

NO. 41937-8-II
COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,
Respondent,
vs.
TROY BELCHER,
Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	3
D. ARGUMENT	
I. THE TRIAL COURT VIOLATED MR. BELCHER’S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ALLOWED THE STATE TO PRESENT EVIDENCE CONCERNING THE FACTS OF THE UNDERLYING SEX OFFENSES BECAUSE THIS EVIDENCE WAS MORE PREJUDICIAL THAN PROBATIVE	13
II. THE TRIAL COURT ERRED WHEN IT ENTERED AN ORDER COMMITTING MR. BELCHER AS A SEXUALLY VIOLENT PREDATOR BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT (1) HE SUFFERED FROM A MENTAL ABNORMALITY OR PERSONALITY DISORDER, AND (2) THAT SUCH MENTAL ABNORMALITY OR PERSONALITY DISORDER MADE IT LIKELY THAT HE WOULD ENGAGE IN PREDATORY ACTS OF SEXUAL VIOLENCE IF NOT CONFINED IN A SECURE TREATMENT FACILITY	18
E. CONCLUSION	25

F. APPENDIX

1. Washington Constitution, Article 1, § 3 26

2. United States Constitution, Fourteenth Amendment 26

3. RCW 71.09.020 27

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Bruton v. United States</i> , 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968)	13
<i>Foucha v. Louisiana</i> , 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)	20
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	21

State Cases

<i>Detention of Sease</i> , 149 Wn.App. 66, 201 P.3d 1078 (2009)	21
<i>Detention of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003)	20, 21
<i>State v. Acosta</i> , 123 Wn.App. 424, 98 P.3d 503 (2004)	14, 15
<i>State v. Baldwin</i> , 109 Wn.App. 516, 37 P.3d 1220 (2001)	14
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 472 (1999)	13
<i>State v. Kendrick</i> , 47 Wn.App. 620, 736 P.2d 1079 (1987)	14
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001)	14
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963)	13
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973)	21

Constitutional Provisions

Washington Constitution, Article I, § 3	20
United States Constitution, Fourteenth Amendment	20

Statutes and Court Rules

ER 403 13, 15
RAP 2.2(a)(8) 20
RCW 71.09.020 18-20
RCW 71.09.060 18, 20

Other Authorities

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) 14

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated Mr. Belcher's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it allowed the state to present evidence concerning the facts of the underlying sex offenses because this evidence was more prejudicial than probative.

2. The trial court erred when it entered an order committing Mr. Belcher as a sexually violent predator because the state failed to prove beyond a reasonable doubt that (1) he suffered from a mental abnormality or personality disorder, and (2) that such mental abnormality or personality disorder made it likely that he would engage in predatory acts of sexual violence if not confined in a secure facility.

Issues Pertaining to Assignment of Error

1. In a sexually violent predator cases under RCW 71.09, does a trial court violate a respondent's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it allows the state over respondent's objection to present evidence concerning the facts of the underlying sex offenses when the respondent has stipulated to the existence of the convictions and when the presentation of such evidence is more prejudicial than probative?

2. Does a trial court err if it enters an order committing a respondent as a sexually violent predator when the state has failed to prove beyond a reasonable doubt that (1) the person committed suffered from a mental abnormality or personality disorder, and (2) that such mental abnormality or personality disorder made it likely that the person committed would engage in predatory acts of sexual violence if not confined in a secure facility?

STATEMENT OF THE CASE

Appellant Troy Belcher was born on December 13, 1984, and is currently 27-years-old. CP 3. He has two prior convictions for sex offenses, committed when he was 13 and 15-years-old respectively. CP 3-5. The following quotes the state's rendition of his two sex crimes given in the Certification for Determination of Probable Cause.

1. Rape in the Second Degree by Forcible Compulsion, Clark County Superior Court Cause No 98-8-00834-8

On or about July 16, 1998, 13-year-old TROY BELCHER approached a 13-year-old girl, L.C. (DOB: 5/15/85), who was babysitting at a park. L.C. and Belcher had never met prior to that day. Belcher struck up a conversation with L.C. while pushing one of the children on the swings.

L.C. decided it was time to take the children home. When she was about half way home, she noticed that Belcher was following her. When she got to the house, Belcher tried to invite himself inside. L.C. wouldn't let him inside, but eventually agreed to give him her phone number hoping he would leave. After they exchanged phone numbers, Belcher left.

A few minutes later there was a knock on the door. When L.C. answered the door, Belcher forced his way inside. Belcher told L.C. that he wanted to have sex with her. She told him no and unsuccessfully tried to push him away from her. Belcher pushed her up the stairs and into one of the bedrooms. He pinned her down on the floor and told her to remove her pants. When she refused, Belcher forced them off. L.C. Kept telling him no and hit him repeatedly trying to get him off of her. Belcher then put his penis inside L.C.'s vagina and vaginally raped her. She was menstruating at the time. After approximately twenty to thirty seconds, one of the children knocked on the door. This alarmed Belcher, who quickly put on his pants and left.

Belcher was subsequently charged in the Juvenile Division of the Clark County Superior Court with rape in the first degree by forcible compulsion and burglary in the first degree. On October 5, 1998, a judge found Belcher guilty of a lesser included offense of rape in the second degree by forcible compulsion. On November 10, 1998, Belcher received a manifest injustice sentence and was committed to the Department of Juvenile Rehabilitation for 65 weeks. While still on parole for his sex offense, Belcher committed his second sexually violent offense.

2. Attempted Rape in the Second Degree, Cowlitz County Superior Court Cause No. 00-8-00693-7

In April 2000, 13-years-old J.A. (DOB: 10/9/86) was walking to a friend's house when she encountered 15-year-old Belcher. J.A. knew who Belcher was because they rode the same bus to school. Belcher offered to show J.A. a shortcut through the woods. J.A. agreed, although unbeknownst to her, there was no such shortcut.

Once they were in the woods, Belcher started to kiss J.A. He unbuttoned her pants, pulled her pants and underwear down to her knees, and pushed her to the ground on her back. Belcher then pulled down his pants and straddled her with one leg on each side of her. Belcher told her he wouldn't hurt her as long as she didn't scream. J.A. finally managed to push Belcher off of her, pull up her pants, and run away. However, Belcher chased her. Belcher caught up to J.A. and grabbed her. He then told her that she was a sweet girl and she shouldn't let anyone do that to her. During an interview with the police, Belcher admitted that he pulled down J.A.'s pants and underwear and that he planned on having sex with her. He also admitted that he had tried to rape J.A.

On October 17, 2000, Belcher was charged in the Juvenile Division of the Cowlitz County Superior Court with attempted rape in the second degree with forcible compulsion. On December 1, 2000, a judge found Belcher guilty of attempted rape in the second degree. On January 17, 2001, Belcher received a manifest injustice sentence and was committed to the Department of Juvenile Rehabilitation for 256 weeks.

CP 4-5.

Approximately four years after being sentenced on the second sex offense, the then 19-year-old Mr. Belcher, committed one further felony while he was a resident at the Green Hill School in Chehalis. CP 5. It was not a sex offense. *Id.* The state gave the following rendition for this offense in its Certification for Determination of Probable Cause:

OTHER OFFENSE HISTORY

1. Intimidating a Witness, Lewis County No. 04-1-00804-9

In late July/early August 2004, while Belcher was incarcerated at Green Hill School, he tried to find someone to kill one of his former victims, L.C. Belcher found out that a resident at Green Hill School used to know people who did this type of thing. Belcher approached the resident and asked him if he knew someone on the outside who could harm someone. When the resident inquired how badly he wanted this individual hurt, Belcher replied, "Really, really bad" and then explained that he wanted her either killed or put in a coma. Belcher then explained that the individual he wanted harmed was his prior rape victim, L.C. because she had ruined his life and put him in jail. He gave her full name to the resident and explained in detail where she lived. The resident agreed to harm Belcher's victim in order to keep Belcher from finding someone else to do it. Once the resident received the information from Belcher, he reported it to staff at the facility.

The Victim Notification Department notified L.C. and her parents of Belcher's threat. They were very afraid and L.C. fears that Belcher will kill her when he is released. As a result of Belcher's actions, L.C. has cancelled her home phone number and only uses a P.O. Box as an address.

On October 8, 2004, Belcher was charged in Lewis County Superior Court with solicitation to commit murder in the first degree and intimidating a witness. On November 19, 2004, Belcher pled guilty to intimidating a witness. The court sentenced Belcher to 27 months in prison and 9 to 18 months community custody.

CP 5-6.

Following Mr. Belcher's adjudication in Lewis County Superior Court, he was transferred to the custody of the Washington State Department of Corrections to finish his sentence on the Cowlitz County matter and then begin to serve his adult sentence on the intimidating conviction. CP 3-51.

On December 6, 2007, with just a couple weeks remaining on his last sentence, the State of Washington filed a petition to civilly commit Mr. Belcher as a sexually violent Predator under RCW 71.09. CP 1-2. The state also filed a Certification for Determination of Probable Cause in support of its petition. CP 3-51. Upon review of these two documents, the Cowlitz County Superior Court entered an order finding probable cause, issuing a warrant for Mr. Belcher's arrest, and ordering him held in the Cowlitz County jail without bail. CP 55-56. Four days later, the court appointed counsel to represent Mr. Belcher, who the court determined was indigent. CP 57.

After a number of continuances over several months, the court eventually entered an order detaining Mr. Belcher, remanding him to the custody of the Special Commitment Center (SCC) at McNeil Island during the pendency of this case, and ordering him to submit to interviews and testing by the state. CP 84-85. However, since he had already submitted to a psychological evaluation by a state's expert, the court did not order that he

submit to a second evaluation. *Id.* The state later returned to court with a motion to require Mr. Belcher to undergo a second psychological evaluation. CP 99-107. The court granted that request and ordered, over objection, that Mr. Belcher submit to a second evaluation. CP 120-121; RP 7-9.

Mr. Belcher later submitted to this second evaluation by the state's expert, Dr. Brian Judd. RP 829-841. However, Mr. Belcher refused to submit to either an issue-related polygraph or a penile plethysmograph (PPG) test. RP 35-38. Although the court had ordered this testing, the state ultimately abandoned a motion to find Mr. Belcher in contempt for his refusal to perform these tests. RP 35-38. Mr. Belcher also underwent psychological testing by Dr. Richard Wollert, an expert employed by the defense. RP 1154 -1163.

Following a number of agreed continuances, this case eventually came on for trial before a jury beginning on January 25, 2011, and running through February 3, 2011. RP 199-1887. During this trial, the state called eight witnesses, and played excerpts from depositions the state took of Mr. Belcher. RP 487, 542, 560, 587, 695, 743, 754, 807. At the beginning of its case before the jury, the state proposed calling L.C. and J.A. as its first two witnesses. RP 487, 452. They are the victims of the two sex crimes Mr. Belcher had committed 13 and 11 years prior to trial when Mr. Belcher was 13 and 11-years-old respectively. RP 487-541, 542-559. Mr. Belcher

objected to the state calling either witness for two reasons: (1) Mr. Belcher was willing to stipulate to the fact that he had the two qualifying convictions for sexually violent offenses, thus greatly reducing the relevancy of the testimony of the two witnesses, and (2) given this willingness to stipulate to the facts of these convictions, allowing the two victims to recount traumatic crimes Mr. Belcher committed against them more than a decade previous was more prejudicial than probative. RP 282-288, 292-293. The court overruled these objections and allowed both witnesses to testify to the details of both crimes. RP 487-541, 542-559. The transcription of these testimonies includes a notation of L.C. breaking down and weeping before the jury during her rendition of events. RP 497.

As its last witness in its case-in-chief, the state called Dr. Brian Judd. Initially, Dr. Judd testified concerning his training as a psychologist and his experience in diagnosing sexually violent predators. He also explained that he had testified in scores of sexually violent predator cases as an expert for the state. Following this rendition of his training and experience, Dr. Judd testified concerning his two interviews with Mr. Belcher, his review of the testing performed on Mr. Belcher, his review of the police reports of Mr. Belcher's prior offenses, his interviews with the victims of Mr. Belcher's offenses, his review of treatment records, and his review of the defense evaluation of Mr. Belcher. Dr. Judd also testified that he reviewed the

depositions performed in this case

Based upon his interviews and review of materials, Dr. Judd rendered a number of opinions. The first was that Mr. Belcher suffered from Paraphelia (Not Otherwise Specified - nonconsent), an “Axis I Major Mental Disorder” under the American Psychiatric Associations “Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).” RP 844-854. According to Dr. Judd, the diagnosis of Paraphelia (NOS - nonconsent) describes a group of people who experience recurrent intense sexual fantasies centered on suffering or humiliation, sadism, masochism, and nonconsent conduct. RP 852-853. The second was that Mr. Belcher suffered from Antisocial Personality Disorder, an “Axis II Personality Disorder” also defined in the DSM-IV.” RP 852-853. In making these diagnoses, Dr. Judd admitted that there was a great deal of criticism in the scientific community for the diagnosis of “Paraphelia (Not Otherwise Specified - nonconsent), on the basis that it was creating a category of mental disorder that was really simply criminal conduct. RP 855-858.

In his testimony Dr. Judd went on to testify that in his professional opinion, based upon the combined Axis I diagnosis of Paraphelia (NOS - nonconsent) combined with the Axis II diagnosis of Antisocial Personality Disorder, Mr. Belcher was likely to engage in predatory sexual acts if not confined to a secure treatment facility. RP 923-932. Dr. Judd went on to

explain that he was basing this prediction upon Mr. Belcher's test results on an actuarial prediction tool known as the Sex Offender Risk Appraisal Guide or "SORAG," which is generally accepted in the psychological community as valid predictors of potential sexual recidivism. RP 933-969. According to Dr. Judd, Mr. Belcher's score of 36 on the SORAG actuarial assessment tool, indicated a 100% risk of reoffense after 7 years. *Id.*

On cross-examination, Dr. Judd admitted that the average age from the pool of test subjects used in creating the SORAG was 26-years-old, and that there was significant criticism in the scientific community concerning the use of the SORAG to predict recidivism for persons who committed their qualifying offenses when a juvenile. RP 1055-1056, 1067-1068. Dr. Judd also stated on cross-examination that there have been a variety of studies performed which indicate that recidivism for persons who have committed their qualifying offenses while juveniles is around 10%. RP 1075-1076.

In its case-in-chief, the defense called its own expert, Dr. Richard Wollert. RP 1132-1334. Dr. Wollert has a PhD in clinical psychology from Indiana University and has previously taught psychology at Florida State University, Portland State University, the University of Saskatchewan, and Lewis & Clark College. RP 1132-1144. He is also a research professor in psychology at Washington State University (Vancouver), and has published 9 peer review articles since 2001 on the assessment of sexually violent

predators. *Id.* Throughout his career, he has evaluated and treated thousands of sex offenders, and has consulted in about 150 sex offender cases and has testified approximately 120 times. *Id.*

According to Dr. Wollert, he performed an evaluation on Mr. Belcher, which included a review of all the materials Dr. Judd utilized. RP 1144-1163. Dr. Wollert also relied upon his own interviews with Mr. Belcher. *Id.* During his testimony Dr. Wollert stated that in his expert opinion, Mr. Belcher does not suffer from a mental abnormality. RP 1172. The reason underlying this opinion is that there was no evidence that Mr. Belcher had psychological attitudes which were pervasive and inflexible over a period of time. RP 1173-1182. Thus, Dr. Wollert testified that Mr. Belcher does not suffer from Paraphelia (NOS - nonconsent) because there is no indication in the evidence that Mr. Belcher has recurrent, intense sexually arousing deviant fantasies, which must exist for this diagnosis to be valid. RP 1182-1186.

In addition, Dr. Wollert explained that the data base used in creating the actuarial tables underlying the SORAG are not scientifically valid when employed in predicting the likelihood of reoffense for people whose only predicate offenses were committed as juveniles. RP 1216-1228. Thus, this is not a valid test for determining the possibility of recidivism or future sexual offenses by a person who committed their offenses as a juvenile. *Id.*

Rather, the studies which deal with the population of persons who commit their predicate sex offenses solely as juvenile indicated that the level of recidivism is around seven percent. RP 1227, 1329.

In addition to Dr. Wollert, the defense called five other witnesses, including the Mr. Belcher's wife, and then Mr. Belcher as its last witness. RP 1498, 1519, 1530, 1544, 1571. Following the close of Mr. Belcher's case, the state called Dr. Judd for relatively brief rebuttal. RP 1628-1676.

After the state presented its rebuttal witness, the court instructed the jury. RP 1757-1772; CP 1819-1848. Following instruction, the parties presented closing argument. RP 1772-1823 (State's closing argument); RP 1823-1861 (Mr. Belcher's closing argument); RP 1861-1871 (State's rebuttal argument). The jury then retired for deliberation. Following deliberation, the jury returned its verdict, finding that the state had proven beyond a reasonable doubt that Troy Belcher was a sexually violent predator. RP 1876-1879; CP 1849.

After accepting the verdict of the jury, the court entered an order committing Mr. Belcher to the Special Commitment Center in Steilacoom, Washington, under the custody of the Department of Social and Health Services. CP 1850. Mr. Belcher thereafter filed timely notice of appeal. CP 2032-2033.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. BELCHER'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ALLOWED THE STATE TO PRESENT EVIDENCE CONCERNING THE FACTS OF THE UNDERLYING SEX OFFENSES BECAUSE THIS EVIDENCE WAS MORE PREJUDICIAL THAN PROBATIVE.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all litigants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree

theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

Turning to the case at bar, the trial court allowed the state to elicit the

detailed testimony from J.A. and L.C., who, over a decade previous, were the victims of Mr. Belcher's predicate offenses of second degree rape and attempted second degree rape. Initially, it should be noted that the fact of the two convictions was relevant to the issues before the court because, under RCW 71.09, the state bore the burden of proving that Mr. Belcher had been convicted of a sexually violent offense as a predicate to commitment under RCW 71.09. However, once Mr. Belcher indicated his willingness to stipulate to the facts of these convictions, the relevance in calling these two witnesses to establish the fact of the predicate convictions dropped to zero.

This is not to say that the evidence from these two victims detailing the nature of the crimes Mr. Belcher committed became irrelevant in its entirety. Rather, as the state argued and the court accepted, their testimony remained at least marginally relevant in potentially helping the jury assess the scope and extent of Mr. Belcher's alleged psychopathy. However, what the court failed to do in this case under ER 403 was to assess the probative value of this evidence against its unfair prejudicial effect. As Graham points out in his treatise on evidence, this assessment must be performed "in the context of the litigation [and] the strength and length of the chain of inferences necessary to establish the fact of consequence." In this case, two overriding facts strongly indicate that the details underlying the two convictions as presented by the victims themselves were only marginally

relevant to the issues before the jury. These facts were: (1) the two events were over a decade old, and (2) Mr. Belcher had committed them when a juvenile.

In addition, as noted in the *Acosta, supra*, there was nothing in ER 403 that prevented the state's expert from interviewing these two witnesses and using their statements in support of his expert opinion. However, the error in the case at bar was in letting the state call the victims of decade old crimes when the practical effect of this evidence was to inflame the emotions of the jury. Thus, the unfair prejudice of this evidence far outweighed the probative value, particularly since the state was free to elicit the facts underlying the two crimes through the testimony of its expert. Consequently, the trial court erred when it denied Mr. Belcher's motion to exclude these two witnesses.

In addition, given the age of the predicate offenses, as well as the questions surrounding the scientific validity of both Dr. Judd's diagnosis of Mr. Belcher as well as the scientific validity of Dr. Judd's use of the SORAG in this case, there is a high likelihood that had the court properly excluded the emotional evidence from the two victims, the jury would have returned a verdict that the state had failed to meet its burden of proof. As a result, Mr. Belcher respectfully requests that this court vacate the order of commitment and remand for a new trial.

II. THE TRIAL COURT ERRED WHEN IT ENTERED AN ORDER COMMITTING MR. BELCHER AS A SEXUALLY VIOLENT PREDATOR BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT (1) HE SUFFERED FROM A MENTAL ABNORMALITY OR PERSONALITY DISORDER, AND (2) THAT SUCH MENTAL ABNORMALITY OR PERSONALITY DISORDER MADE IT LIKELY THAT HE WOULD ENGAGE IN PREDATORY ACTS OF SEXUAL VIOLENCE IF NOT CONFINED IN A SECURE FACILITY.

Under RCW 71.09.060, prior to committing a person to a secure treatment facility and thereby taking away that person's liberty, the state must prove beyond a reasonable doubt that the person to be committed is a "sexually violent predator." Under RCW 71.09.020(18), the term "sexually violent predator" is defined as follows:

(18) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

RCW 71.09.020(18).

This subsection contains four phrases that have special definitions under RCW 71.09.020. They are: (1) "crime of sexual violence," (2) "mental abnormality or personality disorder," and (3) "likely to engage in predatory acts of sexual violence if not confined in a secure facility." Subsection (17) of the statute defines the first phrase as follows:

(17) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible

compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

RCW 71.09.020(17).

Subsections (8) and (9) of the statute define the second set of terms as follows:

(8) “Mental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(9) “Personality disorder” means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.

RCW 71.09.020(8)&(9).

Finally, subsection (7) of RCW 71.09.020 gives the following definition to the last phrase:

(7) “Likely to engage in predatory acts of sexual violence if not confined in a secure facility” means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

RCW 71.09.020(7).

Since an order to commit an individual as a sexually violent predator under RCW 71.09.060 constitutes a significant curtailment of that individual’s civil rights, due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, require that the State prove beyond a reasonable doubt that the person to be committed is both “mentally ill” and is “currently a danger to others.” *Detention of Thorell*, 149 Wn.2d 724, 731, 72 P.3d 708 (2003); *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Under RAP 2.2(a)(8), a person committed as an SVP has a right to appeal that determination and the order of commitment.

As part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and as part of the “proof beyond a reasonable doubt standard,”

the court on appeal must reverse the order of commitment unless each and every factual finding necessary for commitment under RCW 71.09 is supported in the record by substantial evidence. *Detention of Sease*, 149 Wn.App. 66, 201 P.3d 1078 (2009). This is the same “proof beyond a reasonable doubt” and “substantial evidence” requirement which exists in criminal cases. *Detention of Thorell*, 149 Wn.2d at 731.

“Substantial evidence” in the context of a criminal case as well as an SVP case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). In the context of a criminal case, the test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979). To paraphrase *Jackson v. Virginia*, in an SVP case, the test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the [state] any rational trier of fact could have found the essential required elements of [commitment] beyond a reasonable doubt.”

In the case at bar, Mr. Belcher does not dispute that the state proved

beyond a reasonable doubt that he had “been convicted of . . . a crime of sexual violence” and that he was in custody at the time the state filed its petition for commitment. However, he does dispute that the state proved beyond a reasonable doubt that he “suffered from a mental abnormality or personality disorder” or that Mr. Belcher was “likely to engage in predatory acts of sexual violence if not confined in a secure facility” as that phrase is used in the definition of a “sexually violent predator.”

The problem with the evidence presented at trial on these two issues is two fold. First, as Dr. Wollert testified, there is no evidence in the record to support the conclusion that Mr. Belcher had psychological attitudes which were pervasive and inflexible over a period of time. Thus, as Dr. Wollert explained, Mr. Belcher did not suffer from Paraphelia (NOS - nonconsent) because there was no indication in the evidence that Mr. Belcher has recurrent, intense sexually arousing deviant fantasies, which must exist for this diagnosis to be valid. Even Dr. Judd admitted in his testimony that absent evidence of recurrent, intense sexually arousing deviant fantasies, one cannot correctly make a diagnosis of paraphelia.

Second, as Dr. Wollert explained in his testimony, the data base used in creating the actuarial tables underlying the SORAG are not scientifically valid when employed in predicting the likelihood of reoffense for people whose only predicate offenses were committed as juveniles. Thus, this is not

a valid test for determining the possibility of recidivism or future sexual offenses by a person who committed their offenses as a juvenile. *Id.* Rather, the studies which deal with the population of persons who commit their predicate sex offenses solely as juvenile indicate that the level of recidivism is around seven percent. Even Dr. Judd admitted in his testimony on cross-examination that the recidivism for offenders who committed their offenses as a juvenile was around ten percent.

To put this evidence in context, a comparison to the “proof beyond a reasonable doubt” in criminal cases is apropos. Consider the hypothetical of a criminal charge of forcible rape and murder in which there is overwhelming evidence that the crime was committed by someone, but the only evidence of who committed the offense comes from a DNA sample obtained from semen taken from the body of the victim of the crime. The defendant is charged, tried, convicted, and then appeals. In that appeal, the record reveals that the only evidence identifying the defendant as the perpetrator of the offenses is the testimony of the state’s expert that there is a 7% to 10% statistical probability that the DNA belonged to the defendant. No court on appeal would sustain convictions based upon this evidence because a 7% to 10% statistical probability does not constitute proof beyond a reasonable doubt. Yet in the case at bar, this is precisely what the jury did. It found that a 7% to 10% statistical probability of reoffense, and that

sometime years into the future, constituted proof beyond a reasonable doubt that Mr. Belcher was “likely to engage in predatory acts of sexual violence if not confined in a secure facility.”

Thus, the trial court erred when it accepted the jury’s verdict and entered the order committing Mr. Belcher as a sexually violent predator under RCW 71.09.020. As a result, Mr. Belcher respectfully requests that this court reverse the order of commitment, remand the case back to the trial court for dismissal of the petition and release of Mr. Belcher from the SCC.

CONCLUSION

The state failed to present substantial evidence to prove that Mr. Belcher was a sexually violent predator. In addition, the trial court erred when it allowed the state to present evidence that was more prejudicial than probative. As a result, this court should vacate the trial court's order of commitment and remand with instructions to dismiss the state's petition and release Mr. Belcher. In the alternative, this court should vacate the trial court's order of commitment and remand for a new trial.

DATED this 13th day of January, 2012.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 71.09.020

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Department" means the department of social and health services.

(2) "Health care facility" means any hospital, hospice care center, licensed or certified health care facility, health maintenance organization regulated under chapter 48.46 RCW, federally qualified health maintenance organization, federally approved renal dialysis center or facility, or federally approved blood bank.

(3) "Health care practitioner" means an individual or firm licensed or certified to engage actively in a regulated health profession.

(4) "Health care services" means those services provided by health professionals licensed pursuant to RCW 18.120.020(4).

(5) "Health profession" means those licensed or regulated professions set forth in RCW 18.120.020(4).

(6) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092. A less restrictive alternative may not include placement in the community protection program as pursuant to RCW 71A.12.230.

(7) "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(8) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(9) "Personality disorder" means an enduring pattern of inner

experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.

(10) "Predatory" means acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.

(11) "Prosecuting agency" means the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney, as provided in RCW 71.09.030.

(12) "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.

(13) "Risk potential activity" or "risk potential facility" means an activity or facility that provides a higher incidence of risk to the public from persons conditionally released from the special commitment center. Risk potential activities and facilities include: Public and private schools, school bus stops, licensed day care and licensed preschool facilities, public parks, publicly dedicated trails, sports fields, playgrounds, recreational and community centers, churches, synagogues, temples, mosques, public libraries, public and private youth camps, and others identified by the department following the hearings on a potential site required in RCW 71.09.315. For purposes of this chapter, "school bus stops" does not include bus stops established primarily for public transit.

(14) "Secretary" means the secretary of social and health services or the secretary's designee.

(15) "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096.

(16) "Secure community transition facility" means a residential facility for persons civilly committed and conditionally released to a less restrictive alternative under this chapter. A secure community transition facility has supervision and security, and either provides or ensures the provision of sex offender treatment services. Secure community transition facilities include but are not limited to the facility established pursuant to RCW 71.09.250(1)(a)(i) and any community-based facilities established under this chapter and operated by the secretary or under contract with the secretary.

(17) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

(18) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(19) "Total confinement facility" means a secure facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility designated as a total confinement facility by the

secretary.

HAYS LAW OFFICE

January 13, 2012 - 2:52 PM

Transmittal Letter

Document Uploaded: 419378-Appellant's Brief.pdf

Case Name: State vs. Troy Belcher

Court of Appeals Case Number: 41937-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Cathy E Russell - Email: donnabaker@qwestoffice.net

A copy of this document has been emailed to the following addresses:

sasserm@co.cowlitz.wa.us