

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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DEC 10 2010  
King County  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Trickey, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The court erred when it denied Appellant's motion to present evidence regarding the State's ability to file another RCW 71.09 petition if he committed a "recent overt act."

2. Cumulative error denied Appellant a fair trial.

Issues Pertaining to Supplemental Assignments of Error

1. Appellant moved in limine to present evidence regarding the State's power to initiate RCW 71.09 civil commitment proceedings against offenders in the community if they are found to have committed a recent overt act. Based on two Court of Appeals decisions, the court denied that motion. The Supreme Court, however, subsequently ruled evidence of the recent overt act provision was admissible and relevant to the element of risk to reoffend and disapproved of those cases holding otherwise. Where the central issue was Appellant's motivation and ability to control his behavior without community supervision, was the trial court's denial of Appellant's motion to inform the jury of the recent overt act provision prejudicial error?

2. Did cumulative error deny Appellant a fair trial when the State's expert was permitted to vouch for the State's filing standards and Appellant was not permitted to present evidence regarding the State's power to file a subsequent petition based on a recent over act?

B. ARGUMENT

1. THE COURT'S REFUSAL TO PERMIT THE JURY TO HEAR RELEVANT EVIDENCE REGARDING THE STATE'S POWER TO FILE A SUBSEQUENT PETITION BASED ON A RECENT OVERT ACT DENIED TOWN A FAIR TRIAL.

Town moved in limine to present evidence of the State's ability, should the jury find he was not subject to civil commitment, to intervene and incarcerate Town if he were to commit a "recent overt act" (ROA).<sup>1</sup> CP 99-102. Town argued the jury must be able to consider the full range of available State interventions when assessing Town's stated intentions to avoid high risk activities in the community. CP 100.

In this regard, Town argued the ROA provision represented a "real" world condition and not informing the jury about the State's ability to intervene using this provision "would create a non-existent, hypothetical world where a police officer would have to stand by and watch if Mr. Town were engaging in high risk behavior[.]" CP 101. Town argued the ROA provision represented both an important factor in Town's internal motivation and a significant external tool for reducing risk. Id. In particular, Town argued the treatment summary prepared by

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<sup>1</sup> 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."

staff at the Twin Rivers Sex Offender Treatment Program identified otherwise legal behaviors that would trigger State intervention under the ROA provision, even if Town's behaviors were not illegal or a violation of conditions. Id.

The State objected, citing State v. Harris, 141 Wn. App. 673, 174 P.3d 1171 (2007) and In re Det. of Post, 145 Wn. App. 728, 753, 187 P.3d 803 (2008) (Post I) for the proposition that the recent overt act provision would not be an issue because Town was not living in the community when the petition was filed. Supp. CP \_\_\_\_ (sub no. 77, Pet. Resp. to Respondent's Mt In Limine, 05/27/2009, at 14-15). The State argued the statutes permitted the jury to consider only placement conditions that would "actually exist" if the respondent was unconditionally released. Id. at 14. The State argued the potential for the State to pursue a RCW 71.09 petition based on a recent overt act to be a hypothetical scenario "beyond the scope of the issues properly before the jury." Id. (citing Harris, 141 Wn. App. at 680; quoting without citing Post I, 145 Wn. App. at 754)

Arguing to the court below, Town's counsel explained the issue of ROA was directed to a distinction Phenix drew between internal and external aspects of volitional control. 2RP 241-42.<sup>2</sup> Counsel argued the

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<sup>2</sup> As in the opening brief, 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

ROA provision represented an external level of control beyond the potential for criminal prosecution and knowledge of that provision was relevant to Town's state of mind regarding the external controls he was facing if released. 2RP 242, 246. Counsel said Town should be allowed to introduce the ROA provision to balance the State's ability to inform the jury Town was not facing community supervision under his criminal sentence. 2RP 243.

The State again relied on Harris and Post to argue the ROA provision was irrelevant in a RCW 71.09 commitment trial. 2RP 243-44. In reply, Town argued Post I was wrongly decided and informed the trial court that the Supreme Court had accepted review. 2RP 247.

After reviewing Harris and Post I, the court said those cases closed the door on evidence of the ROA provision to respondents in RCW 71.09 cases. 3RP 292. On that basis, the court prohibited Town from inquiring into the ROA provisions. 3RP 292.

After Town's trial, and after the filing of the opening brief here, the Supreme Court issued its decision in In re Det. of Post, No. 83023-1, 241 P.3d 1234, 2010 WL 4244821 (Oct. 28, 2010) (Post II).<sup>3</sup> That

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AM & PM; 11RP – 6/16/09 Mid-AM; 12RP – 6/17/09; 13RP – 6/18/09 AM; 14RP – 6/18/09 PM.

<sup>3</sup> While a Pacific Reporter Third (P.3d) citation for Post II has been assigned, at the writing of this brief internal page citations in that reporter have not yet been published.

decision disapproved of Harris and held evidence of the recent overt act provisions was relevant in RCW 71.09 civil commitment trials. Post II, 2010 WL 4244821, at \*7-8, ¶¶ 27-29.

In Harris, this Court addressed a challenge to the trial court’s exclusion of evidence regarding the State’s ability to file another petition for commitment if the respondent were released. Harris, 141 Wn. App. at 679-80. Reasoning the State’s potential to file a subsequent petition did not reflect a “condition that would exist or that the court would have the authority to order” or “placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention[,]” this Court rejected Harris’s challenge. Id. at 680 (quoting RCW 71.09.015<sup>4</sup> and RCW 71.09.060(1)).<sup>5</sup> The Harris Court categorized

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Internal page references to this case will be to the page and paragraph numbers in the Westlaw version of the slip opinion – 2010 WL 4244821.

<sup>4</sup> RCW 71.09.015 provides in part:

The legislature hereby clarifies that it intends, and has always intended, in any proceeding under this chapter that the court and jury be presented only with conditions that would exist or that the court would have the authority to order in the absence of a finding that the person is a sexually violent predator.

<sup>5</sup> RCW 71.09.060(1) provides in part:

In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition.

the State's power to file subsequent petitions as "hypothetical evidence."  
Id.

In Post I, this Court relied on Harris as controlling precedent to reject a challenge to the trial court's exclusion of evidence regarding the State's ability to initiate a subsequent commitment procedure if Post were released and committed a "recent overt act." Post I, 154 Wn. App. at 753-54. Citing Harris, the Post I Court said of the State's ability to file a subsequent petition if Post committed a recent overt act, "Such a hypothetical scenario was beyond the scope of the issues properly before the jury." Id. at 754. The Post I Court, however, reversed based on the trial court's admission of evidence regarding stages of treatment available at the Special Commitment Center that Post had not yet completed. Id. at 741-49.

In Post II, the Supreme Court affirmed this Court's reversal, holding the evidence of treatment stages the respondent had not undertaken constituted prejudicial error. Post II, at \*1, ¶ 1. Addressing issues that may arise in a new trial, however, the Supreme Court disagreed with this Court regarding the relevance of the State's power to bring a subsequent petition based on evidence of an ROA. Id. at \*7-8, ¶¶ 27-29.

Post raised the ROA issue in his answer to the State's petition for review. Post II, at \*7, ¶ 27. The Supreme Court noted this Court's

reliance on Harris and specifically disapproved of both the reasoning in Harris and this Court's reliance on that case in Post I. Id.

In its analysis, the Supreme Court found evidence of the recent overt act provision to be both statutorily admissible and relevant to the jury's factual determinations. The Supreme Court said the legislature had provided for filing a petition against an offender who has been released from total confinement and has since committed a recent overt act. Post II, at \*8, ¶ 28 (citing RCW 71.09.030).<sup>6</sup> The potential for the State to file a subsequent petition was a condition which Post would be subject to if released, and thus admissible under the statutory requirement for the fact finder to consider only placement conditions and voluntary treatment options that would exist if the respondent were released from detention. Id. (citing RCW 71.09.060(1)).

The Supreme Court also said evidence a respondent in a RCW 71.09 proceeding, who is subsequently released, could be subject to another such proceeding if he commits a recent over act is relevant because knowledge of this consequence could well serve as a deterrent to

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<sup>6</sup> RCW 71.09.030 provides in part:

(1) A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that: . . . (e) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.

engaging in such conduct. Id. at \*8, ¶ 28. The Court reasoned this knowledge has some tendency to diminish the likelihood of committing another predatory act of sexual violence, which is an element the jury must address. Id. (citing RCW 71.09.020(18)).<sup>7</sup> And the court said, “That the filing of a new petition is not certain to occur does not make the possibility irrelevant.” Id.

The Court, however, limited its decision to the question of relevance and admissibility, and did not decide whether the evidence in that case was admissible. Post II, at \*8, ¶ 29. The Court reserved that question to the trial court for consideration under ER 403.<sup>8</sup> Id.

Here, the trial court relied on Harris and Post I to exclude evidence of the State’s power to file a petition if Town committed an ROA. Thus, under Post II, the court erred. And because evidence of the State’s authority under the recent overt act provision addressed a central issue of this case, the court’s exclusion of that evidence was prejudicial.

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<sup>7</sup> RCW 71.09.020(18) defines a “sexually violent predator” as “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.”

<sup>8</sup> 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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”

The relevance of the ROA provision is that it creates a lesser standard for proceeding against an offender than would be required to make an arrest in a criminal proceeding. A criminal arrest can occur only if police have probable cause to believe a crime has been committed and the accused is responsible. See State v. Wagner-Bennett, 148 Wn. App. 538, 541, 200 P.3d 739 (2009) (probable cause to arrest exists where facts and circumstances within the arresting officer’s knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed). In Washington, however, an otherwise qualifying offender living in the community can be subject to a RCW 71.09 commitment proceeding if he does “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.” RCW 71.09.020(12) (emphasis added). Thus, under the ROA provision, no criminal act need occur for detention under RCW 71.09. Conduct that creates a mere apprehension is sufficient. See, e.g., Froats v. State, 134 Wn. App. 420, 439-40, 140 P.3d 622 (2006) (possession and displays of cut out pictures of children constitute a recent overt act); In re Det. of Hovinga, 132 Wn. App. 16, 24, 130 P.3d 830, rev. denied, 158

Wn.2d 1024 (2006) (following girls around department store while masturbating constitutes a recent overt act); In re Det. of Broten, 130 Wn. App. 326, 335-36, 122 P.3d 942 (2005), rev. denied, 158 Wn.2d 1010 (2006) (presence in park without chaperone, combined with admitted fantasies and pattern of placing himself in high risk situations, constitute a recent overt act).

The State also established the relevance of the ROA provision in its case in chief when Phenix testified about the lack of formal supervision over Town should he be released from detention. It was stipulated that Town would not be under DOC supervision or probation. CP 585; 10RP 2018. Discussing her scoring of Town on the MnSOST-R, Phenix said the developer of that actuarial advised risk for persons not subject to community supervision programs would be higher than for those subject to supervision. 7RP 19-22. Phenix explained the MnSOST-R developer had discounted in-custody sex offender treatment and explained decreased recidivism rates by more intensive supervision regimes. Id. On redirect, Phenix also emphasized the absence of community supervision as significant to her decision to assign Town to the higher risk category of the Static 99 and Static-2002, as well as the MnSOST-R. 8RP 24-27.

Phenix noted, however, other possible explanations for decreased recidivism, including identification of sex offenders in the community

with the potential for intervention should the released sex offender behave in a suspicious manner. 7RP 21. In addition, Phenix suggested offenders may realize they are under public scrutiny and offend less often. 7RP 21-22. This awareness on the part of offenders was cited by the Court in Post II as favoring relevance for evidence of the ROA provision. Post II, \*8 ¶ 28. Phenix was allowed to testify said she had assigned Town a higher level of risk because he was not subject to formal supervision. 7RP 20, 22. The jury, however, was not permitted to weigh this testimony against Town's knowledge of the ROA provision.

The jury was seriously concerned about the issue of managing risk should Town be released. Two jury questions for Phenix were forwarded to the court but not asked. The first asked whether secure confinement was the only choice of treatment that can reduce sex offender's risk to reoffend. CP 572. The second addressed the issue of managing risk in the community, "Dr. Phenix, you stated that Randy's sexual disorders can't be cured and so he should remain in custody for public safety. You also stated that his disorders could be managed. My question is, to what end can they be managed and how successfully and under what realist conditions?" CP 573. In addition, questions addressed to Edward Fish, the director of the living facility that had accepted Town if he were

released, asked how compliance with house rules was verified and about security procedures at the facility. CP 587-88; 12RP 2066-67.

These questions indicate a jury actively engaged in establishing the contours of public safety if Town were released. The fact that the ROA provision established a lesser standard for proceeding under RCW 71.09 than the commonly understood probable cause standard required for criminal proceedings was crucial to address the jury's concerns. It was also critical for the jury to understand Town's own assessment of his need to behave in a manner that not only avoided overt criminality, but also stayed within the "reasonable apprehension" standard of the ROA provision.

In closing, the State argued the question was whether Town would be able to manage his fantasies and control his behaviors. 14RP 2418. Town's counsel responded Town is a person who can be deterred by consequences and wants to follow the rules. 14RP 2439, 2452. In rebuttal, the State closed with an image of Town having free range over any child he happened to encounter, "The bottom line, folks, is that all that is standing between Mr. Town and another child is a rubber band and, perhaps the window for him to look out of, in case of one of those horrible urges and fantasies enter his mind." 14RP 2474-75.

In Post II the Court said, regarding the relevance of the ROA provision, “[the respondent’s] knowledge of the consequences for engaging in such conduct may well serve as a deterrent to such conduct and, therefore, has some tendency to diminish the likelihood of his committing another predatory act of sexual violence. This likelihood, of course, is an element that the jury must address.” Post II, at \*8, ¶ 28. Without evidence regarding the ROA provision, Town’s jury was not permitted to factor his knowledge of those consequences into their decision on whether he was likely to reoffend. Instead the jury was left with an image of a rubber band as the only thing between Town and an accomplished violent sexual offense.

Given the facts and issues in this case, exclusion of evidence of the ROA provision denied Town a fair trial. This Court should reverse.

2. THE COMBINED ERRORS IN THIS CASE DENIED TOWN A FAIR TRIAL.

It is well settled law in Washington state that, “The combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial.” State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); see also State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992);

State v. Oughton, 26 Wn. App. 74, 85, 612 P.2d 812 (1980), rev. denied, 94 Wn.2d 1005 (1980).

Cumulative error doctrine may be invoked even where valid grounds for reversal are presented. Oughton, 26 Wn. App. at 85. Thus, for example, accumulated evidentiary errors may require a new trial. Coe, 101 Wn.2d at 789. Or, a prosecutor's improper questioning and closing argument combined with evidentiary errors and vouching may prevent the defendant from receiving a fair trial. Alexander, 64 Wn. App. at 158. Reversal is required whenever cumulative errors "deny a defendant a fair trial." State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997).

Here, the court erred by permitting Phenix to bolster the State's filing standards and by refusing to admit evidence of the State's authority, should Town be released into the community, to file a subsequent civil commitment petition if he committed a recent overt act that need not amount to a criminal act. The former error strengthened the State's case, while the latter error weakened Town's position. While either error alone justifies reversal, their combined effect mandates that result.

Because the combined effect of the court's evidentiary rulings denied Town a fair trial, this Court should reverse.

C. CONCLUSION

For the reason presented here and in the opening brief, this Court should reverse.

DATED this 10th day of December 2010.

Respectfully submitted,

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	)	
STATE OF WASHINGTON,	)	
	)	COA NO. 63732-1
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	)	
vs.	)	
	)	
RANDY TOWN,	)	
	)	
Appellant.	)	

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2010 DEC 10 10:51 AM

**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 10<sup>TH</sup> DAY OF DECEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL 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 10<sup>TH</sup> DAY OF DECEMBER, 2010.

x *Patrick Mayovsky*