of release. *Id.* at 357.

When Aston reported on November 6, 2006, Officer Austin, as usual, asked him if he had anything to report. *Id.* at 360. Aston disclosed that he had been writing and destroying sexually explicit stories again. After taking a polygraph, Aston told Officer Austin that he had written even more sexually deviant fantasies than he initially reported. *Id.* at 360-362. Even though writing sexually explicit fantasies was considered possession of pornography and a violation of Aston's conditions of release for which he had previously been arrested and now could be again, Officer

⁵ Aston says he destroyed all but one of his writings, which he hid in his father's

Austin decided not to arrest him for the violations. Instead, he asked Aston to describe his sexually deviant writings to him so that he could try to understand what was going on with Aston and help get him back on track. *Id.* at 366. He asked Aston to give him a brief description of his writings. *Id.* at 363.

Aston summarized eight stories on a sheet of paper and gave it to Officer Aston. VRP 9/30/09 at 363, Ex. 66. One of his stories he wrote about involved a man who engineered an android daughter, who looked seven years old, for sex. Another story depicted a seven-year old girl being raped by a dog. And, in another, Aston wrote about a mother offering her seven year old daughter to her new husband for sex. Ex. 66 "11/6/06".

After reviewing Aston's summary, Officer Austin strictly prohibited Aston from writing any more sexual stories. But, Officer Austin told him, if he were to write a sexual fantasy he was not to destroy it, but instead was to give it to Officer Austin. VRP 9/30/09 360-362. Later, after Aston admitted that he continued to write sexually deviant stories, Officer Austin ordered him to write all the stories he had written and destroyed and give them him. *Id.* at 366. Aston turned in a total of nine

room. VRP 9/30/09 at 317.

sexual stories between November 6, 2006 and December 8, 2006. One, dated November 27, reads:

I was shocked when Desire dropped off a five year old girl named Sara who was my daughter. She was very cute and I listened intently as the mother talked of her love and obedience. I had a free hand in raising her as I wished. The mother simply watched as I scooped Sara up and kissed her on the lips hungrily. Sara was shocked for a moment then she tried to wrap her arms and legs around me as she responded. . . I hiked up her pretty little dress and had her hold it up so I slide my hand under her lacy panties so I could probe her cunny. She gave a soft moan, "oh Daddy, that really feels good." She spread her legs to give me better access to her sensitive little clitty. I told her that certain games we'll play are secret.

Ex. 66. The story continues detailing Aston having vaginal intercourse with the five year old girl.

Aston's "Story 2" is about a little girl named Rose who is given to him by her mother for him to assert mind control over her. On the third page, Aston describes how sexually aroused the girl's mother becomes as she holds the little girl down while Aston digitally penetrates her. The little girl cries out for her mommy for help. In Aston's story the mother ignores her cries and joins Aston in raping the little girl. The last sentence reads:

Finally, Linda got off then went back to holding her down but I had her relax since Rose no longer looked ready to resist, in fact she curled up and simply whimpered.

Ex. 66.

Aston's writing entitled "Story 6" details a 26 year old man who is invited to a special club that caters to what Aston calls "exotic tastes." Aston describes an adult male brutally attacking an eight year old girl, ripping off her clothes, bending her over a table and forcibly raping her. Ex. 66 Aston writes, "I smiled as I watched her continue to struggle while I forced my cock into her virgin cunny then started to fuck hard. She felt incredible and when I finished with her she weakly begged me not to hurt her anymore."

In "Story 7" Aston writes a first person narrative of a 28-year-old man, with a secret desire for kiddie porn, who has sex with his wife's seven year old daughter. In the story, Aston tells the little girl that he wants to teach her some special games to play in secret, and that the games could feel really good. Aston writes, "I told her that I was looking forward to seeing and playing with all of your cute body also. She giggled as I unbuttoned her blouse and kissed the growing expanse of her soft skin." Aston describes, in graphic detail, the little girl performing oral sex on him and asking whether they "would ever play this game again." Ex. 66.

When Aston reported to the Department of Corrections on November 9, 2006, he told Officer Austin that he had been sexually fantasizing about children in the community and "given the opportunity to reoffend, he would." VRP 9/30/09 at 364. Although very concerned,

Officer Austin determined that he could not arrest Aston that day just because he made that statement. *Id.* at 365. Instead, he directed Aston to report to DOC daily and to not leave the house without his parents. *Id.* at 364-365. Officer Austin believed Aston's parents were the best intervention they had for 24/7 in line of site supervision. *Id.* at 365.

Unbeknownst to Officer Austin, Aston's father knew that Aston had been sexually fantasizing about children. Aston had not only been discussing the sexual fantasies he wrote with his father, he had *acted* them out for him while they sat in restaurants using crying and emotional tones. Aston's father never reported any of this to the CCOs as he was required. VRP 10/01/09 at 444-445.

Then, on December 1, 2006, Aston reported that he had had several sexual fantasies that he had not written down. One sexual fantasy involved a six year old girl, another involved him sexually assaulting a little girl child at Kinko's, and another fantasy involved him babysitting a six year old girl and sexually assaulting her. VRP 9/30/09 at 367, 370.

During his August 13, 2009, deposition, Aston detailed the encounter that fueled his fantasy of sexually assaulting the little girl at Kinkos. CP 556-558, 564-566, 571-572. Just days before his December 1st report date, Aston and his father drove to Kinko's in Olympia. Aston stayed in the car. He had been waiting in the parking lot for about three

minutes when he saw a little girl approximately ten feet away. CP 564-565. As the mother picked up the little girl she inadvertently exposed the girl's panties for a second or two. CP 564-566, 571. Aston saw the panties and immediately became sexually aroused. CP 571.

Aston explained, during his deposition, that part of the reason he became so sexually aroused to the little girl at Kinkos was because earlier in the day he had been having fantasies of kissing his old childhood girlfriend. Her name was Dove and she was six years old.⁶ CP 567-570.

When he reported on December 8, 2006, Aston revealed he had been fantasizing about young children he had been watching in movies. VRP 9/30/09 at 371-372. Aston repeatedly watched the *Yours, Mine, and Ours* because he was sexually aroused by the infants in the movie. He would pause the movie on scenes involving infants and masturbate. Even when not watching the movie he sexually fantasized about the infants and masturbated. *Id.* He also fantasized about the children in the Harry Potter movie after watching it. *Id.* at 372.

Aston also reported that he was having sexual and deviant thoughts about an eight-year old neighbor girl that Officer Austin thought mirrored Aston's rape of MM. VRP 9/30/09 at 368. Officer Austin asked if he was

⁶ He met her by saving her from her brother who was beating her up. CP 567.

thinking about reoffending and Aston said that he was "aware of the possibility." *Id.*

Aston was again arrested for violating his conditions of release for possessing pornography (using the movies for pornographic purposes) and was sanctioned to 300 days confinement. VRP 9/30/09 at 368. Following a referral from DOC, the State then filed its Sexually Violent Predator Petition.

While awaiting his September 28, 2009 trial at the Special Commitment Center, Aston admitted to having a sexually deviant fantasy involving a child just one week before his August 13, 2009 deposition. CP 574-576. In this fantasy, to which Aston masturbated, a six year old girl, wearing only a towel wrapped around her waist, enters the bathroom where her father was showering. CP 574. She enters the shower and Aston writes of the pleasure the girl feels being raped digitally and orally by her father. At the end of the fantasy the little girl asks if they can do it again tomorrow. CP 575-576.

Aston also admitted that he has had a reoccurring sexually deviant fantasy since 1999 when he was incarcerated at the Department of Corrections. CP 576-577. This fantasy involved a legalized brothel that offers children for sexual purposes. He recalls masturbating to this fantasy in the Spring of 2009. CP 576.

B. EXPERT TESTIMONY

The State presented expert testimony from Dr. Brian Judd, a member of the Joint Forensic Unit. Dr. Judd relied upon the above evidence in reaching his opinion that Aston suffered from a mental abnormality (pedophilia, sexually attracted to females) that causes him serious difficulty controlling his sexually violent behavior making him likely to engage in predatory acts of violence if not confined to a secure facility. VRP 10/5/09 613-615, 617, 670.

Dr. Judd also testified that Aston's behavior while in the community caused him reasonable apprehension of sexually violent harm knowing Aston's history and mental condition. VRP 10/5/09 at 671-675. Dr. Judd testified that he was concerned that Aston sought out and obtained books involving children that he found sexually arousing; that Aston watched a movies involving children that he found arousing and watched them multiple times; and that Aston was repeatedly writing out articulate fantasies depicting sexual offending against children. VRP 10/5/09 at 673. According to Dr Judd, the fact that Aston put so much effort into generating material, masturbating to it and then destroying it created real concern that Aston was likely to cause harm of a sexually violent nature. VRP 10/5/09 at 674. He also felt Aston's statement that given the chance he would reoffend constituted a recent overt act because

by making the statement Aston himself recognized his likelihood to reoffend. VRP 10/5/09 at 675.

III. ISSUES

A. Did the State present sufficient evidence of a recent overt act? Yes.

B. Did testimony regarding a polygraph prejudice Aston when the fact that he lied to his CCO was not in dispute? No.

C. Did the trial court abuse its discretion by imposing reasonable limits on voir dire? No.

IV. SUFFICIENT EVIDENCE SUPPORTED THE JURY'S DETERMINATION THAT ASTON COMMITTED A RECENT OVERT ACT

Despite his alarming behaviors in the community, Aston claims that the State failed to present sufficient evidence supporting a recent overt act. He further claims that the jury needed to be unanimous and that his various statements and writings could not be used absent a "true threat" for First Amendment purposes. Without citation or argument in his opening brief, he also makes a general claim that an unspecified substantive due process right was violated. Given this court's recent decision in *In re Danforth*, 153 Wn. App. 833, 838, 223 P.3d 1241, 1243 (2009), *review granted* 168 Wn.2d 1036, 233 P.3d 888 (2010), Aston's arguments should be rejected.

A. STANDARD OF REVIEW

The "substantial evidence" test, in the context of an SVP case, was explained in *In re Detention of Sease*, 149 Wn.App. 66, 79, 201 P.3d 1078, 1085 (2009):

To determine whether the jury's verdict in an SVP case was based on sufficient evidence, we must determine whether the evidence, "viewed in a light most favorable to the State, is sufficient to persuade a fair minded rational person that the State has proven beyond a reasonable doubt that [the defendant] is a sexually violent predator." *State v. Hoisington*, 123 Wn. App. 138, 147, 94 P.3d 318 (2004).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom." *In re Broten*, 130 Wn.App. 326, 334-335, 122 P.3d 942, 946 (2005). Circumstantial evidence is as reliable as direct evidence. *Id.*

In undertaking a substantial evidence review, the *Sease* opinion correctly notes that disagreement by defense witnesses with the State's evidence is "inconsequential." 149 Wn. App. at 80. The choice between conflicting evidence requires a credibility determination and such determinations "are for the trier of fact and are not subject to our review." *Id.*

B. THE EVIDENCE OF ASTON'S RECENT OVERT ACT WAS SUFFICIENT

As amended in 2009 by the Legislature, a "recent overt act" means "any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors." RCW 71.09.020(12). Because Aston was on community supervision when the State initiated sexually violent predator proceedings against him, the State was required to prove a recent overt act. Aston's claim that the State lacked sufficient evidence of a recent overt act ignores the record in this case.

As noted above, Aston engaged in a number of alarming activities during his period of community supervision. These actions include:

- Overall poor compliance with his release conditions. VRP 9/30/09 at 298, 358.
- Writing numerous lurid, sadistic and sexually explicit stories about raping young girls despite repeated warnings from his CCOs. *Id.* at 310, 317 and 326
- Purchasing a book that contains a sexual depiction of an adult male with mind control over a naked minor female. *Id.* at 307.
- The pancake house incident. *Id.* at 309.
- The Kinkos incident. *Id.* at 367, 370.
- Stating that he would reoffend if given the opportunity. VRP 9/30/09 at 364.

- Obsessively watching movies with children and masturbating to those movies. *Id.* at 371-72.
- Sexually deviant thoughts of the eight-year-old neighbor girl similar to his rape of MM. *Id.* at 368.
- Continued sexually deviant fantasies of children and masturbation to those fantasies while at the Special Commitment Center. CP 574-577

In his testimony, Dr. Judd explained how these actions created reasonable apprehension given Aston's history of sexually offending against children. VRP 10/5/09 at 671-75. In short, he explained how Aston's combined acts and threats constituted a recent overt act. *Id.*

Aston's claim that the State lacked sufficient evidence of a recent overt act is contrary to the decision in *In re Froats*, 134 Wn. App. 420, 440, 140 P.3d 622, 632 (2006). Acting under the former definition of recent overt act, the court found that Froats had engaged in a number of recent overt acts, including "his sexual harassment of a developmentally-delayed fellow inmate, pasting a photograph of two young girls over his identification badge photograph, cutting out and displaying hundreds of pictures of children, and possessing nude photographs of children." *Id.* at 438. The *Froats* opinion notes that each of these actions provided sufficient evidence of a recent overt act. *Id.* at 439-440. The court noted that "a reasonable person could conclude that Froats's pedophilic urges persist, creating a reasonable apprehension of future harm of a sexually violent nature." *Id.*

In particular, the *Froats* opinion notes the importance of Froat's decision to possess photos of children and masturbate to those photos:

Finally, the trial court did not err in finding that Froats's possession and display of hundreds of photographs of children, including some nude photographs, was a recent overt act. He admitted that he masturbates to pictures of children and that he cuts out such pictures to gratify his lust for children. He acknowledges that he should avoid contact with such pictures because they are risky for him, as they activate his irresistible pedophilic urges. As the State's expert testified, his possession of the photographs evidences his current preoccupation with children and his unwillingness or inability to regulate his behavior in a manner that would reduce the risk of reoffending. A reasonable person could reasonably fear that Froats's possession of such photographs indicates that he is a recalcitrant pedophile, more likely than not to commit harm of a sexually violent nature.

134 Wn. App. at 440.

Aston's actions in writing lurid, sadistic stories of child rape and masturbating to those stories certainly raise concerns similar to those recognized in the *Froats* decision. When viewed in the light most favorable to the State, sufficient evidence supports the jury's verdict that Aston engaged in a recent overt act. The evidence strongly indicates that Aston, like Froats, is a "recalcitrant pedophile." *Id. See also In re Anderson*, 134 Wn. App. 309, 323-324, 139 P.3d 396, 404 (2006), *affirmed* 166 Wn.2d 543 (2009) (noting sufficient evidence to support recent overt act where SVP respondent "engaged in serial sexual behaviors that exploited vulnerable adults, which acts were closely akin to his assaults on children. And his persistence in that conduct, his ongoing

sexual fantasies involving sexual violence of children, his rule breaking behavior, and his inability to avoid high risk situations all indicated that he posed a clear risk to reoffend if released from custody.").

C. THE CURRENT RECENT OVERT ACT DEFINITION ENCOMPASSES ALL BEHAVIOR AS A SINGLE ACT, THEREFORE DOES NOT REQUIRE UNANIMITY ON INDIVIDUAL COMPONENT ACTS

Aston argues that he was entitled to a *Petrich*⁷ instruction requiring jury unanimity on the specific action that constituted a "recent overt act" in his case. In making this argument, Aston ignores the importance of the current statutory definition, which directs the finder of fact to any "act, threat, or combination thereof." The statute does not require unanimity on a specific action because the focus is on Aston's entire conduct during his conditional release period. It was his acts, threats and combinations thereof in light of his serious history of sexual assault that supported a "reasonable apprehension" of sexually violent harm.

Although there are certain statutory rights to unanimity in SVP actions, *see* RCW 71.09.060(1), the Washington Supreme Court has determined that the SVP statute supports the alternative means analysis of *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976), rather than the broader analysis of *Petrich* -- at least as it pertains to the "mental

⁷ *State v. Petrich*, 101 Wn.2d 566, 569, 583 P.2d 173 (1984).

abnormality or personality disorder" requirement. *In re Halgren*, 156 Wn.2d 795, 809, 132 P.3d 714, 720 (2006). As *Halgren* notes, "[a]lternative means statutes identify a single crime and provide more than one means of committing the crime." *Id.*

Nevertheless, the fact that the statutory requirement of a "mental abnormality or personality disorder" supports an alternative means analysis does not mean that such an analysis is appropriate under the recent overt act inquiry. The "[l]egislative intent determines whether this court should analyze a statute under the alternative means framework." *In re Sease*, 149 Wn. App. 66, 77, 201 P.3d 1078, 1083 (2009). As *Halgren* explained:

Legislative intent determines whether this court should analyze a statute under the alternative means framework. *Id.* at 378, 553 P.2d 1328. In *Arndt* and *State v. Berlin*, 133 Wash.2d 541, 947 P.2d 700 (1997), we determined legislative intent by considering "(1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are consistent with and not repugnant to each other; and (4) whether the acts may inhere in the same transaction." *Berlin*, 133 Wash.2d at 553, 947 P.2d 700 (citing *Arndt*, 87 Wash.2d at 379, 553 P.2d 1328). Applying these factors, the *Berlin* court held that second degree murder was an alternative means crime. *Id.* In reaching this conclusion, it considered the fact that both means for committing second degree murder-intentional murder under RCW 9A.32.050(1)(a) and felony murder under RCW 9A.32.050(1)(b)-existed under the same title of "Murder in the Second Degree." *Id.* In addition, the *Berlin* court noted that "[t]he readily perceivable connection between the acts set forth is a common object: causing the death of another person" and that "proof of an offense under one subsection does not disprove an offense under the other subsection." *Id.* (quoting *State v. Russell*, 33 Wash.App. 579, 586, 657 P.2d 338 (1983), *rev'd on other grounds*, 101 Wash.2d 349, 678 P.2d 332 (1984)). Finally, the *Berlin* court noted that "

‘[t]he prohibited acts may inhere in the same transaction’ ” since one may simultaneously satisfy the elements of felony murder and intentional murder. *Id.*

156 Wn.2d at 809-810.

Even if the pre-2009 statute supported an alternative means analysis, the current statute does not. Prior to 2009 amendments to the recent overt act definition in RCW 71.09.020, the term was defined to mean an "act or threat." Because this language presented to possibility of separating actions from words, the Legislature amended the definition in 2009 to require consideration of an "act, threat, or combination thereof." This amendment removes the definition from any possible *Arndt* or *Petrich* unanimity requirement.

The current definition changes the focus from a series of acts (viewed in light of the person's history, including each preceding act) to a single "act, threat, or combination thereof" that causes reasonable apprehension. The question for the jury in the current case therefore focused on the totality of Aston's actions -- his acts, threats, or combination thereof -- to determine if he committed *a* recent overt act during his recent period of community supervision. In this way, the 2009 amendment better reflects the reality that mental health professionals are concerned with a course of conduct rather than a discreet action. *E.g. In re Brown*, 154 Wn. App. 116, 128, 225 P.3d 1028, 1034 (2010)(noting role

of "offense cycle" in determining concerning behavior by sex offenders); *Brotten*, 130 Wn. App. at 335 (noting testimony on "offense cycle" in support of sufficient evidence proving recent overt act). Because the statute was amended to allow any combination of acts or threats to constitute a recent overt act, it is clear that the Legislature did not intend to focus on discreet acts, or to require the jury to be unanimous on discreet acts. Under the current definition, a recent overt act is the totality of behavior, not its individual component parts.

Aston's creative use of *State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994) does not alter this legislative analysis. In *King*, the question was where and when the defendant possessed drugs. This is an obvious *Petrich* situation that is defined by both temporal and spatial facts. The statute at issue in *King* did not require the jury to find a single recent overt act based on an "act, threat, or combination thereof."

Alternatively, unanimity on the particular act or threat was not required under the "means within a means" analysis that was explained in *In re Sease*, 149 Wn. App. 66, 78-79, 201 P.3d 1078, 1084 (2009). In *Sease*, the State presented proof of two possible personality disorders that Sease suffered from for purposes of proving an SVP diagnosis. Sease argued that the jury needed to be unanimous as to *which* personality disorder caused him to be a sexually violent predator. Thus, even though

the statute required proof of a "mental abnormality or personality disorder," Sease advocated that the jury must also be unanimous on the particular personality disorder that supported his civil commitment.

The Court of Appeals rejected Sease's argument under the "means within a means" analysis. Quoting *In re Pers. Restraint of Jeffries*, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988), the Sease Court pointed out that "where a disputed instruction involves alternatives that may be characterized as a 'means within [a] means,' the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply." 149 Wn. App. at 77. Because the SVP statute delineates two alternatives for establishing a qualifying mental condition -- mental abnormality *or* personality disorder -- requiring unanimity on the particular personality disorder would represent a "means within a means."

The *Sease* opinion explains that:

As in *Jeffries*, the jury here need only have unanimously found that the State proved that Sease suffered from a personality disorder that made it more likely that he would engage in acts of sexual violence if not confined to a secure facility. The jury need not have unanimously decided whether Sease suffered from borderline personality disorder or antisocial personality disorder. Therefore, the trial court did not err in failing to give a unanimity instruction and it is not an error that Sease can raise for the first time on appeal.

149 Wn. App. at 78-79.

In the current case, the SVP statute provides only one means of proving a recent overt act by allowing proof based on an "act, threat, or combination thereof." RCW 71.09.020. Aston is essentially arguing that this court should impose an additional means within this single means to prove a recent overt act. The *Sease* opinion does not support this effort to require unanimity on a "means within a means." There is no constitutional basis for Aston's requested relief.

D. THE FIRST AMENDMENT TRUE THREAT ANALYSIS DOES NOT APPLY TO LIMIT THE STATE'S RECENT OVERT ACT PROOF

On a daily basis, in court rooms throughout the United States, constitutionally protected speech is regularly used to prove civil and criminal matters. Although an employer has an absolute First Amendment right to disparage minorities, evidence of such statements is routinely used to prove employment discrimination. In contract disputes, First Amendment protected speech in the form of a contract is frequently used to determine liability. Similarly, while a murderer has an absolute First Amendment right to tell his victim, "you deserve to die," the statement is nonetheless freely admissible to prove motive and intent. In short, our First Amendment rights do not translate into a general evidentiary privilege against having the content of our protected speech used in a later court proceeding. *See generally Wisconsin v. Mitchell*, 508 U.S. 476, 489

(1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech . . .").

The sole and narrow exception to the general rule allowing the unfettered use of speech to prove a criminal or civil matter is where the government attempts to *punish* speech itself. *State v. Kilburn*, 151 Wn.2d 36, 41, 84 p.3d 1215 (2004) (recognizing special constitutional protections where statute "criminalizes pure speech"). In this narrow situation, this court has adopted the "true threat" doctrine to ensure that protected speech is never subject to criminal punishment or civil sanction. *Id.*

The recent *Danforth* decision forecloses Aston's First Amendment arguments. *In re Danforth*, 153 Wn. App. 833, 223 P.3d 1241 (2009). In response to Aston's claim that a "threat" under the recent overt act statute must be a "true threat" for First Amendment purposes, the appellate court held that the RCW 71.09 does not regulate pure speech and the true threat analysis therefore does not apply. *Id.* at 843-44. Alternatively, the court held that Danforth's statements fell within the true threat doctrine when the evidence was viewed in the light most favorable to the nonmoving party (the State). *Id.* at 845.

The very fact that civil commitment is not a sanction or punishment eliminates the need to limit the State's actions via the First Amendment. Civil commitments under RCW 71.09 represent neither a

sanction, nor a criminal punishment. *In re Young*, 122 Wn.2d 1, 24-25, 857 P.2d 989 (1993). The State is unconcerned with *punishing* Aston for his statements. *Id.* Instead, the State's compelling interests are to provide Aston with treatment and to incapacitate him pending successful treatment in order to protect children. *Id.* In order to serve the compelling interests of treatment and incapacitation, the State must be allowed to act whenever a Level III sex offender makes statements suggesting that he is on the verge of molesting a child absent being taken into civil commitment custody.

Aston's argument for application of the "true threat doctrine" proceeds from the premise that civil commitment represents a "sanction" for Aston's speech. However, RCW 71.09 makes no effort to criminalize or sanction speech. Instead, Aston's statements serve only as evidence toward a portion of the State's civil commitment proof.

A "true threat" is merely a term of art used to delineate the permissible scope of certain threat statutes for First Amendment purposes. *State v. Tellez*, 141 Wn. App. 479, 170 P.3d 75 (2007).⁸ Aston fails to cite a single case where a civil commitment statute was limited by First

⁸ A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted...as a serious expression of intention to inflict bodily harm upon or to take the life of another person." *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

Amendment true threat concerns. There are several reasons why the First Amendment does not operate to immunize Aston from civil commitment.

First, civil commitment is concerned with Aston's behavior, namely his mental condition and the resulting dangerousness. Statutes that regulate conduct, rather than speech, do not implicate the same First Amendment concerns. *See State v. Talley*, 122 Wn.2d 192, 210, 858 P.2d 217 (1993) ("hate crimes statute" regulates conduct, not pure speech); *State v. Dyson*, 74 Wn. App. 237, 243, 872 P.2d 1115 (telephone harassment has a speech component, but the statute is directed against specific conduct), *rev. denied*, 125 Wn.2d 1005 (1994).

Second, contrary to Aston's assertion, RCW 71.09 makes no effort to criminalize, penalize, or sanction pure speech. This court has repeatedly emphasized that the sole purpose of civil commitment is to provide treatment and to protect the public. *Young*, 122 Wn.2d at 24-25. In affirming the Kansas statute that was patterned on RCW 71.09, the United States Supreme Court noted the non-punitive purpose behind committing sexually violent predators. *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). "[C]ommitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." 521 U.S. at 361-62. The court

specifically rejected the notion that confinement equated with punishment. *Id.* at 363. The court rejected Hendricks *ex post facto* and double jeopardy claims because the SVP civil commitment law "does not establish criminal proceedings" and "involuntary confinement pursuant to the Act is not punitive." With no criminal or civil sanction attached to civil commitment, the First Amendment true threat doctrine is without application.

Finally, Aston's statements go to only a portion of the recent overt act definition and the civil commitment definition, not the entirety of the State's proof. Under *Wisconsin v. Mitchell*, speech may be used as evidence to "establish the elements of a crime or to prove motive or intent" when the statute regulates conduct, rather than criminalizing the speech itself." 508 U.S. at 489. Aston fails to provide any authority for precluding civil commitment on First Amendment grounds.

E. SUBSTANTIVE DUE PROCESS HAS NO APPLICATION

Aston claims a substantive due process violation, but nowhere makes an argument or explains his theory. Because the lack of any real argument greatly hampers the State's efforts at a response, this court should refuse to consider any expansion of this argument in Aston's reply brief.

In *Young*, the Washington Supreme Court determined that RCW 71.09 complied with substantive due process concerns. 122 Wn.2d at 26. *accord Kansas v. Hendricks*, 521 U.S. 346, 356-60 (1997). Aston nowhere identifies a substantive due process right regarding the proof that is used to satisfy the statutory recent overt act requirement. Under *Washington v. Glucksberg*, 521 U.S. 702 (1997), Aston has failed to address the "threshold question" of a "carefully described" right that is necessary for any substantive due process analysis.

The *Glucksberg* decision imposes a "restrained methodology" where the court requires a "'careful description' of the asserted fundamental liberty interest." 521 U.S. at 721. Rather than allowing substantive due process to occupy and permeate an entire field, *Glucksberg* requires each claimed substantive due process right to stand on its own merits. As a result, there is "threshold requirement" to identify a carefully described "fundamental right found to be deeply rooted in our legal tradition" that is supported by "concrete examples." *Id.* at 722. The requirement to identify a "carefully described" substantive due process right for each challenged state action "tends to rein in the subjective elements that are necessarily present in due process judicial review." *Id.* Until and unless there is a specific and carefully described due process right, there is no need for the court to require "more than a reasonable

relation to a legitimate state interest to justify the action," nor is there "the need for complex balancing of competing interests in every case." *Id.* at 722. Aston fails to address any of these factors in claiming a substantive due process violation.

Although a statutory right to a recent overt act applies in this case, this court should exercise great care before using substantive due process to expand the statutory recent overt act requirement. The United States Supreme Court has placed substantial limits on the doctrine of substantive due process because "[t]he doctrine of judicial self-restraint requires us to exercise the *utmost care* whenever we are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292 (1993) (emphasis added). The Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Glucksberg*, 521 U.S. 702, 720 (1997). Substantive due process analysis is disfavored because it places a matter largely "outside the arena of public debate and legislative action." *Id.* The doctrine must be carefully utilized "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." 521 U.S. at 720.

Indeed, the constitutional underpinnings of the recent overt act doctrine are dubious and seldom recognized outside our jurisdiction. This

court should reject Aston's invitation to expand this doctrine by somehow invalidating or revising the statutory definition of recent overt act under the guise of substantive due process. A substantial number of courts have rejected any due process doctrine requiring proof of a recent overt act.⁹ In accord with this precedent, the United States Supreme Court decision in *Kansas v. Hendricks* does not identify proof of a recent overt act as a constitutionally relevant consideration when evaluating substantive due process. Although the statutory recent overt act requirement precludes any need to revisit the constitutional underpinnings of the recent overt act

⁹ Cases rejecting a recent overt act requirement as a matter of due process include *Project Release v. Prevost*, 722 F.2d 960, 972-75 (2nd Cir. 1983) (proof of recent overt act is not constitutionally required because, *inter alia*, “we are not convinced that, as a practical matter, the addition of a recent overt act requirement would serve to reduce erroneous commitments.”); *United States v. Sahhar*, 917 F.2d 1197 (9th Cir. 1990); *Colyar v. Third Judicial District Court for Salt Lake County*, 469 F.Supp. 424, 434-35 (D.Utah 1979); *United States ex rel. Mathew v. Nelson*, 461 F.Supp. 707, 709-12 (N.D.Ill. 1978); *Matter of Maricopa County Cause No. MH-90-00566*, 840 P.2d 1042, 1049 (Ariz.Ct.App. 1992); *People v. Stevens*, 761 P.2d 768, 771-774 (Colo.S.Ct. 1988); *Matter of Snowden*, 423 A.2d 188, 192 (D.C. 1980); *People v. Sansone*, 309 N.E.2d 733, 739 (Ill.App. 1974); *Matter of Albright*, 836 P.2d 1, 5-6 (Kan.Ct.App. 1992); *State v. Robb*, 484 A.2d 1130, 1134 (N.H.S.Ct. 1984); *Commonwealth v. Rosenberg*, 573 N.E.2d 949, 958-59 (Mass.Sup.Jud.Ct. 1991); *Matter of Sonsteng*, 573 P.2d 1149, 1155 (Mont.S.Ct. 1977); *Scopes v. Shah*, 398 N.Y.S.2d 911, 913 (1977) (proof of a recent overt act is “too restrictive and not necessitated by substantive due process. The lack of any evidence of a recent overt act . . . does not necessarily diminish the likelihood that the individual poses a threat of substantial harm to himself or others.”); *In the Matter of Salem*, 228 S.E.2d 649, 652 (N.C.App. 1976); *In re Slabaugh*, 475 N.E.2d 497, 500 (OhioCt.App. 1984) (“we do not believe, as contended by appellant, that a mentally ill person can be said to be dangerous only if there is evidence that the person recently committed a dangerous overt act or threatened one.”); *Matter of Giles*, 657 P.2d 285, 287-88 (UtahS.Ct. 1982); *In re L.R.*, 497 A.2d 753, 756 (Ver.S.Ct. 1985); *but see, Matter of Mohr*, 383 N.W.2d 539 (IowaS.Ct. 1986).

doctrine, this court should be hesitant to expand this doctrine in the manner suggested by Aston (whatever that may be).

V. **THE POLYGRAPH TESTIMONY DOES NOT REQUIRE REVERSAL OF THE JURY VERDICT**

Aston argues that the trial court should have granted a mistrial when witnesses for the State testified that Aston was subject to polygraph testing under the terms of his community supervision. This argument should be rejected. Aston was subject to polygraph testing by the Department of Corrections to ensure his compliance with his conditions of release. With the exception of Aston's mother blurting out testing results during testimony, all testimony regarding the polygraph from the State was presented as part of the administration of his supervision while Aston was living in the community. The CCOs did not inform the jury of the polygraph results or provide any information from which the jury could infer the results of the polygraph.

Even if the actions of a hostile witness (Aston's mother) are held against the State, any error in this case is harmless because the results did not prejudice Aston in any manner. Aston later acknowledged that he lied to his CCOs about his behavior and his own testimony was fully admissible. The fact that the polygraph results confirmed his own admitted lie does nothing to alter the substantive facts considered by the jury in committing Aston. In this way, Aston's argument is like

complaining about the results of a smoke detector when other evidence conclusively demonstrates the house is on fire.

A. STANDARD OF REVIEW

On a daily basis, trial judges throughout our state make thousands of discretionary decisions regarding the admissibility of evidence and the scope of cross-examination. If trial courts are to function effectively, it is important that our judges enjoy substantial latitude to make routine and timely, good-faith evidentiary decisions without unnecessary fear of reversal by appellate courts. Recognizing this important reality, our appellate courts have repeatedly emphasized that "[d]eterminations regarding the scope of cross-examination are within the trial court's discretion and will not be overturned on appeal absent an abuse of discretion." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (citations omitted).

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 only 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 Wn.2d 821, 856, 83 P.3d 970 (2004). Aston fails to satisfy this standard.

An error in admitting evidence does not require reversal if it meets the harmless error standard. The error is harmless if it did not within reasonable probability materially affect the outcome of the trial. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

There were no evidentiary errors regarding polygraph testimony in Aston's civil commitment trial that materially affected the juror's determination that he met criteria as a sexually violent predator. Mrs. Aston's testimony did not prejudicially affect the outcome of the trial. Any prejudice that might have arisen would constitute harmless error.

**B. TESTIMONY REGARDING THE FACT OF
POLYGRAPH TESTING WAS ADMISSIBLE TO
EXPLAIN ASTON'S COMMUNITY SUPERVISION**

The mere fact that a jury is informed that a polygraph examination was conducted is not per se prejudicial especially when such testimony is otherwise relevant. *State v. Descoteaux*, 94 Wn.2d 31, 38, 614 P.2d 179 (1980) overruled on other grounds in *State v. Danforth*, 97 Wn.2d 255 643 P.2d 882 (1982). What the court judiciously guards against is the admission of polygraph results, i.e., those that tend to establish the truth or

falsity of a disputed fact, because polygraph testing is inherently unreliable as an indicator of deception. *State v. Reay*, 61 Wn. App. 141, 150, 810 P.2d 512 (1991); *State v. Descoteaux*, 94 Wn.2d 31, 38, 614 P.2d 179 (1980).

When polygraph evidence is being introduced as an operative fact, meaning it was relevant that the polygraph was administered, and it is not being offered to establish the truth or falsity of a disputed fact, the evidence may be admissible. *State v. Reay*, 61 Wn. App. 141, 150, 810 P.2d 512 (1991)(citing *Brown v. Darcy*, 783 F.2d 1389, 1397 (9th Cir. 1986) (holding that polygraph evidence was directly relevant to the thoroughness of an investigation and the medical examiner's determination)).

It is only polygraph testimony from which a jury can infer polygraph results that are prejudicial which could cause a court to find possible reversible error. Polygraph testimony that does not mention polygraph results or does not implicate the results may be admissible. *State v. Terrovona*, 105 Wn.2d 632, 652, 716 P.2d 295 (1986); *State v. Descoteaux*, 94 Wn.2d 31, 38, 614 P.2d 179 (1980). Even if the polygraph results are somehow inferred, the polygraph testimony may still be admissible so long as the inferences are nonprejudicial. *State v. Descoteaux*, 94 Wn.2d 31, 38, 614 P.2d 179 (1980).

The court also looks at the affect the polygraph testimony had on the jury at the time it was presented. In *Terrovona*, a defense alibi witness was asked if he remembered talking to a particular person. The witness responded that the person must have been the polygraph examiner. The court held that it was unlikely that a reference to a polygraph examination in this case prejudiced the defendant. The court noted the defendant's alibi in this case was already on "shaky" ground long before the witness mentioned the polygraph examiner. *State v. Terrovona*, 105 Wn.2d 632, 652, 716 P.2d 295 (1986).

In the case at hand, the jury heard that Aston was subjected to and had actually undergone two polygraph tests as part of the administration of his supervision while conditionally released into the community as part of his sexually violent predator commitment trial. VRP 9/30/09 at 272, 296, Ex. 65. It was important for the jury to understand the nature of Aston's supervision for several reasons. First, it demonstrated the strength of Aston's deviance – that he continued to engage in sexualized and deviant behavior despite a likelihood of being caught through tight supervision. Second, it helped to prove that Aston required confinement in "a secure facility" because his existing supervision conditions were not sufficient to control his sexually deviant behavior. Finally, it demonstrated his risk to reoffend by pointing out that he would affirmatively hide deviant behavior unless

confronted with testing. Ultimately, his admissions in the course of a polygraph interview were far more interesting and relevant than the test itself.

The polygraph evidence was presented to explain the administration of Aston's supervision at his SVP trial.¹⁰ The jury learned that when Aston was released into the community in 2006 he was to have no contact with minors or go where minors congregate. He was not allowed to possess pornographic materials. He was to complete sex offender treatment and get a job. Aston was expected to disclose to his CCO his sexual fantasies, potential violations, and any incidental contact with minors. VRP 9/30/09 at 270, 272-276.

The purpose of the polygraph testimony in this case was to show it was an administrative part of his supervision. The polygraph testimony was not presented to establish the "truth" of a disputed fact, such as whether or not he violated his conditions of release. The jury was instructed by the court that it was only to consider the polygraph testimony in the context of the conversation that took place between Officer Jones and Mr. Aston. The jury was further instructed to disregard entirely any consideration of any results of polygraph tests that might or might not have

¹⁰ Aston was not polygraphed in conjunction with the sexually violent proceedings under RCW 71.09.040. *In re Hawkins*, __ P.3d __ (2010) WL 3504833 is not applicable to this case.

been administered. VRP 9/30/10 at 315. The jury then learned that during those conversations with his CCO, Aston admitted he violated the conditions of his release by writing sexually deviant fantasies.

The fact that Aston was subject to polygraph testing was relevant to ensure his compliance with the conditions of release. The purpose of the polygraph evidence in this case is similar to that in *Reay*. In *Reay* it illustrated the thoroughness of the police investigation. Here, it demonstrates cautious and prudent supervision to which Aston was subject.

Moreover, the administration of the polygraph in conjunction with all the conditions of release with which Aston was required to comply are extremely and directly relevant to the issue at trial: whether Aston is a sexually violent predator. Dr. Judd, like the medical examiner in *Reay*, relied upon the fact that Aston was under the strict supervision of the Department of Corrections, which strictly prohibited him from writing sexually deviant fantasies and possessing pornography as part of his basis for determining that Aston had serious difficulty controlling his sexually violent behavior and had committed a recent overt act. VRP 10/5/09 at 647, 677-79.

Clearly, the purpose of the polygraph testimony in Aston's SVP trial was to demonstrate the thoroughness of the corrections officers in ensuring that Aston comply with the conditions of release to which he was subject. This testimony was directly relevant to both the administration of his supervision as well as Dr. Judd's determination that Aston met criteria as a sexually violent predator. Despite close supervision, Aston could not comport his behaviors with his CCO's requirements. As such the polygraph testimony is an operative fact and therefore admissible.¹¹

When polygraph evidence is introduced as an operative fact, as it was in Aston's case, it is admissible without regard to the results. The Aston jurors were never apprised of the polygraph results by Officer Jones or Austin.

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¹¹ Aston was not prevented from cross examining Officer Austin on properly admitted polygraph evidence. Aston does not have a right to cross examine witnesses on inadmissible evidence, i.e., Aston failed a polygraph and Austin could have violated him. Determinations regarding the scope of cross-examination are within the trial court's discretion and will not be overturned on appeal absent an abuse of discretion. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Officer Austin testified at least twice that he could have violated Aston for writing fantasies but chose not to do so. Brief of Appellant at 35. Aston's decision not to cross Officer Austin was a purely strategic choice. VRP 9/30/09 at 406.

C. EVEN ASSUMING THE RESULTS OF THE POLYGRAPH TESTS WERE IMPLICATED BY THE TESTIMONY OF OFFICERS JONES AND AUSTIN, ANY INFERENCES THE JURY COULD HAVE MADE WOULD NOT HAVE BEEN PREJUDICIAL IN SVP PROCEEDINGS.

An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). There were no evidentiary errors regarding polygraph testimony in Aston's civil commitment trial that materially affected the juror's determination he met criteria as a sexually violent predator.

Aston cites to a number of cases where a trial court in a criminal proceeding allowed polygraph testimony from which the Court held a jury could have inferred prejudicial results. In the cases cited by Aston, the court noted that the prejudicial effect of the polygraph testimony linked the accused to the crime charged. In *Sutherland*¹² and *Justesen*¹³ the court

¹² In *State v. Sutherland* a detective testified that a witness, who initially had been the primary suspect in the murder case for which the defendant was now on trial, had taken two polygraph tests. The court held that the jury could infer from the detective's testimony that the witness had told the truth and passed those polygraphs. This testimony worked to fortify the witness's testimony against the defendant because the jury could only conclude that the witness was telling the truth and therefore prejudicial to the defendant. *State v. Sutherland*, 94 Wn. 2d 527, 617 P.2d 1010(1980).

¹³ In *State v. Justesen*, the noncustodial parent, was on trial for custodial interference after concealing her daughter in another state. Justesen told the jury that the police informed her that KS, her daughter's father, had passed a polygraph during their investigation of the sexual abuse allegation. The court held that the jury could infer that KS must have passed the polygraph because he

held the polygraph evidence worked to fortify the witness' testimony against the defendant. In distinguishing *Justesen* from *Reay*, the court noted that *Justesen* was not a case where the central issue was the thoroughness of a professional investigation where the polygraph was administered in the process of the investigation:

Like *Sutherland*, it is a criminal case where the ultimate issue is guilt. KS was a critical witness against Justesen and the jury had to decide whether [KS] was telling the truth. An obvious inference was that KS, by taking the polygraph had satisfied police investigators that he was not guilty of child molestation. This inference strongly and impermissibly, fortified his testimony.

Justesen, 121 Wn. App. at 86.

Unlike the *Sutherland* and *Justesen* trials, which were criminal trials, sexually violent predator cases are civil proceedings. *In re Young*, 122 Wn.2d 1, 15-52 (1993). The ultimate issue in sexually violent predator cases is not guilt. It is whether Mr. Aston meets criteria as a sexually violent predator. The officers' testimony that Aston underwent a polygraph did not fortify their testimony, or any witnesses' for that matter, against Aston in any way. They did not offer such an opinion as to whether Aston was a sexually violent predator.

was not charged with child molestation. Therefore, he must be telling the truth now. The polygraph testimony essentially strengthened his testimony in a case where the jury had to decide whether or not he was telling the truth testifying against Justesen. As a result, the polygraph testimony prejudiced the defendant. *State v. Justesen*, 121 Wn. App. 83, 85, 86 P.3d 1259, 1260 (2004).

Moreover, Aston cannot even argue the polygraph evidence strengthened or reinforced the officers' testimony over his because jurors were not asked to determine whether Aston was telling the truth about his sexually deviant fantasies, nor was there any disputed fact about Aston's fantasies. Aston repeatedly disclosed he was having sexually deviant fantasies involving little girls with or without a polygraph test. In addition to the testimony of Officer Jones and Austin, the jury heard Aston describe numerous fantasies where he would sexually abuse little girls in his August 13, 2009 deposition. CP 555-572, 574-577. Aston even elaborated in that deposition regarding two fantasies he had only mentioned to Officer Jones and Austin. CP 555-572. The jury also read the originals of Aston's handwritten stories depicting the sexual abuse of children. Ex. 66. And, they heard from Aston's own father who described Aston acting out his sexually deviant fantasies involving little girls in restaurants, which even his father found the subject matter uncomfortable. VRP 10/1/09 at 444.

It is clear in this case, as in *Terrovona*, that in light of the weight of all the evidence, if the polygraph results were inferred, they were not prejudicial. Moreover, the polygraph results could not have materially affected the outcome of the trial. The most a jury could have inferred is that on June 13, 2006 Aston lied to Officer Jones about having sexually

deviant fantasies when he initially told Officer Jones he had nothing to report. But it did not take a polygraph to establish this fact. Aston himself essentially admitted he lied to Officer Jones by disclosing he had in fact been writing sexually deviant fantasies. Even if the jury had inferred he lied, his immediate confirmation of that fact through independent evidence — Aston's own testimony — removed any prejudicial taint.

Aston's case is also distinguishable from *Descoteaux*¹⁴ because the Aston jury did not hear that Aston's polygraph implicated him in other bad acts or crimes not relevant to his SVP trial. In *Descoteaux*, the court held that a criminal defendant can only be tried on the offense charged and evidence of other bad acts or crimes are not admissible. In an SVP trial, however, which is a civil proceeding, all acts are generally relevant and admissible to whether Aston suffers from a mental abnormality, has difficulty controlling his sexually violent behavior, is likely to engage in

¹⁴ In *State v. Descoteaux* the defendant was charged with Escape in the First Degree after he failed to return to work release. Descoteaux claimed he was needed to take care of his fiancée, who was ill, and her three children rather than reporting back to the jail. At trial, the court allowed the prosecutor to cross Descoteaux on the fact that he was scheduled to take a polygraph regarding "possible violations, perhaps even criminal activities" the day after he escaped to rebut his necessity defense. The court found error because a defendant in a criminal case must be tried on the offense charged. Any evidence of unrelated acts of misconduct is inadmissible. The reference to the scheduled polygraph in the context "possible violations or criminal activity" allowed the jury to draw an inference that the defendant had in fact violated the terms of his work release and engaged in criminal activities. *State v. Descoteaux*, 94 Wn.2d 31, 38, 614 P.2d 179 (1980).

acts of predatory acts of sexual violence if not confined to a secure facility, or has committed a recent overt act.

The mere fact that the word polygraph was uttered did not implicate a polygraph result in any manner materially affecting the outcome of the case. The judge did not abuse his discretion in refusing to grant a mistrial. Aston's civil commitment should be affirmed.

D. THE COURT'S CURATIVE INSTRUCTION ENSURED ANY PREJUDICIAL EFFECT RESULTING FROM UTTERING THE WORD "POLYGRAPH" CONSTITUTED HARMLESS ERROR.

The mere fact that a jury is informed that a polygraph examination was conducted is not per se prejudicial. The court has considerable discretion in balancing the probative value of evidence against its prejudicial impact. *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986). A trial court should only grant a mistrial when the defendant has been so prejudiced that nothing of a new trial can ensure he will be tried fairly. *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). Anything less is deemed harmless error. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

When polygraph evidence is admitted as a relevant operative fact, as it was in this case, the potential for prejudice is negligible in light of the purpose for which the polygraph was admitted as well as the limiting

instruction given to the jury. *State v. Reay*, 61 Wn. App. 141, 150, 810 P.2d 512 (1991). A jury is presumed to follow the court's instruction and that presumption will prevail until it is overcome by a showing otherwise. *Carnation Co. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416 (1990).

The limiting instruction issued in *Reay* rendered the potential for prejudice negligible in light of the purpose for which the polygraph was admitted. *State v. Reay*, 61 Wn. App. 141, 150, 810 P.2d 512 (1991). The *Reay* instruction read:

You will hear testimony concerning the use of a polygraph in this case. There is scientific dispute about the reliability of the polygraph and the polygraph is not generally accepted in the community as reliable.

Based on the current scientific data supplied to the court of this state, the polygraph has not been shown to be sufficiently reliable as an indicator of truthfulness to be admissible in court proceedings.

However, the polygraph is used by law enforcement as an investigatory tool and you may consider its use here in evaluating the conduct and investigation carried out by the Medical Examiner.

You are instructed that the result of the test of the deceased's husband may not be considered by you as reliable evidence that the husband did or did not kill his wife.

In contrast, however, a limiting instruction that invites a jury to consider polygraph testimony in evaluating the reasonableness of a defendant's defense is ineffective in overcoming the prejudicial effect of a

witness whose testimony was fortified by polygraph testimony. *State v. Justesen*, 121 Wn. App. 83, 85, 86 P.3d 1259, 1260 (2004).

In Aston, the State asked Officer Jones if Aston took a polygraph after Aston informed him that he did not have anything to report on July 13, 2006. VRP 9/30/09 at 314. The State then asked Officer Jones if he had an opportunity to talk to Aston at some point later. *Id* at 314. The trial court issued the following curative instruction similar to the instruction in

Reay:

Polygraph evidence is not admissible. Polygraph results are not admissible in evidence in the courts in the State of Washington. And, that's because polygraph evidence is simply not sufficiently reliable to be admissible. Therefore, no testimony will come in this case regarding polygraph testing, either the results, good, bad or indifferent, either expressed or implied.

The testimony that is allowable is the context of the conversation that ensued between Mr. Jones and Mr. Aston. But you should disregard entirely any consideration of any results of any polygraph test that might or might not have been administered.

VRP 9/30/09 at 314 - 315.

After the court delivered the limiting instruction to the jury, Officer Jones testified that in the context of a conversation after Aston took a polygraph, Aston "disclosed that he, in fact, had been having several fantasies that he had not reported to me or to his sex offender treatment provider." VRP 9/30/09 at 316.

By instructing the jury similarly to the instruction in *Reay*, any potential prejudice is negligible in light of the administrative purpose for which the polygraph was administered in this case. The court must presume the jury followed the court's instruction. *Carnation Co. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416 (1990). Aston has not presented any evidence to the contrary.

In contrast, Officer Austin's testimony that Aston was scheduled to take a polygraph on November 6, 2006 did not require a curative instruction because other than mentioning a polygraph there was no reference to any results. VRP 9/30/09 at 360.

When asked if he had anything to report Aston informed Officer Austin that he had been writing more stories. VRP 9/30/09 at 361. The State then asked, "so you interviewed him, he took a test and then he came back and you talked to him?" Officer Austin answered, "I did." Aston objected and the court ordered the State to move on and get into what was said. Officer Austin then testified that Aston told him a few times that he had continued to write stories. Aston admitted to Officer Austin that he would rewrite the stories, "fantasize about them, masturbate and then destroy them." VRP 9/30/09 at 360-362.

Clearly, this testimony was in context of the conversation that ensued between Aston and Officer Austin. There was no reference to

polygraph results. There was no testimony from which the jury could infer polygraph results. This testimony was not erroneously admitted. Furthermore, the stories Aston wrote and masturbated to were admitted into evidence. Ex. 66. The jury read them. Obviously, this admission could not have prejudicially affected the outcome of the trial in light of all the evidence presented.

E. MARY ASTON'S TESTIMONY THAT ASTON "FAILED" A POLYGRAPH CONSTITUTED HARMLESS ERROR AND DID NOT AFFECT THE OUTCOME OF THE TRIAL

Although the State's witness's did not mention polygraph results, the respondent's mother, Mary Aston, offered unsolicited testimony on this fact. Aston argues that his mother's testimony that he "failed" a polygraph is prejudicial and constitutes reversible error. The court, however, was within its discretion and authority to not grant a mistrial because the unsolicited statements of the respondent's mother should not be grounds for a mistrial, particularly when there was no prejudicial affect. The court also properly instructed the jury to disregard her statement. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014, (1989).

Prior to trial, the State had concerns that Mrs. Aston would be a hostile witness when called by State and it raised those concerns with the court on September 23, 2009. VRP 9/23/09 at 79. When Mrs. Aston testified on October 1, 2009 she gave two unsolicited answers that her son

had “failed a polygraph.” Initially, the prosecutor asked Aston’s mother if she was aware that her son was writing sadistic stories. Mrs. Aston responded:

Mrs. Aston: I knew there were thoughts. And he told his CCO about it and they – told him to give them copies.
Prosecutor: I am going to stop you right there, you have to have a question before you answer.
Mrs. Aston. Sorry.
Prosecutor: So you knew there were thoughts. How did you know there were thoughts?
Mrs. Aston: I think he – well, it came up after he failed one of the polygraph tests.
Counsel: Your Honor, objection, may we have a sidebar
COURT: Well, the jury will disregard the last question and answer in their entirety. Let’s rewind and ask another question.
Prosecutor: Did your son ever tell you or did you ever see his writings at home that he was having these sadistic fantasies about young children.
Mrs. Aston: I know of one story that he – I know he had to write – he had written several stories, because he had talked about it after he failed the polygraph test. I never actually saw them.
Counsel: Your Honor, objection, can we have a sidebar, please?

VRP 10/1/09 at 458 – 459.

It is important to remember that Mrs. Aston’s testimony on the polygraph results established no substantive facts that were outside of the jury’s proper consideration. Through Aston’s own testimony it was already established that he had essentially lied to his CCOs about his sexually deviant fantasies. At worst, his mother’s testimony was

cumulative evidence of Aston's deception toward his CCO, who he thought were persecuting him. CP 555.

Polygraph testimony may still be admissible so long any inferences to the results are non-prejudicial. *State v. Descoteaux*, 94 Wn.2d 31, 38, 614 P.2d 179 (1980). A "trial judge is best suited to judge the prejudice of a statement." *Id* at 284 (citing *State v Weber*, 99 Wn. 2d 158, 166, 659 P.2d 1102, 1107 (1983)).

Mrs. Aston's testimony that Aston failed a polygraph did not establish the truth or falsity of a disputed fact. Her testimony did not fortify anyone's testimony against Aston in any way. More importantly, her testimony did not materially affect the outcome of the trial. Aston's mother cannot manufacture a mistrial for her son late in the trial when the State's proof is so strong. It is not the rule that every inadvertent or irresponsible answer of a witness will require a new trial:

The law presumes, and must presume, that the jury finds the facts from the evidence the court permits them to consider. Any other rule would render the administration of the law impractical. The state in criminal trials cannot choose its witnesses. It must call those who have knowledge of the facts, whether they be willfully designing or stupidly ignorant, and, if new trials were granted because of their irresponsible answers, the administration of the criminal laws would become so burdensome as to deny to the state the protection afforded by such laws. Again, as we have said on other occasions, to maintain a contrary rule is to impeach the intelligence of the jury; it is to say that they will return a verdict on evidence which the court tells them they must not consider-a verdict they would not have returned had the inadmissible evidence been kept entirely from their knowledge.

State v. Priest, 132 Wash. 580, 584, 232 P. 353, 354 (1925) (adopted by *State v Johnson*, 60 Wn. 2d 21, 29, 371 P.2d 611, 615-16 (1962).

Before ever taking the stand, the jury knew Mrs. Aston was hostile toward the State and very protective of her son. Officer Jones testified that when Aston had been arrested for writing sexually violent fantasies on July 13, 2006, he called his mother from jail and told her to clean his room. VRP 9/30/09 at 327. Mrs. Aston initially told Officer Jones she had cleaned his room and had thrown all its contents away. *Id* at 322. She later told Officer Jones that she had kept the contents of James' room and would bring them in as long as Officer Jones would not use it *against* Aston. *Id* at 323.

When Mrs. Aston took the stand the jury then learned the lengths she would go to protect her son. The jury had heard Mrs. Aston say she did not believe Aston molested MM because Aston did not do anything to her. Aston just "used bad judgment." VRP 10/1/09 at 453. The jury also knew Mrs. Aston sent her other son, Timmy, a minor to live with someone else so that Aston could live with them. *Id* at 456-57. Like the alibi witness in *Terrovana*,¹⁵ Mrs. Aston's integrity was already "shaky" before she testified that Aston had "failed" a polygraph.

¹⁵ *State v. Terrovona*, 105 Wn.2d 632, 652, 716 P.2d 295 (1986).

The Washington Supreme Court has deemed the trial judge best suited to judge the prejudice of a statement. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). That is certainly the case here. This trial judge clearly did not believe Aston's mother's statement was so prejudicial it warranted a mistrial. In denying Aston's motion for a mistrial, the court noted for the record the "quite well taken," comments of the prosecutor:

This is not the kind of case where Mr. Aston took a polygraph, failed, and then continued to assert that he had told the truth in the polygraph, and thus when the polygraph results came in they would be coming in for the truth of the matter asserted or the truth of what the test stood for, which is that he lied on the test. Instead, this is a situation where he took the test, he failed the test, and in the subsequent interview he admitted that he lied. So there is absolutely no possibility of prejudice.

VRP 10/1/09 at 467 citing 463.

After admonishing the jury to disregard the witnesses' testimony (VRP 10/01/09 at 459), the court also noted:

. . . today when I instructed the jurors to disregard the comment that had been volunteered by the witness not in response to a question, I had at least three nods from the jury box reflecting that they understood how the volunteered response was inappropriate and was not something for their consideration. So I feel quite confident in this jury's ability to follow the admonishment from the Court. If requested, I can certainly give a written instruction further addressing the question in the – or the

issue of the polygraph evidence in the Court's written instruction at the conclusion of trial.¹⁶

Id at 466.

This jury, who the trial judge felt quite confidently would follow his instruction, is now presumed to have followed the court's instruction. *Carnation Co. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416 (1990). Aston has not shown otherwise.

Mrs. Aston's unsolicited response that Aston "failed" a polygraph was a harmless error. Knowing the lengths that Mrs. Aston would go to protect her son, Aston should not benefit from her attempt to intentionally create a basis for a mistrial.

In summary, Aston's argument that his civil commitment should be reversed because of the polygraph testimony is utterly unpersuasive. The polygraph testimony was not admitted to prove the truth or falsity of a disputed fact. The jury was simply informed that a polygraph was conducted as part of the administration of Aston's supervision while in the

¹⁶ A curative instruction to strike the testimony was clearly available to Aston and he chose not to ask for it. Under these circumstances Aston has failed to preserve the argument that the court's curative instruction failed to cure the prejudicial effect, if any, of his mother's testimony. A party must object to any irregularities and request remedial action *before* the case is submitted to the jury. *Spratt v. Davidson*, 1 Wn. App. 523, 526, 463 P.2d 179 (1969); *see Cerjance v. Kehres*, 26 Wn. App. 436, 441, 613 P.2d 192 (1980). It is an increasingly common practice for trial counsel to invite error by remaining silent when presented by a trial court with options to cure error. Because "[a] curative instruction will often cure any prejudice that has resulted from an alleged

community to ensure he complied with his conditions of release. The testimony was allowed in the context of a conversation that ensued between Mr. Aston and the Community Correction Officers. With the exception of his own mother's testimony, the results of the polygraph test were never mentioned or inferred.

Mrs. Aston's testimony did not prejudicially affect the outcome of the trial. Her testimony did not prejudicially strengthen the testimony of a critical witness against Aston. The court also instructed the jury to disregard Mrs. Aston's testimony and according to the court it appeared the jury understood its direction. Any prejudice that might have arisen would have been negligible constituting harmless error.

The trial court did not err in denying Aston's motion for a mistrial. This court should reject his arguments and affirm the trial court.

VI. ASTON'S STRATEGIC DECISION ON HOW TO USE LIMITED VOIR DIRE TIME DOES NOT CREATE AN ABUSE OF DISCRETION

Although granted more than a full day for voir dire, including individual questioning of selected jurors, Aston now claims that the trial court denied him due process by placing "unreasonable limits" on voir dire. Aston cites very little authority in support of his claim and almost no relevant authority from Washington State. Aston effectively claims that

impropriety.," *State v. Pastrana* , 94 Wash.App. 463, 479, 972 P.2d 557 (1999),

the trial court did not provide time adequate for Aston to effectuate his preferred *strategy* for voir dire -- i.e. asking questions in closed session rather than open session, asking questions unrelated to bias, using general voir dire time to indoctrinate jurors, etc. It is clear that Aston was informed of the court's limits early and often, but still chose to utilize his allotted time in a manner that limited his opportunity to follow up on other areas of relevant inquiry. Because the conduct of voir dire is well within the discretion of the trial court, Aston cannot successfully claim error when he made the strategic decision to consume his voir dire time on other matters.

Our system vests a trial judge with considerable latitude in shaping the limits and extent of voir dire. *Murray v. Mossman*, 52 Wn.2d 885, 887, 329 P.2d 1089 (1958); *State v. Robinson*, 75 Wn.2d 230, 231, 450 P.2d 180 (1969). Voir dire is not a topic that lends itself to appellate review because of the nuances and subtleties presented by each jury case. *State v. Davis*, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000).

The primary purpose of voir dire is to give a litigant an opportunity to explore the potential jurors' attitudes in order to determine whether the jury should be challenged. *State v. Frederiksen*, 40 Wn. App. 749, 752, 700 P.2d 369 (1985). Voir dire should not be used to educate the jury

this court should make it clear a practice of "hedging bets" fails to preserve error.

panel to particular facts of the case, to compel jurors to commit themselves or to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law. *State v. Frederiksen*, 40 Wn. App. 749, 752, 700 P.2d 369 (1985).

It is for these reasons that “[t]he trial court is vested with discretion (1) to see that the voir dire is effective in obtaining an impartial jury and (2) to see that this result is obtained with reasonable expedition.” *State v. Frederiksen*, 40 Wn. App. 749, 753, 700 P.2d 369 (1985). Absent an abuse of discretion and a showing that the accused's rights have been substantially prejudiced thereby, the trial judge's ruling as to the scope and content of voir dire will not be disturbed on appeal. *Id.*

A trial judge does not abuse his or her discretion by allowing or not allowing any single question or even a line of questioning. The test is whether the court permitted a party to ferret out bias and partiality. *Frederiksen*, 40 Wn. App. at 752. One of the only situations where a trial court abused its discretion in managing voir dire was where the trial court eliminated a round of questioning without prior notice. Two of the attorneys had completed what was intended to be their opening general voir dire session, but it turned out to be their only session. By eliminating a second period and not allowing the parties to adjust the court found the

court abused its discretion. *State v. Brady*, 116 Wn. App. 143, 64 P.3d 1258 (2003). The court further held the trial court's abuse of discretion was prejudicial because the two attorneys who had completed the first round had saved topics relating to bias and race for the second round, which was then eliminated. *Brady* at 149.

In the current case, Aston has failed to make an argument -- apart from his own strategic preferences -- on how the trial court abused its discretion. The basic problem is not how much time the trial court allocated to Aston, but how Aston chose to allocate that time. This court has the entire voir dire transcript. VRP 9/28/2009; 9/29/2009. To the extent that Aston had important topics to address, he had the opportunity to address those topics, but made the strategic choice to address other topics instead.

Prior to trial, the trial court informed the parties that it would present the jurors with a questionnaire, allow time for some individual questioning and then allow 20 minutes for each of the four attorneys. VRP 9/23/09 at 146-155. The court counseled all parties to use their time efficiently during voir dire. *Id.* at 14-19.

On the first day of trial the judge allowed time for the parties to question individual jurors regarding answers to their questionnaire. VRP 9/28/2009 at 39 -81. The record reflects that the court allowed individual

questioning where requested by the individual juror and necessary due to the questionnaire answers. VRP 9/28/2009 at 36. The court then allowed each attorney 20 minutes to conduct a general voir dire session. *Id.* at 85-146. The next day, Aston requested more time to question the jurors for bias and that request was granted. VRP 9/29/2009 at 161.

Even before voir dire began, it is clear from the record that Aston's counsel spent a significant amount of time complaining that they did not have enough time to conduct voir dire. It is clear that Aston's voir dire lacked a laser focus on bias issues despite the time limits. Often, the defense strategy for voir dire was to indoctrinate the jury by favorably framing the issues for trial. *E.g.*, VRP 2/28/2009 at 114-116 (complaining about statutory danger criteria). Some of the questions asked by counsel were redundant. Even so, the issues of bias were fully and adequately explored by the court and the parties. Indeed, the prosecution also dedicated large portions of its voir dire to ferreting out bias. VRP 9/28/2009 at 91-99 (prosecutor ensuring that jurors can vote to release if State fails to meet its burden).

It is important to note that Aston does not challenge the seating of any particular juror because he cannot make such a challenge.¹⁷ Without

¹⁷ Aston's backdoor claim that question number 31 in the jury questionnaire automatically established bias goes too far. This question asked "Do you believe that someone who has previously committed more than one sexual assault

demonstrating that a biased juror actually sat on the jury, Aston cannot demonstrate error meriting reversal. *State v. Fire*, 145 Wn.2d 152, 154 (2001); *United States v. Martinez-Salazar*, 528 U.S. 304, 307, 315-16, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). Aston's claim that the trial court erred in managing voir dire fails to provide valid grounds to reverse the jury verdict in this case.

VII. CONCLUSION

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

DATED this 11th day of October, 2010.

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automatically is likely to reoffend." CP 972-1042. This question stands for the unremarkable proposition that persons who have committed multiple sex offenses have a higher propensity to commit future sex offenses. It does not equate with the statutory "more likely than not" threshold that would establish real bias. Likewise, Aston has demonstrated no prejudice from being denied an individual voir dire session with jurors who had experienced sexual assault, but who indicated no special desire to discuss their situation in private. Aston has cited no case allowing a right to interrogate jurors individually, especially when the juror has indicated no problem with discussing the otherwise sensitive matter in a more public setting.