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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 27520-5-III

**COURT OF APPEALS, DIVISION III
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,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES PRESENTED

1. Whether Coe's counsel provided him ineffective assistance by not proposing an instruction defining a technical term, where case law precedent held that no such instruction was necessary and there was no effect on the outcome of the trial.
2. Whether the trial court abused its discretion by admitting expert opinion testimony about Coe's ritualistic signature, where the expert's qualifications were not challenged and his testimony was helpful to the jury.
3. Whether Coe failed to preserve a hearsay objection to testimony about the Homicide Investigation Tracking System (HITS).
4. Whether Coe's counsel provided him ineffective assistance by not preserving a hearsay objection to the HITS evidence, where he vigorously challenged that evidence and its admission was harmless because other substantial evidence linked Coe to unadjudicated rapes.
5. If the Court recognizes a preserved hearsay objection, whether the HITS evidence was inadmissible hearsay.
6. Whether the trial court abused its discretion by admitting the testimony of victims of unadjudicated crimes, where the trial court had found such evidence admissible pursuant to ER 404(b).
7. Whether the trial court abused its discretion by permitting the State's forensic psychologist to rely upon signature and HITS evidence, where such evidence is reasonably relied upon by experts who conduct SVP evaluations.
8. Whether the trial court abused its discretion by permitting the State's expert to disclose the bases of her opinions under ER 703 and 705.
9. Whether Coe has a right to confront individuals who provide information that an expert reasonably relies upon.
10. Whether Coe has established cumulative error.

II. STATEMENT OF FACTS

A. Procedural History

1. SVP Petition and Probable Cause hearings

On August 30, 2006, the State filed a petition alleging that Kevin Coe (Coe) is an SVP. CP at 1-2. That same day, the trial court entered an ex parte

order that found probable cause to believe Coe was an SVP and issued a warrant for his arrest. CP at 126-27. The trial court held a contested probable cause hearing on December 18, 2006. 1RP at 4262-430.¹ The following day the court affirmed its previous finding of probable cause. 1RP at 4476.

On October 31, 2007, Coe filed a motion to exclude (motion to exclude) all evidence pertaining to victims of unadjudicated sexual crimes. CP at 450-628. On January 28, 2008, 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 to exclude on February 13, 2008, and held an evidentiary hearing regarding evidence from the State's HITS on March 13, 2008. 1RP at 145-253, 3869-4040. After considering all of the evidence offered by both parties, the court ruled on the motion. CP at 888-98, 904-07. The court found that the State had proved by a preponderance of evidence that Coe was the offender in 36 unadjudicated crimes. CP at 894-96, 904-05.

The trial began on September 15, 2008. 1RP at 438. The jury returned a verdict on October 16, 2008, finding Coe to be an SVP.

B. Factual History

¹ The State adopts Coe's system of referencing the verbatim report of proceedings: 1RP (consisting of 26 consecutively paginated volumes) – 9/6/06; 1/12/07; 2/15/07; 7/13/07; 8/23/07; 1/11/08; 2/13/08; 6/16/08; 6/17/08; 7/18/08; 8/15/08; 9/9/08; 9/11/08; 9/12/08; 9/15/08; 9/16/08; 9/17/08; 9/18/08; 9/22/08; 9/23/08; 9/24/08; 9/25/08; 9/29/08; 9/30/08; 10/1/08; 10/2/08; 10/6/08; 10/7/08; 10/8/08; 10/9/08; 10/13/08; 10/14/08; 10/15/08; 10/16/08; 3/13/08 (vol. 23); 10/11/06, 12/21/07 and 9/8/08 (vol. 24); 12/18/06 & 12/19/06 (vol. 25); 8/29/07, 9/11/07, 12/5/07 & 1/18/08 (vol. 26); 2RP - 2/1/08; 3RP - 4/7/08.

At trial the State presented the expert opinion testimony of Dr. Amy Phenix, a clinical psychologist specializing in forensic psychology. 1RP at 3064-65. Before the State filed its petition, Dr. Phenix had completed an SVP evaluation of Coe at the request of the Washington State Department of Corrections' (DOC) End of Sentence Review Committee, pursuant to RCW 71.09.025(1)(b)(5). CP at 10-108. Coe declined to be interviewed and Dr. Phenix's evaluation was based on a records review. *Id.* at 10. Based on that review, Dr. Phenix opined that Coe suffered from three mental abnormalities and a personality disorder. *Id.* at 83. She also opined that he was likely to commit future predatory offenses if he was not confined. *Id.* at 98.

Coe's primary diagnosis is Paraphilia not otherwise specified (NOS), nonconsenting females with sadistic traits. 1RP at 3119. A person with a paraphilia experiences intense, sexually arousing fantasies, urges or behaviors toward non-human objects, the suffering or humiliation of one's self or one's partner, or towards children or other nonconsenting persons. *Id.* This condition causes Coe to have recurrent, intense, sexually arousing fantasies, urges and behaviors involving nonconsenting sexual contact with females. *Id.* at 3126.

Additionally, Dr. Phenix diagnosed Coe with Paraphilia NOS Urophilia/Coprophilia. 1RP at 3142. This condition causes Coe to have recurrent, intense, sexually arousing fantasies, urges and behaviors involving urine and feces during sexual activity. *Id.*

Dr. Phenix also diagnosed Coe with Exhibitionism, which causes him to have recurrent, intense, sexually arousing fantasies, urges and behaviors

involving exposure of his genitals to unsuspecting strangers. *Id.* at 3148-49. "The point of exhibitionism for the offender is to cause shock and surprise to an unsuspecting stranger by viewing their genitals." *Id.* at 3151. In some crimes, Coe had pretended to expose himself by using a dildo, but it supported the diagnosis because his arousal was to the reaction of the victim, not the baring of his genitals. *Id.* Lastly, Dr. Phenix opined that Coe suffers from a personality disorder NOS, with traits of antisocial personality disorder, narcissistic personality disorder, and traits of histrionic personality disorder. 1RP at 3159.

At trial, Dr. Phenix based her opinions in part on 33 sexual offenses that she believed had been linked to Coe by a variety of evidence. 1RP at 3085. That evidence included, among other things: (1) Identifications of Coe by victims; (2) evidence from the HITS database; (3) a signature linkage analysis by Dr. Robert Keppel; (4) blood typing evidence; and (5) Coe's admissions. *Id.* at 3087-103, 3098-99, 3110-11.

Dr. Robert Keppel, who conducted the signature linkage analysis, has extensive education, training and experience in criminology. CP at 3875-83, 4109-14, 4455-84. On four occasions between 1991 and Coe's SVP trial, Dr. Keppel conducted a signature analysis and testified about it at trial. CP at 4113. In addition Dr. Keppel has conducted a signature analysis in approximately six other cases in the United States and Canada in which there either had not been a trial or where Dr. Keppel was not called as a witness. *Id.*

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.*

MO behaviors are those the offender engages in to obtain a victim and complete the crime without being detected. CP at 4414. They can range from quite simple to very complex, and evolve as the offender becomes more experienced and confident in his offending. *Id.* In serial sexual crimes, for a variety of reasons, the MO "evolves quite rapidly over time and can present significant changes in a period of only weeks or months." CP at 4415.

Ritualistic behaviors, on the other hand, "are derived from the motivation for the crime and the sexual fantasy that expresses it." CP at 4415. Instead of being functional, like the MO, they are not necessary for completing the crime. *Id.* Instead, they are symbolic and reflect the primary motivation or purpose of the crime. *Id.* They can

express themselves differently over a series of offenses either due to the refinement and more complete reflection of their underlying intent or fantasy substrate, or through an addition of unexpectedly arousing aspects of a prior offense.

CP at 4416. MO and ritualistic behaviors can be combined in a ritualistic signature, which has been referred to as the "calling card" of the offender or their "psychological imprint." CP at 4416.

Based on the ritualistic signature he found in the crime of which Coe had been convicted, Dr. Keppel concluded that 18 rapes shared a common signature, including Coe's conviction. 1RP at 2904-05.

Though the HITS evidence was not available when she first formed her opinions, Dr. Phenix took it into account at trial. 1RP at 3098-99. The HITS database is discussed *infra* at III(C)(1).

III. ARGUMENT

A. **Coe's Counsel Was Not Ineffective For Deciding Not To Propose A Jury Instruction Defining "Personality Disorder" Because Existing Precedent Held The Instruction Was Unnecessary And There Was No Effect On The Trial's Outcome**

Coe argues that his trial counsel was ineffective when he failed to propose an instruction defining "personality disorder." At the time of trial, however, existing precedent held that no such instruction was required. Effective representation does not require that attorneys advance novel arguments contrary to existing precedent. Furthermore, in the case of instructional errors that are not manifest constitutional errors—as Coe admits was the case here—"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 (2010). Coe's argument lacks merit because it relies on hindsight as the standard for effective representation.

1. **Standard of Review**

In order to prevail on an ineffective assistance of counsel claim, the claimant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant, "i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007) (*Stout II*). In applying this two-part test, the court presumes counsel was effective. *Id.* In addition, the court presumes that defense counsel's decisions are strategic. *In re Detention of Stout*, 128 Wn. App. 21, 28, 114 P.3d 658 (2005) (*Stout I*). "Courts engage in a strong presumption counsel's representation was effective." *State v.*

McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

2. The *Pouncy* Decision

Coe's argument relies on a recent Washington Supreme Court decision: *In re Detention of Pouncy*, 168 Wn.2d 382, 229 P.3d 678 (2010) (*Pouncy II*). Following a jury trial, Curtis Pouncy was found to be an SVP. At trial, he had unsuccessfully requested a jury instruction defining the term "personality disorder." *Id.* at 388.

On appeal, Pouncy argued that the trial court's failure to define the term for the jury constituted reversible error. *In re Detention of Pouncy*, 144 Wn. App. 609, 620-21, 184 P.3d 651 (2008). The Court of Appeals, Division I, determined that a definitional instruction was not required. *Id.* at 621. Division I noted that the same argument had been rejected previously, by this Court. *In re Detention of Twining*, 77 Wn. App. 882, 894 P.2d 1331 (1995). In *Twining*, this Court held that a definitional instruction was not required because the term "personality disorder" was not defined in RCW 71.09. *Pouncy*, 144 Wn. App. at 621.

The Washington Supreme Court reversed. The Court commented that *Twining's* reasoning—that the term "personality disorder" was not "a statutorily defined term with a specific legal meaning"—was "too simplistic" in light of *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988) and *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). *Pouncy II*, 168 Wn.2d at 390-91. "Personality disorder," the Court determined, is a technical term, not of common usage and beyond the experience of the average juror. *Id.* at 391. Because it is a "term of art under the [Diagnostic and Statistical Manual] that

requires definition," the Court determined, the error was not harmless and a new trial was required. *Id.* at 391-92.²

Coe now argues that *Pouncy II* requires this Court to find that he received ineffective assistance, because his trial counsel did not propose an instruction defining "personality disorder." His argument should be rejected because his counsel cannot be found ineffective where then-existing appellate authority was clear that no such definition was required and there was no affect on the trial's outcome.

3. Coe Is Precluded From Raising This Issue On Appeal Because He Did Not Request or Propose a Jury Instruction Defining "Personality Disorder"

Coe correctly concedes that, because he did not request a jury instruction defining "personality disorder," the lack thereof is not a manifest error affecting his constitutional right to due process and he cannot raise that issue for the first time on appeal. Because Coe did not propose an instruction defining personality disorder, or take exception to the lack thereof, he waived the issue unless he can show that the instruction's absence is a manifest error affecting one of his constitutional rights. RAP 2.5(a)(3).

Pouncy, unlike Coe, requested a jury instruction defining "personality disorder" at the time of trial. *Pouncy II*, 168 Wn.2d at 388. The *Pouncy II* Court, therefore, was not required to engage in a RAP 2.5(a)(3) analysis and did not reach that issue. Instead, the Court simply determined that the term "personality disorder" constituted a technical term that required a definitional

² The *Pouncy* Court also reversed on other grounds related to the prosecutor's cross-examination of Pouncy's expert. 168 Wn.2d at 392-94.

instruction for the jury. *Id.* at 391. The *Pouncy II* Court did not, however, attempt to answer the question of whether failure to define a technical term, in the absence of a request to do so, constituted a "manifest error of constitutional magnitude." Under well-established precedent, it is clear that it does not, and Coe is not entitled to review of this issue.

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 II*, 168 Wn.2d at 390 (citing *Brown*, 132 Wn.2d at 611-12). Whether a word is technical in nature is a question within the discretion of the trial court. *Id.* The technical term rule "attempts to ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law" and complements the requirement that juries be informed about the elements necessary for conviction by requiring that technical terms within those elements be defined. *Scott*, 110 Wn.2d at 690.

While the technical term rule requires a definitional instruction, failure to give that instruction is not to be confused with failure to instruct on an essential element. *Scott*, 110 Wn.2d at 690 (citing *State v. Tarango*, 105 N.M. 592, 599, 734 P.2d 1275, 1282 (1987)). The constitutional right to due process is protected when a jury "is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted." *Id.* Thus, while the technical term rule requires a definitional instruction, the failure to give that instruction is not an error of constitutional magnitude. *Id.* at 691. For this

reason, Washington courts have consistently refused to permit litigants to raise this issue for the first time on appeal. *See, e.g., State v. Ng*, 110 Wn.2d 32, 44, 750 P.2d 632 (1988); *State v. Pawling*, 23 Wn. App. 226, 232-33, 597 P.2d 1367 (1979).

This principle was most recently affirmed in *O'Hara*, 167 Wn.2d 91. There, the trial court, sua sponte, had provided the jury with a definition of the term "malice"—a term that is specifically defined by statute. *Id.* at 97. The definition given, however, was incomplete. *Id.* at 104. O'Hara did not take exception to the instruction, and was convicted of second degree assault. *Id.* at 96-97. On appeal, he argued that the trial court's incomplete instruction defining "malice" was a manifest error affecting a constitutional right that he could raise for the first time on appeal. *Id.* at 97. The Court of Appeals agreed, and reversed O'Hara's conviction. *Id.*

The Washington Supreme Court reversed, holding that the incomplete instruction, under the facts of the case, did not constitute a manifest error affecting a constitutional right. *Id.* at 104-05. While acknowledging that, in general, unpreserved claims of error involving jury instructions "are subject to an analysis of whether the error is manifest constitutional error", the court noted that certain types of instructional errors, such as "the failure to define individual terms," did not constitute manifest constitutional errors. *Id.* at 100-01 (citing *Scott*, 110 Wn.2d at 690-91). Significantly, the court observed, "one can imagine justifications for defense counsel's failure to object or where the jury could still come to the correct conclusion." *Id.* at 103.

4. Coe's Counsel Was Not Ineffective Because Existing Precedent Held That An Instruction Defining "Personality

Disorder" Was Unnecessary

Coe argues that his trial counsel was ineffective when he failed to propose an instruction defining "personality disorder." At the time of trial, however, existing precedent held that no such instruction was required. Effective representation does not require that attorneys advance novel arguments contrary to existing precedent. Coe's argument relies on hindsight as the standard for effective representation and should be rejected.

In September, 2008, longstanding case law precedent held that a definitional instruction for "personality disorder" was not required. The Washington Supreme Court had observed that "the term 'personality disorder' has a well-accepted psychological meaning." *In re Detention of Young*, 122 Wn.2d 1, 50, 857 P.2d 989 (1993); *Pouncy*, 168 Wn.2d at 391. Two years after *Young*, this Court upheld a trial court's refusal to give a definitional instruction for the term, holding that a definitional instruction was required only for "statutorily defined terms with specific legal definitions." *Twining*, 77 Wn. App. at 895.

Twining had been the law of the land for 13 years when Coe's case went to trial in September 2008. More than a year after Coe's trial, the *Pouncy II* Court abrogated *Twining*, holding that the term "personality disorder" is not of common usage and beyond the experience of average jurors. *Pouncy II*, 168 Wn.2d at 391 (citing *State v. Allen*, 101 Wn.2d 355, 362, 678 P.2d 798 (1984)). *Pouncy II*, therefore, stands for a new proposition: Technical terms must be defined even if they do not have a legal definition. *Id.* at 397-98 (Madsen, C.J., dissenting).

At the time of Coe's trial, not only was there long-standing precedent

holding that an instruction for "personality disorder" was neither required nor appropriate, there was no legal authority from which to craft such an instruction: "[N]o statute, no pattern jury instruction, and no appellate court case." *Id.* at 397 (Madsen, C.J., dissenting). Coe's trial counsel, in not proposing a "personality disorder" instruction, relied on existing precedent and was not ineffective for having done so.

Effective representation does not require counsel 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's argument, like the appellant's in *United States v. Ardley*, unreasonably elevates hindsight to a standard of competency. 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, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992) (citing *Strickland v. Washington*,

466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984)); *State v. Zatkovich*, 113 Wn. App. 70, 84, 52 P.3d 36 (2002). This Court should reject Coe's hindsight-assisted arguments and hold that his counsel was not ineffective.

Furthermore, because this case involves the technical term rule, the Court should conclude that defense counsel's decision to forego proposing a definitional instruction was strategic. Courts reviewing an ineffective assistance claim begin by assuming that counsel's decisions were strategic. *Stout I*, 128 Wn. App. at 28. That assumption cannot be overcome in this case because, where the absence of a definitional instruction is not a manifest error affecting a constitutional right, "one can imagine justifications" for not proposing one. *O'Hara*, 167 Wn.2d at 103. Because one can imagine such justifications, the initial assumption that counsel's decisions were strategic cannot be overcome, and Coe's counsel cannot be found ineffective.

5. Even if the Performance of Coe's Trial Counsel Fell Below an Objective Standard, Coe was Not Prejudiced by It

If this Court finds that the performance of Coe's trial counsel was substandard, Coe must still demonstrate that his counsel's performance prejudiced him, "i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *Stout II*, 159 Wn.2d at 357. Coe cannot make that showing.

There was no prejudice to Coe or effect on the trial because of the absence of an instruction defining "personality disorder." That diagnosis was undisputed. The State's expert, Dr. Phenix, testified that Coe had a personality disorder. 1RP at 3159. Coe's own expert, Dr. Donaldson, not only agreed with

Dr. Phenix that Coe suffered from a personality disorder, he testified that he "would probably make [the diagnosis] even stronger." 1RP at 3582. Given that the diagnosis was uncontested, the jury could not have been confused about whether Coe suffers from a personality disorder and they submitted no questions to the Court about that issue.

Additionally, *O'Hara* holds that, under the technical term rule, where the lack of a definitional instruction is not a manifest error affecting a constitutional right, there is reason to believe that the jury would still have come to the same conclusion. Here, where the lack of a definitional instruction is not a manifest constitutional error, "one can imagine . . . the jury could still come to the correct conclusion." *O'Hara*, 167 Wn.2d at 103.

The lack of a definitional instruction could not have had any effect on the jury's verdict. Therefore, even if Coe's counsel performed deficiently, it did not affect the ultimate outcome.

B. The Trial Court Did Not Abuse Its Discretion By Admitting Dr. Keppel's Signature Analysis Testimony

Coe argues that the trial court abused its discretion by admitting the expert opinion testimony of Dr. Robert Keppel. He asserts that the signature "did not meet the legal requirements for showing a unique *modus operandi*." Opening Brief of Appellant (Opening Br.) at 19-29. Dr. Keppel, however, did not opine that Coe had a *modus operandi* (MO) signature. He opined that Coe had a ritualistic signature, sufficiently distinctive that it could be used for identification purposes in other crimes. Where crimes share a ritualistic quality, a lesser degree of similarity is required. Coe's argument is off the mark and the MO signature cases he relies upon are inapposite.

Dr. Keppel was a qualified expert and his testimony was legally admissible signature evidence that helped a jury lacking the experience and training to discern a ritualistic signature. Coe fails to establish that the trial court's decision was manifestly unreasonable or unsupported by tenable reasons; his arguments go to the weight of the evidence and not to its admissibility.

1. Standard of Review

The trial court possesses "broad discretion" when deciding the admissibility of expert testimony under ER 702. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). The court's decision will not be disturbed unless it has abused its discretion. *Id.* A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A decision is manifestly unreasonable if it takes a view no reasonable person would take. *Id.* It rests on untenable reasons if it is the result of an incorrect standard or facts that do not meet the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

2. "Other Crimes" Evidence

At issue in this case is the State's use of Dr. Keppel's expert opinion testimony to link Coe to 17 adjudicated rapes. Those crimes and others were then relied upon by Dr. Amy Phenix, an expert forensic psychologist, in forming her diagnostic and risk assessment opinions. In addition, the State introduced substantive evidence of eight of the adjudicated rapes through victim testimony.

Other crimes, wrongs or acts are admissible through ER 404(b).³ When the State offers such evidence, the trial court must: (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974, 976 (2002).

In SVP cases, a respondent's criminal sexual history presumptively meets three of the four ER 404(b) admissibility criteria. *In re Detention of Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993); *In re Detention of Turay*, 139 Wn.2d 379, 401, 986 P.2d 790 (1999); *In re Detention of Paschke*, 121 Wn. App. 614, 624, 90 P.3d 74 (2004). Consequently, in order to introduce the alleged SVP's unadjudicated criminal sexual history at an SVP trial, the State must prove by a preponderance of evidence that the uncharged acts probably occurred. *Kilgore*, 147 Wn.2d at 292. The State can make its showing by an offer of proof. *Id.* at 290-91. An evidentiary hearing is not required. *Id.* at 294-95. The trial court is not bound by the rules of evidence. ER 104(a).

3. Linking "Other Crimes" Evidence By Signature

a. MO signatures

³ ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"Other crimes" evidence is relevant for establishing identity when the MO used in each crime is so distinctive "that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." *State v. Russell*, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). The more distinctive the MO, the more likely the alleged perpetrator committed the crimes, and the greater the relevance of the evidence. *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002) (citing *State v. Coe*, 101 Wn.2d 772, 777-78, 684 P.2d 668 (1984)). In some cases where shared MO features are not particularly unique, several common MO features combined with a lack of dissimilarities "can create sufficient inference that they are not coincidental, thereby justifying the trial court's finding of relevancy." *Id.* at 644.

b. Ritualistic signatures

Crimes that share a "ritualistic quality," on the other hand, require less similarity than do those with MO signatures. *State v. Fualaau*, 155 Wn. App. 347, 357, 228 P.3d 771 (2010). Such cases are "strongly probative" of identity. *Id.* (citing *Russell*, 125 Wn.2d at 67-68). Thus, in a case involving similar methods of ritualistic punishment, a unique signature was found despite several dissimilarities in the crimes. *Id.* at 358.

In the instant case, Coe exhibited a ritualistic signature in the crime of which he was convicted. CP at 4417-18. Because that Coe's ritual was distinctly evident in numerous other crimes, Dr. Keppel's analysis met the standard for admission of signature evidence "notwithstanding any

dissimilarities." *Fualaau* at 358.

4. Dr. Keppel's Signature Analysis

a. Dr. Keppel was a qualified expert witness on signature crimes

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*, 151 Wn.2d at 393. The trial court possesses "broad discretion" when deciding the admissibility of expert testimony under ER 702. *Id.* "If the reasons for admitting or excluding the opinion evidence are 'fairly debatable', the trial court's exercise of discretion will not be reversed on appeal." *Group Health Coop. v. Dep't of Revenue*, 106 Wn.2d 391, 398, 722 P.2d 787 (1986).

Expert testimony on signature linkage of serial crimes is admissible in Washington.⁴ *Russell*, 125 Wn.2d at 71-73. In *Russell*, Dr. Keppel testified about ritualistic signatures. *Id.* The *Russell* 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. Even Coe admits the jury in his SVP trial "was undoubtedly impressed by [Dr. Keppel's] credentials[.]" Opening Br. at 30-31. The trial court below found that he had "significant education and experience in signature analysis[.]" CP at 890.

b. Ritualistic signature in the rape of Julie Harmia

Answering Coe's motion to exclude, the State provided the trial court

⁴ Other jurisdictions also have found expert signature analysis testimony admissible. See e.g., *People v. Prince*, 156 P.3d 1015, 1045-51 (Cal.S.Ct. 2007).

with Dr. Keppel's signature analysis. CP at 3873-98. Dr. Keppel opined that Coe exhibited a distinct signature in the rape of which he had been convicted, and that his signature was present in 17 other unadjudicated rapes. CP at 4417-18.

Dr. Keppel reviewed approximately 13,500 pages of documents pertaining to 51 crimes in which Coe was a suspect. CP at 4114. He reviewed police reports, witness statements, photographs, medical records of the victims and the transcripts of Mr. Coe's two criminal trials. *Id.* He also reviewed the depositions of victims in the SVP case. *Id.* All of these records are of a type reasonably relied upon by experts like Dr. Keppel. *Id.*

Dr. Keppel reviewing Coe's crime of conviction. CP at 4421. On the evening of October 23, 1980, Harmia was walking home on Spokane's South Hill after getting off of a bus. CP at 4421. Coe jogged past her, then came from in back of a motor home and grabbed her from behind. 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. After dragging her into a vacant lot he threw her down, keeping his hand in her mouth. *Id.*

Coe told Harmia to take off her pants, hose and blouse. *Id.* If she didn't fully comply he did it for her. *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.* While he did so he told her she had "a nice cunt," that he "beat off" all the time and he 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 then fled. *Id.*

Dr. Keppel concluded that Coe exhibited a "highly specialized ritual," the distinguishing behavioral characteristics of which were: (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.

Intimidation. Coe intimidated Harmia first through controlling techniques. CP at 4429. He grabbed her from behind, forced his fingers into her mouth and threw her to the ground. *Id.* Dr. Keppel opined that Coe's use of the words "beat off," "cunt," and "fuck" were aggressive, offensive and used to intimidate Harmia. *Id.* Coe's threats of a knife and that he would kill her if she told police were acts of intimidation. *Id.*

Co-opting the victim's compliance. Coe co-opted Harmia's compliance by telling her to take off her own pants, hose and blouse. CP at 4430. If she didn't he did it himself. *Id.* It was also significant that Coe did not rip, tear, or cut any of Harmia's clothes. *Id.*

The rapist undoing his own clothing. Though Coe asked Harmia to remove her own clothing, he did not ask her to undo his. CP at 4430. He unzipped his own pants to expose his penis.

The necessity of sexual intercourse and/or ejaculation. Coe demonstrated a need to ejaculate by fondling his victim, kissing her, and masturbating himself. CP at 4430.

The need for questioning and engaging in conversation with the victim. Coe talked a great deal to Harmia, making highly personal and

offensive comments and asking her questions. CP at 4430. His use of vulgar terms was part of a personal script that reinforced his need for dominance and control. *Id.*

c. Coe's ritualistic signature identified in 17 other unadjudicated rapes

Dr. Keppel concluded Coe had a distinct signature that could be used to link other crimes to him. CP at 4431. He reviewed and compared the other five rapes with which Coe had been charged in 1981: Jean C., Elizabeth S., Cheri H., Mary S., and Diane F.. CP at 4421, 4431. He found Coe's signature present in all five. CP at 4431-35.

The rapist never displayed a weapon or bound or severely injured his victims, and always tried to prevent them from seeing him. CP at 4434. It is "relatively rare for a power assertive rapist to not injure a victim or show a knife or other weapon because of his need for domination and mastery over his victim." *Id.*

Dr. Keppel reviewed 45 other cases he'd been provided. In five, he determined that a more detailed interview or materials were necessary before he could find a signature. CP at 4419. In 28 cases he concluded that there was no signature. CP at 4419-21. And, in 12 additional cases, Dr. Keppel found Mr. Coe's signature present. CP at 4435-53.

5. The Ritualistic Signature Identified by Dr. Keppel Was Admissible

a. Dr. Keppel's testimony was helpful to the jury

Dr. Keppel was qualified to provide expert opinion testimony on the subject of signature crimes linkage. The testimony of a qualified expert is

admissible if it is helpful to the jury. *Russell*, 125 Wn.2d at 69.

Coe argues that Dr. Keppel's testimony was not helpful to the jury because it did not establish a unique signature. Opening Br. at 23. He asserts that four out of five of Coe's signature elements "are ordinary incidents of rape." *Id.* at 25. To support his contention he relies on a number of MO signature cases to establish the "stringent test" he claims went unmet in this case. These cases, however, are clearly distinguishable.

(1) Coe's MO signature cases are distinguishable

Coe relies upon *Thang*, 145 Wn.2d 630. *Thang* is clearly distinguishable. The two crimes the *Thang* prosecutor tried to link without expert testimony occurred 18 months apart on opposite sides of the state. *Id.* at 644. Without temporal and geographic proximity, the State had to rely solely on a few MO features, which the *Thang* court found insufficient.

Vy Thang was charged with murdering an 85-year-old woman while on escape status from a juvenile facility. *Thang*, 145 Wn.2d at 634. He blamed an accomplice. *Id.* at 641. To prove identity in the murder case, the trial court admitted ER 404(b) evidence from Thang's prior conviction for robbing and burglarizing an elderly woman. *Id.* The prosecutor attempted to establish an MO signature through testimony by the prior victim. There was no expert signature testimony about ritual features. The similarities between the crimes were: (1) Theft of a purse and jewelry; (2) elderly victims; (3) the perpetrator said that "the bitch is dead;" and (4) both victims were kicked. *Id.* at 645. The dissimilarities included: (1) They were 18 months apart; (2) they were in different parts of the state; (3) one was kicked three times and the other until

she died; (4) entry through a door versus through a window; and (5) the perpetrators first fled in the victim's car, and in the other case on foot. *Id.*

Thang argued on appeal that the features allegedly linking the crimes were not sufficiently unique. *Id.* at 642-49. The Washington Supreme Court agreed and reversed, holding that:

When evidence of other bad acts is introduced to show identity by establishing a unique modus operandi, the evidence is relevant to the current charge "only if the method employed in the commission of both crimes is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged."

Id. at 643 (quoting *Russell*, 125 Wn.2d at 66-67).

Coe argues that his case compares favorably to *Thang*. Opening Br. at 29. *Thang*, however, does not help Coe because it is not a ritualistic signature case. *Thang* addresses MO signatures unsupported by expert testimony. *Thang*, 145 Wn.2d at 643. Here, the trial court did not abuse its discretion because a qualified expert found a ritualistic signature and that signature was sufficiently unique to establish linkage by a high probability. Coe misapplies *Thang* as specifically requiring temporal and geographic proximity or similar clothing. Opening Br. at 26. Such features *can* indicate an MO signature, but are not required. Ritualistic signature cases require less similarity because they are "strongly probative" of identity. *Fualaau*, 155 Wn. App. at 357.

The crimes linked to Coe are more similar than he acknowledges. Two of the three *Thang* features are substantially present. Coe concedes that the rapes occurred in geographical proximity. Opening Br. at 26. But his argument that the rapes did not occur within a short time frame or have any

pattern is incorrect. Certainly, there is a gap between the first and second rapes—Jean C. in April 1978 and Shelley Hall in September 1979. CP at 6750. But during that time frame—January 1978 to October 1979—Coe was so busy experimenting that he was identified in eight crimes of indecent liberties, indecent exposure and rape. *Id.* He may have been perfecting his rape ritual. On April 30, July 30, and September 7, 1979, suspicious attempted rapes in which Coe was suspected were interrupted and did not present sufficient signature information. CP at 4419-20. But after the Shelly H. rape in October, 1979, the next 16 signature rapes occurred an average of once a month until Coe's arrest on March 10, 1981, when they abruptly ceased. CP at 6750; 1RP at 2782. The frequency and persistence of the signature rapes is quite striking. *Cf. State v. Roscoe*, 145 Ariz. 212, 700 P.2d 1312, 1317 (1984) (MO signature linked to defendant though crime committed six months after his release for prior offense."); *People v. Prince*, 40 Cal. 4th 1179, 156 P.3d 1015, 57 Cal. Rptr. 3d 543 (2007) (six murders over one year linked to defendant by expert signature analysis).

That the rapist did not always wear the same clothes over three years is insignificant here. Similar clothing "can be" useful in MO signature cases. *Thang*, 145 Wn.2d at 643. It is not required in this ritualistic signature case where a serial rapist conducted a rape campaign in a single neighborhood for three years. *Fualaau*, 155 Wn. App. at 358.

Other cases Coe cites suffer the same deficiency and are distinguishable. In *Coe*, 101 Wn.2d 772, the testimony of Coe's girlfriend described consensual sexual behavior by Coe similar to the rapist's. *Id.* at 776.

Coe held that the described behavior did not meet the "stringent test of uniqueness" required to prove identity." *Id.* at 778. But there was no expert testimony in *Coe* establishing ritual behaviors.

Coe relies on *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986). There, the State again attempted to prove identity through a common MO. *Id.* at 774-75. It is not a ritualistic signature case with expert testimony.

Coe relies on *State v. Eastabrook*, 58 Wn. App. 805, 795 P.2d 151, review denied, 115 Wn.2d 1031, 803 P.2d 325 (1990). The *Eastabrook* court concluded that evidence of the two crimes charged was not cross-admissible to prove identity because the features were not distinctive or unusual. *Id.* at 813-14. The behaviors included, for example, entry into apartments occupied by lone females in late or early hours, clothing disrupted and the suspect having similar physical characteristics. *Id.* at 814. *Eastabrook* is distinguishable because there was no expert testimony about a ritualistic signature. In fact, the term "signature" does not appear in *Eastabrook*.

(2) Coe's own expert contradicts his "ordinary incidents of rape" argument

Coe claims the signature elements identified by Dr. Keppel are merely "ordinary incidents of rape." Opening Br. at 25-26. He cites nothing to support his assertion—not even the signature report by Brent Turvey, his own signature expert, which was submitted with *Coe*'s motion to exclude.⁵ Turvey's report does not support *Coe*. CP at 5578-604. In fact, Turvey identifies "offender signatures" that might also appear quite "ordinary." Turvey opined that

⁵ *Coe* elected not to call his expert as a witness at trial. See CP at 3898-914.

an offender signature is a repeated pattern of distinctive behaviors that are characteristic of, and satisfy, emotional and psychological needs. They are distinct from MO behaviors in that they are not necessary to complete any part of the crime.

CP at 5578-79. Like Dr. Keppel, Turvey identified an "offender signature" in the Harmia rape. CP at 5583. Some of its features were:

1. Adult female victim.
-
4. Pseudo-foreplay: kissing and fondling victim's breasts.
5. Pseudo-foreplay: vaginal fondling with ungloved fingers.
-
11. Ejaculated internally, into the victim's vagina a single time.
12. Attack was relatively short in duration.
13. Repeatedly threatened to kill victim if she resisted or went to police.

CP at 5583-84 (footnotes omitted). These are examples of behaviors Coe's expert believed to form a ritualistic signature. CP at 5578-79. There are many more for the other 17 victims. *See e.g.* CP at 5589, 5590, 5595. Coe's belief that Dr. Keppel wrongly relied on "ordinary incidents of rape" is inconsistent with the evidence he presented the trial court.

Coe's expert also identified some "signature behaviors" similar to those Dr. Keppel identified: "Physically violent towards the victim; struck her multiple times to the neck, face and head to gain control and compliance" (Dr. Keppel's "intimidation"); "Ejaculated internally, into the victim's vagina one time" (Dr. Keppel's "necessity of sexual intercourse and/or ejaculation"); and "Verbally degrading and vulgar regarding attack: 'Do you like getting fucked?'; 'you have a nice cunt'" (Dr. Keppel's "need for questioning and engaging in conversation with the victim"). CP at 5583-84.

Coe's contention that Dr. Keppel relied on "ordinary incidents of rape"

is unsupported. A juror lacking education, training and experience in serial sexual crime investigation cannot be expected to accurately differentiate between ordinary, unusual, and ritualistic behaviors. Jurors *can* be helped by expert testimony such as Dr. Keppel's. *See Prince*, 156 P.3d at 1047 (jurors can be helped in signature cases by experts trained in crime scene analysis).

(3) Coe failed to preserve his challenge to partial signature cases and his arguments go to the weight of evidence

Coe asserts that the trial court abused its discretion by admitting evidence of crimes that had most but not all of the signature elements. Opening Br. at 24-25. He raises the argument for the first time on appeal and it should be rejected.

Coe moved pretrial to exclude Dr. Keppel's testimony. *See* CP at 544-57, 574-78. His challenges to Dr. Keppel's opinions did not include the one he now raises. CP at 578. Nor did he later move to strike Dr. Keppel's testimony or for any other relief. Neither the trial court nor the state read or heard this argument below. *State v. Stevens*, 58 Wn. App. 478, 494, 794 P.2d 38 (1990) (trial court had no opportunity to correct alleged error and issue not preserved where no objection on proper grounds or motion to strike).

A party objecting to the admission of evidence must make a "timely objection or motion to strike" stating the specific grounds. ER 103(a)(1). The failure to do so does not preserve the issue for review. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). The court must be informed of alleged error when it is in a position to correct it. *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 83, 492 P.2d 1058 (1971). An appellant can only raise errors that

have been properly preserved. *Id.*; RAP 2.5(a). Coe cannot claim a different error in the admission of Dr. Keppel's testimony merely because he objected pretrial on other grounds. *State v. Mak*, 105 Wn.2d 692, 718-19, 718 P.2d 407 (1986). The Court should decline to review the error Coe alleges.

There was no error. It was evident before trial that Dr. Keppel found a signature present in cases where not all five features were fully present. For example, Dr. Keppel acknowledged in his August 8, 2006, report that there were a few cases where there was no evidence that the rapist asked his victims to remove their clothes. CP at 4449. Coe received Dr. Keppel's report and spent two days deposing him before filing his motion to exclude. It was evident from Dr. Keppel's report that he found the presence of a signature even where every characteristic was not fully present. CP at 4417-18.

Dr. Keppel discriminated between cases having sufficient and insufficient signature elements, eliminating 33 that he considered. In five of those 33, he thought there might be a signature if there was a more detailed interview of the victim. CP at 4419. For example, the facts of the Laura T. rape "look close" but were insufficient to form a signature. *Id.* In the case of Margaret M., he determined the perpetrator was "[p]robably the [signature] rapist, but better victim statement needed." *Id.*

Dr. Keppel eliminated 28 other cases where additional information would not be useful. CP at 4419-21. A number of these were attempted rapes with partial signatures that were interrupted. An attempted rape on September 7, 1979, had some, but insufficient, signature elements. CP at 4420. The same was true of attempted rapes on January 2, September 25, November 13, and

December 12, 1980. CP at 4420-21.

Where a methodology is not novel and is accepted within 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*⁶ test, and is admissible under ER 702. *Russell*, 125 Wn.2d at 69. Therefore, Coe's arguments go only to the weight of the evidence.

Coe claims the third characteristic, the rapist undoing his own clothing, was not present in ten out of eighteen cases. Opening Br. at 24. That is not completely accurate. In the case of Joanne T., the rapist "unzipped his pants and undid his belt." CP at 4438. In the case of Elizabeth A., the rapist "pulled down his pants[.]" CP at 6811. And, in the case of Elizabeth S., the rapist "pulled down his pants and raped me[.]" CP at 6856. There is no evidence in any of the signature rapes that the rapist *did not* ask the victim to remove her own clothes or did not undo his own clothes—the records are simply silent about it.

As in the comparison of actual, handwritten signatures, the handiwork of a serial criminal can be identified when most but not all signature elements are present. MO and ritualistic signatures, after all, are "so unusual and distinctive as to be like a signature." *Coe*, 101 Wn.2d at 777. It follows that, when partial handwritten signatures can be sufficient for identification, the same holds true for serial crime signatures. *See, e.g., United States v. Jenkins*,

⁶ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

785 F.2d 1387, 1395 (9th Cir. 1986) (approving jury's comparison of partial signature exemplar with full signature).

b. Any dissimilarities go to weight, not admissibility

Coe claims there are numerous dissimilarities between the signature rapes that the trial court failed to take that into account. He claims: "Some women were raped after getting off the bus. Others were not." Opening Br. at 27. This argument is a distinction without a difference. Wherever they came from, all of the victims were pedestrians on a neighborhood street when they were raped. It is also meaningless in this case because, as the trial court was aware from the State's response, Coe admitted that he both followed buses and followed women on foot. CP at 2931. He admitted following buses possibly more than a dozen times. 1RP at 3051-52. He also had admitted hiding behind trees and following women. 1RP at 3054-60. 1RP at 3054-60.⁷ There is no merit to Coe's distinction.

Coe claims the signature rapes are dissimilar because the rapist did not always stuff his fingers in his victims' mouths. Opening Br. at 27. He also argues that the rapist did not say the same things to every victim. *Id.* at 26. Coe's first point goes to Dr. Keppel's first signature element, "Intimidation," while his second concerns the fifth element, "The need for questioning and engaging in conversation with the victim." CP at 4430.

These are insignificant differences because crimes that share ritualistic qualities are highly probative of identity "notwithstanding any dissimilarities between the two events." *Fualaau*, 155 Wn. App. at 358. Here, the rapist in all

⁷ Coe claimed he was trying to catch the South Hill rapist, assisted by his mother. 1RP at 3057-58.

18 signature rapes attacked the victim's airway. When he raped Julie Harmia, Coe grabbed her by the neck and then shoved several fingers down her throat. CP at 4422, 6882. In the other 17 rapes the rapist likewise choked his victims by grabbing them around their necks, stuffing his fingers down their throats, or both. Beginning with the third signature rape, the rapist intimidated his victims with an unseen knife.

It is insignificant that the ritualistic rapist did not say exactly the same things to every victim. His questions and crude statements clearly exhibited the same vulgar quality that conspicuously links his crimes. In fact, just those first and fifth signature elements reveal a partial signature that is still unmistakably that of the South Hill Rapist:

(1) **Jean C.** (April 25, 1978).

Intimidation: The rapist shoved several fingers into her mouth. CP at 4251. She had trouble breathing. CP at 4252.

Questioning/Conversation: The rapist talked to her "a lot;" asked her if she had to "pee or shit" and said, "I'm going to clean you out;" asked her for her name, where she lived, if she was married, if she had children and if she liked "fucking;" told her he was going to "jack off" and "put myself up your ass." CP at 4252-53.

(2) **Shelly H.** (September 10, 1979).

Intimidation: The rapist put an arm around her neck and tried to put his fingers in her mouth but she bit him. CP at 6756. He punched her in the face several times and then choked her. *Id.*

Questioning/Conversation: The rapist talked to her "quite a bit;" asked her to urinate on him; told her she had a "nice ass" and "nice tits;" asked her questions about masturbation, whether she did it, how she did it, whether she watched her husband do it; asked her how she planned to further her radio career; told her he enjoyed listening to her and thought she was very good; said he masturbated while he listened to her at home. CP at 6757.

- (3) **Paige K.** (December 6, 1979).

Intimidation: The rapist shoved his hand down her throat. CP at 6774. He threatened her with a knife but she never saw one. CP at 6775.

Questioning/Conversation: The rapist "talked a lot;" asked her if she masturbated, whether she enjoyed and liked sex; asked her how old she was; suggested, "Maybe God is punishing you for your sins." CP at 6775.

- (4) **Joanne T.** (December 11, 1979).

Intimidation: The rapist shoved his hand into her mouth and she almost passed out. CP at 4437, 6777. He threatened her with a knife but she never saw one. CP at 6778.

Questioning/Conversation: The rapist talked to her "numerous times during the rape;" said, "You're really tight. . . . When was the last time you had a good fuck?"; before ejaculation said, "Look at this." CP at 6778.

- (5) **Dorcas T.** (December 29, 1979).

Intimidation: The rapist put his hand over her face and mouth and wrapped his arm around her neck. CP at 6786. He threatened her with a knife but she never saw one. CP at 6787.

Questioning/Conversation: The rapist talked to her during the rape; asked her how old she was, and if she'd ever been "fucked before." CP at 6787.

- (6) **Darria L.** (deceased) (February 16, 1980).

Intimidation: The rapist grabbed her around the neck. CP at 4125. She thought he mentioned a knife but was not sure. *Id.*

Questioning/Conversation: The rapist asked her to urinate on him; asked her if she'd ever seen a man masturbate before. CP at 4125.

- (7) **Mary L.** (March 11, 1980).

Intimidation: The rapist put his arm around her throat and she had difficulty breathing. CP at 6790. As he pulled her to the rape site he kept his arm around her neck. CP at 4440. He threatened her with a knife but she never saw one. CP at 6791.

Questioning/Conversation: The rapist talked to her "quite a bit;" asked her where she lived, her age, and about her school; asked her

when she last had sex, with whom and, "Did you get off?"; said, "Did you piss yet?"; asked whether she used the word "cunt;" asked, "Do you know what 'jizz' is?" and, "Do you masturbate? Show me how;" said, "I'm fucking you now—I have your panties down;" told her, "I have to have this" and "you're a good" kid, or girl. CP at 6791.

(8) Margaret D. (April 4, 1980).

Intimidation: The rapist put his arm around her neck and she had difficulty breathing. CP at 6803. He threatened her with a knife but she never saw one. CP at 6804.

Questioning/Conversation: The rapist talked to her "quite a bit;" complimented her on her body; asked her "a lot" about masturbation, if she ever did it and how, when and where she did it; asked if she'd ever seen a man masturbate, whether she'd ever caught her brother's masturbating; whether she'd ever had sex before; whether she'd seen a man naked; whether she'd let a man put his fingers in her vagina; did she know "what that did for a man;" and ordered her to feel his butt and insert her finger into his anus. CP at 6804-05.

(9) Elizabeth A. (May 13, 1980).

Intimidation: The rapist put his arm around her neck and she had difficulty breathing. CP at 6810. As he dragged her to the rape site he choked her. CP at 4442-43. He threatened her with a knife but she never saw one. CP at 6812.

Questioning/Conversation: The rapist "talked a great deal;" asked her numerous questions about her sex life, whether she masturbated and how often she had sex; repeatedly told her, "You have a nice pussy;" told her he'd like to get into her; ordered her to urinate and defecate; told her to concentrate on how much fun she was having and that he wanted her to "get off;" said, "You're going to watch me jerk off" and "Watch it come out, it's coming, it's coming." CP at 6812.

(10) Teresa K. (June 20, 1980).

Intimidation: The rapist put his arm around her neck and she had difficulty breathing. CP at 6818. When she managed to scream he shoved his hand down her throat. *Id.*; CP at 4444-45. He threatened her with a knife but she never saw one. CP at 6819.

Questioning/Conversation: The rapist talked "the entire time;" asked her name and age, where she had come from and where she was going; said, "You're a religious person, aren't you?" "Well, how do you like

this?" "God, this feels good," and, "Do you know how much a guy needs this?"; asked her if she knew what would happen if he "shit inside" her and if she knew how good that would make him feel. CP at 6819.

(11) **Sherry J.** (July 20, 1980).

Intimidation: The rapist put his arm around her neck and choked her. CP at 6846. He threatened her with a knife but she never saw one. CP at 6847.

Questioning/Conversation: The rapist talked "a lot" and asked her questions; told her he "needed a little;" asked her age, where she worked and when she last had sex; while raping her, asked, "Does your husband dump a load when he does it?" CP at 6847.

(12) **Gretchen C.** (August 26, 1980).

Intimidation: The rapist put his arm around her neck. CP at 6850. He threatened her with a knife but she never saw one. CP at 6851.

Questioning/Conversation: The rapist kept telling her things like how beautiful her body was; ordered her to urinate and defecate; asked her how long since she'd been "laid" and when she didn't know said, "What's the matter? Don't you like it?"; said something like, "I'm just trying to give you my juice;" told her he couldn't get an erection because *she* was talking too much. CP at 6851-52.

(13) **Elizabeth S.** (August 30, 1980).

Intimidation: The rapist shoved several fingers into her mouth. CP at 6855. She bit him but he warned her not to and kept his fingers down her throat. CP at 4424. He threatened her with a knife but she never saw one. CP at 6856.

Questioning/Conversation: The rapist asked "a lot of questions;" asked her name, age, address and the name of her school; talked "a lot about sex;" asked if she masturbated and asked, "When is the last time you got fucked?"; asked if she liked having intercourse with him and said he did; asked her about the chain around her neck. CP at 6856.

(14) **Julie Harmia** (October 30, 1980).

Intimidation: Coe grabbed her around the neck. CP at 4422. He forced several fingers into her mouth and down her throat. CP at 6882. Coe threatened her with a knife but she never saw one. *Id.*

Questioning/Conversation: Coe talked "quite a bit;" asked her, "When was the last time you got laid?" and, "Do you like getting fucked?"; said something about her masturbating; made other sexual comments; said she had a nice body and a "nice cunt." CP at 6883.

- (15) **Jennifer C.** (November 30, 1980).

Intimidation: The rapist put his arm around her neck. CP at 4447, 6898. He threatened her with a knife but she never saw one. CP at 6899.

Questioning/Conversation: The rapist talked "a lot;" said "fuck" several times; referred to her vagina as "cunt;" asked her name, whether she was a virgin, had a boyfriend, whether she had "fucked" her boyfriend and if so, when was the last time. CP at 6899.

- (16) **Cheri H.** (December 17, 1980).

Intimidation: The rapist stuck several fingers into her mouth. CP at 4427, 4301. He threatened her with a knife but she never saw one. CP at 4302.

Questioning/Conversation: The rapist talked "a lot;" asked where she had been going and where she lived; asked her about sex, whether she'd had sex with anyone and whether any boys had seen her naked; asked whether she ever masturbated; asked where her friend lived. CP at 4302.

- (17) **Mary S.** (February 5, 1981).

Intimidation: The rapist grabbed her around the neck and tried to force her mouth open with his hands. CP at 4322, 4425. He threatened her with a knife but she never saw one. CP at 4323.

Questioning/Conversation: The rapist talked "quite a bit;" asked, "Do you enjoy it with your husband?"; asked whether she was embarrassed by him looking at her; told her he liked to look at "it" and "jack off;" said, "I did you a favor and came in my pants" and, "You don't know how much I needed this." CP at 4323.

- (18) **Diane F.** (February 9, 1981).

Intimidation: The rapist put his hand over her mouth and then shoved an oven-mitted hand into her throat. CP at 4343. She could not breathe and choked on the mitt. *Id.* He threatened her with a knife but she never saw one. CP at 4344.

Questioning/Conversation: The rapist talked "quite a bit;" told her he wanted to "fuck" her; said he'd been watching her and had wanted to "fuck" her for a long time; said she had a "nice cunt;" asked when she had last "fucked;" asked, "Don't you like to have sex? Are you enjoying this?" and "Do you ever masturbate?"; said he wanted to look at her "ass" while he masturbated; asked, "Do you like the sounds of guys when they shoot?" and "Have you ever heard the noises of people when they fuck?"; asked her where she worked and went to school, and why she never rode the same bus. CP at 4344.

These are remarkably similar behaviors and Coe's distinctions are insignificant. In fact, expert testimony was not necessary to establish a signature here. The trial court would not have abused its discretion if it had found that the facts above, together with the temporal and geographic proximity of the crimes, revealed a sufficiently unique MO signature.

Russell and *Fualaau* recognized the fallacy of magnifying insignificant differences in ritualistic crimes and rejected that strategy. Coe wants to require a specificity few signatures could survive. Consider the *Russell* case. Victim M.A.P. was found outside, near a dumpster, unclothed, wearing two pieces of jewelry, the lid of a container over one eye and forehead, arms folded over her stomach, legs extended and crossed at the ankles, and a pine cone in one of her hands. *Russell*, 125 Wn.2d at 30.

Victim C.B. was found on her bed, unclothed but wearing shoes, feet tied together, legs spread apart, knees bent, blood smeared on her legs, a rifle penetrating her vagina, her left arm bent upward, her right arm bent down, and her head wrapped in a plastic bag and covered with a large pillow. *Id.* at 33.

Victim A.L. was found on her bed, her face turned to the left, legs spread with knees straight, right arm extended above her shoulder, left arm resting by her side, the book *More Joy of Sex* under her left forearm and a

plastic dildo inserted into her mouth. *Id.* at 35.

The differences between these crimes are obvious. The victims were found inside and out, in various positions and desecrated with different objects. C.B had an object inserted into her vagina, A.L. had an object in her mouth and M.A.P had no objects inserted into her. Yet the expert testimony concerned the general linkage element "posed murder victims." *Id.* at 68-69. Judging by his argument, Coe apparently believes this constitutes finding "common features between offenses by making generalizations . . . [and] ignoring or discounting differences in details[.]" Opening Br. at 27.

Nevertheless, Dr. Keppel's opinions were admitted to establish a unique ritualistic signature linking the crimes. *Id.* at 69. The *Russell* trial court found that the jury would not have had the knowledge to determine how unique such facts were. *Id.* Its decision was affirmed on appeal because Dr. Keppel was qualified and his testimony was helpful to the jury. *Id.*

Here, the jury did not have specialized knowledge about how often stranger rapes are committed outdoors by highly similar methods of physical intimidation, with an implied weapon, by a rapist who asks his victims to remove their clothes but undoes his own, who must achieve orgasm during the rape even if he must masturbate at length, and who converses a great deal with his victims in a vulgar and humiliating way. Dr. Keppel's testimony was therefore helpful to them.

In *Fualaau*, substantial differences did not preclude admission of other crime evidence. The defendant allegedly confronted the victim in a garage, pointed a handgun at him, punched him in the face, shot him in the thigh,

forced him to his hands and knees and hit him in the back of the head with a metal bar, pistol-whipped him, made him strip and lie on the floor face-down, stabbed him in the shoulder blade with a knife, burned his back with a blow torch and then allowed him to be taken to the hospital. *Fualaau*, 155 Wn. App. at 352.

The other crime evidence was the defendant's admission that, five years earlier, he had repeatedly struck another victim on the legs and shoulders with a metal baton while cursing him and punching him in the mouth, had moved the victim to another location and forced him to lie on the floor while he hit him on the back with the flat side of a machete, then gave him clean clothes and put ointment on his wounds. *Id.* at 354.

Despite these obvious differences, the trial court did not abuse its discretion admitting the other crime evidence because the two assaults shared "a ritualistic quality." *Id.* at 358. Admission of the evidence 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* 253 (1995)).

6. Admission of Signature Evidence Did Not Unfairly Influence the Outcome

The State agrees with Coe that the jury likely was impressed with Dr. Keppel and considered his testimony important evidence linking 17 unadjudicated rapes to Coe. Opening Br. at 30-33. Certainly the trial court found it so. Dr. Keppel's testimony satisfied the State's ER 404(b) burden of proving, by a preponderance of evidence, that Coe was the perpetrator in

substantively admitted unadjudicated rapes. Coe cannot show he was unfairly prejudiced. His arguments again conflict with his own expert's report.

Attempting to show he was unfairly prejudiced, Coe denigrates Dr. Keppel's opinions as "couched in the aura of behavioral science." *Id.* at 21, 31. His argument is undermined by his own expert. Turvey opined that the 18 signature rapes were all "power assertive rape[s]," including Coe's rape of Harmia. CP at 5884-5603. Thus, according to Coe's own expert, the following applied to Coe:

These include rapist behaviors that are intended to restore the rapist's self-confidence or self-worth through the use of moderate- to high-aggression means. These behaviors suggest an underlying lack of confidence and a sense of personal inadequacy that are expressed through control, mastery, and humiliation of the victim, while demonstrating the rapist's sense of authority. They show a lack of experience with intimacy. For these rapists, sex is a commodity to be bought, sold, or stolen.

CP at 5584 (citing John O. Savino & Brent E. Turvey, *Rape Investigation Handbook* 280 (2004)).

Coe cannot have it both ways. He cannot endorse expert opinion evidence about a ritualistic signature, then turn around on appeal and claim other such evidence is inadmissible and unfairly prejudicial because it is "couched in the aura of behavioral science."

C. The Trial Court Did Not Abuse Its Discretion By Admitting HITS Evidence

Coe argues that admission of HITS data was reversible error because it did not meet standards for signature evidence, was inadmissible hearsay and was otherwise unreliable. Opening Br. at 33. But Coe never raised a hearsay

argument at the HITS hearing. Furthermore, his counsel vigorously challenged the HITS evidence before and during trial and did not provide Coe with ineffective assistance. The trial court conducted a full-day inquiry into the reliability of HITS data. HITS data corroborated other evidence linking 17 unadjudicated rapes to Coe.

1. HITS and Its Results in This Case

In its response to Coe's motion to exclude, the State proffered HITS data showing a unique set of MO features in the unadjudicated rapes linked to Coe by signature analysis. CP at 3868-73. Coe raised the following issues with the HITS evidence in his reply:

Should evidence that purports to establish 404(b) modus operandi evidence be admissible where (A) the statistical evidence is not based on well-founded statistics and (B) the applicable signature analysis report fails to establish that the sexual assaults are so unique that they must have been committed by the same person?

CP at 3992. At the February 13, 2008 hearing on Coe's motion to exclude, consideration of the HITS data was postponed until the court could hold a separate hearing on the validity of that evidence. 1RP at 205. The court held the HITS hearing on March 13, 2008. 1RP at 3869-4040.

The State called three witnesses at the HITS hearing. Marvin Skeen is the Chief Criminal Investigator for the Washington State Attorney General (AGO). 1RP at 3871-72. He testified about HITS and its development. Investigators in the HITS Unit collect, analyze and link violent crime cases. 1RP at 3872. The crimes include homicides, sexual assaults and others. *Id.* Information about the crimes is received from all types of law enforcement agencies. *Id.* The information is coded onto a form and then entered into the

searchable HITS computer database. *Id.*

HITS grew out of discussions between members of the task force formed to solve the Atlanta Child Murders. *Id.* at 3875. Those discussions led to development of the Violent Criminal Apprehension Program (ViCAP), currently operated by the Federal Bureau of Investigation. *Id.* Dr. Keppel, who was also on the task force, returned to Washington and, with grant funding, developed the HITS system. *Id.* The Legislature later approved funding for the system in the Community Protection Act of 1990 and the AGO's HITS unit was started that year. *Id.* at 3875-76. Though it began as a system to link homicides, the HITS unit began collecting stranger rape data beginning in 1992. *Id.* at 3876. The HITS unit developed a form for rape cases. *Id.* at 3877-78. Data is collected from a variety of sources, including, as in this case, the AGO's SVP unit. *Id.* at 3879-81. Rapes prior to 1992 are also collected and stored. *Id.* at 3881.

The State also called Tamara Matheny, a HITS investigator who had been with the unit for 19 years. IRP at 3922-23. She collects and codes cases and trains other to do so. *Id.* at 3924. The rape form has 186 data fields. *Id.* at 3926. Steps to ensure standardized coding include the use of a coding manual, unit meetings and trainings. *Id.* at 3928. Matheny has coded approximately 500 rapes into the database. *Id.* The coding process takes anywhere from one to several hours. *Id.* The coding form is typically filled out by HITS staff who are unconnected with the investigation of the sexual assault being entered into the database. CP at 4371.

In early 2006, the DOC sent Matheny information about the six rapes

Coe had been charged with in 1981.⁸ *Id.* at 3929-30. She coded them, had her coding reviewed by another investigator and entered the data into HITS. *Id.* at 3930-31. In 2007 the SVP unit provided her with information about 18 other rapes in which Coe was a suspect, and Matheny entered those into HITS, as well. *Id.* at 3931-33. All the rape crimes met the HITS criteria for inclusion in the rape database and Matheny followed standard practices when entering that data. *Id.* at 3933-35.

The HITS unit uses a software program to query the database and retrieve data. *Id.* at 3937-38. Matheny has been trained in the use of the software and trains others. *Id.* at 3938. She has run queries like the one in this case for other prosecutors, including an SVP prosecutor. *Id.* at 3940. Here, she ran preliminary queries at the request of the prosecutor, who chose the data fields to be searched. *Id.* at 3939-40. That is not unusual and is consistent with HITS unit policies. *Id.* at 3940-41. The preliminary queries were not manipulated and the data in the database was not altered by them. *Id.* at 3942. They helped identify redundant questions in the queries themselves. *Id.* at 3942-43, 3981-82. Matheny then ran three final queries against a database of 8100 rapes. *Id.* at 3942, 3944.

The first query retrieved rape cases where the offender was a white male who was stranger to the victim, the victim was contacted outdoors and was raped close by, force was used against the victim upon first contact and the rapist asked the victim questions about her or her personal life, moderately to excessively. *Id.* at 3943; CP at 4372. The retrieval returned 26 cases, in 21 of

⁸ Jean C., Sherry S., Julie H., Cheri H., Mary S., and Diane F. CP at 3931.

which Coe was a suspect, and five others committed after 1991. 1RP at 3944-45; CP at 4372-73. The second query added two criteria: a weapon was used and it was a cutting or stabbing instrument. 1RP at 3945-46; CP at 4373-75. That query returned 16 cases, in 15 of which Coe was a suspect, plus one other committed after 1991. *Id.* In the third run one criterion was added: the weapon was only implied. 1RP at 3947-48; CP at 4375-76. That final run returned 14 rapes. *Id.* Coe was a suspect in all 14 and linked by signature to 13. CP at 3885-98.

2. The HITS Results Revealed a Unique MO in Rapes That Had Already Been Linked to Coe by a Ritualistic Signature and Other Evidence

Coe argues the HITS data were illegal signature evidence because they did not establish a unique MO. Opening Br. at 40. But the HITS results did just that. HITS is nothing more than a sophisticated record-keeping system and it demonstrated that Coe's MO in the rape of Julie Harmia was shared only with the perpetrator in rapes already linked to Coe by other means. The HITS evidence reliably demonstrated a unique MO and the trial court did not abuse its discretion by admitting the HITS results.

Coe argues the HITS behaviors were "even more ordinary" than his ritualistic signature elements. *Id.* The State agrees that most, but not all, of the HITS behaviors were common. However, a combination of common features can create a unique MO signature. *State v. Jenkins*, 53 Wn. App. 228, 237, 766 P.2d 499 (1989).

It is precisely the point of the HITS evidence that even common MO features can be unique in combination, as they were in Harmia's rape:

- (1) Coe was white;
- (2) Coe was male;
- (3) Coe was a stranger to Harmia;
- (4) Coe first attacked Harmia out of doors;
- (5) Coe raped her very near where he first attacked her;
- (6) Coe used force upon first contact with Harmia;
- (7) Coe asked Harmia questions about her personal life;
- (8) Coe used a weapon in his rape of Harmia;
- (9) the weapon was a cutting or stabbing weapon; and
- (10) the weapon was only implied—Harmia never saw it.

CP at 6881-83. In the HITS rape database these combined ten features are present only in 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 analysis and other evidence. CP at 3885-98. That information was useful to the jury.

Coe claims the HITS results were skewed because the State did not code in or query the database on dissimilarities between the crimes. That rational argument does not show HITS results were inadmissible. No two crimes can ever be exactly alike. But the State's objective was, first, to identify MO behaviors common to the rapes in which Coe was a suspect, then to use the HITS database to determine how unique those behaviors were. The results speak for themselves.

3. Coe Did Not Preserve A Hearsay Objection To The HITS Data And Cannot Raise That Issue On Appeal

Coe now claims that the trial court erred by failing to exclude the HITS data on hearsay grounds. Opening Br. at 43-49. He cannot raise that issue for

the first time on appeal. The State had no opportunity to respond to a hearsay objection and the trial court never ruled on one.

When Coe objected to the HITS data, he made the following arguments: (1) The HITS data are not based on well-founded statistics; (2) they fail to establish a unique signature; (3) the data were manipulated and are unreliable; and (4) because the data are unreliable, the probative value of the HITS evidence is substantially outweighed by the danger of unfair prejudice. CP at 3992, 3997-98, 3998-4001. There is brief reference to hearsay within the section of Coe's reply addressing his ER 403 argument. CP at 3999. But that passing reference in a reply, imbedded within a different argument, is not sufficient to preserve the issue for appeal. An appellate court "look[s] at the objection and its context when passing on whether an objection is sufficient. *Micro Enhancement International, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 427, 40 P.3d 1206 (2002). Coe's motion to exclude and his reply, together with exhibits, comprised 1176 pages. CP at 450-628, 3988-4096, 5004-891. At no time other than that passing reference imbedded in an ER 403 argument in a reply brief, did Coe ever argue that the HITS evidence was hearsay. He made no motion in limine or hearsay trial objection and his brief allusion to hearsay in his reply brief was insufficient to preserve the issue.

It was understood at the February 13, 2008, hearing on Coe's motion to exclude that the HITS evidence would be addressed at a future hearing. Coe's counsel stated that he would "save any comments and argument" that he had about HITS for that hearing. 1RP at 176. That was also the State's understanding. *Id.* at 203.

At the full-day HITS hearing on March 13, 2008, Coe never raised a hearsay issue. 1RP at 3869-4052. The word "hearsay" does not appear in that hearing's transcript. *Id.* Coe argued only that HITS was a law enforcement tool inappropriate for a courtroom setting, and that its results were not statistically well-founded. *Id.* at 4034-36.

Coe failed to preserve alleged error. ER 103(a)(1); *Guloy*, 104 Wn.2d at 422. It was his burden to "use his best efforts to keep (the) trial free from error." *State v. McDonald*, 74 Wn.2d 141, 145, 443 P.2d 651 (1968). He failed to "make clear to the court, at a time when it has all the evidence and legal arguments before it, the exact points of law and reasons upon which counsel argues the court is committing error." *Dravo*, 6 Wn. App. at 83. The fact that Coe made certain objections at the March 13th HITS hearing does not permit him to raise a different objection to that evidence on appeal. *Mak*, 105 Wn.2d at 718-19.

If this Court finds that Coe's mention of hearsay in his reply brief is an objection sufficient for appellate review, the Court should still decline review, for several reasons. First, Coe waived the issue because he renewed objections to HITS at the March 13th hearing but failed to renew a hearsay objection. Second, Coe should have asked the trial court for a hearsay ruling on HITS because there is no record of the court considering that issue. In general, where a court has entered a definite and final pretrial ruling on an issue, renewing the objection is considered a "useless act" and the objection is preserved. *State v. Poe*, 74 Wn.2d 425, 426, 445 P.2d 196 (1968)). But where a trial court has not ruled, or its ruling is preliminary or tentative, the objection must be renewed at

trial. *State v. Powell*, 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995). "A party losing a pretrial motion will not in every case be deemed to have a standing objection." *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 622-23, 762 P.2d 1156 (1988).

Coe strains to argue that the trial "had the obligation to resolve the hearsay argument advanced by Coe's counsel[.]" Opening Br. at 49. But the opposite is true. Where a trial court has not ruled, it is the objecting party's duty to raise the issue again. *Powell*, 126 Wn.2d at 256-57. "[T]he alleged error must be called to the trial court's attention to afford an opportunity for correction." *In re Welfare of Bennett*, 24 Wn. App. 398, 402-03, 600 P.2d 1308 (1979). Coe's failure to seek a definitive ruling on a hearsay objection precludes him from raising that issue now.

There is another cogent reason for declining review. It was understood that the March 13th HITS hearing was a continuation of the hearing on the motion to exclude, and not the hearing on whether HITS would be substantively admissible. The March 13th hearing concerned the reliability of HITS, so that the trial court could determine what weight to give it when deciding Coe's motion to exclude. At that hearing, Counsel for the State said:

In the hearing before your Honor, the issue is not whether HITS is admissible at trial. They have not made a motion to exclude HITS. . . . The issue of the admissibility of HITS is something completely different, and I guess we'll cross that bridge when they make a motion to exclude it.

1RP at 4036. Neither Coe nor the trial court disputed the State's comments and the trial court's ruling is consistent with the State's position. CP at 888-98. The March 13th hearing was an "evidentiary hearing." *Id.* The court set out the

four issues it was addressing. *Id.* at 889. The admissibility of HITS was not one of them. *Id.* The court's ruling found Dr. Keppel's signature evidence admissible and held that Dr. Keppel and Dr. Phenix could rely on the HITS data in forming their opinions.⁹ *Id.* at 892, 897-98. The trial court did not specifically rule on the substantive admissibility of HITS in either its first or its supplemental orders. *Id.* at 888-98, 904-7.

Because the trial court did not rule on a hearsay objection Coe claims to have made, it was his obligation to bring the matter to the attention of the State and the court and to obtain a ruling on it. *Powell*, 126 Wn.2d at 256-57. His failure to do so precludes review. RAP 2.5(a).

4. If this Court Considers Coe's Hearsay Argument for the First Time on Appeal, It Should Be Rejected

Programs that compile information about reported crimes, such as HITS, "are nothing more than sophisticated record-keeping systems." *Russell*, 125 Wn.2d at 70. "[T]here is no prohibition against using well-founded statistics to establish some fact that will be useful to the trier of fact." *Id.* Here, the State used HITS to establish a fact helpful to the jury—there was a unique set of MO features in Harmia rape and other rapes linked to Coe. The HITS data were shown to be reliable and the trial court did not abuse its discretion by admitting that evidence.

Coe's hearsay claim should be rejected on several grounds. First, as an official data compilation, the HITS evidence was self-authenticating and

⁹ Coe correctly notes that the trial court was mistaken in finding that Dr. Keppel relied on HITS data in forming his opinions, but he did not object below. The court's order, therefore, only addressed HITS as evidence the experts relied upon and that could be disclosed under ER 703 and 705.

admissible pursuant to either RCW 5.44.040 or RCW 5.45.020. Second, the out-of-state cases Coe relies upon are inconsistent with Washington case law, as well as some foreign case law. Third, the HITS data were used here only to show that crimes already linked to Coe shared a unique MO. The HITS evidence was therefore properly admitted as ER 404(b) identity evidence, and as information properly relied upon by Dr. Phenix.

a. HITS Falls Within the Business Records Exception

Although *Russell* does not address the substantive admission of HITS evidence, it found HITS reliable enough that expert witnesses could refer to its results when testify about a unique signature. *Id.* Their testimony was deemed helpful to the trier of fact. *Id.* at 71.

Coe cites *People v. Hernandez*, 55 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (1997), in support of claim that the HITS evidence constituted inadmissible hearsay. In *Hernandez*, the California Court of Appeals concluded that the "business records" hearsay exception did not apply to police report information that was admitted via a computer program called "Sherlock." *Id.* at 240-41. This Court should decline to follow *Hernandez*, because HITS' reliability was recognized by the *Russell* Court, and because other persuasive authority has upheld admission of similar evidence.

For example, in *People v. Hawkins*, 98 Cal. App. 4th 1428, 99 Cal. App. 1333A, 121 Cal. Rptr. 2d 627 (2002), the court addressed a hearsay objection to computer printouts showing when computer files were last accessed. *Hawkins*, 121 Cal. Rptr. 2d at 640. The file-listing was admitted despite its inherent evidentiary shortcomings. *Id.* at 644. The objections were

similar to those raised here at trial below. *See* 1RP at 2690-738. Nevertheless, the Hawkins court held that the hearsay objection was misplaced. *Id.* at 642-43.

Similarly, in *Ed Guth Realty, Inc. v Gingold*, 34 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974), computer printouts representing statistical data in support of the state real property tax equalization rate were held to have been properly admitted over the objection that the printouts were not within the business entry exception to the hearsay rule. *Gingold*, 34 N.Y.2d at 451. The court held that compiling and feeding statistical data into a computer in the process of determining an equalization tax rate was as routine a function as could be imagined, and should be included within the business entry exception. *Id.*

In *United States v. Smith*, 973 F.2d 603 (8th Cir. 1992), police department computer printouts reflecting reports of robberies in Minneapolis and the area of the bank the defendant allegedly robbed were substantively admitted. *United States v. Smith*, 973 F.2d at 605. On appeal, the defendant claimed this evidence was inadmissible hearsay irrelevant to the crimes charged. *Id.* Although the defendant was not specifically linked to any of the other robberies, the Court nonetheless concluded that the evidence of violent crime in the area was relevant in evaluating whether appellant's conduct was reasonably construed as intimidating. *Id.*¹⁰

¹⁰ Many other courts have also upheld admission of results of computer-generated reports in spite of similar hearsay objections. *See, e.g., United States v. Greenlee*, 517 F.2d 899, 906 (3d Cir. 1975) (In a prosecution for failure to file federal income tax returns, the court concluded, that a computer-printed "Transcript of Account" for one of the tax years in question was admissible over a hearsay objection.); *People v. Dunlap*, 18 Cal. App. 4th 1468, 23 Cal. Rptr. 2d 204 (1993) (Computer printout of defendant's RAP sheet was admissible in criminal prosecution as official record over hearsay objection where printout was clearly

Here, the HITS evidence showed only that, other than the rapes already linked to Coe, none of the other 8100 rapes in the database shared the same ten MO behaviors as Coe exhibited in the Harmia rape. CP at 6881-83. The State, therefore, did not produce data other than what it loaded into the HITS database *pretrial*; instead, the State demonstrated a complete absence of data for crimes with a similar MO pattern as the Harmia rape, supporting its contention that Coe exhibited a unique set of MO behaviors.

HITS satisfies the business records exception. Given the measures taken to assure standardization of the data—a standardized coding manual, unit meetings, trainings, a lengthy coding process and the data being entered by trained HITS investigators—the retrievals such as were conducted in this case have a high degree of reliability. 1RP at 3928. Thus, there is an inherent reliability in the HITS data recording process that ensures principles of routineness and consistency that the business records exception recognizes. *State v. Hines*, 87 Wn. App. 98, 101, 941 P.2d 9 (1997). For these reasons, Coe's untimely hearsay argument fails. The routinely recorded HITS data were admissible because they were "made in the regular course of business," and "the sources of information, method and time of preparation" justify its admission. RCW 5.45.020. Coe's argument should be rejected.

Furthermore, because HITS data is routinely compiled in a manner consistent with business records under RCW 5.45.020, the HITS results

identified as "CLETS [California Law Enforcement Telecommunications System] Data Base Response" and bore certification from county district attorney's office that it was received from CLETS.); *California v. Orozco*, 590 F.2d 789, *cert. denied*, 439 U.S. 1049 (9th Cir. 1979) (In criminal prosecution, computer data cards indicating that automobile had been recorded crossing U.S.-Mexican border, were admissible under public records exception to hearsay rule.).

produced at trial meet the hearsay exception of ER 803(a)(7). The ultimate point of the HITS evidence was the absence of crimes in the database that shared Coe's ten MO characteristics from the Harmia rape. The State had already identified that MO in the other rapes linked to Coe. The fact that not a single other rape in the database exhibited Coe's MO was admissible as "[e]vidence that a matter is not included . . . in the data compilations . . . to prove the nonoccurrence or nonexistence of the matter[.]" ER 803(a)(7).

b. The HITS evidence was also admissible as a public record pursuant to RCW 5.44.040

The hearsay exception for public records is codified in RCW 5.44.040.¹¹ To be admissible under this exception, "a report or document prepared by a public official must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion." *State v. Monson*, 113 Wn.2d 833, 839, 784 P.2d 485 (1989). As with all public records, "trustworthiness exists because of the declarant's official duty and high probability that the declarant has performed his public duty to make an accurate record." *Monson*, 113 Wn.2d at 845.

The HITS evidence was properly admitted at trial pursuant to the public records exception because of its structure as a data-compilation. Consider *United States v. Smith, supra*, in which evidence of other reported violent crimes in the area was substantively admitted at trial. 973 F.2d 603. In addition to finding that the evidence was admissible as a business record, the

¹¹ RCW 5.44.040 provides: "Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state."

Court also held "that the evidence was properly admitted as a public record under Rule 803(8)(B) of the Federal Rules of Evidence."¹² *Id.* at 605. Smith is instructive here because RCW 5.44.040 covers the subjects of subsections (A) and (B) of Fed. R. Evid. 803(8). *Bierlein v. Byrne*, 103 Wn. App. 865, 869, 14 P.3d 823 (2000).¹³

Similarly, in *United States v. Enterline*, 894 F.2d 287 (8th Cir. 1990), the defendant challenged the admissibility of a computer printout. The court found that, while the computer report was hearsay, it qualified as a public record under Fed. R. Evid 803(8)(B). *Id.* at 289. The *Enterline* court noted that the Fed. R. Evid. 803(8)(B) exclusion for criminal cases relates to matters observed by police officers at the scene of a crime, while the reports at issue in *Enterline*, as well as in the present case, relate to matters reported to police and

¹² Fed. R. Evid. 803(8)(B) provides a hearsay exception for "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel."

¹³ The Federal Courts have also issued several opinions deeming administrative agency reports concerning investigation of criminal conduct as trustworthy for purposes of admissibility pursuant to the Federal exception to the hearsay rule for factual findings resulting from an investigation made pursuant to authority granted by law under Fed. R. Evid. 803(8)(C). See e.g. *Bradford Trust Co. of Boston v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 805 F.2d 49 (2d Cir. 1986) (Fingerprint reports maintained by the FBI the reports were especially reliable because they were prepared by the FBI in a criminal investigation that was only tangentially related to this civil action.); *In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804, *abrogated in part on other grounds*, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 116 S. Ct. 629, 133 L. Ed. 2d 596 (1996) (Detective's report prepared largely through compiling computerized records of bags, records that had been set up to amass reports from friends and relatives of passengers and crew members who died in an airliner crash and from evidence obtained at the scene of the crash.); *Dubois v. State Farm Fire & Cas. Co.*, 734 F. Supp. 722 (E.D. La. 1990) (Report of the Bureau of Alcohol, Tobacco, and Firearms (ATF) concerning a fire at the plaintiff's business premises the agent, who prepared the report as a part of his everyday function as an investigator for a federal agency, did not stand to gain anything from the criminal investigation of the plaintiffs, nor did he have a stake in the instant litigation.).

do not involve observations of officers in an adversarial setting. *Id.* at 290. Thus, the Court found no abuse of discretion in admitting the evidence as a public record under the Fed. R. Evid. 803(8)(B) exception to the hearsay rule.

Even where the witness who relied on the document did not actually prepare it, he or she may still provide foundation testimony if that person knows its mode of preparation and routinely relies on another's preparation of that document. *State v. Iverson*, 126 Wn. App. 329, 336, 108 P.3d 799 (2005). In another case, the court held that a jail booking record containing information about an inmate is exactly the kind of record RCW 5.44.040 was designed to include. *Hines*, 87 Wn. App. at 101 (citing *State v. Mason*, 31 Wn. App. 680, 683-84, 644 P.2d 710 (1982)).

Both public and business records tend to be the result of numerous daily transactions and events which those who create or have custody of them prepare in the course of their daily routine activities. *Hines*, 87 Wn. App. at 101. It is unlikely that they would remember the details of any particular transaction or event. *Id.* But because the process by which the records are created is inherently reliable, hearsay satisfying the business and public records exceptions is admissible. *Id.* For these reasons, a trial court's decision to admit or refuse evidence is within its discretion and "will not be reversed absent a manifest abuse of discretion." *Iverson*, 126 Wn. App. at 336.

It is undisputed that Matheny was qualified to identify the HITS data and to testify about its mode of entry. She routinely relies on information prepared by other officers to develop the data. The HITS queries she ran did not require the exercise of judgment or discretion, or the expression of

opinion.¹⁴ All of these characteristics combine to give the HITS evidence a level of reliability appropriate for admission as a public record. Therefore, even if the Court considers Coe's hearsay argument, it should be rejected.

5. Coe fails to provide any reason to conclude the HITS evidence is unreliable

Coe provides no basis for this Court to believe the evidence was statistically invalid. In addition, Coe misconstrues the purpose of the HITS evidence as designed to link him to new or additional sexual assaults. When the HITS evidence is viewed in its intended and correct context, its relevance and suitability are clearly established.

Coe first claims that the State did not lay the necessary foundation for admission of the HITS evidence because it failed to prove the "HITS results were not infallible." Opening Br. at 52. Leaving aside the impossibility of that standard, Coe's only citation to the record fails to support his argument. Rather, the cited testimony appears to simply establish that when a particular set of offense characteristics is queried, more than one case or suspect may be returned that shares those characteristics. 1RP at 3918. Those returned cases then provide investigating police officers with possible suspects to investigate further in an attempt to solve the case that was originally queried. *Id.* at 3916. It would seem that the cited testimony actually established that HITS does

¹⁴ Such was not the case with the "Sherlock" database discussed in *People v. Hernandez*, 55 Cal. App. 4th 225. There the information placed into the Sherlock program came from *summaries* of the reported crimes that were prepared by law enforcement staff, and then provided for input into the Sherlock system. *Id.* at 228-29. To summarize and condense reported crimes necessarily requires some level of judgment on the part of the person summarizing the report about what is or is not important. HITS information, on the other hand, comes directly from the reports themselves, and is coded using a standardized checklist and coding manual that is applied uniformly to each offense that is put into the database. 23RP at 3929.

exactly what it is intended to do—assist law enforcement officers with the investigation of crime.

More importantly, Coe misunderstands the way in which HITS was used in his case. Here, HITS was not used to aid police as described above, or to link Coe to new crimes as he argues. The cases at issue had *already* been linked to Coe through a ritualistic signature or other evidence *before* HITS was queried. The HITS queries then confirmed that those cases already linked to Coe also had a unique MO unlike any of the 8,100 cases in the HITS database. Thus, the purpose of consulting the HITS database was not to link Coe to more sexual assaults, but to establish the uniqueness of Coe's MO when committing them. The extraordinarily unique MO, in turn, confirmed information Dr. Phenix already had.

Dr. Phenix was clear that she did not treat the HITS evidence, standing alone, as conclusive proof that Coe committed the crimes. In the context of her psychological evaluation, the HITS information was viewed as "another data point" (in addition to signature evidence, positive victim identification, blood typing, or other evidence) upon which to rely in determining the extent of Coe's criminal history. 1RP at 3099-100. Committing outdoor rapes, while implying a weapon and questioning the victim about her personal life, is so distinctive an MO that it is highly relevant to issues of sexual pathology.

Coe claims the trial court erred when, he argues, it improperly placed the burden on Coe to prove the HITS evidence was statistically invalid in order to justify excluding it. Opening Br. at 51. His argument is not well taken. At a full-day evidentiary hearing the State called three witnesses to speak at length

about those subjects. Two witnesses, Marvin Skeen and Tamara Matheny, testified at length regarding how information is received and input into the data base. 1RP at 3871-81; 3922-41. The trial court also heard the testimony of Sean Clowers, a Software Engineering Section Supervisor for the AGO. 1RP at 4006-07. He provided evidence about the computer system that stores HITS data and its security and backup systems. 1RP at 4011-32. Coe offered no testimony or evidence at the hearing.

After the evidentiary portion of the hearing concluded, Coe argued that the evidence did not contain appropriate "checks and balances," and should be excluded due to what he perceived to be its statistical invalidity. 23RP at 4034-35. Noting that Coe's opinions about the evidence were not evidence themselves, the trial court recognized that literally no evidentiary basis had been provided to justify questioning the "statistical validity" of the HITS evidence. *Id.* The trial court did not foreclose the option of making a formal motion to exclude the HITS evidence, holding instead that HITS' statistical validity was "not in front of me at this point." *Id.* at 4035. Coe ultimately declined the trial court's offer, choosing not to provide evidence or argument later during the proceedings.

Consequently, Coe's argument here regarding the statistical reliability of the HITS evidence suffers the same shortcoming. The record below continues to be devoid of any evidence that the HITS information amounts to flawed statistical analysis. That is not to say that Coe was *required* to produce such evidence. However, it is not a burden shift to ask the opponent of certain evidence for rebuttal when the proponent of that evidence has established its

relevance and propriety. Here, it was established that HITS is simply a computer database that, by all accounts, accurately maintains the information put into it, and provides accurate search results. Coe has never established any flaw in the way information is collected, maintained or classified within the database, or that HITS queries are likely to result in an inaccurate reporting of the pertinent database content.

6. Coe's Counsel Was Not Ineffective

Despite vigorous efforts by his counsel to have the trial court exclude the HITS evidence, Coe claims that his counsel was ineffective for failing to object on hearsay grounds. However, it is purely speculative to conclude a hearsay objection would have been sustained if it had been made, especially given the court's rejection of the substantial efforts of Coe's counsel to establish that the HITS evidence was flawed or unreliable. Furthermore, given the substantial evidence *infra* at III(C)(7), the result at trial would have been the same, even if Coe had managed to exclude the HITS data.

Coe must show that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced." *Stout II*, 159 Wn.2d at 377. "Courts engage in a strong presumption counsel's representation was effective." *McFarland*, 127 Wn.2d at 335. Coe cannot overcome that presumption, because he gives only passing treatment to the deficiency portion of his ineffective assistance argument. Opening Br. at 49. Furthermore, this Court does not review issues that have been inadequately briefed or that have received only passing treatment. *Mossman v. Rowley*, 154 Wn. App. 735, 744-45, 229 P.3d 812 (2009). The Court should decline to

review this argument.

Coe "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *McFarland*, 127 Wn.2d at 336. He fails to comply with this requirement. He presumes that his counsel's failure to raise a hearsay objection to the HITS evidence is *per se* ineffective. But even where counsel in a criminal case with a search and seizure issue does not request a suppression hearing, there "may be legitimate strategic or tactical reasons" for not doing so. *Id.*

"Competency of counsel is determined based upon the entire record below." *Id.* at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The record of the proceedings below, from the filing of the petition in August, 2006, through the verdict on October 16, 2008, demonstrates that Coe received vigorous and competent representation from his three counsel.

Coe's trial counsel may have believed he had preserved his objection. Certainly Coe's appellate counsel argues that he did. Or, Coe's counsel may have thought the trial court's decision had taken his objection into account and denied it. CP at 888-98. Given Coe's vigorous appellate attack on HITS and his arguments that the State manufactured evidence against him, perhaps Coe's trial counsel made a tactical decision, after a vigorous and unsuccessful challenge to the reliability of the evidence, to attack the State at trial on the alleged deficiencies of that evidence.

In any event, Coe cannot show prejudice, because it is not enough to show that an error could have had some conceivable effect on the outcome of the trial. *State v. West*, 139 Wn.2d 37, 46, 983 P.2d 617 (1999) (citing

Strickland, 466 U.S. at 693). Many things that counsel do or decide can have some effect on the outcome. *Id.* That does not mean it would undermine "the reliability of the result of the proceeding." *Id.* There was an abundance of other evidence against Coe, as demonstrated below. Coe has not established that his counsel's performance was objectively unreasonable, or that he was prejudiced.

7. If Admission of the HITS Evidence Was Error, It Was Harmless

If this Court concludes that there was an error in the substantive admission of HITS evidence, it should also conclude that such error was harmless. The issues for the jury were whether Coe was mentally ill and dangerous. Dr. Phenix's testimony was the principle evidence establishing mental illness and dangerousness. But she originally formed her opinions without consideration of HITS. While HITS provided corroboration of the evidence linking Coe to rapes, there was substantial other evidence sufficient to render such crimes admissible. Furthermore, the jury would have heard about the HITS results from Dr. Phenix anyway, because she reasonably relied on them and the trial court had also admitted the HITS data for the purpose of explaining the bases of Dr. Phenix's opinions. There was substantial evidence linking Coe to the unadjudicated rapes, and proving that he was mentally ill and dangerous, with or without the HITS data. Any error was harmless.

a. HITS did not alter Dr. Phenix's opinions

"Evidentiary error is grounds for reversal only if it results in prejudice." *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An evidentiary error is harmless unless it was reasonably probable that it changed the outcome of

the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

There is no reasonable probability that the HITS evidence, on its own, altered the outcome of the trial. It was the State's burden to prove three elements beyond a reasonable doubt:

- (1) That Kevin Coe has been convicted of a crime of sexual violence, namely rape in the first degree; and
- (2) That Kevin Coe suffers from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior; and
- (3) That this mental abnormality or personality disorder makes Kevin Coe likely to engage in predatory acts of sexual violence if not confined to a secure facility.

CP at 3480. The first element was undisputed because Coe had been convicted of rape in the first degree for his crime against Harmia. The primary evidence proving mental abnormalities and the likelihood that he would reoffend, was the expert opinion testimony of Dr. Phenix.

When Dr. Phenix completed her initial SVP evaluation of Coe in August, 2006, HITS evidence was unavailable. CP at 10-108. After HITS evidence was provided to her, her opinions were virtually unchanged when she testified at the commitment trial. 1RP at 3118-19, 3158-59.¹⁵

Proving that Coe was (1) mentally ill and (2) dangerous required expert testimony. *Berger v. Sonneland*, 144 Wn.2d 91, 110-11, 26 P.3d 257 (2001). Those two elements are "beyond the expertise of a layperson." *Id.* Dr. Phenix provided the evidence necessary for the State to meet its burden. The HITS

¹⁵ After conducting a clinical interview of Coe and considering other information, Dr. Phenix opined that his personality disorder also included histrionic traits. 1RP at 3159.

data that Dr. Phenix later considered did not alter her opinions and, even had it been excluded, Dr. Phenix would have offered the same opinions to the jury.

Furthermore, had the State not presented HITS substantively, the jury would still have heard the results from Dr. Phenix, who reasonably relied on them. 1RP at 3098-99. Of course, the jury would have applied that evidence for a different purpose—to determine whether Dr. Phenix's opinions were well-founded. But the difference in purposes, in this case, does not support reversal. There was other substantial evidence linking Coe to the unadjudicated rapes, namely Dr. Keppel's signature analysis and other evidence discussed *infra*. Considered in light of all the evidence, the difference between the jury considering the HITS evidence substantively or in order to understand the bases of Dr. Phenix's opinions, does not establish a reasonable probability that the substantive admission of HITS altered the outcome of the trial. *Bourgeois*, 133 Wn.2d at 403.

b. Substantial evidence other than HITS supported Dr. Phenix's opinions

Dr. Phenix diagnosed Coe with three mental abnormalities. She relied upon an extraordinary amount of evidence, other than the HITS data, in forming her opinions. There is no reasonable probability that exclusion of HITS would have altered her opinions or the outcome of the trial.

(1) Mental abnormality: Paraphilia not otherwise specified, nonconsenting females, with sadistic traits

Dr. Phenix diagnosed Coe with Paraphilia (NOS), nonconsenting females with sadistic traits. 1RP at 3119. The following evidence supported her opinions.

(a) Identifications

Crimes supporting Coe's Paraphilia NOS Nonconsent diagnosis include both rapes and cases of indecent liberties. In total, there are 26 such crimes.¹⁶ In 15 of those 26 the victim identified Coe in some manner as the perpetrator. Not all of the identifications were strong, but Dr. Phenix considered that and assigned varying weight upon that and other factors. 1RP at 3099-100.

(1) Rita S. picked Coe out of his high school yearbook. 1RP at 2202-04. (2) Diane J. identified Coe at the scene of the crime and Coe gave a statement. 1RP at 2219, 2233-34. (3) Colleen D. identified Coe from a photo array. CP at 4235, 4238, 4241. (4) Jean C. identified Coe from a photo array and later in the courtroom. CP at 4264-65, 4267. (5) Robin T. picked Coe out of a photo array. 1RP at 2245; State's Exhibit 16. (6) Diana A. identified Coe from a photo of a line-up. CP at 4294. (7) Jaima E. picked Coe and another man out of a photo of line-up, but later positively identified Coe, and Diana A.'s identification was corroboration. CP at 4285, 4282-83, 4287-88. (8) Patricia O. identified Coe from groups of pictures after seeing a composite drawing on television. CP at 6752. (9) Darria L. picked Coe out of a live line-up. CP at 4126. (10) Mary L., who was a Gonzaga law student, testified that she saw her attacker in a live line-up in 1981 but did not want to identify him then because she was only 95 percent sure it was him; at the SVP trial she identified Coe in a photo of a line-up as the man who raped her. 1RP at 2374-75, 2377-78, 2778-79; Respondent's Exhibit 263. (11) In 1981 Teresa K. was

¹⁶ Rita S., Diane J., Colleen D., Jean C., Robin T., Jaima E., Diana A., Patricia O., Shelly H., Paige K., Joanne T., Dorcas T., Darria L., Mary L., Margaret D., Elizabeth A., Teresa K., Sherry J., Gretchen C., Sherry S., Julie H., Jennifer C., Valerie L., Cheri H., Mary S., and Diane F.

shown photos that included Coe's; she knew that he was the one who had raped her but was too afraid to tell the detective who showed her the pictures. 1RP at 2283. (12) Gretchen C. initially identified someone else, but eventually identified Coe after he had been arrested, where he had different hair styles, and also after seeing him in court. CP at 3840-41, 4122. (13) Julia H. identified Coe in a live lineup. CP at 6891, 6893; 1RP at 2416-17. (14) Valerie L. identified Coe from a photograph of a line-up. CP at 6909. (15) Cheri H. identified Coe from a live line-up. CP at 4313, 4316.

(b) The signature rapes

Dr. Phenix relied on Dr. Keppel's signature analysis; it is the type of information psychologists rely upon when conducting SVP evaluations. 1RP at 3098. Those 17 unadjudicated rapes were therefore admissible to show the bases of her opinions pursuant to ER 703 and 705. Furthermore, the State proved Coe committed the 17 unadjudicated signature rapes by a preponderance of evidence through proof of Coe's ritualistic signature. Signature evidence is only admissible if it "is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." *Russell*, 125 Wn.2d at 66-67 (quoting *State v. Hernandez*, 58 Wn. App. 793, 799, 794 P.2d 1327 (1990)). It necessarily follows that a unique signature proves identity by at least a preponderance of evidence. *See Id.* ("The trial court found cross admissibility on the basis of signature[.]"). Here, the trial court found that a ritualistic signature proved identity in 17 unadjudicated rapes. Therefore, no other evidence was required before those crimes could be admitted at trial

either substantively under ER 404(b) or as relevant to the bases of Dr. Phenix's opinions under ER 703 and 705. Neither Dr. Phenix's opinions nor the result of the trial were altered by the admission of HITS evidence.

(c) Jaima E. and Diana A. (June 17, 1979)

Dr. Phenix also relied on the unadjudicated rapes of Jaima E. and Diana A., which Dr. Keppel was unable to link to Coe through his signature analysis. 1RP at 3089-92. The trial court found that the State had proved Coe the perpetrator in those crimes. CP at 894-96, 905.

The rapes of Jaima and Diana occurred while the two victims were working together at the Tiger's Den massage parlor in Spokane, on June 17, 1979. CP at 3801-06. Jaima was raped first, as she led a customer into a massage room. CP at 4281. The customer bound her, digitally raped her and asked her to urinate on him. *Id.* When he was done Jaima heard him go down the hallway and speak to Diana. *Id.*

Several months after Coe's arrest, police showed Jaima a photo of a lineup including Coe. CP at 4285. Jaima identified Coe and another man as possibly the rapist. *Id.* Jaima later saw Coe at the door of a massage parlor where she was working. CP at 4282. She called 911 and told police she had just seen the man who raped her. *Id.* A separate police report indicates that Coe was at the massage parlor that day. CP at 4287-88.

Diana A.'s identification of Coe ties him to both rapes. After raping Jaima, the man raped Diana. CP at 4290. After Coe's arrest, police showed Diana a photo of a line-up. CP at 4294. Diana picked out Coe. *Id.* Asked how sure she was that he had raped her, she said, "I'm sure." *Id.*

(d) Valerie L. (December 16, 1980)

Dr. Phenix relied on the attempted rape of Valerie L. CP at 3095-96, 3350-51. Coe essentially admitted this crime to a psychiatrist he hired for his criminal sentencing, Dr. Robert Wetzler. On the evening of December 16, 1980, Valerie L. got off a bus on the South Hill. CP at 6906. She saw a man jogging towards her on the sidewalk. *Id.* When he was even with Valerie he suddenly reached out with his left arm, around her neck. *Id.* He put his left forefinger over her mouth and tried to pull her down to the ground. *Id.* She managed to pull a canister of mace from her pants pocket and sprayed him in the face. *Id.* The man released Valerie and she screamed. *Id.* He ran. *Id.*

On April 6, 1981, Valerie viewed a photograph of a lineup with Coe in the number four position. CP at 6909. Valerie said, "Number four is the closest one. Hair seems shorter. Can't say for definite, but could be." *Id.*

On August 13, 1981, Coe met with Dr. Wetzler in the Spokane County jail. CP at 6911. Coe admitted that in December he had attempted a rape but had been driven away by mace. *Id.* at 6912. His admission matches the facts of the attempted rape of Valerie L.

(e) General evidence of Coe's involvement in rapes

1) Coe's stalking behaviors on the South Hill

Dr. Phenix relied on Coe's stalking behaviors. 1RP at 3113. Coe admitted he had gone out repeatedly on the South Hill, in areas where women had been raped, during the early morning and later evening hours when those rapes had occurred, and had hidden behind trees while he followed female

strangers. 1RP at 3054-60. A Spokane police officer saw Coe darting back and forth behind a tree early one morning on the South Hill, within 30 feet of a decoy. *Id.* at 2419-23. Coe also admitted following buses on the South Hill. *Id.* at 3051-52.

Sometime in the summer of 1980, victim Shelly H. appeared in Spokane's Hamblen Park for a radio station promotion. *Id.* at 2321-22. Cheryl Ferguson, a co-worker of Coe's, took her children to the park. *Id.* They saw Coe standing behind a tree and startled him when they spoke to him. *Id.* at 2322-23. For the next half-hour, they watched as Coe followed Shelly through the park, always staying behind a tree where she couldn't see him. *Id.* at 2324-26. It was one year since Shelly H. had been raped.

2) Coe's schedule

Coe was absent from his home and girlfriend for hours at a time in the early morning and the evening, attended work infrequently and put an astonishing number of miles on his car for someone who was unproductive at the work of selling real estate.

Virginia Perham lived with Coe in 1980 and 1981. CP at 3585-86. Coe was frequently gone during the early morning hours. *Id.* at 3600. Often, Perham awoke between 6:00 and 7:00 a.m. from the sound of Coe returning from an outing. *Id.* at 3600, 3627. Coe would also leave for two to four hours in the evening. *Id.* at 3600. He said he was jogging. *Id.* He never jogged around the neighborhood, and would instead get in his car and drive off. *Id.* at 3601-2. During the time Perham knew Coe, she only saw him jog twice, very briefly. *Id.* at 3594.

Cheryl Ferguson worked with Coe at James S. Black Realty in 1980. 1RP at 2308. His attendance at work was poor. *Id.* at 2310-11. Several of the multiple listing books regularly provided him usually just sat on his desk, two or three at a time. *Id.* at 2312-13. Other agents' desks looked busy; Coe's never had anything but the unused listing books. *Id.* at 2314. His attendance at weekly staff meetings was "[a]lmost nonexistent." *Id.* at 2313. While other agents were busy, Coe never had any listings and wrote up only one transaction. *Id.* at 2315-16. It was for his mother, but it "never came to fruition." *Id.* He received no commissions. *Id.* at 2317.

Coe and his friend Jay Williams both worked at Main Realtors in Spokane Valley from January 1979 to early 1980. *Id.* at 2819. Williams was in the office every day. *Id.* at 2806. He sometimes would not see Coe for two or three days at a time. *Id.* at 2805. Around the time they began working together, both obtained new cars, within the same month. *Id.* at 2804. Williams used his to drive around Spokane and preview properties. *Id.* at 2805. A few months afterwards, Williams was surprised to see that Coe's mileage was "several times higher" than his own. *Id.* at 2805.

3) Coe's wounds

Not long after Perham moved in with Coe, she noticed a long, red patch on the side of his neck, inside of which were long, thin red lines. CP at 3593. Coe seemed nervous when she noticed it and said he had injured himself while jogging. *Id.* at 3594. In December 1980 Coe came home with a rip in the left knee of his jogging pants and said he'd fallen while jogging. *Id.* at 3595. He asked Perham to drive him to where his car had stalled and was annoyed when

she suggested they call a tow truck. *Id.* at 3595-96. In Spring 1980 Coe had a circular, deep cut on the palm of his left hand; a flap of skin covered the cut. *Id.* at 3597. He claimed he had fallen while jogging. *Id.* Twice he was limping, and complained about conditions at a running track. *Id.* at 3597-98. Another time Coe had a deep cut inside his mouth and claimed it was another jogging injury. *Id.* at 3598.

Ferguson saw wounds on Coe's hands and face. 1RP at 2319. She saw him with a scrape from just under his eye down to his cheekbone. *Id.* at 2320. It looked like somebody had scratched him—three separate red streaks down his cheek. *Id.* She saw a similar wound on another occasion. *Id.* Coe said he'd been out jogging and was attacked by a dog. *Id.* at 2321. Twice she saw similar scrape wounds on his hands. *Id.*

At his SVP trial, Coe said he had only been wounded once from 1978 to 1981 while jogging. 1RP at 3032. He said he got a small cut when a dog came toward him and he fell, but said the dog never made contact with him. *Id.* at 3032-33. In a previous trial, however, he testified he had been wounded up to six times while jogging because he ran in the dark. *Id.* at 3033-34. He had stepped on a rake and stumbled over dips in a field. *Id.* at 3034. He also said he had run into a low-lying branch. *Id.* at 3034-35.

4) Coe's changing appearance

Coe's appearance changed dramatically and cyclically. His girlfriend Virginia Perham and co-worker Cheryl Ferguson described the changes he would force upon himself.

Perham testified Coe's appearance would change "quite often."

CP at 3589. He would go on seven- to ten-day fasts, drinking only water, and would have to wear a belt to hold his pants up. *Id.* Then, he would enter what he called a "flooding phase." *Id.* He would eat large amounts of junk food and would "gain a lot of weight to the point where his waist would hang over his belt. *Id.* at 3589-90. During this phase he would get pimples on his face and neck. *Id.* at 3590.

Coe's hair style would change, too. He would have his hair cut short, then go for months without a haircut, his hair touching his collar in the back, over his ears and sticking out on the side—what he called "wings." *Id.* His hair on top got so long he would comb it from the back and "swirl it all the way around" to the front, using hairspray to hold it in place. *Id.* at 3590-91.

When flooding with junk food Coe would stop taking care of himself and go up to four days without shaving or showering. *Id.* at 3592. He told Perham he did not shave because he wanted his face to appear darker. *Id.*

Coe exhibited a Jeckyl and Hyde type of transformation. Most of the time, Ferguson testified, Coe was "very well put together," with three-piece suits, very nice shoes, clean shaven, and "never a hair out of place." 1RP at 2316. During these times he was mild mannered, had a "resonant radio personality type of voice" and never used harsh words. *Id.* at 2316-17. In these better times he ate like a "health nut" and preached "nothing with sugar in it, never eat sugar." *Id.* at 2317.

On other occasions he showed up at work in gray sweat pants, with gloves and a knit cap. *Id.* He would claim he had been running. *Id.* His hygiene would be poor, his hair long and disheveled and his face unshaven.

Id. at 2317-18. It was as though he had "rolled out of bed in his sweat suit." *Id.* at 2318. During these times he would eat junk food—candy or chips or "whatever was laying around in the break room." *Id.* His attitude would be "dismal, like the whole world was against him[.]" *Id.* His language, too, would be different. *Id.* Until the first time Ferguson saw him in this state, she had never heard him cursing, but he would on these bad days. *Id.*

5) Blood type evidence

Coe has type A blood and he is a secretor. 1RP at 3636, 3654. A secretor secretes their blood type information into other bodily fluids, such as saliva, semen and perspiration. *Id.* at 3641. The blood type of persons such as Coe, therefore, can be determined from their other body fluids. *Id.*

Dr. Phenix relied on eight cases where evidence collected from the victim indicated the donor had Type A blood.¹⁷ CP at 6750; 1RP at 3111. 38 to 40 percent of the population are Type A secretors. 1RP at 3654. The blood type evidence is not, therefore, specific enough to prove identity. Nevertheless, the fact that so many cases show the perpetrator had the same blood type, and that no case shows a different blood type, indicates a single perpetrator, since each additional crime with the same blood type reduces the likelihood that it is merely coincidence.

In the rape of Shelly H., a vaginal swab indicated the donor had Type B blood, a fact Coe used to challenge the opinions of the State's experts. 1RP at 2957-58, 3224. Coe presented the testimony of William Morig, who

¹⁷ Joanne T. (CP at 6781), Mary L. (CP at 6794), Margaret D. (CP at 6808), Sherry S. (CP at 6873-74), Julia H. (CP at 6886, 6889), Jennifer C. (CP at 6902), Cheri H. (CP at 4307), and Diane F. (1RP at 3111).

had worked for the Washington State Patrol Crime laboratory. 1RP at 3637. In 1979 Morig tested the semen sample from Shelly H. *Id.* at 3643-44. He found that the Type B substance from the vaginal swab most likely came from semen. *Id.* at 3647-48.

But Morig's testimony backfired on Coe. Morig also tested semen found inside Shelly's jeans in the crotch area. *Id.* at 3650-51, 3657-58. That semen showed the donor had Type A blood. *Id.* The rapist of Shelly H. ejaculated mostly on the outside of her vagina, where, after she put her pants back on, it would have transferred to the inside crotch area of her jeans. *Id.* at 2261. Shelly's rapist had Type A blood, as did Coe and the rapist of eight other victims. The consistency of the blood type evidence is striking.

6) Coe's car

About one week after the rape of Diane F., janitors at a school near the rape site provided police with information about a car of interest. 1RP at 2766-67. Detectives began looking for a silver Chevrolet Citation with a factory sunroof and yellow Washington license plates. *Id.* at 2768. Their search led them to Coe. *Id.* at 2771. He was driving a silver Chevrolet Citation distinctive because he had placed yellow Plexiglas over his standard license plates. 1RP at 2806-07, 2772. He also matched the physical description of the rapist given by Mary S. and Diane F. *Id.*

7) Coe's gloves and oven mitts

Some rape victims reported that their attacker wore gloves, others did not. It is unknown whether the rapist in the latter cases was bare-handed or the victims simply did not report that detail. Yet, there is some pattern to the

reports. In the first two signature rapes of Jean C. and Shelly H., gloves are not mentioned. CP at 4251, 4423, 4435, 6756. However, after Shelly bit the rapist's hand (CP at 6756), the next two signature victims (Paige K. and Joanne T.) reported that the rapist wore gloves. CP at 6774, 6777. The reports after that are silent about gloves until the rape of Elizabeth South, who also bit the rapist's hand. CP at 4424, 6855. After that, every victim except one reported the rapist wore gloves, or, in the case of Ms. Fitzpatrick, oven mitts. CP at 6882, 4301, 4322, 4343.

Coe claimed he had never owned or worn a pair of gloves. CP at 3653. Several witnesses saw him wearing them. Coe's neighbor saw Coe wearing gloves. 1RP at 2532. So did Coe's brother-in-law. 1RP at 2543-44. Ferguson saw Coe with gloves when he said he'd been running. 1RP at 2317.

Coe's gloves and oven mitts tie him to the rape of Diane F. Perham testified that Coe owned gloves and wore them when he went running. CP at 3602-03, 3606. His gloves were "becoming more progressively beaten up." CP at 3603. The last time she saw them—six to eight weeks before Coe's arrest—a finger tip was hanging off one finger. CP at 3603-04. About two weeks after that, Diane F. was raped by someone wearing oven mitts. CP at 4343. Then, less than one month later, Perham found Coe washing his oven mitts at 6:30 a.m. CP at 3608-09. When she asked him why, he did not answer. CP at 3609. In his SVP deposition Coe denied ever owning oven mitts and claimed there never had been any in his house.¹⁸ CP at 3654-55.

¹⁸ Coe mistakenly claims that he admitted owning one oven mitt. Opening Brief at 27 n.24. In fact, he denied ever owning even a single oven mitt. *See* CP at 3654-55.

8) Coe's admission to the rape of Diane F.

Dr. Robert Wetzler with Coe on two occasions in August, 1981, after Coe had been convicted of four counts of rape. CP at 3511-12, 3517. Coe told Dr. Wetzler "he was excited by the things that the South Hill rapist did; that he wanted to copycat the type of behavior, and, therefore, he was involved in this type of rape with Mrs. Fitzpatrick." *Id.* at 3513. Coe said he was jealous of the South Hill rapist and wished he could be him. *Id.* at 3514-15. Coe said he had witnessed a rape in December, 1980 and it excited him. *Id.* at 3524-25. Dr. Wetzler recommended that Coe be admitted to the sexual psychopath program. *Id.* at 3518. Coe would not necessarily have had to admit to a rape to be eligible for the program. *Id.* at 3520. He never indicated to Dr. Wetzler that he was just following a legal strategy. *Id.* at 3523.

A classification counselor for the DOC interviewed Coe, who told him that he had become obsessed with trying to find the South Hill rapist and, in that obsession, had followed the MO of the rapist and committed a rape himself. *Id.* at 3545-46; State's Exhibit 103. Coe was seeking admission to the sexual psychopath program. *Id.*

9) Coe's arrest ends the rape spree

Detective Allen, assigned the cases of Mary S. and Diane S., was aware of a unique MO in those rapes. 1RP at 2766. Had similar rapes continued to occur, Allen would have learned of them. *Id.* at 2782. By the time of his retirement in 1986, there had been no further rapes with those MO features. *Id.*

10) Coe's guilty knowledge, attempted cover-up and destruction of evidence

On or about March 11, 1981—the day after Coe was arrested—his friend Williams visited him in the Spokane County Jail. 1RP at 2835. Coe wanted Williams to lie to the police and tell them that he and Coe had been trying to catch the South Hill rapist. *Id.* Williams was supposed to say that he had dressed like a woman and acted as a decoy. *Id.* at 2835-36. Coe also wanted Williams to provide him an alibi for a specific day and time. *Id.* at 2835. Coe had asked his brother-in-law to lie for him but he had refused—Coe said, "Curiously my brother-in-law has some principle against lying." *Id.*

In another conversation with Williams, Coe warned their conversation could be monitored by the guard and held sheets of paper with written messages up to the Plexiglas separator for Williams to read. *Id.* at 2841. The messages said Coe had hidden a dildo and sweater in an empty house, gave the location and asked Williams to retrieve and destroy those items. *Id.* at 2841-42. Coe's message said that "the police could construe these articles as being evidence that I'm a rapist." *Id.* at 2842. He instructed Williams to take the sweater to the Goodwill and to cut up the dildo into a hundred pieces and "spread it over a hundred lots." *Id.* Williams went to the home and found it occupied. *Id.* Coe urged him to try again and Williams did. *Id.* He found a dildo and a running jacket where Coe said they would be. *Id.* at 2843. Williams disposed of the dildo but left the running jacket in case it had evidentiary value for the police. *Id.* at 2845.

(f) Other acts of nonconsent

1) Rita S. (May 1, 1966)

Rita S., who testified at the SVP trial, was 16 years old in 1966, lived at

home with her mother and father and attended Meade High School. 1RP at 2195. On the night of April 30, 1966, she went to a dance club in Spokane with two friends. *Id.* at 2196. When the dance was over, her friends had left without her. *Id.* A young male stranger offered her a ride home. *Id.* Ms. Stephens later identified him as Coe, from a high school yearbook. *Id.* at 2202-04. He drove her to a secluded location and committed indecent liberties against her for ten or fifteen minutes. *See* 1RP at 2197-207. Stevens identified Coe from his high school yearbook. *Id.* at 2202-04.

2) Diane J. (May 28, 1971)

Diane J., who testified at the SVP trial, was 20 years old in May 1971 and lived with roommates in an apartment on Maple Street in Spokane. 1RP at 2212. Coe was caught by her neighbors after he broke into her apartment and sexually assaulted her on May 28, 1971. *See* 1RP at 2213-19. Diane identified Coe as her assailant. *Id.* at 2219. Coe provided the police with a written, signed statement. *Id.* at 2233-34.

3) Colleen D. (March 18, 1977)

In 1977, Colleen D. lived in with her sister in Spokane. CP at 4234. On March 18, 1977, Coe accosted her in the women's bathroom at the VIPS Restaurant in Spokane and made crude comments to her. *See* CP at 4234-35. Witnesses led police to Coe. CP at 4237-38. Colleen's identification of Coe and circumstantial evidence linked him to the incident. *See* CP at 4235, 4237-38, 4241.

4) Robin T. (November 26, 1978)

Robin T., who testified at the SVP trial, was 19 years old in November,

1978 and lived in Spokane. 1RP at 2240. In the early evening of November 26, 1978, Coe grabbed and squeezed her breasts on a Spokane sidewalk in broad daylight. Robin identified Coe from a photo array. See 1RP at 2240-45; State's Exhibit 16.

(g) Patricia O. (August 15, 1979)

In August, 1979, Patricia O. was a student and lived in Spokane in a house on the South Hill. CP at 4297. On the evening of August 15, 1979, Coe committed indecent liberties against her on the South Hill. Patricia fought him off and fled. She identified him from sets of pictures. See CP at 4297-99, 6752.

**(h) Other evidence of deviant arousal to
nonconsent**

Dr. Phenix relied on Coe's penile plethysmograph (PPG) stipulation. 1RP at 3127, 3136. Dr. Phenix read it to the jury:

Prior to trial the Court ordered Mr. Coe to take part in a comprehensive Sexually Violent Predator evaluation. Among other procedures, the Court ordered Mr. Coe to submit to a penile plethysmograph test. Mr. Coe refused to take part in that test, and the Court found that he had no lawful justification for his refusal. Mr. Coe's refusal prevented Dr. Phenix from obtaining relevant information about Mr. Coe's sexual arousal patterns. The jury may infer from Mr. Coe's refusal that he is deviantly aroused by forcible, nonconsensual sexual contact with adult women.

Id. at 3136. Dr. Phenix considered this language to be Coe's admission. *Id.*

Dr. Phenix also relied on information about a statement Coe made to another inmate that supported her opinions. *Id.* at 3127, 3136-37. The inmate reported that, while Coe never admitted committing rapes, he said, "[Y]ou have

to use force or hurt women to get off." *Id.* at 3538-39. He also reportedly said that he had a dislike for women and had to have that state of mind to achieve sexual satisfaction. *Id.* Dr. Phenix considered this evidence of another admission by Coe. *Id.* at 3136-37. Coe's expert, Dr. Donaldson, asked Coe about this statement, but could not remember what Coe said, could not find his notes about it and did not put anything about it in his report. *Id.* at 3539-40.

**(2) Mental abnormality: Paraphilia NOS,
Urophilia/Coprophilia**

Dr. Phenix diagnosed Coe with Paraphilia NOS Urophilia/Coprophilia. 1RP at 3142. There was substantial evidence to support her diagnosis.

(a) Massage parlor behavior

Dr. Phenix had a substantial amount of information indicating that Coe was aroused to urine and feces in both consensual and non-consensual sexual activity. The reports she had reviewed from massage parlor workers indicated that Coe wanted the workers to urinate on him during sexual activity, had urinated on the hot rocks used for massaging and had defecated in sinks. 1RP at 3143.

(b) Coe's masturbation tape

While incarcerated, Coe made a recording on a cassette tape for a female acquaintance. *Id.* at 3143-44. Coe's friend Jay Williams identified the voice on the tape as Coe's. *Id.* at 2812-14. Coe's recorded message told his female acquaintance he would love to have her "send a stream of piss down my chest," and that he would "love to see you piss, Baby, I love to see you shit." *Id.* at 3144-45. Coe said, "I'd love to have you take a shit, Baby, and then I'd fuck you in the ass, getting some shit on my dick, Baby, and shit in my cum up

there." *Id.* at 3145

(c) Symptoms exhibited in the rapes

Dr. Phenix also considered Coe's behavior in the signature rapes. In seven of those crimes, Coe asked his victims to urinate or defecate, indicating his arousal to urine and feces in nonconsensual sexual activity. 1RP at 3145, 3277.

(3) Mental abnormality: Exhibitionism

Dr. Phenix also diagnosed Coe with Exhibitionism. There was substantial evidence at trial to support that diagnosis.

(a) Identifications

There were seven crimes of indecent exposure supporting Coe's Exhibitionism, in addition to acts during rapes where Coe asked a victim to look at his genitals. In each of the following seven crimes the victims identified Coe in some manner.

(b) Mary O. (December 19, 1978)

On the morning of December 19, 1978, Coe exposed himself to Mary. She reported it to police and later identified Coe as the perpetrator when she saw him on television. See CP at 4276, 4278.

(c) Jeanie R. (October 6, 1979)

In October, 1979, Jeanie R. lived in a daylight basement apartment in Spokane. CP at 6763. Around October 6, 1979, Coe exposed himself to her while she was in her car, in the carport. She identified Coe after she moved to another state when a relative sent her Coe's picture in the newspaper. See CP at 6763-65, 6767, 6769.

(d) Claudia H. (October 29, 1979)

Early one morning in late October or early November, 1979, Claudia H. was waiting for a bus to take her to High School for drill team practice. CP at 6771. Coe exposed himself and spoke crudely to her. Claudia later identified him from his picture in the newspaper. *See* CP at 6771-72.

(e) Ann J. (January 2, 1981)

Ann J., who testified at the SVP trial, was 31 years old in January, 1981 and on Spokane's South Hill. 1RP at 2515. In the early morning of January 2, 1981, Coe exposed a dildo to her, made crude comments and chased her while she waited for a bus on the South Hill. She identified Coe in a photograph of a line-up. *See* 1RP at 2516-22, 2777-78.

(f) John L. (February 28, 1981)

John L., who testified at the SVP trial, is a retired dentist living on Spokane's South Hill. 1RP at 2433. On the morning of February 28, 1981, he saw Coe running on the South Hill with no pants on. He identified him from a photograph of a line-up. *See* 1RP at 2433-41, 2778.

(g) Julie He. (March 1, 1981)

In March 1981 Julie He. was 17 years old, lived on the South Hill with her family and was a junior at Gonzaga Prep. CP at 4358. She went for a run on the morning of Sunday, March 1, 1981. *Id.* She came across Coe lying on a bench, with his pants down and masturbating. She wasn't absolutely certain but identified Coe from a photograph of a line-up. *See* CP at 4358-59, 4355.

(h) Mary G. (March 8, 1981)

Mary G., who testified at the SVP trial, was 18 years old in

February, 1981, and attended Spokane Community College on a track scholarship. 1RP at 2448. On the morning of March 8, 1981, she went for a run along a chip trail that ran along the Spokane River, and Coe exposed a dildo to her. Mary G. picked Coe, who she chased, out of a live line-up, as did another witness. See 1RP at 2448-55, 2461-68.

(i) Coe's exposure at the SCC (June 6, 2008)

On June 6, 2008, Coe committed an act of indecent exposure at the SCC. He masturbated during a census check, and when the female staff saw him, he continued to masturbate while he locked eyes with her. Ordinarily, Coe avoided eye contact with this staff member. See 1RP at 2582-614.

(j) Coe's dildo

Victims Ann J. and Mary G. reported that Coe exhibited a large dildo to them. 1RP at 2451, 2517-18. Perham testified that Coe owned a large dildo that he showed to her after she moved in with him. CP at 3611. On two occasions a nude Coe startled Perham when he burst into their bathroom with the dildo held over his genitals and yelled, "Look." *Id.* Another time, he talked about surprising strangers with it. *Id.* Coe kept it in his bedroom and Perham asked him to get it out of the house. Coe's SVP deposition testimony conflicts with Perham's. See CP at 3644-50.

(4) Risk Assessment

To the extent that Dr. Phenix's risk assessment of Coe relied on the 33 offenses that were linked to him, the substantial evidence above supported such reliance. Therefore, even had the trial court excluded HITS as substantive

evidence, it would not have changed Dr. Phenix's opinions or altered the outcome of the trial.

c. Given the Overwhelming Evidence Supporting Dr. Phenix's Opinions, HITS Could Not Have Altered the Outcome of the Trial

The evidence documented above constitutes overwhelming supporting Dr. Phenix's opinions. It is not possible for the HITS data, on its own, to have altered the outcome of the trial. HITS merely provided corroboration for what was already apparent—that Coe demonstrated a unique set of behaviors in his sexual assaults on strangers. Therefore, if admission of the HITS data was error, it was harmless. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 452-53, 191 P.3d 879, 891 (2008) (error is harmless unless it was reasonably probable that it changed the outcome of the trial).

D. The Trial Court Did Not Abuse Its Discretion By Admitting The Testimony Of Victims Of Unadjudicated Crimes

Coe argues that evidence of Coe's crimes was wrongly admitted because the trial court should not have relied on Dr. Keppel's signature evidence or the HITS data. This argument, of course depends on the accuracy of his previous arguments, which the State believes have no merit. The Court should find that the trial court did not abuse its discretion and there was no error in admitting the unadjudicated offenses.

The ritualistic signature identified by Dr. Keppel was sufficient to prove identity in the unadjudicated rapes by a preponderance of evidence, as it was in *Russell*. 125 Wn.2d at 66-67. If this Court agrees with the State that the trial court did not abuse its discretion admitting the signature evidence, then that is the end of this issue. The signature evidence being sufficient, then Dr. Phenix

properly relied on it in forming her opinions and there was no error in admitting substantive evidence through victim testimony, regardless of the admission of HITS evidence.

If this Court agrees with Coe that Dr. Keppel's testimony should not have been admitted, there is still the issue of whether Dr. Phenix reasonably relied upon it. The two issues are not identical. Dr. Phenix is permitted to rely on facts or data reasonably relied upon by experts in her field. ER 703. She testified the Dr. Keppel's analysis is the type of information that psychologists rely upon in conducting SVP evaluations, because it provides data that helps them determine an offender's true criminal sexual history. 1RP at 3098-99. Therefore, whether or not the signature evidence was substantively admissible, the trial court did not abuse its discretion by permitting Dr. Phenix to rely upon it. Her opinions, consequently, would not be affected by the substantive exclusion of that evidence and the jury would still have heard her testimony and the basis of her opinions.

If this Court holds that the signature evidence was inadmissible and Dr. Phenix should not have been permitted to rely upon it, this Court could still find that there was a sufficient MO signature present for linking the unadjudicated rapes. That would be the signature the State identified when developing HITS evidence. There are seven behavioral features in the Harmia rape, sufficient to form an MO signature, that link 20 unadjudicated rapes to Coe. See III(C)(2) *supra*. When that is expanded to nine behavioral features in the Harmia rape, 15 unadjudicated rapes are linked to Coe by that unique MO. *Id.* And, there are ten behavioral features in the rape of Julie Harmia that are

shared by at least 13 other crimes. *Id.* There is no need to rely on expert testimony or HITS to find that signature. As in all the MO signature cases cited by Coe, identity can be proved where an accumulation of seemingly common behaviors combine to form a unique signature. *Jenkins*, 53 Wn. App. at 237. Therefore, even without Dr. Keppel's testimony or the HITS evidence, there is sufficient evidence of an MO signature to support the trial court's decisions. It matters not whether that is the theory on which the trial court admitted the unadjudicated rapes. "An alternate theory can be used to uphold a result below, even if not relied on there, if it is established by the pleadings and supported by proof." *State v. Collins*, 110 Wn.2d 253, 258 n.2, 751 P.2d 837 (1988) (citing *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985)).

This Court's decision on HITS does not affect this issue. Dr. Phenix originally formed her opinions without HITS evidence, and her testimony would have been unchanged had HITS been excluded. HITS provided partial corroboration for the crimes already linked to Coe. The unadjudicated rapes were properly admitted regardless of this Court's disposition of that issue. In any event, whether or not HITS was wrongly admitted, the trial court properly allowed Dr. Phenix to rely on it. *Russell*, 125 Wn.2d at 69.

E. The Trial Court Did Not Abuse Its Discretion By Permitting Dr. Phenix To Rely Upon Signature And HITS Evidence

Coe maintains that the trial court abused its discretion by permitting Dr. Phenix to rely on signature and HITS evidence. There was no error.

The trial court had "broad discretion" regarding the expert testimony in this case. *Philippides*, 151 Wn.2d at 393. Dr. Phenix is permitted to rely on

facts or data reasonably relied upon by experts in her field. ER 703. The court knew that Dr. Phenix believed that the signature evidence was information or data that psychologists like her reasonably rely upon in conducting SVP evaluations. CP at 4887-88; 1RP at 3098-99. Armed with that information, the trial court had a tenable reason for permitting Dr. Phenix to rely upon it, and did not abuse its discretion.

The trial court's decision to permit Dr. Phenix to rely on HITS evidence was amply 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). This same principle was noted by trial court in its ruling. CP at 891-92. Both Dr. Phenix and Tammy Matheny, the HITS Investigator who testified at Coe's trial, were thoroughly cross-examined regarding the strengths and weaknesses of the information that HITS can provide. *See e.g.* 1RP at 2690-738. Any concerns that Coe had about the weight to be given to that evidence he was able to address at trial. The trial court did not abuse its discretion.

F. The Trial Court Did Not Abuse Its Discretion By Permitting Dr. Phenix To Disclose The Bases Of Her Opinions Under ER 703 And 705

Coe next assigns error to the trial court's decision allowing the State's forensic psychologist, Dr. Amy Phenix, to testify about unadjudicated offenses that she reasonably relied upon in forming her diagnostic and risk assessment

opinions. Specifically, Coe objects to 13 offenses where victims did not testify at trial. Opening Br. at 76-77. Though he acknowledges the trial court's discretion to allow such testimony and notes that it gave the required limiting instruction, he speculates that "the jury probably viewed this underlying information as evidence that Coe actually committed these offenses[.]" *Id.* at 74.

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. Here, the court exercised its discretion carefully, permitting Dr. Phenix to disclose highly relevant sexual crime information she reasonably relied upon, but refusing to allow her to rely on or testify about several crimes.

ER 703 allows a trial court to admit expert opinion testimony that is based on facts or data that are not otherwise admissible, if such facts or data are of a type reasonably relied on by experts in the field.¹⁹ ER 705 addresses the testimonial disclosure of those facts or data, and permits experts to testify to otherwise inadmissible information.²⁰ The rule does not permit an expert to testify about "all manner of inadmissible evidence." *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 275, 215 P.3d 990 (2009) (citing *State v. Martinez*, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995)).

¹⁹ ER 703 provides: The facts or 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.

²⁰ ER 705 provides: The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

However, it does give the trial court the discretion to admit hearsay and otherwise inadmissible information to explain the basis of the expert's opinion. *Id.* (citing *State v. Wineberg*, 74 Wn.2d 372, 384, 444 P.2d 787 (1968); *State v. Ecklund*, 30 Wn. App. 313, 633 P.2d 933 (1981); 5B Karl B. Tegland, *Washington Practice: Evidence Law And Practice* § 703.5, at 232-33 (5th ed. 2007)). Evidence admitted for that purpose is not substantively admitted. *In re Detention of Marshall*, 156 Wn.2d 150, 163, 125 P.3d 111 (2005).

A trial court's discretion under ER 703 and 705 enables it to prevent the improper admission of hearsay evidence "that is not necessary to help the jury understand the expert's opinion." *Martinez*, 78 Wn. App. at 880. Thus, where a trial court allowed a toxicologist to testify about information that he did not reasonably rely upon in forming his opinions, it was error, albeit harmless in that case. *State v. Brown*, 145 Wn. App. 62, 75, 184 P.3d 1284 (2008). It was also error where a doctor testified about the conclusions of other doctors that he did not rely upon in forming his opinions. *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 an SVP case, the trial court did not err by allowing Dr. Phenix to testify about a number of facts that would not have been otherwise admissible, in order to explain the bases of her opinions. *Marshall*, 156 Wn.2d at 163. Here, as in *Marshall*, Dr. Phenix related the information she relied upon in forming her diagnostic and risk assessment opinions. Before she offered that testimony, 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. Coe's speculation that the jury did otherwise does not establish that the court abused its discretion.

The standard for admitting that testimony by Dr. Phenix requires that it be information of a type reasonably relied upon by experts in the relevant field. ER 703. Dr. Phenix testified that it is important for an expert in an SVP case to understand the offender's criminal sexual history. 1RP at 3084. Accordingly, experts conducting SVP evaluations routinely rely upon unadjudicated offenses, the occurrences of which are "quite common." *Id.* at 3085. To determine for her purposes Coe's criminal sexual history, Dr. Phenix reviewed approximately 74,000 pages of records and drew reasonable conclusions about whether there was sufficient evidence linking Coe to unadjudicated crimes. *Id.* at 3079, 3084-85. That testimony laid the foundation for her to relate the facts underlying her opinions to the jury.

In this case, the State exceeded the ER 703 requirement. Prior to trial, the court considered whether the State had proven Coe the perpetrator in the 40 unadjudicated offenses Dr. Phenix originally relied upon. In three cases, the court ruled that the State had not produced evidence sufficient linking Coe to those crimes.²¹ 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.²² ER 403. And, in 36 unadjudicated

²¹ Laura T. (CP at 895), Barbara M. (CP at 898) and Karen H. (CP at 905).

²² Colin M. (CP at 897-98).

offenses, the court found that the State had proven 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 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.*

Washington courts recognize the importance of the information Dr. Phenix relied upon:

The manner in which the previous crimes were committed has some bearing on the motivations and mental states of the petitioners, and is pertinent to the ultimate question here. Moreover, the likelihood of continued violence on the part of petitioners is central to the determination of whether they are sexually violent predators under the terms of the Statute. . . . In assessing whether an individual is a sexually violent predator, prior sexual history is highly probative of his or her propensity for future violence.

Young, 122 Wn. 2d at 53. The crimes linked to Coe, therefore, 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.

In the alternative, Coe argues that jury could not have followed their

instruction to use non-substantive evidence only for evaluating Dr. Phenix's opinions. Opening Br. at 78-79. The distinction was easier for the jury than Coe portrays it, however. There was a clear dichotomy between the sources of the information. Substantive evidence was offered by the direct testimony of witnesses, primarily victims, who were then cross-examined by Coe. Other crimes discussed by Dr. Phenix for the purpose of supporting her opinions lacked live witnesses. Jurors, who were provided notepads, could readily distinguish between those sources of information. In its closing argument, the State framed its discussion of all 33 crimes only as to how they supported Dr. Phenix's opinions. 1RP at 3771. The trial court instructed the jury three times that they were to use non-substantive crime evidence only to evaluate Dr. Phenix's opinions. Coe's counsel made extended comments on the need to use the evidence for the purpose for which it was offered. 1RP at 3820-21.

Coe argues that the jury couldn't have followed the limiting instruction because there was too much evidence. Opening Br. at 79. The amount of evidence was indeed unusual, because of Coe's 15 year history of committing sexual crimes. Coe's argument seems to be that an expert is limited in what they can relate when a sex offender has a remarkably extensive criminal sexual history.

Though he cites 13 out of 32 crimes he believes Dr. Phenix should not have testified about, Coe claims that Dr. Phenix's reliance was an "all or nothing thing . . . she relied on all 33 offenses." Opening Br. at 82. Her testimony, however, refutes that claim. Dr. Phenix considered even seven sexual assaults to be a lot. 1RP at 3248.

Coe argues the limiting instruction could not have been effective. In support he quotes some federal cases that appear to make devastating comments about the general efficacy of limiting instructions. For the proposition that such instructions are a "judicial lie" and a "placebo device" he cites to *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) and *Nash v. United States*, 54 F.2d 1006 (2d Cir. 1932). His citations do not support his argument.

Bruton and *Nash* were appeals from joint trials of co-defendants where one party's confession implicating both defendants was admitted, with a limiting instruction that the jury apply the evidence only against the confessing party. 391 U.S. at 123; 54 F.2d at 1006. In *Nash*, the convictions were affirmed, despite admission of the confession. 54 F.2d at 1008. In *Bruton*, however, where the declarant did not testify, the Supreme Court found it was a Sixth Amendment violation and reversed the conviction, holding that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination."²³ 391 U.S. at 137, 88 S. Ct. at 1628. Simply redacting the confession, however, removes the concern. See e.g. *In re Personal Restraint Petition of Hegney*, 138 Wn. App. 511, 545-46, 158 P.3d 1193 (2007); *Richardson v. Marsh*, 481 U.S. 200, 206-08, 107 S. Ct. 1702, 1706-07, 95 L. Ed. 2d 176 (1987).

Bruton represents only "a very narrow exception to the almost invariable assumption of the law that jurors follow their instructions[.]" *Richardson*, 481 U.S. at 200, 107 S. Ct. at 1703;

²³ SVP detainees have no right to confront witnesses at trial. See *infra* at III(G) of this Response; *In re Detention of Stout*, 159 Wn.2d 357 (2007).

Hegney, 138 Wn. App. at 545-46. The same holds true in Washington State, where our Supreme Court "has often recognized that "[t]he jury is presumed to follow the instructions of the court." *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007) (quoting *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)). Coe's distrust of limiting instructions is not of concern here. Even Judge Learned Hand, whose strong language Coe invokes, believed that, "In effect, however, the rule probably furthers, rather than impedes, the search for truth[.]" *Nash*, 54 F.2d at 1007.

Coe cites a Washington case for the proposition that in some situations the danger that the jury will not follow a limiting instruction is great and the consequences are dire. *State v. Dent*, 123 Wn.2d 467, 486, 869 P.2d 392 (1994) (quoting *Bruton*, 391 U.S. at 135-36). But *Dent* merely recognized the *Bruton* rule about a co-defendant's confession. As noted *supra*, *Bruton* represents "a very narrow exception[.]" *Richardson*, 481 U.S. at 200. That narrow exception is not present in this case, and was not even present in *Dent*, where the Court had no concerns about a limiting instruction for hearsay statements by one defendant that could have been prejudicial to a co-defendant. 123 Wn.2d at 486-87.

Coe's speculation about the jury does not show that he was unfairly prejudiced. Dr. Phenix's testimony was proper and the court's limiting instruction is presumed effective.

G. Coe's Proposed New Confrontation Rule Would Lead To Absurd Results And Should Be Rejected

Coe argues his due process right to confront the witnesses against him was violated when the trial court admitted evidence of unadjudicated sexual

offenses, pursuant to ER 703 and 705, to show the bases of Dr. Phenix's opinions. Washington precedent squarely refutes Coe's veiled Confrontation Clause argument. Furthermore, even if this Court chooses to undertake a due process analysis of the admission of the data upon which Dr. Phenix based her opinions, application of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), shows that due process was well satisfied in this case.

1. As a Respondent in a SVP Civil Commitment Proceeding, Coe Has no Due Process Right to Confront Witnesses

On appeal, Coe initially claims a due process violation before launching into a Crawford analysis. He argues that Dr. Phenix's testimony about some of the unadjudicated rapes she relied upon when evaluating Coe should have been excluded because, he alleges, the testimony violated his right to cross-examine the victims of those offenses. However, Coe cannot legally support his claim because it is clear that the Sixth Amendment right to confront witnesses does not apply in SVP proceedings. *In re Detention of Stout*, 159 Wn.2d at 374-76; *In re Detention of Law*, 146 Wn. App. 28, 37, 204 P.3d 230 (2008). Likewise, "an SVP detainee does not have a due process right to confront a live witness at a commitment trial, nor does he have a due process right to be present at a deposition." *Stout II*, at 374; *In re Detention of Allen*, 142 Wn. App. 1, 4-6, 174 P.3d 103 (2007).²⁴ Nonetheless, Coe now asks this Court to either ignore or overrule *Stout II* and its progeny, and create a new rule that extends the right to confront witnesses to SVP civil commitment proceedings.

Coe's argument is premised on a fundamental misunderstanding of the

²⁴ Coe acknowledges the plain language of *Allen*, which wholly rejects his argument. However, he asks this Court to disregard it.

nature of expert testimony. What he fails to acknowledge is that the evidence at issue is the ultimate opinion of the expert witness, not the reports upon which the expert's opinion is based. In Washington, ER 703 expressly allows experts to base their opinion testimony on facts or data that are not admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]" The Federal Rules of Evidence are in accord. *See* Fed. R. Evid. 703. Expert witnesses are not required to have personal, firsthand knowledge of the evidence on which they rely. *In re Disability Proceeding Against Keefe*, 159 Wn.2d 822, 831, 154 P.3d 213 (2007).

Instead, ER 705 gives the trial court discretion to permit an expert to relate hearsay or otherwise inadmissible evidence to the jury for the limited purpose of explaining the reasons for his or her opinion. *Deep Water Brewing, LLC v. Fairway Res., Ltd.*, 152 Wn. App. 229; *State v. Brown*, 145 Wn. App. 62. These principles have long been extended to SVP proceedings. *In re Detention of Young*, 122 Wn.2d 1 (psychiatrist was properly allowed to express an opinion on the defendant's dangerousness, based upon medical reports and criminal histories compiled by others; the court rejected a defense argument that the opinion was inadmissible because it was based upon hearsay); *In re Detention of Marshall*, 156 Wn.2d 150 (the State's expert was properly allowed to base an opinion on certain medical and institutional records; the court rejected the respondent's argument that the expert should be required to testify on the basis of personal knowledge; the court said ER 703 allows experts to base opinions on hearsay, so long as other experts in the same

field reasonably base their opinions on such information).

Reliance upon facts not in evidence is an inherent part of expert psychological testimony in an SVP case. Here, in forming her opinions about Coe's mental state and risk of reoffense, Dr. Phenix necessarily relied upon various statements and reports made or created by other people, including reports of past offenses. The reason for consideration of the reported offenses is obvious. As noted previously in this response, "The manner in which the previous crimes were committed has some bearing on the motivations and mental states of the petitioners. . . . In assessing whether an individual is a sexually violent predator, prior sexual history is highly probative of his or her propensity for future violence." *Young*, 122 Wn.2d at 53.

Consideration of records of reported offenses is so basic, relevant and important, that a forensic expert's failure to do so would be tantamount to professional malpractice.²⁵ Coe's effort to decide in hindsight which offenses were worthy of consideration through a proposed creation of a confrontation right is misplaced. Because Coe had the opportunity to, and did, vigorously challenge the bases of Dr. Phenix' opinion, due process is satisfied and his appeal should be rejected.

2. Due Process Does Not Require Confrontation of Any Potential Witness Who was the Source was Satisfied Matthews balancing favors admission of the testimony

None of Coe's reasons for inviting this Court to adopt a new rule, requiring production of every person who produced information utilized by an

²⁵ In fact, the same offense reports and victim statements at issue here were relied upon by Coe's own expert, who also testified about the reports at trial. *See e.g.* IRP at 3462-63.

expert, carry any weight. For example, Coe relies upon *In re Detention of Brock*, 126 Wn. App. 957, 963, 110 P.3d 791 (2005) in an attempt to support his claim that the opportunity for cross-examination was required at his trial. His reliance on *Brock* is dubious considering that the Court rejected a claim that the opportunity to cross-examine witnesses is required during annual review hearings conducted pursuant to RCW 71.09.090. At annual review hearings, the State's evidence is subject to a probable cause standard. RCW 71.09.090(2)(b). Thus, the State does not have the burden to annually prove, beyond a reasonable doubt, the need for continued confinement.

In that context, consider a portion of the Supreme Court's rationale for rejecting the same confrontation argument in *Stout II*: "More importantly, in none of the cases cited by Stout did minimum due process require that the government bear the burden of proof beyond a reasonable doubt. By that fact alone, Stout received significantly more process than any of the individuals in the cases cited by him." 159 Wn.2d at 374. Because *Brock* is yet another case involving a lesser burden of proof than that which protected Coe at trial, it does nothing to undermine *Stout's* precedential value here.

The *Stout II* Court's reasoning also recognized that, although the ultimate goal of the Fourteenth Amendment's Due Process Clause is to ensure that procedure comports with fundamental principles of fairness, the provision does not guarantee a particular form or method of procedure. U.S. Const. amend. XIV; *See also Young*, 122 Wn.2d at 867. Rather, in determining what procedural due process requires, courts balance three factors: (1) the private

interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the value of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004) (citing *Mathews v. Eldridge*, 424 U.S. at 335).

Although Coe clearly has a significant private interest in his liberty, he has considerable procedural safeguards in place. He has statutory rights to counsel, to present evidence and cross-examine witnesses, the ability to gather evidence and use the civil discovery rules, and the protections of a contested civil trial in which the allegations against him are proven beyond a reasonable doubt. In addition, *Stout II* recognized the significance of the procedural protections afforded an SVP detainee when it considered the second *Mathews* factor. *See* 159 Wn.2d at 370-71.

All of these same procedural protections were enjoyed by Coe at trial, and he presents no reason to now assume that they have less value here. *Stout II* acknowledged the unique evidentiary challenges found in SVP litigation. *Id.* at 372. The considerations deemed relevant to the analysis in *Stout* are present here. The five offenses of which Coe complains here each occurred over thirty years ago. CP at 6750. Although these witnesses were not available to testify, the records reflected that each of the five victims of those offenses had personally identified Coe as the perpetrator. *Id.* Given the extreme passage of time, the importance of the information to the experts, and the voluminous due process protections Coe was afforded during his trial, his argument is without merit. In light of the firm stance on this issue taken by

Washington Courts, Coe cannot simply invent a due process right to confront every one of the many women who reported that he sexually assaulted them. *See In re Allen*, 142 Wn. App. at 4-6 (no due process right to confront girl who reported that respondent sexually touched her).

3. Coe's Proposed Rule Would Lead To An Absurd Result

Forensic psychological evaluation of an alleged SVP often requires consideration of reported sexual offenses that, for a variety of reasons outside the SVP proceedings, are unadjudicated. 1RP at 3195; *See also In re Detention of Strand*, 167 Wn.2d 180, 185, 217 P.3d 1159 (2009). Nonetheless, Coe asks this Court to create a rule that could potentially force an expert witness to withhold a significant portion of the basis for his or her opinion from the jury. Such a rule would unnecessarily undermine witness credibility, and render meaningless the viable alternative of challenging factual bases during cross-examination.

Dr. Phenix reviewed over 74,000 pages of records that included mental health and psychiatric records, court documents, police reports, probation officer's reports, correctional documents—work, disciplinary problems, medical history, progress notes from the SCC, and Coe's own writings to friends and acquaintances. 1RP 3078-79. She testified that the type of records she reviewed were "a standard set" of records of the type that Dr. Phenix and other professionals in her field would ordinarily rely upon. 1RP at 3083. Given the variety and volume of information routinely relied upon in cases involving expert testimony, Coe's proposed rule is especially ill-conceived. Here, taking Coe's proposed confrontation requirement to its logical

conclusion, the proponent of expert testimony would have to produce, not just every alleged victim, but also every police or corrections officer, mental health counselor, doctor, friend or family member who, at some time in the past, provided recorded information that was ultimately relied upon by the expert.

Coe's proposed confrontation rule is unsupported by case law, or by common sense. It ignores the maxim that information admitted pursuant to ER 703 and 705 is not substantive evidence. It ignores the limiting instruction that was read to the jury before discussion of the unadjudicated offenses began. 1RP at 3085-86. As stated above, Coe's due process rights were amply assured during his trial. The bases for Dr. Phenix's opinions were strenuously challenged during cross-examination, and also during closing arguments. 1RP at 3821. The rule proposed by Coe would lead to an absurd result that has no support in the law. For these reasons, his appeal should be denied.

H. Coe Has Not Established Cumulative Error

Coe, relying on all of his arguments, claims cumulative error in his SVP trial requires reversal of the commitment order. Opening Br. at 98. Because Coe has failed to establish error, his cumulative error argument fails.

"A defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair." *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). The trial court here did not make multiple errors. Nor was Coe's counsel ineffective by deciding not to request a jury instruction, or by vigorously challenging the HITS evidence. Even if this Court finds some errors below, the overwhelming evidence supporting Dr. Phenix's opinions renders any such 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).

Here, Dr. Phenix's opinions that Coe is mentally ill and dangerous were supported by an extraordinary amount of evidence. 22 of 33 victims discussed at trial made some identification of Coe as the perpetrator who had sexually offended against them. Coe's argument that Dr. Phenix was allowed to relate *too much* evidence to the jury is a tacit admission of the amount of evidence the State adduced. There is no evidence in the record excluding Coe from any unadjudicated offenses. His diagnoses and the deviant routine they propelled easily distinguishable in the rape crimes lined to him. The Court should deny Coe's appeal and affirm the jury's verdict and the order of commitment.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the order civilly committing Coe as an SVP.

RESPECTFULLY SUBMITTED this 19th day of August, 2010.

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