

NO. 44759-2-II

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

In re Detention of Darrell Kent,

STATE OF WASHINGTON,

Respondent,

v.

DARRELL KENT,

Appellant.

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

The Honorable Marilyn Haan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel.

Issue Pertaining to Assignment of Error

Whether appellant received ineffective assistance of counsel where, in the state's involuntary commitment case against appellant, his attorney failed to object to the state expert's testimony he consulted one of the developers of the actuarial tools and confirmed the accuracy of his scoring on the Static-99R and Static-2002R, the accuracy of which the defense ardently contested and which the defense expert disputed?

B. STATEMENT OF THE CASE

1. Overview

Appellant Darrell Kent is appealing his involuntary commitment under Chapter 71.09 RCW to the Special Commitment Center. RP 7-8. At the time of the commitment trial in March 2013, Kent was sixty years old¹ and his last offense had occurred nearly twenty years earlier. CP 71; RP 438.²

Evidence showed Kent was remorseful for his prior offenses and resolved never to re-offend. RP 335-336, 363, 365. Indeed,

¹ Kent was born July 23, 1952. CP 139; RP 123.

as will be discussed, when Kent was released from prison for 15 months in 2003-2004, he did not reoffend.³ RP 274, 359, 368.

He was arrested and re-incarcerated for a sexual offense occurring at the same time as the offense⁴ for which he had just been released, however. RP 130, 533. That was the offense for which he was "about to be released" at the time the state filed the commitment petition. RP 533; Ex 30, page 69; RCW 71.09.030.

Because Kent had resolved not to re-offend, he did not believe he needed sex offender treatment and chose not to participate while incarcerated. RP 317, 363; Ex 30, page 71-72. While previously in prison in 2003, however, Kent took a six-to-eight week victim awareness class that gave him perspective on how his offending affected his victims. RP 332, 337, 570. Kent understood much of the effect was irreparable, which also motivated him not to re-offend. RP 332.

With the exception indicated in note 4, Kent admitted his prior offending behavior and the experts agreed on his diagnoses.

² The trial transcripts are contained in four bound, consecutively paginated volumes referred to as "RP." The pretrial transcript is referred to as "1RP."

³ As part of his community supervision, Kent was routinely administered "polygraph examinations asking about his contact with children during that time frame." RP 451.

RP 111, 371-72. Accordingly, the case essentially boiled down to a battle between the experts who diverged on the issue of Kent's risk of re-offense. RP 220-222, RP 418-19. Importantly, this divergence was based in part on a scoring dispute for the Static-99R and Static-2002R. RP 184-93, 399-403.

2. History

When Kent was approximately eight years old, he was molested by an older boy from the neighborhood. RP 298-99. Around the same time, he was raped by an unknown adolescent male at a park. RP 299. Kent believed these events may have been a contributing cause of the abuses he, himself, later committed. RP 300, 302.

Kent testified to his history of sexual offending, including unadjudicated offenses. RP 21; Ex 29, 30. In chronological order, his victims included his sister, a store clerk in New Mexico, his niece, his first born daughter, a 14 year old girl in Amarillo, Texas, his stepdaughter C.L., a neighbor P.D., and his second biological daughter, M.K. Ex 29, page 37-38. The latter three occurred at the same time in the early 1990s. CP 51-52; RP 32, 56-58.

⁴ Kent entered an Alford plea as part of a plea bargain and denied committing this offense. Ex 30, page 66-67.

Kent testified he started molesting his sister when he was about eight years old; she was four years younger. Ex 29, page 39. The abuse continued until Kent was 18 years old and moved out of the house. Ex 29, page 39. Kent admitted one occasion where he tried to rape his sister while his friend held her down. Ex 29, page 40. Kent's friend came to his senses, however, and talked Kent out of it. Ex 29, page 41. Regardless, Kent admitted he raped his sister when she was 17 years old. Ex 29, page 41. He admitted he raped her a second time, as well. Ex 29, page 42.

In 1975, Kent left his wife and home in Texas to look for work in New Mexico. Ex 29, page 44. While there, he tried to rape a convenience store clerk but she resisted and he gave up. Ex 29, page 45-46. Kent was ultimately convicted of attempted sexual penetration and sentenced to one to five years in prison, and served about six months. Ex 29, page 45, 47-48; RP 307.

In the early 1980s, Kent molested his sister's ten-year-old daughter (his niece), who was living with Kent's mother at the time. Ex 29, page 42-43. Kent did not have sexual intercourse with his niece, but acknowledged he may have tried. Ex 29, page 44. He took pictures of her naked and threatened to disclose them if she

told anyone. Id. The abuse ended when he went to prison for assaulting a police officer. Id.

Following his divorce, Kent had visitation with his two biological children. Ex 29, page 48. Kent admitted that in 1987, when his daughter was about twelve years old, he raped her. Ex 29, page 49, 54. There were allegations he tied her up afterward so she could not leave, but Kent did not recall. Ex 29, page 49; RP 126. He admitted he molested her a second time, but stopped after realizing the wrongness of his behavior. Ex 29, page 50; RP 310.

In the mid-to-late 1980s, Kent had a fourteen-year-old girlfriend he met from the neighborhood.⁵ Ex 29, page 51; Ex 30, page 55. Kent testified the relationship lasted about six months and included consensual sexual intercourse. Ex 29, page 51. At the time of trial, however, Kent understood the girl was too young to consent to sexual intercourse and the relationship was criminal. Ex 29, page 52.

Kent left Texas and moved to Seattle in 1988. Ex 30, page 55. He met Elizabeth Lorenzo while fishing in Alaska and returned with her to Cathlamet, Washington, where Lorenzo and her family

⁵ Reportedly, Kent previously described this girl as between nine and ten years old. Ex 29, page 52; RP 125. Kent testified the prior evaluator did not accurately report what he said. Ex 29, page 53; RP 309.

lived. Ex 30, page 55-57. Lorenzo had an eight-year-old daughter, C.L. Ex 56. Kent and Lorenzo were married and their daughter M.K. was born nine months later in 1989. Ex 30, page 56.

Kent admitted he sexually abused C.L. on multiple occasions when she was about twelve years old. Ex 30, at 58-59; see also RP 130. He testified the abuse began with molestation but later included rape. Ex 30, at 58-59. Kent acknowledged he held C.L. down to overcome her resistance. Ex 30, page 60.

Kent's abuse of C.L. came to light in 1995, when C.L. and M.K.'s friend P.D. was spending the night. Ex 30, page 61. That morning after Lorenzo went to work, Kent came out into the living room where P.D. and M.K. were sleeping. RP 30. Kent convinced P.D. to come back to his room. RP 30; Ex 30, page 61. P.D. testified Kent tried to get her to lay down with him but gave up and let her go when she refused. RP 31; see also Ex 30, page 61-62.

P.D. testified that after she went back out into the living room, Kent returned and tried to grab M.K. RP 32. P.D. threatened she would "tell" and Kent went back to his room. RP 32. As soon as the sun came up, P.D. went next door to Lorenzo's parents' house and disclosed what had happened. RP 32; Ex 30, page 62. When Lorenzo got home from work that afternoon, her parents

informed her of P.D.'s disclosure. RP 52. Lorenzo did not believe it until C.L. tearfully told her Kent had abused her too. RP 53.

C.L. did not testify, but the parties entered a stipulation as to what her testimony would be. CP 51-52. On January 29, 1995, C.L. reported to the Wahkiakum county sheriff's office that her stepfather had engaged in forcible sexual intercourse with her for approximately three years. CP 52. She alleged it happened on multiple occasions after her mother went to work in the morning. C.L. tried to resist, but Kent held her down. CP 52.

When Lorenzo confronted Kent, he admitted the truth of the allegations. RP 54; Ex 30, page 63. Kent subsequently left for Alaska but was located and brought back to face prosecution. Ex 30, page 63-64. He pled guilty to second degree rape of a child and was sentenced to eight years in prison. RP 55-56; Ex 30, page 64.

Kent was released to community supervision in 2003. During the eighteen months he was in the community, there was no evidence or suspicion he sexually offended, although he was sanctioned for three months for drinking. RP 274, 321, 359, 368. Kent admitted he also smoked marijuana during this time, but was not caught. RP 322, 326.

Kent returned to prison in 2005. Ex 30, page 66. While he was on supervision, his daughter M.K., who was at that time was 15 years old, alleged that Kent abused her when she was five years old, during the same time frame as when he was abusing C.L. RP 56-58. Kent denied the abuse but entered an Alford⁶ plea to second degree child molestation to take advantage of the state's plea offer. Ex 30, page 66-67; RP 314. Kent was still in custody for this offense when the state filed the commitment petition. Ex 30, page 69.

3. Expert Testimony

Pretrial, the defense moved to preclude the state's expert from testifying about the opinions of other witnesses. CP 91. As the defense argued, due process and evidentiary rules prohibit a state's expert from relating the hearsay opinions of other, non-testifying expert witnesses to explain or bolster the testifying expert's opinion. CP 91-92 (citing State v. Wicker, 66 Wn. App. 409, 832 P.2d 127 (1992); ER 703). The state agreed this was an appropriate restriction and the court granted the motion. CP 62; 1RP 107.

⁶ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

In anticipation of state's expert psychologist Mark Patterson's testimony, the assistant attorney general (AAG) moved to preclude Kent's attorneys from insinuating on cross examination that Patterson increased Kent's score on certain actuarial tests at the AAG's behest. RP 68-69. The AAG explained that while preparing for his deposition, Patterson questioned whether he scored Kent appropriately on the "age at the time of release" item on the tests. It occurred to him that because the offense against M.K. *chronologically* occurred at the same time as the offense against C.L. and was part of an index "cluster" – including C.L., P.D. and M.K.⁷ – Kent's "age at the time of release" should be scored according to his age in 2003, when he was released for the offense involving C.L., rather than his current age of 60. RP 69.

The AAG represented that at the time of the deposition, Patterson indicated he wished to consult psychologist Amy Phenix or one of the other individuals who developed the scoring manual for the Static-99R and Static-2002R to confirm the appropriate age and corresponding score. RP 69. Kent's attorney disagreed Patterson indicated anything about consulting Phenix. RP 70.

⁷ This offense "cluster" also included P.D.'s sister, S.P., whom Kent admitted he tickled with a sexual motivation and attempted to persuade to flash him. Ex 30, page 64-65; RP 127, 211.

Regardless, the AAG indicated Patterson had since consulted with Phenix and changed Kent's score, *based on his age in 2003*, which also reflected an increased risk in re-offense, according to the actuarial tables. RP 69.

Kent's attorneys countered that it would be unfair not to allow them to explore the basis for Patterson's changed opinion, especially since the change occurred after the deposition and Kent had only a limited opportunity to inquire about it. RP 70-71. The court ruled Kent's attorneys would be prohibited from implying that Patterson changed his opinion at the AAG's behest, but would be permitted to inquire as to the basis for Patterson's changed opinion.⁸ RP 74.

(i) State's Expert

Patterson previously performed an evaluation (based on a records review) in 2009.⁹ RP 100-101. Patterson prepared an updated in December 2012, after reviewing more recent records and interviewing Kent. RP 103-104.

⁸ The court also indicated that in advance of cross-examination, the defense could question Patterson on the record and make an offer of proof, based on any new information obtained, in support of a request for reconsideration of the court's ruling. RP 76. This never occurred, however. RP 222-226.

⁹ This evaluation formed the basis for the state's probable cause allegation for the commitment petition. CP 139-215;

Patterson diagnosed Kent with pedophilia, antisocial personality disorder and substance abuse of amphetamines, alcohol and marijuana.¹⁰ RP 111, 117, 140-43, 150. He testified the pedophilia and antisocial personality disorder qualified as mental abnormalities under the involuntary commitment statute. RP 158-161.

Patterson also opined that these abnormalities made Kent more likely to engage in predatory acts of sexual violence if not confined to a secure facility. RP 220-222. His risk assessment was based in part on his scoring of certain actuarial tools including the Static-99R and Static-2002R. RP 165-224.

The Static-99R consists of ten static risk factors and attempts to estimate the risk an individual will be charged or convicted of a new sexual offense within five and ten years from the time the offender would be released from custody. RP 170.

According to Patterson's calculations, the risk factors gave Kent a score of four points. RP 177. Of the people in the test group who scored four points are subcategories of different

¹⁰ Kent indicated he had not used amphetamines since his 30s, however. RP 142, 286. Nor had he used alcohol or marijuana since he was re-incarcerated in 2005. RP 143-44, 287, 370. Kent acknowledged drug use was a problem in the past, but stated it was not the cause of his offense behavior. RP 319, 328-29. Rather, his bad choices were the cause. RP 368, 459.

reference groups. 179. In assessing Kent's risk, Patterson compared Kent to the "high risk, high need" group, based on what he termed to be "long term vulnerabilities" not taken into account in the static risk factors. RP 179-180. Of the "high needs, high risk" group who scored four points, 20.1 percent reoffended within five years and 29.6 percent reoffended within ten years. RP 180.

Patterson acknowledged he initially assessed Kent as having a only two points, which corresponded to a lower risk estimate. RP 182, 186. The difference was based on his changed score for item one of the risk factors, age at the time of release. RP 173, 183. Initially, Patterson gave Kent minus three points, based on his current age of 60 years. RP 184. However, he changed it to minus one, based on Kent's age in 2003. RP 184.

Patterson claimed the scoring rules were more complex than it initially appeared:

So this is where it gets a little more complicated in terms of scoring rules that are in this scoring manual that I mentioned. In Mr. Kent's case he was released from custody in 2003 following his 1995 conviction in relation to [C.L.], the child rape offense conviction. When he was released in 2003 he fell into that age span that you see there, 40 to 59.9, which would earn him a minus one point for that item.

Then he was arrested, if you remember, in 2004 for his sexual offending against [M.K.], his daughter, and he was sent to prison in 2005 and has

been in custody since then. So he has turned 60 while he has been in custody. So the trick is that the offending against [M.K.], even though he was arrested for it in 2004 and then turned 60 while he was in custody for that case, the actual sexual offending happened back in 1992 to 1995, so he has been – he was released after that offending, both with [M.K.] and with [C.L.], in 2003 when he had not yet turned 60.

So the proper way to score that age at release item is from the most recent sexual offending and his release point after that sexual offending, which would have been 2003, but when I scored it minus three I was thinking more in terms of him having turned 60 while he was currently in custody. So that's where the error was made on my part.

RP 184-85.

Patterson scored Kent similarly on the Static-2002R. Instead of giving him a minus two points for being 60 years old (as he initially did), Patterson now gave him zero points based on his age in 2003. RP 188-90. The resulting score was six points instead of four with corresponding risks of 24 percent in five years and 33.8 percent in ten years, as opposed to 15.5 percent and 23.5 percent respectively. RP 193.

Patterson also scored Kent on the sexual offense risk appraisal guide (SORAG). RP 170. Patterson assessed Kent with 20 points, putting him in risk category seven, which corresponded to a 58 percent risk of reoffense within seven years and an 80 percent risk in ten years. RP 196.

Patterson testified that because not all sexual offenses result in charges, these actuarial tools underestimate risk. RP 198-98, 280. Accordingly, Patterson also evaluated what he described as Kent's "long term vulnerabilities," using the structured risk assessment – forensic version (SRA-FV) and Kent's purported level of psychopathy using the psychopathy checklist revised (PCL-R). RP 153-55, 201. According to Patterson, consideration of these assessments combined with the actuarial tools convinced him Kent's mental abnormalities were such as to make him more likely than not to engage in predatory acts of sexual violence if not confined. RP 220-222.

On cross examination, Kent's attorney Douglas McCrae asked whether Patterson's changed score was attributable to changes in the coding rules. RP 266. Patterson responded the coding rules had not changed, but that he made an error in scoring initially. RP 268-69.

McCrae asked Patterson about the 2012 update on age coding by two of the developers of the Static tools (Karl Hanson and Leslie Helmus) available on their website. RP 276-77. Patterson agreed their opinion and that of anyone officially involved in the tools' creation would be definitive. RP 277. When defense

counsel next asked solely if Patterson looked at the 2012 update before changing Kent's score, Patterson testified about consulting another expert – until interrupted by the court:

Q. Okay. So did you actually look at the 2012 update on scoring the age item before making the change that you made?

A. What I did was I consulted with one of the people that you're referring to who's been part of the scoring manual and research having to do with the Static-99, Static 2002, and presented information, consulted with her about the scoring of the item.

Q. And you did that over the phone?

A. By e-mail.

Q. By e-mail? Okay. And you did that in terms of questions that you had about the offense cluster and about pseudo recidivism; is that right?

A. As it applies in this case.

Q. Okay.

THE COURT: Counsel, will you approach, please.

(A sidebar conference was had between the Court and Counsel, off the record and outside the hearing of the jury.)

MR. McCRAE: Thank you.

THE WITNESS: You're welcome.

THE COURT: Redirect?

RP 277-78.

On redirect, the AAG asked why Patterson consulted with one of the developers of the Static-99R about the age at release. RP 278. Patterson explained he “would normally consult with a fellow expert in the field if I had some uncertainty and wanted to make sure that my thinking was accurate.” RP 278. When asked why he had uncertainty, Patterson testified: “because I had discovered what appeared to be a mistake in my scoring on that particular item, and I wanted to get a second opinion.” RP 278.

When asked again about the purpose of conferring with “one of the developers of the Static-99R,” Patterson testified he wanted to confirm his “new thinking was accurate:”

Q. I’m sorry. What was the purpose, then, with conferring with one of the developers of the Static-99R about that issue?

A. To present the basic outline of the facts, of the dates and the kinds of offenses and when custody ended, when it began, when it restarted to see if my new thinking was accurate.

Q. And then did you come to the conclusion that your new thinking was accurate?

A. Yes; that the age at release for that item should be calculated from the 2003 release.

Q. And was this a rule you made?

A. No.

Q. Whose rules are these based upon?

A. The developers of the tools.

RP 279.

(ii) Kent's Expert

Psychologist Luis Rosell evaluated Kent in May 2012. RP 354. Like Patterson, he also diagnosed Kent with pedophilia, antisocial personality disorder and substance abuse issues. RP 371-72, 428, 457. He differed with Patterson, however, when it came to assessing Kent's risk of reoffense. RP 355.

In large part, this difference of opinion was based on the experts' divergent scoring on the Static-99R and Static-2002R. RP 389. Unlike Patterson, Rosell gave Kent a minus three on the Static-99R, and a minus two on the Static-2002R, for the "age at the time of release" item on the tests. RP 399-403. To Rosell, it made no sense to score Kent based on his age in 2003, when he was now 60 years old. RP 401.

Kent's attorney Ival Gaer attempted to ask Patterson whether he consulted anyone about how to score the age item, but the court sustained the AAG's hearsay objections:

Q. Have you consulted with anyone about whether to score him a two or a four on the Static-99R?

A. Yes. The same Dr. Looman,^[11] he's one of the people who you can send e-mails to, because they do get a lot of questions about scoring, even though they have an 84-page scoring coding rule from the original

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MS. BOERGER: I'm going to object, Your Honor, to hearsay of other witnesses not before the Court.

THE COURT: Sustained.

Q. (By Mr. Gaer, continuing). And so you're saying it doesn't make sense to score him as if he was, I don't know, in his fifties?

A. Correct.

Q. I mean, these are actuarials that, as you've testified, are kind of designed to take clinical judgment out of it. Are you using clinical judgment, or are you relying on the scoring manual?

A. The scoring manual on this specific issue wasn't – it seemed kind of contradictory, or wasn't totally clear, and that's why I've consulted – like I've done on other cases – and I was provided with the information and that information was –

MS. BOERGER: I'm going to object, Your Honor, to hearsay.

THE COURT: Sustained.

RP 402.

¹¹ Dr. Jan Looman is a researcher on psychopathy and recidivism and the chief psychologist of a sex offender treatment center in Canada. RP 394-98.

At this point, Gaer interjected the offered testimony was “part of the basis of [Rosell’s] opinion.” RP 402. The court reconsidered and overruled the AAG’s objection, but noted: “Just keep it narrowed as to what is the basis for his final decision.” RP 403.

Gaer asked again about consulting with Dr. Looman and Rosell testified:

A. Yeah. Well, the reason I – well, I consulted because I found out that the other expert didn’t – had changed his opinion, and so that’s why I had to consult. But it stayed clear to me that you score the individual based on their current age, which is what I’ve always been doing, and it wasn’t the first time—it was the first time I ever saw it done in this manner, so that’s why I had to look at it.

Q. And are there specific publications, say on the Static-99R website, that you relied upon in determining whether that would be the appropriate way to score the Static-99R or not?

A. It wasn’t really clear to me on how they – what their recommendations were, and that’s why I consulted. So overall I’m comfortable with my opinion that it sounds logical to have an individual who spent the last eight years in a facility who hasn’t been in the community and who’s 60 years old, that we should use his age of 60 and not his age when he was previously released. That just doesn’t make sense to me.

RP 403.

The end result was “a very low score” of two on the Static-99R. RP 402. Rosell agreed that in assessing risk, Kent should be

compared to the “high needs, high risk” reference group of offenders with the same score. Of those “high needs, high risk” individuals with a score of two, only nineteen percent reoffended within ten years. RP 405.

As with the Static-99R, Rosell gave Kent the highest deduction for age on the Static-2002R, resulting in a score of four points, which corresponded with a twenty-three percent risk of reoffense within ten years. RP 406.

Rosell was also critical of Patterson’s use of the SORAG, for three reasons. RP 410. First, its recidivism rates are not specific to sexual offending, but include other, serious offenses. RP 410. Second, it has never been revised or its findings duplicated. RP 410. And finally, it does not take age into account, which is a major drawback, as more recent research indicates the risk of re-offense is greatly reduced for someone over the age of 60.¹² RP 411-14. Three different studies showed the rate dropped as low as between seven to ten percent. RP 413-18.

While Rosell acknowledged the actuarial tools underestimate risk, he expressed skepticism regarding how to make up for potential underestimates:

A. Yes. I'm aware that there are individuals who commit offenses that have not been – we're not aware of, but then that's taking into account we don't know how much percentage to change it. So you take it into account, but then what? I mean, it's really hard to determine, so what do you do? Add five percent, add ten percent? It's really not clear what to do with that.

RP 407.

And although Rosell also assessed Kent with a fairly high score on the PCL-R, Rosell disagreed with Patterson about the significance of psychopathy in predicting sexual re-offense. RP 390. Rosell testified more recent research suggested it is more relevant to predicting re-offense by violent offenders, as opposed to sexual offenders. RP 390, 396, 398.

Finally, Rosell found it highly significant Kent did not re-offend in 2003-2004, when he returned to the community. RP 359. To Rosell, the lack of any offending behavior or accusations went to the heart of the matter – Kent's ability to control his sexually violent behavior. RP 360. Moreover, Kent was now ten years older and had been punished again for that cluster of behaviors. RP 369. Rosell testified Kent presented as a fairly unique individual in that he did not offend the last time he was in the community. RP 369.

¹² The SORAG is scored based on the offender's age at the time of the offense, regardless of how many decades have since passed. RP 259.

Looking at all these factors, it was Rosell's opinion Kent did not meet the criteria for commitment as it was not more likely than not that he would reoffend if not confined to a secure facility. RP 418-19.

Much of the AAG's cross examination of Rosell focused on his score for the age item of the Static-99R and Static-2002R. RP 472-474. The AAG pointed out the developers – in relation to the age item – put on their website that: "Because this item is scored using the age at release from the index sex offense rather than the age of release from the current offense, the offender may now be significantly older than they were when they were released from their index sex offense." RP 473.

In anticipation of redirect, Kent's attorneys asked for some leeway to question Rosell more fully about his consultation with Looman about the scoring issue. RP 498. Counsel acknowledged the testimony would be hearsay, but argued it was admissible as a basis for Rosell's opinion under ER 703. Moreover, as the defense pointed out, Patterson had been allowed to rely on hearsay in his testimony when he talked about the exchanged emails with Dr. Phenix. RP 498-99.

Defense counsel explained that after Rosell laid out the facts, Looman confirmed that he scored the age item correctly; he reasoned that since the offense against [M.R.] was part of the index offense "cluster," the fact he was still serving time on the offense against M.R. meant he had yet to be released on that index offense "cluster." Accordingly, his "age at the time of release" would be now. RP 499.

The prosecutor objected to the proposed testimony on hearsay grounds. According to the AAG, it was an attempt to bolster Rosell's testimony "by bringing in the testimony of statements of another expert who is not here for me to cross-examine." RP 500. Moreover, the AAG asserted the playing field was essentially even in that both experts had testified they consulted someone. RP 500. Primarily, however the AAG objected the testimony amounted to improper bolstering:

He's trying to justify his score to the jury by bringing in another expert who says this guy agrees with me, and he's not before the Court, and that's improper. It's improper bolstering, it's improper hearsay, and it's not helpful to the jury. His understanding was brought before properly in evidence saying, "I consulted with somebody who indicated I should score it this way, so I did." That's the same for both experts. But what they want to do now is exceed that, bolster his opinion by using hearsay that I can't cross-examine at all.

RP 503.

Defense counsel responded the defense had not provided a copy of Phenix's email referenced in Patterson's testimony or allowed an opportunity to confront Phenix:

MR. GAER: And I would just add, you know, they talked about an e-mail that was never provided to us. We were never able to confront that. That was the first we had heard about it was when Dr. Patterson testified. We're just trying to level the playing field. And I think the State essentially has opened the door to this kind of testimony to the limited extent that Dr. Rosell can explain why it is he chose to consult with Dr. Looman.

RP 504.

The court declined to find the door was open "to whatever hearsay is going to come in or not come in." RP 504. Moreover, any objections to Patterson's testimony were untimely and should have been made during his testimony. RP 504. The defense would be allowed to "explain again with the narrow basis for why he consulted" Looman, but the court would sustain any proper hearsay objection. RP 504. To the court, the proffered testimony went beyond providing a basis for Rosell's opinion and amounted to improper bolstering. RP 504.

On redirect, Rosell testified the updated coding rule for the age item indicates the individual is supposed to be scored according to their age at the date of release from their index sex offense. RP 520. In his opinion, Kent was still incarcerated on his index offense because the offense against M.K. was part of the same offense cluster as the offense against C.L. in the 1990s. RP 521. Rosell testified he contacted the “Static-99R coding people,” specifically Dr. Looman “who helps them out with the coding rules,” and “they provided me with basically confirmation that I had done it correctly.” RP 521.

On re-cross-examination, the AGG elicited the fact that Looman is not one of the individuals who prepared the coding rules, but that Dr. Amy Phenix is. RP 530.

(iii) State’s Expert’s Rebuttal Testimony

Patterson reiterated that he consulted with someone about the appropriate way to score the Static-99R and Static-2002R, specifically Amy Phenix. RP 562. Patterson testified Phenix is one of the authors of the scoring manuals for both the static tools. RP 562. Patterson testified he scored the tools in accordance with what Dr. Phenix recommended. RP 562.

C. ARGUMENT

KENT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE STATE'S EXPERT'S TESTIMONY ANOTHER EXPERT VERIFIED HIS OPINION.

The defense successfully sought to exclude the state's expert from relating the hearsay opinions of other, non-testifying expert witnesses to explain or bolster the testifying expert's opinion. Despite this favorable ruling, defense counsel did not object when the state's expert testified the developers of the Static tools verified the accuracy of his score and corresponding risk estimate. Because this was the main issue contested in the case, defense counsel's failure to object to this improper vouching deprived Kent of his right to effective assistance of counsel.

Although RCW 71.09 commitment proceedings are civil rather than criminal, a respondent is nonetheless entitled to due process protections that include effective assistance of counsel. In re Detention of Stout, 159 Wn.2d 357, 370-71, 150 P.3d 86 (2007); In re Detention of Smith, 117 Wn. App. 611, 617-18, 72 P.3d 186 (2003); RCW 71.09.050(1). A defendant establishes ineffective assistance when he shows (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Detention of Stout, 159 Wn.2d at 377.

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Deficient performance cannot be found if counsel's decision is tactically sound. State v. Pottorff, 138 Wn. App. 343, 349, 156 P.3d 955 (2007). Prejudice exists where, but for the deficient performance, there is a reasonable probability the verdict would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). A claim of ineffective assistance of counsel

presents a mixed question of fact and law that is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P. 3d 916 (2009).

1. Counsel's Failure to Object Was Not a Legitimate Tactical Decision.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining the conduct. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Considering that this case boiled down to a battle between the experts, it was objectively unreasonable for counsel to allow the state's expert to bolster his testimony and risk assessment with the opinion of a non-testifying expert, especially when it was used to bolster the state's expert's last minute change of opinion increasing Kent's risk.

Defense counsel properly recognized the impropriety of such testimony when he successfully moved pretrial to preclude the state's expert from relating the hearsay opinions of other, non-testifying expert witnesses to explain or bolster his opinion. CP 91-92. Yet, defense counsel allowed to stand – without objection –

Patterson's non-responsive answer on cross-examination he consulted with the developers of the Static tools in conducting his risk assessment. RP 277-78. In doing so, and by asking additional questions, defense counsel also opened the door to further testimony on redirect that Patterson obtained confirmation from the developers that he in fact scored Kent correctly – despite his current age. RP 279; see e.g. Ang v. Martin, 118 Wn. App. 553, 76 P.3d 787 (2003) (when a party opens up a subject on direct or cross examination, he contemplates that the rules will permit cross-examination or redirect within the scope of the examination in which the subject matter was first introduced).

Considering that the defense essentially did not dispute Kent's prior offenses or the state's expert's diagnosis, it was not legitimately tactical for the defense to allow the state's expert to bolster his risk assessment with the inadmissible hearsay of another expert that Kent was not entitled to a greater deduction in risk based on his age. Kent's age was the main factor in his defense and the experts' decisions on how to score him on that factor the major issue in contention at trial.

In response, the state may argue counsel's failure to object was an attempt to open the door to testimony by his own expert

about consulting another expert on the scoring issue. Any argument that such a tactic was legitimate should be rejected. At the outset, counsel's pre-trial motion belies the existence of such a tactic. Regardless, the trial court has considerable discretion in administering the open-door rule. Ang v. Martin, 118 Wn. App. at 561-62; State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Accordingly, any such gamble was risky on defense counsel's part.

Indeed, during direct of Rosell, the court sustained the AAG's hearsay objections. RP 402. And when defense counsel sought leeway in advance of redirect to question Rosell more fully about his consultation with Looman, the court specifically rejected counsel's argument he was merely trying to "level the playing field,"¹³ noting any objections to Patterson's testimony were untimely and did not open the floodgates to otherwise inadmissible hearsay. RP 504. Given the court's discretion in ruling on the open-door rule and importance of the issue at hand, it was not a legitimately tactical decision to forego what would have been a well-founded objection to Patterson's testimony on the off chance the court would allow similar testimony from the defense expert *and* that it would remedy the resulting prejudice of having the state's

¹³ RP 504.

expert's testimony validated by the developers of the actuarial tools, themselves.

2. A Timely Objection to the Evidence Would Have Been Sustained.

Under ER 703,¹⁴ an expert *may* be permitted to relate inadmissible hearsay when it forms the basis of his or her opinion. See e.g. In re Detention of Coe, 175 Wn.2d 482, 512-13, 286 P.3d 29 (2012) (Dr. Phenix allowed to relate homicide investigation tracking system (HITS) database results as a basis for her opinion); In re Detention of Marshall, 156 Wn.2d 150, 154,55, 161-62, 125 P.3d 111 (2005) (Dr. Phenix allowed to relate records relied on in forming her opinion, including police reports, legal records, treatment records, juvenile records, psychological and psychiatric evaluations and medical records). However, there are limits, as the trial court properly recognized below.

Division One of this Court has held that admission of opinion testimony by a non-testifying expert violates an accused's right to

¹⁴ ER 703 provides:

The facts of data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

confront. See e.g. State v. Wicker, 66 Wn. App. 409, 832 P.2d 127 (1992). There, the only evidence linking Wicker to the charged burglary was fingerprint evidence. Wicker, 66 Wn. App. at 411. At trial, the fingerprint technician testified that one of the three fingerprints lifted from the building matched Wicker's left little finger and the other two matched Wicker's left thumb. The technician also testified his comparison was "verified" by another senior technician who agreed with his conclusions. Id.

On appeal, the court held the verification was not admitted for a non-hearsay purpose, as argued by the state, and that it did not qualify as a business record because it amounted to an expert opinion. Wicker, 66 Wn. App. at 412-13. Its admission therefore violated Wicker's right to confront. Id. at 413.

More recently, however, Division One found no confrontation clause violation where the state's DNA expert at the defendant's trial for unlawful possession of a firearm was not the original analyst of the evidence, but rather, a peer reviewer who conducted an independent review of the DNA evidence and gave her independent opinion, which was consistent with the original, unavailable analyst's conclusions. State v. Manion, 173 Wn. App. 610, 613, 295 P.3d 270 (2013). In so holding, the court relied on

the “independent opinion” or “independent judgment” approach for determining when testifying experts may rely on testing results or reports by nontestifying experts. Manion, 173 Wn. App. at 626-27.

The court held that because Manion was given the opportunity to cross-examine a testifying expert that used her independent judgment, his right to confront was not violated. Manion, 173 Wn. App. at 627. In that same vein, the court held that a testifying expert may base his or her opinion on a non-testifying expert’s testimonial statement, *so long as the testifying expert has exercised independent judgment*. Id. (Emphasis added).

But that is clearly not the case here, as Patterson changed his score based on the testimonial statement of the non-testifying expert. He did not exercise independent judgment at all, but rather relied entirely on Phenix’s purported assertion as to how Kent should be scored in arriving at his ultimate conclusion.

The trial court below recognized the impropriety in allowing an expert to relate hearsay in the form of another non-testifying expert’s opinion as a basis for the expert’s opinion. In ruling the latter would not be allowed on redirect of the defense expert, the court stated:

But there are differences between relying on hearsay evidence, like just the police reports and those kinds of things, versus, as Ms. Boerger has put it, the idea of bolstering. That is beyond the reliance of that for forming an opinion.

RP 504.

The court's reasoning makes clear it would have sustained a timely objection to Patterson's non-responsive testimony about consulting the Static developers, had one been made. Based on the above cases, the court's ruling would have been well within its discretion. Confrontation clause aside, these decisions also show the court would have been well within its discretion in excluding Patterson's testimony about Phenix's purported opinion under an ER 403 analysis.¹⁵

¹⁵ Under ER 403:

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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

In any event, the court already ruled pretrial that testimony like that offered by Patterson would not be allowed. 1RP 107. Accordingly, had defense counsel objected, the door to outside experts would have been shut and the defense would have had not need to “level the playing field.” Defense counsel’s failure to object to the inadmissible hearsay constituted ineffective assistance of counsel. See State v. Hendrickson, 138 Wn. App. 827, 158 P.3d 1257 (2007) (failure to object to testimony that was inadmissible hearsay and violated the confrontation clause was ineffective assistance).

3. The Verdict Would Have Been Different Had the Evidence Not Been Admitted.

Although Patterson testified his change in score did not alter his ultimate conclusion, he acknowledged it made the justification for his opinion Kent was likely to reoffend *stronger*. RP 270. Clearly, the higher score increased Kent’s estimated risk of re-offense on the actuarial tables and pushed him closer to the fifty percent mark, which in turn, made Patterson’s structured risk assessment putting Kent over the fifty percent mark less of a stretch. The credibility of Patterson’s risk assessment was therefore critical to the state’s case. The fact that the Static

developers verified its accuracy undoubtedly lent an aura of credibility to his assessment. Without that stamp of approval, there was little basis for jurors to believe the state's expert over Dr. Rosell, who had worked with preeminent leaders in the field, such as Dr. Fred Berlin. RP 342.

In response, the state may argue there was no prejudice on grounds Rosell was allowed to testify he consulted an outside expert as well and received confirmation he correctly scored Kent on the actuarial tools. In other words, it was a wash. Any such argument should be rejected. First, Rosell was not allowed to explain the reasoning Looman gave for verifying Rosell's score (RP 499); whereas, the state was allowed to explore the reasons the developers reportedly endorsed scoring Kent as if it were 2003. RP 472-74. Second, once this can of worms was open, the state was allowed to elicit the fact that Phenix is one of the developers of the Static tools, whereas Looman is not. RP 530, 562. The inescapable conclusion jurors would have made is that Phenix would know better than Looman how to score the tools. Accordingly, defense counsel's failure to object to the admission of Phenix's purported opinion had an indelible impact on the trial and likely changed its result.

D. CONCLUSION

Because Kent was denied his due process right to effective assistance of counsel, this Court should reverse the order of commitment.

Dated this 31st day of January, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Nelson", written over a horizontal line.

DANA M. NELSON, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

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

In re the Detention of:)	
)	
DARRELL KENT,)	
)	
Appellant,)	
)	
vs.)	COA NO. 44759-2-II
)	
STATE OF WASHINGTON,)	
)	
Respondent.)	

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 31ST 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 DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DARRELL KENT
 SPECIAL COMMITMENT CENTER
 P.O. BOX 88600
 STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JANUARY, 2014.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

January 31, 2014 - 3:39 PM

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