

NO. 27520-5-III

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



IN RE DETENTION OF KEVIN COE:

STATE OF WASHINGTON,

Respondent,

v.

KEVIN COE,

Appellant.

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

The Honorable Kathleen M. O'Connor, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO ENSURE THE COURT INSTRUCTED THE JURY ON THE DEFINITION OF PERSONALITY DISORDER.

The State claims Coe's ineffective assistance argument is based on hindsight. Br. at 6. Coe is not asking this Court to find ineffective assistance based on defense counsel's failure to anticipate In re Det. of Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010).

Long before Coe's case was tried, State v. Allen revealed juries are unable to properly define technical terms for themselves in the absence of court instruction. State v. Allen, 101 Wn.2d 355, 362, 678 P.2d 798 (1984). The complicated science of human psychology is beyond the ken of the average juror. In re Det. of Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006).

Both Supreme Court precedent and the Washington administrative code endorsed the DSM definition of personality disorder. In re Pers. Restraint of Young, 122 Wn.2d 1, 49-50, 857 P.2d 989 (1993); WAC 388-880-010. The meaning of this technical term was settled and there was no dispute as to its meaning at the time of Coe's trial. A reasonably competent attorney is sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) (counsel ineffective

in failing to request instruction that would have allowed her to effectively argue client's intoxication affected his ability form requisite mental state necessary to commit crime).

At the time of Coe's trial, the trial court retained discretion to give a personality disorder instruction if one had been requested under In re Det. of Twining, 77 Wn. App. 882, 895-96, 894 P.2d 1331 (1995). "Reasonable attorney conduct includes a duty to investigate the relevant law." State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). A cursory review of Twining would have revealed the court had discretion to give an instruction defining personality disorder. The trial court would likely have given the instruction because its legal meaning was not in dispute.

Defense counsel's failure to ask for the definitional instruction foreclosed the trial court from exercising its discretion to give it. This was deficient performance.

Analogy to other cases involving the trial court's failure to exercise its discretion is instructive. For example, the court's failure to exercise its discretion in considering whether to impose a sentence below the standard range is reversible error. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005). No defendant has the right to obtain a sentence below the standard range. The court can decline to impose such a sentence in the

exercise of its discretion. Id. at 342. But "[w]hile no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Id.

The same rationale applies here. While Coe was not entitled as a matter of right under Twining to have the court give a personality disorder definition, he was entitled to ask the court to consider give the definition and have the request actually considered.

In State v. McGill, defense counsel was ineffective in failing to cite authority showing the court had discretion to impose an exceptional sentence downward and in failing to request the court to exercise its discretion based on that authority. State v. McGill, 112 Wn. App. 95, 97, 100, 47 P.3d 173 (2002). The appellate court recognized "[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." Id.

In Coe's case, defense counsel did not cite authority showing the court had discretion to give a personality disorder definition and did not request the court to exercise its discretion on this point. Counsel's failing, under the law as it existed at the time, constitutes ineffective assistance.

The State contends counsel was not deficient because "one can imagine justifications" for not proposing a personality disorder definition. Br. at 13 (citing State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009)). But the State nowhere suggests what that justification might be in Coe's case. The jury heard evidence that Coe was weird, abnormal or disordered in some sense. In the absence of court instruction guiding their deliberations, lay jurors were allowed to rely on their common understanding of what "personality disorder" could mean and apply it to Coe's behavior and psychological state.

Under existing precedent, the jury could not rely on argument of counsel to supply the law on what "personality disorder" meant. State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995) ("A jury should not have to obtain its instruction on the law from arguments of counsel."). Under existing precedent, Coe was "entitled to a correct statement of the law and should not have to convince the jury what the law is." Thomas, 109 Wn.2d at 228.

Furthermore, the trial court's instructions in Coe's case prohibited the jury from relying on counsel's argument to supply a definition of personality disorder: "You should disregard any remark, statement or argument that is not supported by the evidence or the law as I have explained it to you." CP 3475 (Instruction 1). The court further instructed

"You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case." CP 3474 (Instruction 1). But no legal definition of "personality disorder" was given to the jury due to counsel's failure to ask for it.

In Twining, the trial court left the parties to present different definitions to the jury through closing argument. Twining, 77 Wn. App. at 895. Ignoring the fact that the jury in Coe's case was forbidden from considering arguments of counsel not supported by trial court instruction, counsel in a hypothetical case might be justified in not requesting a personality disorder instruction when the parties advance conflicting meanings, hoping to convince the jury of a definition more favorable to his or her client. But here, the experts did not disagree about the definition of personality disorder and the attorneys in closing argument did not offer different definitions.

Furthermore under existing precedent, the jury must not be held captive by an expert's definition of personality disorder. See State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) ("Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards."); State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (witnesses are not allowed to

give legal conclusions under guise of expert testimony or testify a particular law applies to the case).

The State claims the lack of a definitional instruction not amounting to manifest constitutional error is harmless because "one can imagine . . . the jury could still come to a correct conclusion." Br. at 14 (citing O'Hara, 167 Wn.2d at 103).

The State entirely ignores the prejudice analysis set forth in Pouncy, which comports with the prejudice analysis under Coe's ineffective assistance claim. See State v. Rodriguez, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004) ("The prejudice prong of a claim of ineffective assistance of counsel compares well to a harmless error analysis — essentially 'no harm, no foul.'").

The failure to define personality disorder in Pouncy was not harmless because the Court could not say the failure to instruct on the definition of "personality disorder" in no way affected the final outcome of the case. Pouncy, 168 Wn.2d at 392. As in Pouncy, the term implicated an element of the State's case. Id. at 391. As in Pouncy, the State had to show Coe suffered from either a mental abnormality or a personality disorder in order to prove Coe was an SVP. Id. As in Pouncy, this Court has no way of knowing from the verdict whether the jury found that Coe was an SVP because he suffered from a mental abnormality or a

personality disorder. Id. at 391-92; CP 3480 (Instruction 5). As in Pouncey, if the jury agreed Coe suffered from a personality disorder, this Court has no way of knowing what definition the jury used in reaching this conclusion. Id. at 392.

Coe need not show counsel's deficient performance more likely than not altered the outcome. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He need only show lack of confidence in the outcome. Thomas, 109 Wn.2d at 226. Coe establishes prejudice because this Court cannot be confident, based on the record, that the trial court would not have given a personality disorder definition had one been requested or that the jury, in the absence of instruction, used the correct definition.

Contrary to the State's assertion, O'Hara did not hold error pertaining to definitional instruction is harmless where "one . . . can imagine the jury could still come to the correct conclusion." Br. at 14 (citing O'Hara, 167 Wn.2d at 103). A harmless error analysis occurs only after the court determines an error is a manifest constitutional error. O'Hara, 167 Wn.2d at 99. "The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal." Id. at 99. O'Hara went no further than the first step of actual prejudice because it determined

the error was not manifest. It was in that context that the Court suggested an error is not manifest if the jury could come to the correct conclusion in the absence of a correct definitional instruction. Id. at 103.

The State conflates the separate analyses. The prejudice prong of an ineffective assistance claim is analogous to the harmless error analysis that the O'Hara court never reached. Rodriguez, 121 Wn. App. at 187.

The State also asserts the error was harmless because the parties did not dispute the definition of personality disorder. Br. at 13-14. Pouncy did not turn on whether the parties agreed or disagreed on a definition. The Supreme Court reversed because it recognized the source of prejudice stems from leaving the jury to invent the meaning of an element of the State's case, regardless of whether the parties disputed its meaning. Pouncy, 168 Wn.2d at 391-92.

2. THE COURT WRONGLY ADMITTED SIGNATURE ANALYSIS EVIDENCE GIVEN BY THE STATE'S EXPERT BECAUSE THE IDENTIFIED SIGNATURE DID NOT PASS THE STRINGENT TEST OF UNIQUENESS NEEDED TO PROVE IDENTITY.

In the opening brief, Coe argued Dr. Keppel's expert testimony should not have been admitted to demonstrate Coe's identity as the perpetrator of various offenses because the offense features identified by Keppel did not exhibit a unique signature as required by the case law. Opening Brief at 19-29.

The State claims Dr. Keppel's signature analysis testimony did not need to meet this test because he did not treat the evidence as modus operandi evidence. Br. at 14. According to the State, Keppel opined there was a "ritualistic" signature and therefore "a lesser degree of similarity is required." Br. at 14, 23. For this dubious proposition, the State cites State v. Fualaau, 155 Wn. App. 347, 228 P.3d 771 (2010). Br. at 17-18.¹

The Fualaau court applied the traditional signature test for uniqueness to determine if the expert opinion in that case was relevant to establish identity under ER 404(b). Fualaau, 155 Wn. App. at 357-58 (citing State v. Russell, 125 Wn.2d 24, 66-68, 882 P.2d 747 (1994); State v. Thang, 145 Wn.2d 630, 642-44, 41 P.3d 1159 (2002); State v. Coe, 101 Wn.2d 772, 777-78, 684 P.2d 668 (1984)). There is no indication in that opinion that "ritualistic" crimes are not subject to that same signature test. Russell analyzed Keppel's "ritual" testimony under the classic signature test. Russell, 125 Wn.2d at 66-68, 71-73. This Court should do the same. The test to establish identity and hence relevance under ER 404(b) is the same, whether one applies the label of "modus operandi," "ritual," or anything else.

¹ Insofar as the State is defending the trial court's discretionary decision on the admissibility of this evidence, its reliance on Fualaau is ironic, given that it came out after Coe's case was tried. See State v. Madsen, 168 Wn.2d 496, 507 n.3, 229 P.3d 714 (2010) ("The Court of Appeals succumbed to the historian's fallacy by relying on then-future events to justify the trial court's denial of Madsen's request.").

The State's citation to State v. Fortin is misplaced. Br. at 38. In addressing expert Hazelwood's opinion involving ritualized aspects of offenses, Fortin applied the same test for admissibility advocated by Coe and established by Washington case law to determine identity under ER 404(b). State v. Fortin, 318 N.J. Super. 577, 595-96, 724 A.2d 818 (N.J. Super. Ct. App. Div. 1999), aff'd, 162 N.J. 517, 745 A.2d 509 (N.J. 2000) (the prior criminal activity with which defendant is identified must be so nearly identical in method as to earmark the crime as defendant's handiwork; the conduct in question must be so unusual and distinctive as to be like a signature.).²

The State's argument would allow an expert witness to dictate the rules concerning the admissibility of his or her own testimony. The label attached by an expert to his testimony and the terminology used by that expert to describe the evidence does not call for a departure from the established test for admissibility to prove identity. Interestingly, the State cites a book written by Douglas, Keppel's colleague, for the proposition that "ritual" evidence is admissible under a lesser degree of similarity than

² Hazelwood's expert testimony was excluded because his linkage analysis lacked sufficient scientific reliability and therefore he could not qualify as an expert. Fortin, 318 N.J. Super. at 599, 610, aff'd, 162 N.J. 517 at 525.

required by the signature test for uniqueness. Br. at 38. The State's citation illustrates Coe's point.³

Defense counsel moved to exclude Keppel's testimony because it did not establish the rapes were so unique as to meet the signature requirement under ER 404(b). CP 533, 544-60, 574-75, 578. The trial court ruled Keppel's signature analysis was admissible on the issue of identity. CP 892, 898.

The State nonetheless claims defense counsel failed to preserve a "partial signature" argument. Br. at 27-28. The State is incorrect. Counsel pointed out the dissimilarities between the offenses. CP 546-57. The record before the trial court at the time of the ruling showed a number of crimes did not contain all the elements Keppel identified as the signature. CP 4417-24, 4431-44. The State admits this. Br. at 28.

Defense counsel argued Keppel's testimony did not meet the test to show identity under ER 404(b). CP 533, 544-60, 575, 578. The ground for objection is readily apparent from the circumstances and was more than sufficient to apprise the trial court of his objection. State v. Black, 109

³ Keppel cited to articles written by Douglas and Hazelwood in describing the theoretical basis for his linkage analysis. CP 4410. Hazelwood trained Keppel in how to produce a sex offense signature. RP 2972. The signature analysis field is one in which only Hazelwood and a few of his close associates (including Douglas and Hazelwood), are involved. State v. Fortin, 178 N.J. 540, 583, 843 A.2d 974 (N.J. 2004) (citing Fortin, 162 N.J. at 527).

Wn.2d 336, 340, 745 P.2d 12 (1987); ER 103(a)(1). Indeed, "[a] trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it." State v. Quismundo, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008). The test for admissibility is clear and counsel correctly cited that test in arguing the evidence should be excluded. Nothing more was needed to preserve the issue for review.

The State complains Coe offers no authority for his argument that four of the five ritual elements identified by Keppel involved ordinary incidents of rape. Br. at 25. Coe relies on common sense and the proposition that legal principles should be applied in a common sense manner. See, e.g., MacKay v. Dep't of Labor & Indus., 181 Wn. 702, 704, 44 P.2d 793 (1935) ("The want of book authority may be supplied by a common-sense consideration of the circumstances of the case."); State v. Leach, 36 Wn.2d 641, 647, 219 P.2d 972 (1950) (courts are to apply legal principles governing whether an attempt has been made to commit a crime in a common sense manner).

The State asserts Keppel's expert testimony was helpful to the trier of fact and therefore admissible because lay jurors could not be expected to have such specialized knowledge. Br. at 27, 37. Yet the State also admits "[i]n fact, expert testimony was not necessary to establish a signature here." Br. at 36. The State cannot have it both ways. See City of Seattle v.

Personeus, 63 Wn. App. 461, 464, 819 P.2d 821 (1991) (citing State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985)) (expert testimony is unnecessary and should be excluded if the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment).

3. THE COURT ERRED IN ADMITTING HITS EVIDENCE BECAUSE IT DID NOT ESTABLISH THE PRESENCE OF A UNIQUE SIGNATURE, IT CONSISTED OF INADMISSIBLE HEARSAY, AND IT WAS OTHERWISE UNRELIABLE AND MISLEADING.

The State claims the HITS evidence was admissible as a public record exception to the hearsay rule under RCW 5.44.040. Br. at 52. This claim fails.

Under Washington law, the public records exception has never been applied to the contents of a police report relating the victim's account of the crime. The exception has only been extended to cover police records related to the fact of arrest and bookings. State v. Iverson, 126 Wn. App. 329, 339-40, 108 P.3d 799 (2005) (in a criminal case in which the State was required to establish identity of victim, victim's jail booking records from a computer-based system admissible as public or business record); State v. Hines, 87 Wn. App. 98, 101, 941 P.2d 9 (1997) (jail booking sheet that included routine information such as social security number, phone number, date, address, height, weight was the routine kind of record

contemplated by RCW 5.44.040); State v. King, 9 Wn. App. 389, 390, 393, 512 P.2d 771 (1973) (Seattle Police Department booking sheet and record of arrests admissible as public record, apparently to show outstanding warrant as basis for defendant's arrest in that case).

Underlying the public records exception is the presumed reliability of regularly kept records. State v. Monson, 53 Wn. App. 854, 859, 771 P.2d 359, aff'd, 113 Wn.2d 833, 784 P.2d 485 (1989). The exception finds justification in the sound assumption that a public official will properly perform his duties and is not likely to remember details independent of the record. Monson, 53 Wn. App. at 859-60. Producing custodians of public records for cross-examination when such a record is offered would be unproductive. Id. at 860.

The rationale underlying the public record exception does not apply to statements made by victims that are contained in police reports. Statements made by victims of a crime are not presumed reliable. Unlike a public official carrying out his or her governmental duties, the victim has no public duty to report and there is no sound assumption that a victim's statement is accurate. Police officers putting the victim's accounts into their reports have no knowledge of the truthfulness of the information being recorded. Cross-examination of the victim is a productive endeavor in this context.

The State cannot cite a single case from Washington or elsewhere that admitted hearsay statements of a victim contained in a police report under a public record exception. Witness statements that would be subject to cross examination in court do not somehow become immune from examination simply because those statements are contained in a police report.

In Hines, a patrol incident report did not qualify as a public record because it was the summary of an investigation by a police officer. Hines, 87 Wn. App. at 101-02. The report, while "routine," included the officer's observations of Hines' incriminating behavior and statements. Id. The court held the report was a summary of an investigation by the patrolman and should be subject to cross-examination by the accused, which would permit her to test the accuracy of the patrolman's observations and the accuracy attributed to her statements. Id.

Those same concerns apply with full force here. The HITS database, comprised of more than 8100 cases, came from police investigation summaries. CP 3869, 4369, 4371; 1RP 3926. If a police officer's first hand observations of a defendant's behavior cannot qualify under the public record exception, it necessarily follows an officer's second-hand report of a victim's observations cannot qualify under this exception either.

"It should be remembered that the public records statute simply removes the hearsay objection to certain evidence. It does not necessarily remove other objections. Statements that could not be made by a witness on the witness stand (*if, for example, they are irrelevant or contain hearsay statements by others*) do not become admissible by virtue of the fact they are included in a public record." 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.47 at 117-18 (5th ed. 2007) (emphasis added).

The State ignores ER 805, which provides "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." In other words, each level of hearsay must fall within exception to the hearsay rule to be admissible. State v. Hopkins, 134 Wn. App. 780, 788, 142 P.3d 1104 (2006).

The State focuses on one level of hearsay — Methany's report derived from her input of data from police reports into the HITS system. Br. at 54. The police reports are hearsay within hearsay, because they contain out-of-court statements made by police officers, repeating or summarizing statements of the victims. Cf. State v. Pollard, 66 Wn. App. 779, 786, 834 P.2d 51 (1992) (rejecting sentencing court's use of unsworn double hearsay police reports to establish amounts stolen in check kiting scheme). The first

level of hearsay — the victim accounts contained within the police reports — falls under no exception.

The public record exception "does not include verbatim statements of others which, for one reason or another, are found in governmental records or files." Tegland, § 803.48 at 119; see State v. Connie J.C., 86 Wn. App. 453, 456-57, 937 P.2d 1116 (1997) (written confession by defendant's husband was inadmissible as a public record; it amounted to nothing more than facts reported by a private citizen, and the facts did not relate to matters of a public nature).

The State's citations to United States v. Enterline, 894 F.2d 287 (8th Cir. 1990) and United States v. Smith, 973 F.2d 603 (8th Cir. 1992) are inapposite. Br. at 52-54. The courts in both cases addressed whether a computer report itself was admissible as a public record, but neither case addressed the double hearsay issue. Enterline, 894 F.2d at 289-91; Smith, 973 F.2d at 605.

As under Washington law, the contents of police reports that contain third party statements are inadmissible hearsay and do not qualify under the public record exception. United States v. Sallins, 993 F.2d 344, 347-48 (3d Cir. 1993) (even if the 911 record itself was admissible under the federal public records exception, details as to the out-of-court statements made by the person who called 911 were not admissible unless

covered by a separate hearsay exception; distinguishing Enterline); United States v. De Peri, 778 F.2d 963, 976-77 (3d Cir. 1985) (third parties' out-of-court statements contained with FBI agents reports were not admissible under the public records exception because while the reports themselves may have been admissible as public records, a separate hearsay exception was required for the third parties' out-of-court statements); Bemis v. Edwards, 45 F.3d 1369, 1372 (9th Cir. 1995) (because citizens who call 911 are not under any "duty to report," a recorded statement by a citizen must satisfy a separate hearsay exception).

The State claims Coe waived a hearsay objection to the HITS evidence in failing to object on that ground. Br. at 44-48. By citing People v. Hernandez, 55 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (Cal. Ct. App. 1997) and applying it to the facts of Coe's case, Coe sufficiently raised a hearsay objection before the trial court definitively ruled the HITS evidence was substantively admissible. CP 3995-96, 3999; see State v. Powell, 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995) (party losing final pre-trial evidentiary ruling has standing objection).

If this Court finds otherwise, then counsel was ineffective in failing to properly raise the hearsay objection. Opening Brief at 49. Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. 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 counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The State suggests Coe's trial counsel made a tactical decision, after unsuccessfully trying to exclude the evidence, to attack the evidence at trial. Br. at 59. That conceived justification does not bear scrutiny. The circumstances of this case show trial counsel's clear goal was to prevent the admission of the HITS evidence altogether. He fought to keep it out because he realized how damaging it would be to his client.

There is no legitimate reason why he would have deliberately avoided a hearsay objection that would have accomplished his goal of exclusion after citing case law that excluded the same type of evidence on hearsay grounds. Having failed to prevent the admission of HITS evidence on other grounds, it is inexplicable that the hearsay objection would not be properly lodged. There is absolutely no suggestion in this record that counsel wanted the jury to hear about the HITS evidence. If the State is correct that counsel failed to preserve the hearsay objection under established law, then it is impossible to conceive a reasonable attorney in trial counsel's position would have done so. Cf. State v. Sutherby, 165

Wn.2d 870, 883-84, 204 P.3d 916 (2009) (counsel ineffective where record reflected no legitimate strategic or tactical reason for counsel's conduct). Perhaps counsel merely forgot to raise the hearsay objection after the court ruled the HITS evidence was substantively admissible. If so, counsel's performance would still be deficient. Oversight is not a tactic. It is simple negligence.

4. THE COURT ERRED IN ALLOWING DR. PHENIX TO DISCLOSE UNADJUDICATED OFFENSES AS THE BASIS FOR HER OPINION BECAUSE THE JURY LIKELY CONSIDERED THOSE OFFENSES AS PROOF THAT COE COMMITTED THEM.

The State claims the trial court did not abuse its discretion by permitting Dr. Phenix to disclose the bases of her opinions under ER 703 and 705 in their totality. Br. at 85. The State is wrong.

The court denied the defense motion to prohibit Dr. Phenix from disclosing the bases of her opinion to the jury that consisted of evidence not substantively admitted elsewhere, saying the issue of whether Phenix could rely on the contested information and present it to the jury as the basis for her opinion had already been decided against Coe based on previous rulings. RP 2110-12. In actuality, the previous ruling involving these offenses only allowed Phenix to rely on these offenses in forming her opinion, but did not address whether Phenix could disclose them to the jury while testifying. CP 904-07.

The legal standard governing admissibility of expert opinion under ER 703 is not the same as the legal standard governing disclosure of the bases for an expert's opinion under ER 705. "ER 703 allows experts to base an opinion on facts or data that are not admissible in evidence, but does not address the admission of the facts on which the expert relies. ER 705 addresses the disclosure of the underlying facts." State v. Anderson, 44 Wn. App. 644, 652, 723 P.2d 464 (1986). The trial court failed to grasp this distinction.

Under ER 703, the expert is permitted to base his or her opinion on otherwise inadmissible facts as long as they are of a type reasonably relied on by experts in the field. "Under ER 703, a trial court may admit an expert's testimony that is based on facts or data which are not otherwise admissible, if those facts or data are of the type reasonably relied upon by experts in that field in forming opinions other than for the purposes of litigation." State v. Brown, 145 Wn. App. 62, 74, 184 P.3d 1284 (2008).

Whether an expert should be permitted to disclose the bases of her opinion to the jury is governed by a different legal analysis under ER 705. ER 705 incorporates an ER 403 analysis: "The trial court should determine under ER 403 whether to allow disclosure of inadmissible underlying facts based upon whether the probative value of this information outweighs its prejudicial or possibly misleading effects." State v. Martinez, 78 Wn. App.

870, 879, 899 P.2d 1302 (1995); accord State v. Acosta, 123 Wn. App. 424, 436, 98 P.3d 503 (2004). It is crucial that the trial court conduct the proper balancing test before deciding to admit the bases for expert opinion under ER 705, including the likely effectiveness of a limiting instruction to the jury to alleviate any perceived danger of prejudice.

A trial court abuses its discretion when it gives no reason for its discretionary decision. State v. Hampton, 107 Wn.2d 403, 409, 728 P.2d 1049 (1986). Here, the court apparently believed it had already exercised its discretion on the issue of whether Dr. Phenix should be permitted to disclose the bases of her opinion to the jury under ER 705, but in reality it addressed a different evidentiary issue governed by a different legal standard under ER 703. This resulted in the trial court failing to give any cognizable reason for her decision to allow Dr. Phenix's disclosure.

A discretionary decision is based on untenable grounds or made for untenable reasons "if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A trial court abuses its discretion if it fails to adhere to the requirements of an evidentiary rule. Quismundo, 164 Wn.2d at 504; State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The trial court necessarily abuses its discretion when its decision is based on an

erroneous view of the law or involves application of an incorrect legal analysis. Rafay, 167 Wn.2d at 655; Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Because the trial court was in effect silent as to the reasons for denying Coe's motion, this Court cannot say whether the court rested its decision on facts supported by the record. Rafay, 167 Wn.2d at 655. Nor can this Court be sure what legal standard the trial court applied, as it did not specify whether it based its ruling on a belief that the probative value of *disclosure* to the jury outweighed the prejudicial effect or on some other basis entirely. Id. Depending on what the trial court thought about the issue or to what extent the court did or did not incorporate the proper legal standard into its reasoning, it may be that it abused its discretion per se based on an erroneous interpretation of law. Id.

In some instances, appellate courts may overlook a court's abuse of discretion if its decision can be affirmed on any ground within the pleadings and the proof. Id. "But such a rule presupposes that we have some knowledge of the reasons upon which the lower court based its decision, and the rule should not apply where, as here, we have no insight into the lower court's reasoning." Id.

The State asserts the limiting instruction prevented any prejudice that the jury may have treated the non-substantive bases for Dr. Phenix's opinion

as substantive evidence. Br. at 89-92. "One of the greatest dangers in allowing otherwise inadmissible evidence under Rule 705 is that the jury will consider the facts and data as substantive evidence rather than as merely constituting the underlying basis for the expert's opinion." Wood v. State, 299 S.W.3d 200, 213 (Tex. Crim. App. 2009) (quoting Valle v. State, 109 S.W.3d 500, 505-06 (Tex. Crim. App. 2003)); accord Vann v. State, 229 P.3d 197, 208-09 (Alaska Ct. App. 2010).

This is precisely the situation presented in this case, because the unadjudicated offense data explained and supported Phenix's opinions only if they were true. Wood, 299 S.W.3d at 213. Even though the trial court instructed the jury to consider bases for Phenix's expert opinion for the limited purpose of explaining and supporting her opinion, the jury could not have given effect to that instruction without first determining those bases were true. Id.; see also Martinez, 78 Wn. App. at 881 (recognizing jury would have likely construed basis for expert testimony as substantive evidence had it not been excluded); State v. Clinkenbeard, 130 Wn. App. 552, 570, 123 P.3d 872 (2005) (recognizing juries have difficulty in making subtle distinction between impeachment and substantive evidence) (citing State v. Hancock, 109 Wn.2d 760, 763, 748 P.2d 611 (1988)).

In closing argument, defense counsel referenced this limiting instruction, telling the jury that "the State exhaustively went through each particular victim" but that it had not substantively proven Coe was responsible for these offenses through Phenix and the jury could not view the information relied on by Phenix as proof that Coe committed the offenses. RP 3819-24. Counsel reminded the jury that they promised to follow the law and that they needed to sift through the evidence carefully to draw the distinction, but recognized "How do you ignore evidence, old police reports, that mention my client's name as substantive evidence? I don't know. I just know you're told you have to." RP 3823. Counsel also remarked "It's extremely difficult in sexually violent predator commitment cases to deliberate under these circumstances." RP 3823. Counsel referenced the limiting instruction again when addressing another piece of evidence relied on by Phenix, telling the jury he did not know how it could treat that piece of evidence for non-substantive purposes "once the bell is rung as many times it's been rung in this case." RP 3833-34.

Examination of the State's opening statement and closing argument reveals the State was unable to maintain the distinction between offenses offered for their truth and those offered only for a non-truth purpose. In opening statement, the AAG told the jury "You will hear evidence in this case, lady -- ladies and gentlemen, about two things: the crimes that the

evidence will show that he committed first, and secondly the evidence that links Mr. Coe to those crimes. Dr. Phenix relied on both of those things. Both the evidence of Mr. Coe's sex offenses, as well as the evidence linking Mr. Coe to them." RP 2171-72.

In closing, the AAG described the facts of each and every offense relied on by Phenix. RP 3771-83, 3787-95. The AAG never mentioned that a number of those offenses could not be used as substantive evidence. After finishing the list of 33 victims, the AAG lumped all the offenses together, simply stating "So these are the ones that Dr. Phenix relied upon and the reasons, in summary, why she relied upon them." RP 3795. The AAG told the jury "we have set out this evidence of his offending because it's relevant to the diagnoses that have been assigned to Mr. Coe, and to the assessment of Dr. Phenix that he presents a high risk of committing another sexually violent offense if he's released." RP 3802.

At one point the AAG directed the jury to "hold him to his admissions in the information Dr. Phenix reviewed that he had attempted to rape someone in December 1980, and had been driven off by mace." RP 3805. This "admission," however was not substantive evidence and thus there was nothing to "hold him" to. Phenix referenced Coe's "admission" and linked it to the attempted rape of Littlest. RP 3095-96. The court, however, had already instructed the jury that this basis for

Phenix's opinion could not be considered for its truth. RP 3085-86. In fact, the State had maintained pre-trial that Phenix could rely on and disclose the Littlest offense because it was not offering this incident for its substantive truth.⁴ CP 905, 3986; RP 235-36. The AAG could not keep the distinction between substantive and non-substantive evidence straight. How, then, could the jury?

In rebuttal, another AAG expressly treated another piece of "evidence" offered for non-substantive purposes as substantive evidence. RP 3855-56. Referencing a letter written by Coe to another inmate upon which Phenix relied, the AAG told the jury "that is evidence of his sexual deviance." RP 3856. Defense counsel objected to use of the word "evidence." RP 3856. The court sustained the objection, stating "If you are going to use the word 'evidence,' I would ask you to make it substantive evidence." RP 3856. The AAG responded "Certainly. That is evidence that Dr. Phenix relied on in the case." RP 3856. That letter was not admitted as substantive evidence and yet the AAG persisted in the use of the term "evidence" after the trial court requested he limit its use to "substantive evidence."

⁴ Coe denied making an admission to Dr. Wetzler that he attempted a rape in December 1980 but had been driven away by mace. CP 3667; RP 3043.

The jury could not properly assess the value of Phenix's opinion without first assessing the truth of the bases for her opinion. It was logically impossible for the jury to fully evaluate her opinion without treating the unadjudicated offenses for their truth. "[O]pinions of expert witnesses are of no weight unless founded upon facts in the case." Theonnes v. Hazen, 37 Wn. App. 644, 649, 681 P.2d 1284 (1984). It follows the jury must have treated the underlying bases of her opinion as fact in assessing the weight of her opinion. The State chooses to turn a blind eye to this reality. This Court need not.

5. THE COURT VIOLATED COE'S DUE PROCESS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT ALLOWED THE JURY TO HEAR EVIDENCE OF OTHER OFFENSES LINKED TO COE DESPITE THE FACT THAT COE NEVER HAD THE OPPORTUNITY TO EXAMINE THE VICTIMS OF THOSE OFFENSES.

The State claims due process does not require confrontation of any witness in an SVP proceeding. Br. at 93-99. To the extent it claims In re Det. of Stout, 159 Wn.2d 357, 150 P.3d 86 (2007) defeats Coe's argument, the State simply does not understand Stout. Br. at 93, 97-98. Stout supports Coe's argument. The analysis set forth in the opening brief need not be repeated here.

In relying on ER 703 and 705, the State's argument amounts to saying the rules of evidence related to expert opinion trump the

constitutional due process rights of the accused. Br. at 94-95. That proposition is not well taken. See, e.g., State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008) (evidentiary rule must give way to constitutional concerns such as the right to a fair trial); Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (rules of evidence do not trump Sixth Amendment protections); Meléndez-Díaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 2538, 174 L. Ed. 2d 314 (2009) ("the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.").

The State also suggests no confrontation error occurred here because the bases of Dr. Phenix's opinion were ostensibly not offered for their truth. Br. at 94, 99. The State does not even attempt to refute Coe's opening brief on this point. The right to confrontation cannot be circumvented by declaring the bases for expert opinion are not being offered for their truth. People v. Goldstein, 6 N.Y.3d 119, 122, 810 N.Y.S.2d 100, 843 N.E.2d 727 (N.Y. 2005); Vann, 229 P.3d at 208-09; Wood, 299 S.W.3d at 213.

In Wood, for example, the State's expert gave an opinion regarding the nature and causes of a victim's injuries and death. Wood, 299 S.W.3d at 213. The expert also disclosed to the jury the testimonial statements in the autopsy report on which his opinions were based. Id. The facts and data in the autopsy report explained and supported the expert opinion only if

they were true. Id. The Wood court held the disclosure of the out-of-court testimonial statements underlying the experts opinions, even if only for the ostensible purpose of explaining and supporting those opinions, constituted the use of the testimonial statements to prove the truth of the matters stated in violation of the Confrontation Clause. Id. Even if the trial court had expressly instructed the jury to consider the testimonial statements in the autopsy report for the limited purpose of explaining and supporting the expert's opinions, "the jury could not have given effect to that instruction without first determining that the statements were true." Id.

"The factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition." David H. Kaye et al., The New Wigmore: Expert Evidence § 3.7 at 19 (Supp. 2005) (cited by Goldstein, 6 N.Y.3d at 128). Applying that principle, the Vann court disavowed the suggestion a defendant has no right to confront the person who performed DNA testing linking him to a crime because the DNA test results are only being introduced to explain the basis for the DNA analyst's opinion, rather than being introduced for the truth of the matter asserted. Vann, 229 P.3d at 208. An expert's testimony about the factors underlying their opinion is formally

not introduced for the truth of the matters asserted under the rules of evidence, "[b]ut, as a practical matter, there are times when the expert's opinion has essentially no probative value unless the jury assumes the truth of some or all of this underlying information or data." Id. at 209. The real probative force of the expert's testimony hinges on the accuracy of bases for that opinion: if those bases are false or mistaken, then the expert's opinion has essentially no value. Id.

The probative value of Dr. Phenix's opinion that Coe met the SVP criteria hinges on the accuracy of her bases for that opinion, which in this case include victim accounts from police reports. In that circumstance, Coe was entitled to confront the original witnesses against him.

Cross-examination of the expert is an unacceptable substitute. Cross-examination of the victim could have illuminated the potential sources of error in their accounts of what happened. See Meléndez-Díaz, 129 S. Ct. at 2537-38 (in holding right to confrontation violated where defendant prevented from cross examining author of drug analysis report, recognizing cross-examination could have illuminated the potential sources of error in either the testing procedures or the interpretation of the test results). Furthermore, confrontation provides an opportunity for the witness to reconsider previously false statements. Id. at 2537 ("Like the eyewitness who has fabricated his account to the police, the analyst who

provides false results may, under oath in open court, reconsider his false testimony.").

The State contends honoring the right to confrontation in SVP cases leads to absurd results because the State would need to produce every person who provided information ultimately relied on by the its expert. Br. at 98-99. This contention is overblown. Coe's argument is that due process requires confrontation when an alleged victim provides testimonial statements and those statements are relied on and disclosed by the expert without the victim testifying at the SVP trial or by means of deposition. Consistent with confrontation requirements, an expert may rely on and disclose any number of information sources so long as those sources give non-testimonial statements. Confrontation protections are triggered when an alleged victim gives testimonial statements to a police officer and the State's expert relies on those statements in an SVP trial.

D. CONCLUSION

For the reasons stated above and in the opening brief, Mr. Coe requests that this Court vacate the commitment order and remand for a new trial.

DATED this 8th day of October, 2010.

Respectfully Submitted,

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