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701398

NO. 70139-8-I

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

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In re Detention of Erik Hanson,

STATE OF WASHINGTON,

Respondent,

v.

ERIK HANSON,

Appellant.

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

The Honorable Millie D. Judge, Judge

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BRIEF OF APPELLANT

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MARTI McCALEB  
CHRISTOPHER H. GIBSON  
Attorneys for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The court erred by denying Hanson's motion for a mistrial after the State's expert witness, Dr. North, made unsupported and extremely prejudicial statements describing Hanson as a psychopath who is capable of sadistic rape and even murder. RP 492-500.

2. The court violated Hanson's Fourteenth Amendment due process right to present a complete defense by refusing to allow John Rockwell to testify as an expert witness regarding his personal interactions and professional opinion of whether Hanson exhibited signs of psychopathy. CP 71; RP 645-60.

3. The court erred by denying Hanson's motion for a Frye hearing to determine the scientific reliability of the Paraphilia—Not Otherwise Specified (Coercion) diagnosis as a basis of civil commitment. RP 211-16.

4. The court erred by limiting the scope of voir dire and not allowing defense counsel's questioning about potential jurors' willingness to presume the defendant innocent. RP 154-60.

Issues Pertaining to Assignments Of Error

1. Where the State's expert witness unexpectedly and in spite of the evidence called Hanson a psychopath and told the jury he was likely

to commit a sadistic rape or sexually motivated murder if released, did the trial court err by denying Hanson's motion for a mistrial?

2. Where the State expert's testimony that Hanson's dangerousness stemmed from psychopathic tendencies was a central issue at trial, did the court violate Hanson's constitutional right to present a complete defense when it refused to allow the defense expert to testify that Hanson does not exhibit signs of psychopathy?

3. Where the State's case rested on the validity of expert testimony diagnosing Hanson with a rape paraphilia—a diagnosis not included in any version of the psychological diagnostic manuals, did the trial court err by not conducting a Frye hearing to determine the validity of the diagnosis to justify involuntary commitment?

4. Where defense counsel asked the jurors to imagine the importance of impartiality and the presumption of innocence if they were accused of a crime, did the court err by limiting the scope of voir dire and finding these questions to be improper?

B. STATEMENT OF THE CASE

1. Procedural Facts

On January 19, 2009, the State filed a petition seeking appellant Erik Hanson's involuntary and indefinite civil commitment under Chapter 71.09 RCW. CP 409-11. After a seven-day trial, a jury found Hanson met

the commitment criteria and therefore the court ordered his indefinite confinement. CP 4-5. Hanson appeals. CP 1-3.

2. Substantive Facts

When Hanson was about 23 years old, he met Mary Beth Woll through a church outreach program. She invited him to her home to spend the evening with her family and purchased him several days' worth of food. As she drove him back to the shelter where he was staying, he asked her to park in a secluded area, where he subsequently choked her to unconsciousness. Later, he turned himself into authorities and admitted during questioning that he had originally wanted to have sex with her, but could not go through with it. He was convicted of attempted rape and served a ten-year sentence. RP 299; Ex. 45.

Additionally, Hanson had juvenile convictions for child molestation and incest. When Hanson was ten, he pled guilty to touching his younger sisters' vaginas. RP 300; Ex. 24. At age thirteen, he pled guilty to touching his five-year-old cousin's vagina and poking her in the stomach with "pick up sticks." Supp. CP \_\_ (sub 137, deposition of Erik Hanson, Feb. 20, 2013).

While Hanson was a youth incarcerated at Echo Glen, he assaulted Pam Morton, a female employee, by luring her into a locker room and choking her. Supp. CP \_\_ (sub 137, supra). He was charged with simple

assault, but admitted he had plans to have sex with Morton when he attacked her. Id.

Dr. North, a forensic psychologist from California, testified for the State at Hanson's commitment trial. RP 325. In addition to the juvenile and adult sex offenses to which Hanson pled guilty, Dr. North relied on other incidents that Hanson had recounted as a juvenile during group sessions at Echo Glen. RP 331-33. Specifically, he identified as relevant Hanson's youthful disclosures that he was sexually abused by his mother and by several babysitters as a boy, had regular sexual contact with his siblings for years, and sodomized family pets. Hanson later recanted all these statements, however, and Dr. North said he believed Hanson had exaggerated his accounts at Echo Glen in a juvenile attempt to make himself look more important and tougher to his peers there. RP 412.

Dr. North diagnosed Hanson with paraphilia, not otherwise specified (NOS) (coercion), antisocial personality disorder, and exhibitionism. RP 341-48. According to Dr. North, a paraphilia involves:

recurrent, intense, sexually arousing fantasies, sexual urges or behaviors generally involved in, one, nonhuman objects, two, the suffering or humiliation of one's self or one's partner, or three, children or other non-consenting persons. These fantasies, urges and behaviors occur over a period of at least six months, and they cause clinically significant distress or impairment in social, occupational or other important areas of functioning.

RP 336.

Although the American Psychological Association (APA) has repeatedly rejected proposals to include “paraphilic coercive disorder” as a legitimate psychological diagnosis in its updated versions of the Diagnostic Statistical Manual (DSM), Dr. North maintained that paraphilia (NOS) (coercion) is a credible diagnosis from which to find a mental abnormality to justify involuntary commitment. RP 345.

Dr. North testified that Hanson would likely engage in future acts of predatory sexual violence if not confined. RP 491. He relied on two actuarial instruments (Static-99 and Static 2002) and his clinical judgment in reaching his conclusion. RP 444. Dr. North rated Hanson as high risk. RP 471. However he acknowledged that the actuarial instruments were no better than moderately predictive and when asked, would not provide a probability of the Hanson’s risk to reoffend. RP 471-73.

Dr. North concluded that Hanson’s rape paraphilia and antisocial personality disorder created difficulties in controlling his behavior. RP 428. He told the jury Hanson was likely psychopathic and likely to commit a rape, attempted rape, sadistic sexual assault, or sexually motivated murder if released. RP 395-97,490-91.

Defense counsel objected that this testimony was inflammatory, was not supported by the evidence, and had never been indicated before in

any of Dr. North's depositions or pretrial reports. RP 491, 501-02. The court ruled that the witness was entitled to give his opinion, even if it differed from prior statements and that there was evidence of sadism, despite the lack of a diagnosis. RP 499. Hanson's counsel also moved for a mistrial for undue prejudice and lack of foundation. RP 492-500. The court denied the motion, stating it did not believe the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. RP 500.

Dr. Halon, an expert forensic psychologist testifying for the defense, refuted Dr. North's opinion. RP 823. Dr. Halon noted the reliability of a paraphilia (NOS) diagnosis is terrible, and explained that it was highly discouraged in clinical settings. RP 819. Dr. Halon explained that paraphilia (NOS) is used in forensic settings as a means of gaining involuntary commitment orders, despite the fact that the APA has repeatedly rejected the existence or legitimacy of an explicit rape paraphilia. RP 819. The manual itself sets out that "When the DSM-IV categories, criteria and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. . . These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in the clinical diagnosis." RP 809. According to

Dr. Halon, the paraphilia (NOS) (coercion) diagnosis can be useful in clinical settings, but there it lacks any clear diagnostic criteria and no way of verifying the diagnosis. RP 818-19.

Dr. Halon also explained that the “rape fantasies” Hanson described and that Dr. North relied on in diagnosing paraphilia (NOS), were not sexually arousing urges based on the use of force. RP 824. Instead, Hanson’s sexual fantasies of initiating sex with an uninterested partner and arousing her to the point of enjoying and wanting sex with him are common scenes played out in garden-variety pornography. RP 824-26. Hanson’s early childhood sexualization and his exposure to pornography at a very young age made it very likely that he would internalize some of these ideas, but Hanson realized that while the fantasy was of turning a woman on to having consensual sex, any overt act to do so would constitute a rape in the real world. RP 830-39. Thus, he had no other word for his thoughts than “rape fantasy,” even though Hanson repeatedly expressed that he had no interest in actually forcing a woman to have sex with him. RP 824.

Along this same line, Dr. Halon testified that Hanson was the first person he had ever seen diagnosed with a rape paraphilia who had never actually committed a rape. RP 824. While Hanson reported that his physical assaults on Pamela Morton and Mary Beth Woll were motivated

by a desire to have sex with them, in both cases Hanson stopped himself before ever attempting sexual contact. RP 931, 958.

Hanson's counselor at the Special Commitment Center (SCC), John Rockwell, testified Hanson never had inappropriate contact with staff or other residents. RP 765-67. Although Rockwell was originally scheduled to appear as a fact witness, after Dr. North testified regarding the possible diagnosis of psychopathy, defense counsel attempted to qualify Rockwell as an expert to rebut that testimony. Because of the late disclosure of the expert witness, the court refused to allow Rockwell to testify as an expert witness. RP 660.

C. ARGUMENT

1. THE COURT ERRED BY DENYING HANSON'S MOTION FOR A MISTRIAL AFTER THE STATE'S EXPERT WITNESS MADE UNSUPPORTED AND EXTREMELY PREJUDICIAL STATEMENTS DESCRIBING HANSON AS A PSYCHOPATH AND POTENTIAL MURDERER.

During examination by the State, Dr. North unexpectedly stated that Hanson exhibited signs of clinical psychopathy. RP 489. He claimed Hanson was likely to reoffend, and was at risk for committing a sadistic rape or a sexually motivated murder. RP 490. Defense counsel made an offer of proof that these opinions were outside the scope of anything Dr. North had stated in depositions or his professional reports leading up to

the trial. RP 501-02; see e.g., RP 431, Ex. 59. Indeed, Dr. North made it very clear that he had not diagnosed Hanson with sadism. RP 505-07. Dr. North also never indicated that he believed Hanson attempted to murder either Pam Morton or Mary Beth Woll. Thus, Dr. North's trial testimony was unfounded and never should have been admitted in the first place. It was also inflammatory and prejudicial.

When the trial court overruled counsel's objection to Dr. North's testimony and counsel then moved for a mistrial. While she did not request a curative instruction, the prosecutor suggested one as a possible lesser remedy. RP 497. However, as the court had decided there was nothing to cure, a defense request for a curative instruction would have been futile. Further, given the extremely prejudicial nature of the testimony and the value the jury put on expert testimony, the prejudice resulting from Dr. North's testimony was incurable. The court ultimately denied Hanson's motion for a mistrial. RP 500.

A trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217(2003). This Court should reverse the trial court if there is a substantial likelihood the trial irregularity prompting the mistrial motion affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). In determining the effect of an

irregularity, the court must examine “(1) the seriousness of the irregularity; (2) whether the statement at issue was cumulative evidence; (3) whether the jurors were properly instructed to disregard the remarks of counsel not supported by the evidence; and (4) whether the prejudice was so grievous that nothing short of a new trial could remedy the error.” State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). When these factors are examined in the context of the relevant facts here, it is apparent the trial court abused its discretion in denying Hanson's mistrial motion.

First, Dr. North's testimony that Hanson was likely to commit a sadistic rape or sexually motivated murder was the strongest statement regarding his future dangerousness. While Hanson admitted to repeated “flashing” incidents and precocious consensual sexual activity with his siblings, he denied other sexual deviance and had in fact never actually committed a sexual assault. Supp. CP \_\_ (sub 137, supra). Despite these strong indicators that Hanson's actions, while criminal, were not sufficient to support his involuntary commitment, Dr. North's damning testimony discredited all that. Coming from an expert witness, it is unimaginable that the jury would not have used that information as a primary consideration in its decision making process. As such, Dr. North's improper testimony constituted a very serious trial irregularity.

Second, the statements at issue were not cumulative. The evidence against Hanson was not overwhelming. The case involved dueling experts and a “rapist” who had never committed a rape. Both sides presented expert testimony on whether Hanson was likely to reoffend and reached diametrically opposed conclusions. Dr. North’s testimony was central to the ultimate question of whether Hanson suffered from a mental abnormality or personality disorder that made him likely to engage in predatory acts of sexual violence. In re Detention of Twining, 77 Wn. App. 882, 890, 894 P.2d 1331 (1995), overruled on other grounds, In re Detention of Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010). Dr. North's unsupported claim that Hanson would violently rape or murder someone was not cumulative of any other evidence at trial.

Third, no curative instruction was given. This is not surprising as the trial court determined Dr. North's testimony was not improper. RP 500.

Finally, nothing short of a mistrial would have sufficed to ensure Hanson a fair commitment trial. No instruction from the court could have cured the unfair prejudice resulting from Dr. North's unfounded and surprise testimony.

As indicated by Hanson’s offer of proof, Dr. North’s testimony lacked foundation. It was counter to the evidence of Hanson’s previous

actions and contradicted Dr. North's own prior assessments of Hanson's condition and potential for future dangerousness. The admission of this improper evidence constitutes a serious trial irregularity. Combined with the fact that the evidence was not cumulative, the court declined to remedy the prejudice through a curative instruction, and that in any event the prejudice was so overwhelming as to be incurable, the court should have granted the motion for a mistrial. This Court should reverse.

2. THE COURT VIOLATED HANSON'S DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE BY REFUSING TO ALLOW THE EXPERT TESTIMONY OF COUNSELOR JOHN ROCKWELL.

After Dr. North testified that Hanson exhibited psychopathic traits and the court denied the motion for a mistrial, Hanson's defense attempted to rebut that prejudicial testimony as best it could. John Rockwell, a psychologist at the SCC, was already slated to testify as a fact witness. Given his professional training and his personal interactions with Hanson, the defense sought to qualify Rockwell as an expert witness to provide opinion testimony refuting North's, but the court denied the request on the basis of untimely disclosure. RP 660. This was error that deprived Hanson of his due process right to present a complete defense. Reversal is therefore warranted.

Involuntary commitment under Chapter 71.09 RCW is a significant deprivation of liberty triggering due process protection under the Fourteenth Amendment of the United States Constitution. In re Detention of Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003). Notions of fundamental fairness require an accused be given "a meaningful opportunity to present a complete defense." State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); see also In re Welfare of Hansen, 24 Wn. App. 27, 36, 599 P.2d 1304 (1979) (due process principles require party be given a full and meaningful opportunity to present evidence). "[T]he right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies" is a fundamental element of due process as protected by the Fourteenth Amendment. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Whether constitutional right has been violated is a question of law reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). Whether a trial court's ruling excluding evidence violates the constitutional right to present a defense is therefore subject to de novo review. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

a. The Trial Court Prevented Hanson From Presenting A Complete Defense By Excluding Rockwell's Expert Testimony.

Rockwell was Hanson's counselor and case manager at SCC. Originally, Rockwell was slated to testify as a fact witness, but given the extremely prejudicial nature of Dr. North's testimony, the defense sought to qualify him as an expert witness so it could rebut that testimony with its expert's own opinion. Rockwell would have testified that Hanson had not exhibited signs of psychopathic behavior and that he had completed a treatment program and successfully internalized the lessons and behaviors taught in sex offender treatment therapy. RP 648-50.

Neither the prosecutor nor the court disputed Rockwell's qualifications as an expert witness, but the court determined the late disclosure warranted excluding this testimony. RP 659-60. In not allowing Rockwell's expert testimony, the court violated Hanson's due process right to present a complete defense. The ruling prejudiced Hanson's right to have the jury consider all relevant evidence in determining whether he met the commitment criteria.

While CR 26(b)(5) generally requires expert witnesses be disclosed prior to trial, a defendant has a constitutional right to present testimony of witnesses to establish a defense. State v. Cheatam, 150

Wn.2d 626, 648, 81 P.3d 830 (2003). A witness with scientific, technical, or other specialized knowledge may testify thereto if the testimony will be helpful to the trier of fact and the witness is qualified as an expert by knowledge, skill, experience, training, or education. ER 702. Practical experience is sufficient to qualify a witness as an expert. State v. Ortiz, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). Testimony must be relevant to be admissible. ER 402. Evidence is relevant if (1) it tends to prove or disprove the existence of a fact and (2) that fact is of consequence to the outcome of the case. ER 401; Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 573, 719 P.2d 569 (1986).

Rockwell's testimony as a fact witness was that Hanson was a model prisoner who was cooperative and treated staff and other inmates appropriately. The defense did not initially disclose him as an expert witness because it believed this testimony was sufficient to rebut the State's claims that Hanson's antisocial tendencies made him likely to reoffend. However, when Dr. North changed his expert opinion on the stand and suddenly testified that Hanson was a psychopath, the defense found it needed Rockwell's professional opinion and evaluation of Hanson's behavior. Because the State already knew Rockwell would be testifying for the defense, the additional inclusion of his expert opinion to counter the extremely prejudicial last-minute expert opinion-change by

Dr. North, was necessary to present a full defense. Further, because the State had ample opportunity to interview Rockwell before trial, the late disclosure created no prejudice that could justify the denial.

b. The State Cannot Prove The Error Was Harmless Beyond A Reasonable Doubt.

The denial of the right to present a complete defense is constitutional error. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "The presumption may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

The trial court, acting as evidentiary gatekeeper, deprived the jury of fairly judging whether the State had proven its case based on all relevant evidence, including evidence that would have rebutted North's surprise testimony that Hanson exhibited signs of psychopathy that could lead him to commit a sadistic rape or sexually motivated murder if

released. The denial of Hanson's constitutional right to present a complete defense and rebut this testimony distorted the fact-finding process, was not harmless, and therefore requires reversal of the commitment order.

3 THE TRIAL COURT ERRED BY DENYING HANSON'S MOTION FOR A FRYE HEARING TO DETERMINE THE SCIENTIFIC RELIABILITY OF THE PARAPHILIA—NOT OTHERWISE SPECIFIED (COERCION) DIAGNOSIS AS A BASIS FOR INVOLUNTARY COMMITMENT.

Despite Dr. North's diagnosis, the general psychological community does not recognize paraphilic coercive disorder as a legitimate psychiatric diagnosis, and it has been rejected for inclusion in the DSM at least five times. RP 817; DSM-IV-TR (2000); see also Frances and First, "Paraphilia NOS, Not Ready for the Courtroom," 39 J. Am. Acad. Psychiatry & Law 555, 556 (2011). Thus, the court should have conducted a Frye<sup>1</sup> hearing to determine the admissibility of North's

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<sup>1</sup> Washington has adopted the so-called "Frye" test under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), for evaluating the admissibility of new scientific evidence. State v. Gregory, 158 Wn.2d 759, 820, 147 P.3d 1201 (2006). The goal of the test is to determine whether scientific evidence is based on established scientific methodology. State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). "The core concern of Frye is only whether the evidence being offered is based on established scientific methodology. This involves both an accepted theory and a valid technique to implement that theory." State v. Cauthron, 120 Wn.2d 879, 888-89, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997). Unanimity is not required. State v. Copeland, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996). But if there is a significant dispute among qualified scientists in the relevant scientific community, the evidence may not be admitted. State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001).

diagnosis. This Court reviews the necessity of a Frye hearing de novo. Gregory, 158 Wn.2d at 830.

"At the SVP determination trial, there is but one question for the finder of fact: Has the State proved, beyond a reasonable doubt, that the respondent is an SVP?" In re Detention of Post, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010) (citing RCW 71.09.060(1)). To answer this question in the affirmative, the jury must determine three elements: (1) that the respondent "has been convicted of or charged with a crime of sexual violence," (2) that the respondent "suffers from a mental abnormality or personality disorder," and (3) that such abnormality or disorder "makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." Post, 170 Wn.2d at 309-10 (quoting RCW 71.09.020(18)).

The second element — mental abnormality — is implicated by the court's refusal to question the admissibility of the Paraphilia—NOS diagnosis. The Frye standard requires a trial court to determine whether a scientific theory or principle has achieved general acceptance in the relevant scientific community before admitting it into evidence. Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600-01, 260 P.3d 857 (2011); Thorell, 149 Wn.2d at 754.

This Court recently held that Frye does not apply to the diagnosis of paraphilia NOS (nonconsent). In re Detention of Berry, 160 Wn. App. 374, 379, 248 P.3d 592 (2011). The panel reasoned that the proper focus of Frye is the science on which the expert's opinion is founded, and the science at issue with regard to paraphilia diagnoses is standard psychological analysis. Berry, 160 Wn. App. at 379. The court noted:

As the Supreme Court reasoned almost 20 years ago, nothing about this science is novel: "The sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable cause and effect relation petitioners seek, the level of acceptance is sufficient to merit consideration at trial."

Id.

Frye, however, examines the validity of the scientific theory, not the entire underlying field of study. In re Pers. Restraint of Young, 122 Wn.2d 1, 56, 857 P.2d 989 (1993) (citing Frye, 293 F. at 1014). As such, this Court's explanation in Berry incorrectly focuses on the overall legitimacy of psychological science—a reality disputed by no one—and ignores the more difficult, but serious question whether the court should continue to accept as valid a diagnosis that is not recognized as a psychological disorder by the relevant medical community. Frances and First, supra, at 558.

Hanson respectfully encourages the court to use this opportunity to reconsider the Berry decision. The massive liberty implications of allowing involuntary civil commitments on the basis of inaccurate and unreliable science requires intervention. This Court should overrule its decision in Berry, hold Hanson was entitled to a Frye, hearing, and reverse his commitment order.

4. THE COURT IMPROPERLY LIMITED THE SCOPE OF VOIR DIRE BY DENYING HANSON'S COUNSEL THE OPPORTUNITY TO QUESTION JURORS ABOUT THEIR ABILITY TO BE FAIR AND IMPARTIAL TO SOMEONE ACCUSED OF SEX CRIMES.

During voir dire, defense counsel attempted to explore jurors' biases by asking them to imagine if their personal liberty was at stake, would they feel confident having a jury of six or twelve people just like them. Specifically, she told a potential juror,

Q. The question is, do you have special experiences in your life or do you feel so strong about this subject that emotionally you can't separate your feelings from being able to judge the evidence fairly? When I say that, I don't mean follow or not follow the law. Of course you are going to try the [sic] follow the law. Does that mean that you might not hold the State to its burden, you might not listen to Mr. Hanson's evidence as closely. You might not be willing to accept valid scientific testimony because it's on behalf of a sex offender. You are the best person to know that. It's not about whether or not you are going to like my client or like would [sic] he did, because you won't.

A. Right.

Q. It's whether or not, if you were in his position, you would want somebody like you on the jury, not because you are going to release or commit him, because you can be fair. At the end of the day, you are not going to let your personal experiences get involved. That's what it's about. And you're the best person to know that.

RP 62-63.

Despite case law indicating that questions like this during voir dire are an appropriate way to gauge bias,<sup>2</sup> the court ruled that the statements violated the "golden rule." RP 63; RP 158.

The trial court has broad discretion in determining the scope and extent of voir dire. CrR 6.4(b); State v. Frederiksen, 40 Wn. App. 749, 752-53, 700 P.2d 369 (1985). This discretion is limited, however, by the need to assure a fair trial by an impartial jury. State v. Brady, 116 Wn. App. 143, 149, 64 P.3d 1258 (2003); Frederiksen, 40 Wn. App. at 752. The trial court's ruling here was an abuse of discretion because no reasonable judge would have found counsel's conduct to be a violation and because the court's refusal to allow Hanson's line of questioning jeopardized the impartiality of the jury panel.

In the legal context, the 'golden rule' is often explained as "urging the jurors to place themselves in the position of one of the parties to the

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<sup>2</sup> See e.g., City of Cheney v. Grunewald, 55 Wn. App. 807, 809-10, 780 P.2d 1332 (1989) (court erred in denying challenge for cause when potential juror revealed bias in favor of the prosecution).

litigation, or to grant a party the recovery they would wish themselves if they were in the same position." Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 139, 750 P.2d 1257 (1988). Such an argument is "improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." Adkins, 110 Wn.2d at 139.

In City of Cheney v. Grunewald, supra, this Court reversed a defendant's conviction due to inclusion of a bias juror on the jury. The defendant was charged with driving while intoxicated, and a potential juror disclosed that his niece was killed by a drunk driver. While he repeatedly stated he would be able to set aside his personal experience and decide the case fairly, when asked "If you were in [the defendant's] place today, would you want six jurors with your frame of mind? Would you feel that he would get a fair trial with six jurors with your frame of mind right now?" the potential juror replied, "I don't think so." 55 Wn. App. at 809.

Despite this response, the trial court denied counsel's motion to dismiss the juror for cause, and because the defense was out of peremptory challenges, the contested juror was seated on the jury. Id. The defendant was convicted, and on appeal the court found the defense's line of questioning revealed actual bias that justified removing the juror for cause.

55 Wn. App. at 811. While Grunewald did not involve a challenge to the validity of the question, the court implicitly validated the use of just this type of question to gauge potential juror bias in the context of voir dire.

The court here clearly based its ruling on the format of counsel's question rather than either its intent or its effect. While Hanson's counsel did ask jurors to imagine they were charged with a crime, in the context of voir dire, the questions were intended to help potential jurors assess their own biases and whether they would be able to evaluate the case fairly and without bias. This is exactly the type of question used to determine bias in Grunewald and it does not violate the principles of the 'golden rule.' The court's rote dismissal of this argument failed to consider the purpose behind the rule and unfairly placed Hanson's counsel in the position of not being able to truly explore whether the potential jurors could be fair and impartial. This Court should therefore reverse the commitment order and remand so Hanson can receive a fair commitment trial.

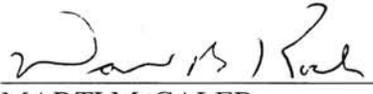
D. CONCLUSION

For the reasons stated above, Hanson requests that this Court vacate the commitment order and remand for a new trial.

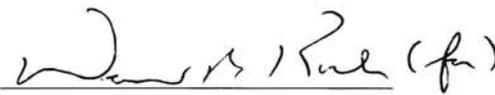
DATED this 31<sup>st</sup> day of January 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

 # 23789 (for)

MARTI McCALEB  
WSBA No. 43303

 (for)

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

Attorneys for Appellant

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

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In re the Detention of:	)	
	)	
ERIK HANSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	COA NO. 70139-8-I
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 31<sup>ST</sup> DAY OF JANUARY, 2014 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JEREMY BARTELS  
ATTORNEY GENERAL'S OFFICE  
800 5TH AVENUE  
SUITE 2000  
SEATTLE, WA 98104  
[jeremy.bartels@atg.wa.gov](mailto:jeremy.bartels@atg.wa.gov)  
[crjsvpef@atg.wa.gov](mailto:crjsvpef@atg.wa.gov)
  
- [X] ERIK HANSON  
SPECIAL COMMITMENT CENTER  
P.O. BOX 88600  
STEILACOOM, WA 98388

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STATE OF WASHINGTON  
2014 JAN 31 PM 4:22

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF JANUARY, 2014.

X *Patrick Mayovsky*