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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Kevin Coe, a/k/a Frederick Harlan Coe:

STATE OF WASHINGTON,

Respondent.

v.

KEVIN COE,

Petitioner.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I.	IDENTITY OF RESPONDENT	1
II.	DECISION BELOW	1
III.	ISSUES PRESENTED FOR REVIEW	1
IV.	COUNTER STATEMENT OF THE CASE	2
V.	REASONS WHY REVIEW SHOULD BE DENIED	4
	A. Standard for Accepting Review	4
	B. Coe Failed to Establish Ineffective Assistance Because Precedent did not then Require an Instruction Defining “Personality Disorder,” Coe Admitted Through His Expert That He Suffered From That Condition, and the Absence of the Instruction had no Effect on the Trial’s Outcome	5
	1. The <i>Pouncy</i> Decision and the Technical Term Rule	6
	2. The Court of Appeals Correctly Rejected Coe’s Ineffective Assistance Claim Because Then-Existing Precedent Held a Definitional Instruction was Unnecessary	7
	3. There was no Prejudice	8
	C. Coe’s Mistaken Belief that he had a Right to Confront Sources of Information Admitted as the Bases for Expert Opinions Under ER 703 and 705 Does Not Support Review	9
	D. Pursuant to ER 404(B), the Trial Court Properly Allowed Expert Testimony Regarding the Five-Element Ritualistic Crime Signature Linking Coe to 17 Unadjudicated Rapes	11

E.	Pursuant to ER 404(b), the Trial Court Properly Admitted HITS Data Further Linking Coe to 17 Unadjudicated Rapes. However, Even if the Data were Deemed Inadmissible, Its Admission would be Harmless Error	14
F.	The Trial Court Properly Admitted Testimony from Victims of Unadjudicated Crimes Linked to Coe by Crime Signature, HITS Data and Other Evidence	18
G.	The Court of Appeals' Determination that the Trial Court did not Abuse its Discretion when it Permitted Dr. Phenix to Rely on Signature Crime Analysis and HITS Evidence is Consistent with this Court's Precedent	19
H.	The Court of Appeals Correctly Determined that the Trial Court Did Not Abuse Its Discretion By Permitting Dr. Phenix To Disclose The Bases Of Her Opinions Under ER 705	20
I.	Coe Has Not Established Cumulative Error	23
VI.	CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	8
<i>Deep Water Brewing, LLC v. Fairway Resources Ltd.</i> , 152 Wn. App. 229, 215 P.3d 990 (2009).....	10, 21
<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923).....	14
<i>Horne v. Trickey</i> , 895 F.2d 497 (8th Cir. 1990).....	8
<i>In re Detention of Coe</i> , ___ Wn. App. ___, 250 P.3d 1056 (2011).....	passim
<i>In re Detention of Marshall</i> , 156 Wn.2d 150, 125 P.3d 111 (2005).....	10, 21, 23
<i>In re Detention of Pouncy</i> , 168 Wn.2d 382, 229 P.3d 678 (2010).....	6, 7
<i>In re Detention of Stout</i> , 159 Wn.2d 357, 150 P.3d 86 (2007).....	7, 8, 9
<i>In re Detention of Twining</i> , 77 Wn. App. 882, 894 P.2d 1331 (1995).....	7
<i>In re Disability Proceeding Against Keefe</i> , 159 Wn.2d 822, 154 P.3d 213 (2007).....	10
<i>In re Personal Restraint Petition of Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	8
<i>Jameson v. Coughlin</i> , 22 F.3d 427 (2d Cir. 1994).....	7

<i>Philippides v. Bernard</i> , 151 Wn.2d 376, 88 P.3d 393 (2004).....	12, 19
<i>State v. Brown</i> , 145 Wn. App. 62, 184 P.3d 1284 (2008).....	21
<i>State v. Fortin</i> , 917 A.2d 746 (N.J. 2007)	17
<i>State v. Fortin</i> , 318 N.J. Super. 577, 724 A.2d 818 (1999).....	13
<i>State v. Fualaau</i> , 155 Wn. App. 347, 228 P.3d 771 (2010).....	13
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	14
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	16
<i>State v. Jenkins</i> , 53 Wn. App. 228, 766 P.2d 499 (1989).....	15
<i>State v. Martinez</i> , 78 Wn. App. 870, 889 P.2d 1302 (1995).....	21
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	6, 9
<i>State v. Phillips</i> , 123 Wn. App. 761, 98 P.3d 838 (2004).....	20
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	passim
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	6, 7
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	15

<i>State v. Thang</i> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	11, 13, 15
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	24
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007).....	22
<i>United States v. Ardley</i> , 273 F.3d 991 (11th Cir. 2001)	8
<i>Washington Irrigation and Dev. Co. v. Sherman</i> , 106 Wn.2d 685, 724 P.2d 997 (1986).....	21

Statutes

RCW 5.44.040	17
RCW 5.45.020	17

Other Authorities

John Douglas & Mark Olshaker, <i>Mindhunter</i> , at 253 (1995).....	13
--	----

Rules

ER 103(a)(1)	16
ER 403	22
ER 404(b).....	passim
ER 702	11, 14
ER 703	passim
ER 705	passim
RAP 13.4(b)	passim

I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

II. DECISION BELOW

The decision below is a published decision by the Court of Appeals, Division III, that affirmed a superior court order civilly committing Kevin Coe (Coe) as a sexually violent predator (SVP). *In re Detention of Coe*, ___ Wn. App. ___, 250 P.3d 1056 (2011).

III. ISSUES PRESENTED FOR REVIEW

This Court should deny review because the decision below does not meet any of the RAP 13.4(b) criteria. The State does not seek review of any issue; however, if the Court were to accept review, the following issues would be presented:

1. Does Coe fail to establish ineffective assistance of counsel, due to trial counsel not requesting a definitional instruction for "personality disorder", where precedent at that time did not require such an instruction, Coe admitted through his expert that he suffers from that condition, and there was no prejudicial effect on the trial's outcome?
2. Coe claims due process requires he be allowed to confront sources of information relied on by expert witnesses in forming their opinions and subsequently admitted at trial pursuant to ER 705. Is due process satisfied by Coe's opportunity to challenge the bases of the expert's opinions at trial?
3. Did the trial court properly exercise its discretion pursuant to ER 404(b) in admitting "other crimes" evidence, when it allowed an undisputedly qualified expert to testify regarding the five-element ritualistic crime signature he identified as linking Coe to 17 unadjudicated rapes?

4. Did the trial court properly exercise its discretion pursuant to ER 404(b) in admitting "other crimes" evidence, when following a full-day evidentiary hearing it admitted data from the state's Homicide Investigation Tracking System (HITS) that provided additional linkage between Coe and the 17 unadjudicated rapes linked to him by crime signature? Although a hearsay objection to the HITS data was not properly preserved, if the data were nonetheless determined to be inadmissible, would its admission constitute harmless error?
5. Did the trial court properly exercise its discretion when it admitted testimony from victims of unadjudicated crimes linked to Coe by crime signature, HITS data and other evidence, after finding such testimony admissible as ER 404(b) "other crimes" evidence?
6. Did the trial court properly exercise its discretion when, pursuant to ER 703, it permitted the State's forensic psychologist to rely upon crime signature and HITS evidence, where such evidence is reasonably relied upon by experts who conduct SVP evaluations?
7. Did the trial court properly exercise its discretion when it permitted the State's expert to disclose the bases of her opinions under ER 705, where such disclosure is authorized and the trial court gave the required limiting instruction?
8. Did Coe fail to establish cumulative error?

IV. COUNTER STATEMENT OF THE CASE

Shortly before Coe was due to be released from prison in 2006, the State filed a petition alleging that he is an SVP. CP at 1-2. In the fall of 2007, Coe filed a motion to exclude all trial evidence pertaining to victims of unadjudicated sexual crimes. CP at 450-628. The State responded, documenting evidence of 41 crimes which it alleged Coe had committed: 40 unadjudicated sexual offenses and the rape for which Coe had been convicted. CP at 3780-987, 4097-5003, 6751-924.

The trial court heard oral argument on Coe's motion and held a full-day evidentiary hearing concerning the HITS database. 1RP at 145-253, 3869-4040. The court found that the State had proved by a preponderance of evidence that Coe was the offender in 36 unadjudicated crimes. CP at 888-98, 904-07.

Coe's SVP trial began in September 2008. 1RP at 438. Dr. Amy Phenix had completed an SVP evaluation of Coe and the State presented her expert testimony. CP at 10-108; 1RP at 3064-65. Dr. Phenix opined that Coe suffers from three mental abnormalities and a personality disorder and is likely to commit future predatory offenses if not confined. *Id.* at 83, 98.

Dr. Phenix diagnosed Coe with three paraphilias: Paraphilia not otherwise specified (NOS) (nonconsenting persons, with sadistic traits); Paraphilia NOS, Urophilia/Coprophilia; and Exhibitionism. 1RP at 3119, 3126, 3142, 3148-49. These conditions cause Coe to have recurrent, intense, sexually arousing fantasies, urges and behaviors involving, respectively, nonconsenting sexual contact with females, urine and feces during sexual activity, and exposure of his genitals to unsuspecting strangers. *Id.* Dr. Phenix also diagnosed Personality Disorder NOS, with antisocial, narcissistic and histrionic traits. 1RP at 3159.

Dr. Phenix based her trial opinions in part on 33 crimes linked to Coe by evidence of, among other things: (1) Identifications of Coe by

victims; (2) a crime signature linkage analysis by Dr. Robert Keppel; (3) evidence from the HITS database; (4) blood typing evidence; and (5) Coe's admissions. *Id.* at 3085, 3087-103, 3098-99, 3110-11.

Dr. Keppel has extensive education, training and experience in criminology. CP at 3875-83, 4109-14, 4455-84. He reported that the term "signature" in a sexual crime, describes "a unique combination of behaviors that emerges across two or more offenses." CP at 4416. It may include behaviors that are categorized as either *modus operandi* (MO) or "ritualistic." *Id.* Dr. Keppel opined that the ritualistic signature he found in the crime of which Coe had been convicted occurred in 17 other unadjudicated rapes. 1RP at 2904-05.

The jury found Coe to be an SVP. CP at 3503-4. He timely appealed and Division III affirmed. *Coe*, 250 P.3d 1056. Coe now seeks review of the opinion below.

V. REASONS WHY REVIEW SHOULD BE DENIED

A. Standard for Accepting Review

The purpose of discretionary review is to provide guidance regarding issues of broader import than just a specific, fact-bound controversy between parties. This is amply demonstrated by the criteria governing discretionary review. A petition is accepted only when an issue of such broader import is presented: a conflict between the Court of Appeals decision and a decision of this Court, a conflict within the Court

of Appeals, a significant constitutional question, or an question of significant public interest. RAP 13.4(b).

Although on the third page of his petition Coe suggests in passing that three of these criteria apply, he never mentions them again or provides any argument supporting acceptance of review under RAP 13.4(b). The RAP do not require prescience. The Court should deny review because of Coe's failure to address the applicable criteria and because his petition does not present a significant constitutional question, an issue of substantial public interest, or a conflict in Washington appellate law.

B. Coe Failed to Establish Ineffective Assistance Because Precedent did not then Require an Instruction Defining "Personality Disorder," Coe Admitted Through His Expert That He Suffered From That Condition, and The absence of the instruction had no Effect on the Trial's Outcome

Coe argues that his trial counsel was ineffective when he did not propose an instruction defining "personality disorder." However, Coe fails to establish how this issue meets any of the RAP 13.4(b) criteria. Nor was counsel ineffective. As the court of appeals concluded, Coe's counsel not requesting a definitional instruction for "personality disorder" was consistent with Washington precedent at the time, which held that such an instruction was not required. Moreover, Coe admitted through his expert that he suffers from that condition, and thus there was no prejudice.

1. **The *Pouncy* Decision and the Technical Term Rule**

Coe's argument relies on a decision this Court handed down two years after his trial: *In re Detention of Pouncy*, 168 Wn.2d 382, 229 P.3d 678 (2010). At Pouncy's SVP trial, he unsuccessfully requested a jury instruction defining the term "personality disorder." *Id.* at 388. This Court held that "personality disorder" is a technical term that is beyond the experience of the average juror. *Id.* at 391. Having decided that the term requires definition, this Court then determined the error was not harmless and reversed Pouncy's commitment. *Id.* at 391-92.

Under the technical term rule, "[t]rial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory." *Pouncy*, 168 Wn.2d at 390. The failure to give that instruction is not the same as the failure to instruct on an essential element. *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). Due process is protected when a jury is instructed on all the elements, the burden and the standard of proof. *Id.* However, this Court has held that the lack of a definitional instruction is not a manifest constitutional error because "one can imagine justifications for defense counsel's failure to object or where the jury could still come to the correct conclusion." *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). Thus, the failure to give a definitional instruction is not an error of constitutional magnitude. *Id.*;

Scott at 691.

2. The Court of Appeals Correctly Rejected Coe's Ineffective Assistance Claim Because Then-Existing Precedent Held a Definitional Instruction was Unnecessary

To prove ineffective assistance Coe must show that his counsel performed below an objective standard of reasonableness and he was prejudiced. *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). Courts reviewing such claims begin by assuming that counsel's assistance was effective, and the claimant bears the burden of showing otherwise. *Id.* The court of appeals correctly concluded that Coe did not receive ineffective assistance. *Coe*, 250 P.3d at 1070-71.

At Coe's trial, longstanding precedent held that "personality disorder" did not require a definitional instruction. In 1995 Division III upheld a court's refusal to give that instruction, concluding that only "statutorily defined terms with specific legal definitions" required a definitional instruction. *In re Detention of Twining*, 77 Wn. App. 882, 895, 894 P.2d 1331 (1995). At Coe's trial, *Twining* had been the law of the land for 13 years. Moreover, there was no legal authority from which to craft an instruction: "[N]o statute, no pattern jury instruction, and no appellate court case." *Pouncy* at 397 (Madsen, C.J., dissenting).

Counsel are not required to anticipate changes in the law. *See, e.g., Jameson v. Coughlin*, 22 F.3d 427, 429 (2d Cir. 1994)

(trial counsel cannot “be deemed incompetent for failing to predict that the New York Court of Appeals would later overrule the Second Department’s reasonable interpretation of New York law.”); *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990) (ineffectiveness not established by claim that “counsel should have realized that the Supreme Court was planning a significant change in the existing law[.]”). Trial attorneys are not required to anticipate even strong appellate arguments. *United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001) (counsel not ineffective for failing to foresee results of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

Coe elevates hindsight to a standard of competency. But courts reviewing ineffective assistance claims make every effort to “eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.” *In re Personal Restraint Petition of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). Coe’s counsel relied on existing precedent and was not ineffective for doing so.

3. There was no Prejudice

Even if Coe’s counsel had been deficient, which they were not, Coe is still required to show prejudice. *Stout*, 159 Wn.2d at 357. The court of appeals correctly concluded he could not make that showing. *Coe*, 250 P.3d at 1071. Coe admitted through his expert that he suffered from a personality disorder. 1RP at 3582. In fact, his expert testified he

would probably make the diagnosis “even stronger.” 1RP at 3582. Where the disorder was not disputed the jury could not have been confused. Furthermore, this Court has said that, even in the absence of a definitional instruction for a technical term, “[O]ne can imagine . . . the jury could still come to the correct conclusion.” *O’Hara*, 167 Wn.2d at 103. The lack of a definitional instruction, therefore, could not have had any effect on the jury’s verdict and this issue does not present a basis for review.

C. Coe’s Mistaken Belief that he had a Right to Confront Sources of Information Admitted as the Bases for Expert Opinions Under ER 703 and 705 Does Not Support Review

Coe asserts a due process right to confront sources of information relied on by experts and admitted under ER 703 and 705. His argument stems from his misinterpretation of a decision by this Court addressing substantive evidence. *See Stout*, 159 Wn.2d 357. Coe’s attempt to create a new due process right fails and does not support review.

Stout addressed the admission of deposition testimony used as substantive evidence to prove sexual motivation. 159 Wn.2d at 362. This Court reiterated that SVP respondents have no Sixth Amendment confrontation right and held that they have no due process or equal protection right to confront witnesses at trial or be present at a deposition. *Id.* at 368-76. *Stout*’s due process rights were protected by his counsel’s cross-examination of the victim at the deposition. *Id.* at 368 n.9, 371.

Coe misapplies *Stout*’s holding to non-substantive information

admitted to show the bases of an expert's opinions. ER 703 allows experts to base opinions on inadmissible facts "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]" Experts are not required to have personal knowledge of the information on which they rely. *In re Disability Proceeding Against Keefe*, 159 Wn.2d 822, 831, 154 P.3d 213 (2007).

The inadmissible, non-substantive evidence can then, in the trial court's discretion, be related to the jury for the limited purpose of explaining the expert's opinions. ER 705; *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 275, 215 P.3d 990 (2009). These rules have long been extended to SVP trials. *In re Detention of Young*, 122 Wn.2d 1, 58, 857 P.2d 989 (1993); *In re Detention of Marshall*, 156 Wn.2d 150, 161, 125 P.3d 111 (2005).

Coe's argument fails to apprehend that the "evidence" here was the ultimate opinions of the experts, not the information upon which they relied. No confrontation right is triggered by the limited admission of ER 705 evidence. Such a rule would have the absurd result of requiring the production of everyone who made a statement relied on by an expert.

Consideration of records of reported offenses is so relevant and important that the failure to do so would be tantamount to professional malpractice. In fact, the same offense reports and victim statements at issue here were relied upon by Coe's own expert, who also testified about

them at trial. *See e.g.* 1RP at 3462-63. Because Coe was able to challenge the bases of expert's opinions, due process was satisfied.

D. Pursuant to ER 404(B), the Trial Court Properly Allowed Expert Testimony Regarding the Five-Element Ritualistic Crime Signature Linking Coe to 17 Unadjudicated Rapes

Coe asks this Court to accept review of the trial court's decision to admit expert testimony about his ritualistic crime signature. He again fails to explain how his argument meets any of the RAP 13.4(b) criteria. In any event, as the court of appeals correctly concluded, the trial court did not abuse its discretion, and review of that decision is not warranted.

At trial the state offered Dr. Keppel's signature testimony linking Coe to 17 unadjudicated rapes. *Coe*, 250 P.3d at 1059, 1060-61. "Other crimes" evidence is relevant for establishing identity when the MO is so distinctive that proof a person committed one crime creates a high probability they committed another. *State v. Russell*, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994). The more distinctive the MO, the more likely the person committed the crimes and the greater the relevance of the evidence. *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). In some cases where MO features are not highly unique, common features combined with a lack of dissimilarities suffice. *Thang*, 145 Wn.2d at 644.

Expert testimony is admissible under ER 702 if the witness qualifies as an expert and the testimony is helpful to the trier of fact. *Russell*, 125 Wn.2d at 69. This Court broadly construes "helpfulness to

the trier of fact.” *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 393 (2004). The trial court possesses “broad discretion” to decide admissibility. *Id.*

Expert testimony linking signature crimes is admissible in Washington. *Russell*, 125 Wn.2d at 71-73. In *Russell*, Dr. Keppel testified about a ritualistic signature. *Id.* The trial court found he was widely recognized as an authority in crime scene analysis and had extensive experience in serial crime analysis and investigation. *Id.* at 69. The trial court here found he had significant education and experience in signature analysis. CP at 890. Coe did not challenge his qualifications.

In response to Coe’s motion to exclude the State submitted Dr. Keppel’s signature analysis. CP at 3873-98, 4410-53. In Coe’s crime of conviction he grabbed the victim from behind on a public street. CP at 4421-22. He forced gloved fingers into her throat, hit her in the head and threatened her with an unseen knife. CP at 4422. Dragging her into a vacant lot, he threw her down, keeping his hand in her mouth. *Id.* He told her to take off her pants, hose and blouse. *Id.* He fondled and kissed her, unzipped his pants and masturbated himself. *Id.* Then he raped her, first with his fingers and then with his penis. *Id.* He told her she had “a nice cunt,” that he “beat off” all the time and asked her if she enjoyed “being fucked.” *Id.* After ejaculating, he again threatened her with the unseen knife, warned her not to contact the police and fled. *Id.*

Dr. Keppel concluded Coe exhibited a “highly specialized ritual:” (1) Intimidation; (2) co-opting the victim into compliance; (3) the rapist undoing his own clothing; (4) the necessity of sexual intercourse and/or ejaculation; and (5) the need for questioning of and engaging in conversation with the victim. CP at 4429. He reviewed 50 other cases and found Coe’s signature in 17 of them. CP at 4421, 4431, 4435-53.

Relying on *Thang*, Coe argues the trial court abused its discretion because Dr. Keppel did not establish a unique signature. But *Thang* is distinguishable because the two crimes the prosecutor tried to link without expert testimony occurred 18 months apart on opposite sides of the state. 145 Wn.2d at 644. *Thang* found the few common MO features insufficient and only addresses signatures unsupported by expert testimony. *Id.* at 643.

Thang is not a ritualistic signature case. *Id.* In *Fualaau*, the trial court properly admitted other crime evidence where two assaults shared “a ritualistic quality.” *State v. Fualaau*, 155 Wn. App. 347, 358, 228 P.3d 771 (2010). Admission was proper because a lesser degree of similarity is required in ritualistic signature cases. *Id.* at 357-58. *See also State v. Fortin*, 318 N.J. Super. 577, 603-04, 724 A.2d 818, 832-33 (1999) (quoting John Douglas & Mark Olshaker, *Mindhunter*, at 253 (1995)).

Where methodology is not novel and is accepted by the relevant professional community, challenges to how it is applied in a particular

case go to weight, not admissibility. *State v. Gregory*, 158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006). In Washington State, expert opinion testimony about serial crime signatures is not novel or subject to the *Frye*¹ test and is admissible under ER 702. *Russell*, 125 Wn.2d at 69. Here, the trial court did not abuse its discretion by admitting testimony from a qualified expert who found a ritualistic signature sufficiently unique to establish linkage by a high probability. Coe's arguments go only to the weight of the evidence and do not support review.

E. Pursuant to ER 404(b), the trial court properly admitted HITS data further linking Coe to 17 unadjudicated rapes. However, even if the data were deemed inadmissible, its admission would be harmless error

Coe alleges error in the admission of HITS data that showed the uniqueness of a combination of ten MO features that provided additional linkage between Coe and the Keppel-signature offenses. Coe claims the features are not distinctive enough to form a signature, but dismisses the data that demonstrates how rarely they occur in combination. The trial court properly admitted HITS data under ER 404(b) after a full-day pre-trial evidentiary hearing. Coe did not preserve a hearsay objection or ask the trial court to rule on one and the issue is not properly before this Court. Even had Coe preserved his objection, HITS data has sufficient indicia of reliability and is either not hearsay or is admissible under a

¹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

hearsay exception. Finally, even if this Court considers the hearsay issue and finds its admission objectionable, it was harmless error.

Responding to Coe's motion to exclude over one year after filing the SVP petition, the State proffered HITS data showing that ten MO features in the rapes already linked to Coe by Dr. Keppel's signature analysis were highly unique. CP at 3868-73. Those features were: (1) Coe was white; (2) Coe was male; (3) Coe was a stranger to the victim; (4) Coe first attacked the victim out of doors; (5) Coe raped her near where he first attacked her; (6) Coe used force upon first contact; (7) Coe asked the victim questions about her personal life; (8) Coe used a weapon; (9) the weapon was a cutting or stabbing weapon; and (10) the weapon was only implied – the victim never saw it. CP at 6881-83. In HITS these combined ten features are present in only 14 other rapes. 1RP at 3947-48; CP at 4375-76. Coe, suspected in all 14, was linked to 13 by Dr. Keppel's signature and other evidence. CP at 3885-98.

Coe argues the ten features were not unique enough to establish a signature. He fails to address the correct question, which is whether "all of these shared features, when combined, are so unusual and distinctive to be signature-like." *Thang*, 145 Wn.2d at 645. Combinations of commonplace features can create a unique MO signature. *State v. Smith*, 106 Wn.2d 772, 778, 725 P.2d 951 (1986); *State v. Jenkins*, 53 Wn. App. 228, 237, 766 P.2d 499 (1989).

HITS addressed precisely this point. This Court described HITS as a “sophisticated record-keeping system[.]” *Russell*, 125 Wn.2d at 70 (HITS data admissible as information Dr. Keppel relied on in finding signature). This Court approved “using well-founded statistics to establish some fact that will be useful to the trier of fact.” *Id.* Here, Dr. Phenix relied on HITS because it established that a unique set of MO features in Coe’s adjudicated rape were shared by other rapes already linked to him.

The trial court scrutinized HITS’ reliability during a separate, full-day pretrial hearing. 1RP at 3869-4040. The State presented three witnesses and several exhibits. *Coe*, 250 P.3d at 1066; 1RP at 3869-4040; CP at 888. Coe did not present evidence. *Id.* He argued that HITS was a law enforcement tool inappropriate for a courtroom setting and its results were not statistically well-founded. 1RP at 4034-36. The trial court relied on *Russell* and found HITS to be sufficiently reliable to be considered by the court and the jury, with respect to identity. *Coe* at 1066-67; CP at 891-92. The trial court concluded under ER 404(b) that the evidence was admissible and properly relied upon by Dr. Phenix. *Coe* at 1067.

At no time during the HITS hearing or thereafter did Coe raise a hearsay objection or did the trial court rule on one. 1RP at 3869-4040. Coe failed to preserve that alleged error and the issue is not properly before this Court. ER 103(a)(1); *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). The arguments he did raise went to the weight of

the evidence and not its admissibility.

If this Court considers the hearsay issue, it should find HITS admissible for the purpose it was used, and because of Dr. Phenix's reliance on it. The trial court's extensive inquiry established HITS' reliability for the limited purpose of showing the rarity of an MO signature in crimes already linked to Coe by other evidence. The HITS data were therefore properly admitted as ER 404(b) identity evidence and as information reasonably relied upon by Dr. Phenix. The foreign cases Coe relies on are inconsistent with this Court's *Russell* opinion. For example, in the most recent case relied on by Coe, crime data was held inadmissible in part because the experts had not relied on it. *See State v. Fortin*, 917 A.2d 746, 762 (N.J. 2007). Additionally, as an official data compilation, the HITS data were self-authenticating and admissible pursuant to either RCW 5.44.040 or RCW 5.45.020.

Assuming HITS were inadmissible hearsay, the error was harmless. Overwhelming evidence linked Coe to the signature rapes and supported Dr. Phenix's opinions, as documented in the state's Division III Respondent's Brief at 60-82. When Dr. Phenix completed her initial SVP evaluation of Coe in August 2006, HITS evidence was unavailable. CP at 10-108. After she reviewed the HITS data her opinions were unchanged. 1RP at 3118-19, 3158-59. Therefore, the result at trial would have been the same, even if Coe had managed to exclude the HITS data.

Lastly, Coe claims his counsel was ineffective for failing to object on hearsay grounds. His contention does not support review. It is speculative to conclude a hearsay objection would have been sustained if made, especially given the court's rejection of the substantial efforts of Coe's counsel to establish that the HITS data were unreliable. Furthermore, given the remarkable evidence catalogued for Division III in the Respondent's Brief, the result would have been the same.

The court of appeals found that there was no error in the admission of HITS data. Coe fails to prove otherwise or to show a basis for review under RAP 13.4(b) and review should be denied.

F. The trial court properly admitted testimony from victims of unadjudicated crimes linked to Coe by crime signature, HITS data and Other Evidence

Coe argues that evidence of his unadjudicated crimes was wrongly admitted because the trial court should not have relied on Dr. Keppel's signature evidence or the HITS data. As the Court of Appeals concluded and Coe acknowledges, this issue turns on whether there was a proper basis for admission of the crimes under ER 404(b). The Court should find that Coe has not established a basis for review.

As in *Russell*, Dr. Keppel's signature testimony was sufficient to prove identity in unadjudicated crimes by a preponderance of evidence. 125 Wn.2d at 66-67. The signature evidence being sufficient, there was no error in admitting the victim testimony, regardless of the admission of

HITS evidence. Review should be denied.

G. The Court of Appeals' Determination that the Trial Court did not Abuse its Discretion when it Permitted Dr. Phenix to Rely on Signature Crime Analysis and HITS Evidence is Consistent with this Court's Precedent

Coe asserts that the court of appeals incorrectly affirmed the trial court's decision to allow Dr. Phenix to rely on signature and HITS evidence. However, because the court of appeals decision was correct and consistent with this Court's *Russell* decision, review is not warranted.

The trial court had broad discretion to decide the scope of expert testimony. *Philippides*, 151 Wn.2d at 393. Dr. Phenix can rely on facts or data reasonably relied upon by experts in her field. ER 703. Expert signature testimony is admissible in Washington if the expert is qualified and the information is helpful to the jury. *Russell*, 125 Wn.2d at 69. The signature evidence was information that psychologists like Dr. Phenix reasonably rely upon in conducting SVP evaluations. CP at 4887-88; 1RP at 3098-99. As the court of appeals correctly determined, the trial court had a tenable reason for permitting Dr. Phenix to rely upon this evidence, and did not abuse its discretion.

The trial court's decision to allow Dr. Phenix to rely on HITS data was supported by *Russell*, 125 Wn.2d at 70. An otherwise qualified expert is not prohibited from giving expert opinion testimony merely because he or she uses the assistance of a software program in making conclusions.

Challenges to the proper use of such software go to the weight, not the admissibility, of the expert testimony at trial. *State v. Phillips*, 123 Wn. App. 761, 771, 98 P.3d 838 (2004) (citing *Russell*, 125 Wn.2d at 51). Both Dr. Phenix and the HITS investigator were thoroughly cross-examined on the strengths and weaknesses of the information that HITS can provide. See e.g. 1RP at 2690-738. Any concerns about the weight to be given that evidence were addressed by Coe at trial. The court of appeals correctly concluded that the trial court did not abuse its discretion and there is no basis for review under RAP 13.4(b).

H. The Court of Appeals Correctly Determined that the Trial Court Did Not Abuse Its Discretion By Permitting Dr. Phenix To Disclose The Bases Of Her Opinions Under ER 705

Coe next argues that the court of appeals and the trial court erred by allowing Dr. Phenix to testify about the unadjudicated offenses she reasonably relied upon. There was no error here. It is well-settled that a trial court has discretion to decide what underlying information an expert can testify about to explain the bases of her opinions. *Coe*, 250 P.3d at 1069. The trial court here properly exercised that discretion and instructed the jury on the limitations of the evidence. *Id.*

ER 703 allows a trial court to admit expert opinion testimony that is based on facts or data that are not otherwise admissible, if of a type reasonably relied upon. ER 705 addresses the testimonial disclosure of those facts or data, and permits experts to testify to otherwise inadmissible

information. The rule does not permit an expert to testify about “all manner of inadmissible evidence.” *Deep Water Brewing*, 152 Wn. App. at 275. However, the trial court has discretion to admit otherwise inadmissible information to explain the bases of the expert’s opinion. *Id.* Evidence admitted for that purpose is not substantively admitted. *Marshall*, 156 Wn.2d at 163.

A trial court has discretion to prevent the improper admission of hearsay evidence “that is not necessary to help the jury understand the expert’s opinion.” *State v. Martinez*, 78 Wn. App. 870, 880, 889 P.2d 1302 (1995). Thus, a toxicologist’s testimony about information he did not reasonably rely upon was harmless error. *State v. Brown*, 145 Wn. App. 62, 75, 184 P.3d 1284 (2008). A doctor’s testimony about the conclusions of others that he did not rely on was also error. *Washington Irrigation and Dev. Co. v. Sherman*, 106 Wn.2d 685, 688, 724 P.2d 997 (1986).

However, where otherwise inadmissible evidence helps to explain the bases of the expert’s opinions it can be admitted with an appropriate limiting instruction. *Brown*, 145 Wn. App. at 74. Thus, in another SVP case Dr. Phenix properly testified about inadmissible facts to explain the bases of her opinions. *Marshall*, 156 Wn.2d at 163. Here, Dr. Phenix did precisely what this Court approved of in *Marshall* – she related the information she relied upon in forming her diagnostic and risk assessment

opinions, and the trial court gave an appropriate limiting instruction. 1RP at 3085-86. The jury is presumed to have followed its instructions and to have considered the evidence for its limited purposes. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007).

The standard for admitting such testimony requires that it be information of a type reasonably relied upon by other experts in the field. ER 703. Dr. Phenix testified that it is important to understand the offender's criminal sexual history and that SVP experts routinely rely on unadjudicated offenses. 1RP at 3084-85. To determine Coe's history, Dr. Phenix reviewed approximately 74,000 pages of records and drew reasonable conclusions about whether sufficient evidence linked Coe to unadjudicated crimes. *Id.* at 3079, 3084-85. That laid the foundation for her to relate the facts underlying her opinions to the jury.

Here, the State exceeded the ER 703 requirement. Pretrial, the court considered whether the State had proved Coe the perpetrator in the 40 unadjudicated offenses Dr. Phenix originally relied on. In three cases the court found the State had not produced evidence sufficient to link Coe to those crimes.² In a fourth, the evidence linked Coe to the sexual abuse of his nephew but the court found that unfair prejudice would substantially outweigh the probative value of the evidence.³ ER 403. And, in 36

² Laura T. (CP at 895), Barbara M. (CP at 898) and Karen H. (CP at 905).

³ Colin M. (CP at 897-98).

unadjudicated offenses, the court found that the State had proved Coe to be the perpetrator by a preponderance of evidence. CP at 894-96, 904-05. At trial, Dr. Phenix relied on Coe's conviction and 32 of those 36 unadjudicated offenses to support her opinions. 1RP at 3085. Any concerns about the reliability of the evidence Dr. Phenix relied upon were addressed pretrial by the court's findings and during trial by Dr. Phenix's testimony. Additionally, Coe was able to, and did, cross-examine Dr. Phenix about her reliance on the 13 unadjudicated offenses about which he is concerned. *See e.g.* 1RP at 3299-306. Coe's counsel conducted a vigorous cross-examination of Dr. Phenix about her reliance on information linking Coe to unadjudicated offenses where the victim did not testify. *Id.*

The crimes linked to Coe were relevant and admissible to explain the bases of Dr. Phenix's diagnostic and risk assessment opinions. As in *Marshall*, the trial court here did not abuse its discretion by permitting her to testify about the information she reasonably relied upon. 156 Wn.2d at 163. The court of appeals' correct decision on this issue does not require review.

I. Coe Has Not Established Cumulative Error

Coe claims cumulative error in his SVP trial requires reversal of his commitment order. The court of appeals did not reach this issue because it found no error below. *Coe*, 250 P.3d at 1071-72.

The overwhelming evidence supporting Dr. Phenix's opinions renders any errors harmless. "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Dr. Phenix's opinions were supported by an extraordinary amount of evidence. 22 of 33 victims made some identification of Coe as the perpetrator. There is no evidence in the record excluding Coe from any unadjudicated offenses. His diagnoses and the deviant behaviors they propelled are readily identifiable in the rape crimes linked to him. The Court should deny Coe's appeal and affirm the jury's verdict and the order of commitment.

VI. CONCLUSION

Coe has not established a basis for review by this Court. The State respectfully requests that the Court deny his petition for review.

RESPECTFULLY SUBMITTED this 10th day of June, 2011.

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NO. 85965-5

WASHINGTON STATE SUPREME COURT

In re Detention of Kevin Coe, a/k/a
Frederick Harlan Coe:

DECLARATION OF
SERVICE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN COE,

Appellant.

I, Kelly Hadsell, declare as follows:

On June 10, 2011, I deposited in the United States mail true and correct cop(ies) of Respondent's Answer To Petition For Review and Declaration of Service, postage affixed, addressed as follows:

Casey Grannis
1908 E. Madison Street
Seattle, WA 98122

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of June, 2011, at Seattle, Washington.


KELLY HADSELL

OFFICE RECEPTIONIST, CLERK

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State of Washington v. Kevin Coe

Respondent's Answer To Petition For Review

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Thank you,

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