

63732-1

63732-1

NO. 63732-1-I

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

In re the Commitment of Randy Town,

STATE OF WASHINGTON,

Respondent,

v.

RANDY TOWN,

Appellant.

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MAR 23 2011

King County Prosecuting Attorney's Office
Criminal Division
Civil Commitment Unit

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

The Honorable Michael J. Trickey, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>STATEMENT OF THE CASE IN REPLY</u>	1
B. <u>ARGUMENT IN REPLY</u>	1
1. CONTRARY TO THE STATE’S ARGUMENTS, NO DOOR WAS OPENED TO THE VOUCHING THAT DENIED TOWN A FAIR TRIAL.....	1
2. THE STATE ADVANCES A LONE DISSENTER AND RAISES PHANTOMS TO JUSTIFY THE TRIAL COURT’S ACKNOWLEDGED ERROR IN EXCLUDING RECENT OVERT ACT EVIDENCE.....	11
3. CUMULATIVE ERROR.....	20
C. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Davidson v. Municipality of Metropolitan Seattle</u> 43 Wn. App. 569, 719 P.2d 569 <u>rev. denied</u> , 106 Wn.2d 1009 (1986)	9
<u>Det. of Henrickson v. State</u> 140 Wn.2d 686, 2 P.3d 473 (2000).....	18
<u>Hayes v. Wieber Enterprises, Inc.</u> 105 Wn. App. 611, 20 P.3d 496 (2001).....	17
<u>In re Det. of Post</u> 145 Wn. App. 728, 187 P.3d 8003 (2008).....	13, 16
<u>State v. Darden</u> 145 Wn.2d 612, 41 P.3d 1189 (2002).....	17
<u>State v. Post</u> 170 Wn.2d 302, 241 P.3d 1234 (2010).....	10, 11, 12, 14, 16, 18, 21
<u>State v. Prado</u> 144 Wn. App. 227, 181 P.3d 901 (2008).....	6
<u>State v. Quismundo</u> 164 Wn.2d 499, 192 P.3d 342 (2008).....	18
<u>State v. Ray</u> 116 Wn.2d 531, 806 P.2d 1220 (1991).....	18
<u>State v. Rice</u> 48 Wn. App. 7, 737 P.2d 726 (1987).....	13
<u>State v. Suarez-Bravo</u> 72 Wn. App. 359, 864 P.2d 426 (1994).....	5

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>FEDERAL CASES</u>	
<u>United States v. Amral</u> 488 F.2d, 1148 (9 th Cir. 1973)	8
<u>United States v. Edwards</u> 154 F.3d 915 (9 th Cir. 1998)	10
<u>United States v. Fosher</u> 590 F.2d 381 (1 st Cir. 1979).....	9
<u>United States v. Lumpkin</u> 192 F.3d 280 (2d Cir. 1999)	9
<u>United States v. McKoy</u> 771 F.2d 1207 (9 th Cir. 1985)	9
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 403	11, 16, 17, 18
ER 702	8
RCW 71.09	12, 13, 18, 20

A. STATEMENT OF THE CASE IN REPLY

Citing Town's own testimony, the State claims he acknowledged sexually victimizing "over 50 children" while he was a Sunday School teacher at the Christian Faith Center. Brief of Respondent (BOR) at 8. That is inaccurate and misleading. While testifying regarding his disclosures to Marsha Macy, his treatment provider, Town acknowledged having "victimized over 50 boys" at the Sunday School. 9RP 1872.¹ In the midst of this testimony, however, Town corrected this estimate to 25, because approximately half of the class was girls, and Town denied molesting any of the girls in the Sunday School. 9RP 1873-74.

B. ARGUMENT IN REPLY

1. CONTRARY TO THE STATE'S ARGUMENTS, NO DOOR WAS OPENED TO THE VOUCHING THAT DENIED TOWN A FAIR TRIAL.

In its argument on the vouching issue, the State confuses context, with the substantive prejudice addressed in the Brief of Appellant (BOA). The State characterizes the testimony at issue here as Phenix's "record of positive or negative [civil commitment] findings[.]" BOR at 20. This characterization missed the mark. What is actually challenged is Phenix's

¹ As in the opening and supplemental briefs, the Verbatim Report of Proceedings is referenced as follows: 1RP – 6/01/09; 2RP – 6/02/09; 3RP – 6/03/09; 4RP – 6/08/09; 5RP – 6/09/09; 6RP – 6/10/09; 7RP – 6/11/09; 8RP – 6/15/09 AM; 9RP – 6/15/09 PM; 10RP – 6/16/09 Start AM & PM; 11RP – 6/16/09 Mid-AM; 12RP – 6/17/09; 13RP – 6/18/09 AM; 14RP – 6/18/09 PM.

testimony regarding the positive differential of meritorious Washington filings as compared with other states. See BOA at 21-23.

Two of the three motions in limine addressed in the opening brief were written motions: Number 3 intended to exclude Phenix's testimony regarding the number of times she recommends or declines to recommend commitment; and Number 9 intended to preclude Phenix from vouching of the prosecutor's filing standards. CP 78, 87; see also BOA at 17-18. The third motion was an oral clarification of Number 9 as to whether Phenix would be permitted to testify to weighing the fact that case had been referred to her as a factor in her classification of Town's risk. 2RP 115-17; see also BOA at 18.

To simplify matters, this case revolves around the two written motions. Number 3 was granted with the caveat that the door might be opened if Phenix was cross-examined on bias for always working for the State. 2RP 147-49. This was the motion to which counsel opened the door by asking Abbott for the number of times he had worked for various parties. See BOA at 18-20. Further, Abbott's testimony regarding the percentage of cases he found merited commitment arguably opened the door to Phenix's testimony that she found approximately fifty percent of cases referred to her as meriting commitment. 12RP 2100.

The issue here, however, addresses motion Number 9, which precluded Phenix from indicating her belief that Washington has a higher filing standard than other states. CP 87; 2RP 115. As written, that motion argued: such testimony constituted vouching for the State's counsel; was not relevant; and constituted inadmissible conformity evidence, implying that because Washington has a better history of screening commitment candidates than other states, that history reflects on the prosecutor's decision to seek commitment in Town's case. CP 87. This motion was agreed to by the State and granted by the court.² 2RP 115, 184.

None of counsel's questioning regarding Abbott's general employment for various parties or the percentage of cases he found meriting commitment, however, opened the door to a specific and clear statement that Phenix found 80 percent of Washington referrals merited commitment, while only 50 percent of cases overall were so deserving. Nowhere in Abbott's testimony did he distinguish between Washington cases and cases from other states. The trial court erred when it overruled Town's objection to Phenix's testimony that violated the agreed motion Number 9.

² There was some subsequent discussion, however, regarding Phenix's testimony in her deposition regarding whether the fact of a Washington filing entered into her risk assessment of Town. 2RP 115-17, 173-85. This was addressed in Town's opening brief. See BOA at 18.

In a footnote, the State argues the vouching error was not preserved for appeal because the “beyond the scope” objection was insufficient. BOR at 22 n.3; see also BOR at 20-21. The State ignores the long series of colloquies prior to Phenix’s rebuttal testimony and the trial court’s instruction to raise a “beyond the scope” objection if Phenix’s testimony strayed beyond permissible rebuttal. 2RP 111, 115-17, 147-49; 12RP 2117-19, 2165; 13RP 2275-77. Those colloquies show the door everyone was addressing went no further than testimony from Phenix about the percentage of cases she found warranted commitment, or not. None of those colloquies addressed whether Phenix found a higher percentage of Washington cases warranted civil commitment proceedings.

In the colloquy on the morning of Phenix’s rebuttal testimony, Town’s counsel said:

I want to make sure that Dr. Phenix’s testimony is going to be limited to the true rebuttal to Dr. Abbott’s testimony, as well as the fact that Dr. Phenix, how much – how many times that she worked for the defense and how many times did she work for the prosecution, not any other vouching or any other things that I have not opened the door to.

13RP 2275.

In response, the prosecutor said he was aware of the rebuttal rules and Phenix would be brought in to testify regarding matters the State believed the court had ruled were opened by the defense. 13RP 2276.

And the judge told Town's counsel to object if they thought something went "beyond the scope" of rebuttal for the court to rule on it. 13RP 2277. Thus, the court directed counsel regarding the nature of the objection to raise if Phenix's testimony went beyond that opened door.

During the rebuttal testimony, counsel raised the "beyond the scope" objection when the State asked Phenix how many of her civil commitment evaluations she felt had met the criteria, and the court overruled, "for reasons that have [been] put on the record." 13RP 2380-81. When the State then asked how many of the Washington cases she felt met the criteria, counsel again objected, this time saying "Standing objection." 13RP 2381. In response the court said, "You may have a continuing objection. It is overruled again for the reasons that I put on the record." Id.

The purpose of requiring specific objections at trial is to alert the trial court of the issues the court is to rule upon. State v. Suarez-Bravo, 72 Wn. App. 359, 365, 864 P.2d 426 (1994) (objection sufficient if it informs the court of the basis for the claimed error). Here, the outlines of the permissible rebuttal testimony had been well established. The court was aware of the issues before it. The State's suggestion this error is not preserved for appeal finds no support in the record. The issue is properly before this Court.

The State argues the prosecution is allowed “greater latitude when responding to defense actions that open a previously barred door.” BOR at 23. That latitude, however, is not unbounded. Statements that go beyond the scope of an appropriate response are not permitted. State v. Prado, 144 Wn. App. 227, 252, 181 P.3d 901 (2008) (addressing claim of prosecutorial misconduct in closing argument). The State’s elicitation of evidence from Phenix comparing Washington’s percentage of meritorious civil commitment filings with those of other states went beyond the scope of any door opened by counsel’s questioning of Abbott. 13RP 2381. In like manner, the State’s argument supported by that testimony went beyond the scope of an appropriate response. 14RP 2434.

In an effort to deny the obvious, the State claims no connection between the prosecutors and Phenix was presented to the jury because Phenix told the jury she had been contacted by the Department of Corrections (DOC) to evaluate Town. BOR at 21-22. This argument, however, is premised on the jury performing a prodigious feat of bureaucratic gerrymandering. Phenix was presented as the State’s expert witness, and the trial deputies who called her were functioning as the State’s attorneys. Given the interactions between Phenix and the prosecutors witnessed by the jurors, the fact Phenix was initially contacted

by DOC or any other agency is irrelevant. The connection between Phenix and the State's attorneys was obvious to anyone in the courtroom.

The State also argues Phenix's testimony regarding the differential percentage of meritorious filings in Washington compared with other states did not violate Town's motion in limine Number 9 because Phenix's deposition, from which counsel learned of this differential was not entered into evidence. BOR at 23-24. The State says, "The testimony that was offered to the jury mentions neither Washington's rigorous screening process or its heightened filing standards." BOR at 24. It strains credulity to believe a jury, hearing Phenix testifying that she found 50 percent of cases over all merited filing commitment proceedings but 80 percent of Washington cases were meritorious, would not instantly fill in the blanks regarding the quality of the case before them. The prejudicial error here is that the jury heard Washington does a better job than other states of presenting Phenix with meritorious cases.

The State then argues Phenix's vouching testimony was harmless error because it indicates she is biased in favor of Washington State. BOR at 22, 24-25. This argument ignores the fact that Phenix had been presented to the jury as an expert scientific witness, with the trial prosecutors clearly establishing her professional credentials, education and experience. 6RP 1157-73. Thus, she was presented as an objective

observer, permitted to give her opinions based on that education and experience. ER 702.³ Even though this was a battle of experts, that battle addressed scientific approaches towards diagnoses, tests, actuarials, and the analysis of records. See BOA at 11-15.

Nothing in the record established Phenix as a person who based her decisions on personal emotional considerations. Neither would anything in the record permit the jury to infer Phenix had any special fondness for, or emotional attachment to Washington State, as opposed to any other state. The State's suggestion that the jury would see Phenix's vouching as evidence she was biased for, or less careful with, her Washington cases is supported by nothing but whimsy.

Finally, the State presents this issue as a matter of trial court discretion. BOR at 19. The vouching in this case, however, goes beyond the simple evidentiary issue to compromise the fundamental fairness of the proceedings.

It has long been recognized that witnesses qualified to testify as experts carry a special aura of reliability. See United States v. Amral, 488 F.2d, 1148, 1152, (9th Cir. 1973) (because of its aura of special reliability

³ ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

and trustworthiness, expert testimony courts substantial danger of undue prejudice, confusing issues, or misleading jury); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979) (recognizing aura of special reliability and trustworthiness of expert testimony creates substantial danger of prejudice and confusion); United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) (proffered expert identification testimony properly excluded; added aura of reliability that necessarily surrounds expert testimony would have placed officers' credibility in jeopardy); see also Davidson v. Municipality of Metropolitan Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569, rev. denied, 106 Wn.2d 1009 (1986) (recognizing danger of jury being overly impressed with a witness possessing the aura of an expert). This special aura of reliability carried by expert witnesses implies the prejudice from Phenix's vouching here is analogous to that found in prosecutorial vouching.

In United States v. McKoy, 771 F.2d 1207 (9th Cir. 1985), the Court reversed because a former prosecutor, testifying about the plea agreement reached with co-conspirators, commented on the extreme strength of the government's case. McKoy, 771 F.2d at 1209-10. The Court analogized this vouching error to expert witness testimony.

Even if the jury did not understand the prosecutor to refer to his knowledge of facts outside the record, the jury could have construed his statements of opinion as "expert

testimony” based on his personal knowledge and his prior experience with other cases. [citation omitted]. A jury is especially likely to perceive the prosecutor as an “expert” on matters of witness credibility, which he addresses every day in his role as representative of the government in criminal trials.

Id. at 1211; see also United States v. Edwards, 154 F.3d 915, 922 (9th Cir. 1998) (recognizing jurors’ natural tendency to believe in the honesty of government attorneys).

Similarly, Phenix’s vouching for Washington’s filing standards was uttered by an expert witness carrying the same special aura of reliability and honesty as that recognized in prosecutors. The degree of prejudice here is substantially higher than typical for an evidentiary error.

Because the State’s evidence of direct molesting predated Town’s initial incarceration while his subsequent history was that of a person seeking to address his offensive behavior; and because Town presented a voluntary treatment and housing plan that would minimize his opportunities to re-offend, this case was much closer than indicated by consideration of Town’s pre-incarceration and pretreatment conduct alone.

This Court will reverse if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Post, 170 Wn.2d 302, 315, 241 P.3d 1234 (2010) (Post II). There certainly is a reasonable probability the outcome of the trial

would have been different had Phenix not been permitted to vouch for the State's filing standards. The error is not harmless, and reversal is required.

2. THE STATE ADVANCES A LONE DISSENTER AND RAISES PHANTOMS TO JUSTIFY THE TRIAL COURT'S ACKNOWLEDGED ERROR IN EXCLUDING RECENT OVERT ACT EVIDENCE.

In its argument on the recent overt act (ROA) evidence, the State raises several phantoms, including: the potential for extensive evidence of the ROA provision as an alternative to civil commitment; that evidence of the ROA provisions would "violate" ER 403;⁴ and that evidence of the ROA provisions would invite jury nullification. BOR at 26. None of these claims bear any relationship to the Supreme Court's majority decision in Post II,⁵ or to the issue raised below and here.

The State calls on this Court to follow a lone dissenting judge and bases its arguments on an overly constrained reading of Post II. BOR at 28. The State relies upon the opinion of Chief Justice Madsen in Post II,

⁴ ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

⁵ Consistent with the Supplemental Brief of Appellant (SBOA), this brief refers to this Court's opinion in In re Det. of Post, 145 Wn. App. 728, 187 P.3d 8003 (2008) as Post I and to the Supreme Court's decision as Post II. Since the SBOA was filed, however, the official Washington Reports version of the Supreme Court opinion has been published at 170 Wn.2d 302, 241 P.3d 1234 (2010). References to Post II in this brief are to the Washington Reports version of that opinion.

which the State here characterizes as a “concurrence.” BOR at 28. In fact, that opinion is both a concurrence and a dissent. See Post II, 170 Wn.2d at 319 (“Madsen, C.J. (concurring/dissenting)”). The Chief Justice concurred with the majority to reverse on the trial court’s admission of treatment available at the Special Commitment Center (SCC). Post II, 170 Wn.2d at 319. She dissented, however, from the majority’s holding regarding the admissibility of the ROA evidence at issue here. Post II, 170 Wn.2d at 319, 322 (at 322, “Thus, I dissent from the majority’s position that the trial court erred by excluding this evidence.”) The Chief Justice was the lone dissenter in Post II.

As the majority stated, the State’s ability to file a subsequent petition upon evidence of conduct amounting to a ROA is a condition that would exist if the respondent in an RCW 71.09 civil commitment trial was not committed. Post II, 170 Wn.2d at 316; see also Supplemental Brief of Appellant (SBOA) at 6-8 (discussing Post II). This condition exists only for persons otherwise liable to RCW 71.09 sanctions, and is not within the knowledge or experience of the general public.

The majority also stated this evidence is relevant because the respondent’s knowledge of the consequences for engaging in such conduct may well serve as a deterrent to such engaging in that conduct. Post II, 170 Wn.2d at 316-17. And that conduct includes anything, which would

raise the alarm of any person who knows the respondent's history and mental condition. RCW 71.09.020(12).⁶ Thus, the deterrent is addressed not only to criminal acts, but any lesser conduct tending to create such alarm. Here, Town's knowledge of the ROA provision would certainly be a deterrent from any conduct involved in his offense cycle, as such conduct would necessarily alarm anyone who knew his history and mental condition.

The State characterizes ROA evidence as having "theoretical relevance," "not strong" and having "only 'some tendency' to inform the question of future risk."⁷ BOR at 27. Relevance, however, is determined on a case-by-case basis, depending on the circumstances, facts and ultimate issues. State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987).

The State, however, seeks to constrain Post-II by ignoring the issue actually presented to the Court in that case. In Post I, the issue presented to this Court was whether ROA evidence was relevant to show his

⁶ RCW 71.09.020(12) defines a "recent overt act" as "any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors."

⁷ The State here claims it was prepared to permit argument regarding Town's fear of arrest from a criminal incident or a recent overt act for some limited purpose. BOR at 33. The State, however, does not indicate how such argument regarding a ROA could be brought without explaining to the jury just what that provision entailed. Further, as Town's counsel subsequently made clear, they were also addressing Phenix's analysis of volitional control, which includes both internal and external components. 2RP 246. see

motivation not to reoffend. Post I, 145 Wn. App. at 753. Thus, the Supreme Court's relevance analysis in Post II addressed only the issue presented. Post II, 170 Wn.2d at 316-17. Other cases, however, may present other issues. Contrary to the State's position here, nowhere in Post II did the Supreme Court say ROA evidence was precluded for other purposes. Compare BOR at 30, with Post II, 170 Wn.2d at 316-17.

Of course, the court below never addressed the relevance of the requested ROA evidence because it ruled under an erroneous application of law that all such evidence was inadmissible. See SBOA at 8. Despite this, the State argues here Town sought to inject a broad collateral proceeding with evidence from a whole raft of witnesses regarding his claimed fear of committing a ROA. BOR at 29-30. This argument finds no support in the record below or appellant's arguments here.

As an initial matter, nowhere in the Supplemental Brief of Appellant was any call made for admission of a broad spectrum of evidence on collateral matters. In fact, no specific evidence was mentioned in that brief, because there was no ruling below on specific ROA evidence. The entire issue was precluded under the trial court's erroneous legal ruling. The jury questions to Phenix and Edward Fish

also SBOA at 10-11 (discussing Phenix's reliance on the presence or lack of external controls for risk assessments).

discussed in the Supplemental Brief were merely indicative of areas the jury found significant. SBOA at 11-12.

In his Motion in Limine Number 20, Town sought to introduce evidence of the ROA provision as both an internal motivation to avoid reoffending and as an external tool to protect society. CP 101. The motion made clear, however, Town did not intend to create a hypothetical Lesser Restrictive Alternative. CP 100-01. Rather, its intent was to avoid creating a hypothetical world where society would be left without recourse unless Town was apprehended for an actual criminal violation. CP 101.

While the motion does allude to the possibility that “several witnesses” could testify regarding the ROA provision as an external control, the only evidence specified in the written motion was the list prepared by the Twin Rivers treatment providers of “otherwise legal behaviors” that could trigger an ROA intervention. CP 101. This evidence could have been introduced by Arkame Curry, a State’s witness, and supplemented by an instruction identifying these behaviors. Such an instruction would be no more burdensome to the proceedings than the instructions already given defining the crimes, which would constitute acts of sexual violence, and listing the elements of those crimes. See Supp. CP ____ (sub no. 98, Court’s Jury Instructions, 6/19/09) (Instructions 9-12). Of course, the trial court would have defined the parameters of permissible

testimony if it had conducted the ER 403 analysis. At this point, the State's assertion that the request for ROA testimony was an invitation for a broad collateral proceeding raises a mere phantom.

Likewise, the State's assertion that ROA evidence would be an invitation to jury nullification is nothing more than a phantom. BOR at 32-33. Town's counsel made clear that the ROA evidence would be aimed at Phenix's analysis of the internal and external components of volitional control. See SBOA at 10-11. There was never any suggestion counsel was planning to create a "Potemkin Village" in an imaginary land of LRAs through the introduction of the ROA provisions. To the extent, either party is attempting to obtain a verdict contrary to the stated law, the State's insistence on keeping the jury in the dark about the ROA provision as a real world condition presents the greater threat.

Despite the fact the trial court ruled the ROA evidence was inadmissible under Post I, the State calls upon this Court to directly examine the evidence to determine whether the trial court abused its discretion under ER 403. BOR at 26 n.5. In Post II, however, the Supreme Court said the trial court was in the best position to carry out this initial analysis and refused to rule on the specifics of the case. Given the fact that the ROA evidence was excluded based on the trial court's reliance on Post I, the record is insufficient to permit this Court to conduct

an independent analysis. This Court should be guided by the wisdom of the Supreme Court and remand to the trial court for a new trial where the initial ER 403 balancing is properly conducted.

Even if this Court were to address the State's ER 403 argument, the State fails to sustain its burden to exclude relevant evidence. The rule for admitting relevant evidence is very low and even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The rule for excluding such evidence under ER 403 is much higher, and the opponent of relevant evidence must show any probative value is outweighed by a "substantial danger" of the claimed ills. Hayes v. Wieber Enterprises, Inc., 105 Wn. App. 611, 618, 20 P.3d 496 (2001). The State has failed to make this showing, and given the procedural posture of this case, the State cannot do so.

The State also argues the trial court did not err by excluding the requested ROA evidence because there had been no offer of proof that Town was concerned with a future ROA as a motivating factor to avoid future offenses. BOR at 30-31. This argument fails.

An offer of proof is sufficient if it informs the court of the legal theory favoring admission, informs the court of the specific nature of the offered evidence for assessing its admissibility, and creates a record adequate for review. State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220

(1991). An offer of proof is not required, however, if the substance of the excluded evidence is apparent from the record. Id. at 539.

As discussed above, counsel explained he wanted to admit evidence of the ROA provisions as relevant to show both internal and external motivating factors for Town to avoid conduct associated with his offense cycle. And because the court applied the wrong legal standard, the record is adequate for this Court to review. See State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (court necessarily abuses its discretion by basing its ruling on an erroneous view of the law). Any deficiencies regarding the specific parameters of that evidence should have been addressed by a well-litigated ER 403 analysis, which properly belongs in the trial court.

Relying on its overly narrow view of Post II's statement on relevance, the State claims the trial court's refusal to permit introduction of the ROA evidence was "harmless" error. BOR at 34-36. In so arguing, the State presents little of substance indicating present danger and relies almost exclusively on Town's pre-incarceration and pre-treatment history to support its argument. Cf. Det. of Henrickson v. State, 140 Wn.2d 686, 692, 2 P.3d 473 (2000) (RCW 71.09 premised on a finding of the present dangerousness of those subject to commitment).

The only evidence of present dangerousness argued by the State is that Town has admitted to instances of sexual arousal to children while at the SCC. BOR at 35. But as counsel below explained in closing argument, the question of risk presented by those suffering with paraphilias is not whether their fixations persist, but rather whether they have acquired methods for ensuring the mental process does not progress to physical expression. 14RP 2448. The State cites Town's history of undetected offending as evidence that the potential for an ROA filing would not have prevented new offenses (BOR at 35),⁸ but this argument avoids the central critical fact that Town's initial self-disclosures placed him in his current situation and that he continues to self-disclose the very instances of sexual arousal the State relies on in its harmless error analysis. 9RP 1837-42; 10RP 1986.

While complaining of a defense-inspired "Potemkin Village," the State also claims exclusion of the ROA evidence was harmless because they would be able to introduce evidence that very few ROAs are used to

⁸ In this context the State characterizes Town as "a man who had no regard for his freedom or his soul["]." BOR at 35 (emphasis added). The State may have some argument regarding Town's concern for his freedom. In light of his self-disclosures, a case can be made for his willingness to sacrifice his freedom so that he might become a person who is no longer a danger to children. The State, however, has no competence in the matter of Mr. Town's "soul." Washington Courts are secular in nature, and considerations of the soul are best referred to the ecclesiastical courts. It bears noting, however, that Town stopped teaching the Sunday School classes when he self-reported his conduct to the minister. 8RP 64-65.

justify RCW 71.09 petitions. BOR at 36. Of course, that might have opened the door for testimony regarding the actual voluntary living and treatment conditions Town would be facing if released and whether those particular conditions made it more or less likely that conduct relevant to early phases of Town's offense cycle might be detected, with the resulting intervention. Certainly, a few questions about the impact of early offense cycle conduct could have been asked of the Mercy House coordinator Edward Fish and of Dr. Gerald Hover, the clinical director of the outpatient SOTP program available to Town upon release. Both had already testified about their reporting practices. 10RP 1973-74; 12RP 2067. Given the close scrutiny Town would be under while living at the ministry and in his out-patient treatment, there is a reasonable probability the jury would have found against commitment.⁹

The court's error refusing testimony about the ROA provisions of RCW 71.09 was prejudicial error. This Court should reverse.

3. CUMULATIVE ERROR.

Nothing in the State's argument here addresses the cumulative effects of the two issues raised in this case. See SBOA at 13-14. The State does not dispute the vouching testimony was given, but argues it was

⁹ Of course, contrary to the State's "Potemkin Village" fantasy, these are "voluntary treatment options that would exist for [Town] if unconditionally released from detention." RCW 71.09.060.

invited by an open door. In regard to the court's error in excluding the requested ROA evidence, the State merely asks this Court to elevate the sole dissenter in Post II to the majority position.

Relying on the discussions of prejudicial error above, and in the previous briefs, Town renews his request for this Court to consider the cumulative effects of the two errors raised.

C. CONCLUSION

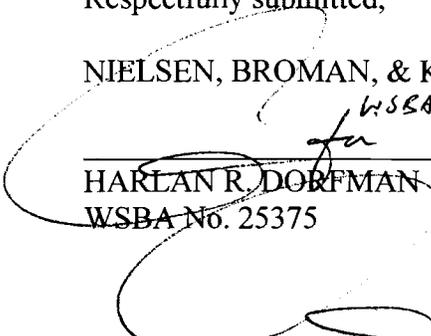
For the reasons stated above, and in the opening and supplemental briefs, this Court should reverse.

DATED this 23rd day of March 2011.

Respectfully submitted,

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WSBA 25097



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

In re the Commitment of Randy Town,)	
)	
STATE OF WASHINGTON,)	
)	COA NO. 63732-1
Respondent,)	
)	
vs.)	
)	
RANDY TOWN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RANDY TOWN
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388-0646

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF MARCH, 2011.

x *Patrick Mayovsky*