NO. 43757-1-II

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

In re Commitment of Sheldon Martin,

STATE OF WASHINGTON,

Respondent,

v.

SHELDON MARTIN

Appellant.

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

The Honorable Robert Lewis, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Sheldon Martin is appealing his involuntary commitment under Chapter 71.09 RCW. CP 179-80. At the time of Martin's commitment, twenty years had passed since his last sexual offense. 3RP 112. As is typical in commitment trials, the case boiled down to a battle of the experts. The state's psychologist, Amy Phenix, opined Martin met the criteria for commitment; whereas, the defense psychologist, James Manley, did not. 3RP 110; 5RP 95.

The primary dispute centered on whether Martin suffered from a mental disorder of pedophilia, which also qualifies as a mental abnormality – an element the state is required to prove for commitment.[1] 6RP 40-41. In arriving at her pedophilia diagnosis, Phenix was permitted to testify to inadmissible hearsay contained in department of corrections (DOC) records as a basis for her opinion under ER 703. Incongruously, however, the court prohibited Manley from testifying about a polygraph Martin underwent as a basis in forming his opinion Martin did not in fact suffer from

[1] Specifically, the state was required to prove that Martin suffers from a mental abnormality or personality disorder, which causes him serious difficulty in controlling his sexually violent behavior. 6RP(6/25/12) 9.

pedophilia. Despite the court's ability to give a limiting instruction regarding this evidence – as it did for evidence relied upon by Phenix – the court ruled the evidence was more prejudicial than probative and therefore inadmissible under ER 403.

Martin will argue the court's ruling prevented him from fully defending against the state's allegations by unfairly diminishing the credibility and weight of his expert's opinion and thereby violated his right to a fair trial.

B. ASSIGNMENTS OF ERROR

1. The court erred in excluding evidence relied upon by Martin's expert in forming his opinion that Martin did not meet the statutory criteria for involuntary commitment.

2. The court's ruling deprived Martin of his right to present evidence and to a fair trial.

Issue Pertaining to Assignments of Error

Where Martin's testosterone suppressing medication would have rendered plethysmograph (PPG) testing unrevealing and Dr. Manley therefore requested polygraph testing as an alternative, did the court err in excluding evidence – offered solely as a basis for Manley's opinion Martin did not meet the definition of a sexually

violent predator – indicating Martin showed no sign of deception in responding no, when asked if he was sexually aroused to children?

C. STATEMENT OF THE CASE[2]

1. Pretrial Ruling Excluding Basis for Defense Expert's Opinion

No deception was indicated when Martin was asked during a polygraph examination if he had masturbatory fantasies about children and he said no. 1RP 25. Defense counsel moved to admit this evidence under ER 703,[3] as basis for Dr. Manley's opinion Martin did not meet the criteria for involuntary commitment as a sexually violent predator. 1RP 24-25.

As part of his evaluation, Manley requested Martin undergo plethysmograph (PPG) as well as polygraph testing. The possibility of PPG testing was discussed extensively amongst Manely,

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[2] This brief refers to the transcripts as follows: "1RP" – 6/8/12; 2RP – 6/19/12; 3RP – 6/20/12; 4RP – 6/21/12; 5RP – 6/22/12; and 6RP – 6/25/12.

[3] ER 703 provides:

> The facts of 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.

defense counsel, and psychiatrist Leslie Sziebert, the clinical director at the Special Commitment Center (SCC). 1RP 25. The possibility was decided against, however, as Martin would not likely perform in "any measurable way," as he was taking Depo Lupron, a testosterone suppressing drug, which also negates sexual arousal in men. 1RP 25.

The option of weaning Martin off the drug to undergo PPG testing was considered an unacceptable solution. 1RP 25. Consequently, Manley whittled down his request to polygraph testing on the question of whether Martin had masturbatory fantasies about children. 1RP 25-26.

Defense counsel argued evidence that no deception was indicated in Martin's negative response was relevant because Dr. Phenix diagnosed Martin as suffering from pedophilia, and the question regarding his masturbatory fantasies therefore was of significant concern given this diagnosis. 1RP 26. In particular, the defense was anticipating Phenix's testimony suggesting that Martin currently entertains masturbatory fantasies about children. 1RP 27. Therefore, the use and reliance of defense expert Manley on the polygraph result for his opinion was integral to the defense case. 1RP 26.

As the defense pointed out, and the state did not dispute, experts frequently rely on inadmissible evidence, such as polygraphs, in formulating their opinions, especially at the SCC. 1RP 26-27. The state added that while the experts may disagree about the reliability of polygraph testing, they universally agree to its usefulness in fostering honesty in their patients' responses:

> And finally there was some argument about the State's evaluators getting polygraphs and plethysmographs all the time and that's true, I would like to have them in every case, but my experts testify to the polygraph results and they will testify, if asked, that the reason they ask for them is because it tends to increase the candor of the person. They believe the disclosure is more reliable if the person believes they're going to be caught lying. That's the reason they like to use a polygraph, and they don't necessarily rely on the results, which really aren't reliable.

1RP 29-30.

Accordingly, the defense proposed to offer the polygraph result not for its truth, but as the basis for Manley's opinion. The credibility of Manley's opinion (which would in no doubt depend in large part on its basis) would be of particular importance considering Phenix's anticipated testimony. 1RP 27.

The prosecutor responded that even under ER 703, the basis for an expert's opinion should be excluded under ER 403 if its

probative value is outweighed by it potential for unfair prejudice. 1RP 29. According to the prosecutor, the probative value was slight, considering that polygraph testing doesn't meet the Frye[4] test. The prosecutor claimed that in contrast, the potential for prejudice was high, on grounds the test result would invade the province of the jury by essentially communicating to them that Martin was telling the truth. 1RP 29.

The Court sided with the state and ruled the polygraph would be excluded as a basis for Manley's opinion. Instead, Manley would be permitted to testify he relied on Martin's statements during an "an interview," which he assumed to be truthful, in formulating his opinion. 1RP 32-34.

While the court recognized ER 703 allows experts to testify to evidence that would otherwise be inadmissible as a basis for their opinions, the court ruled that the rule did not give experts "carte blanche" to testify to inadmissible evidence. 1RP 32. Moreover, the court predicted a slippery slope in allowing

[4] Frye v. United States, 293 F. 1013 (D.C.Cir.1923). "The Frye standard requires a trial court to determine whether a scientific theory or principle 'has achieved general acceptance in the relevant scientific community' before admitting it into evidence." In re Det. of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003) (internal

admission of the polygraph evidence here. The court foreshadowed that it would be compelled to admit evidence of deception in future cases as a basis for state's experts' opinions, for reasons similar to those offered by the defense here. 1RP 33.

Incongruously, the court put no similar restraint on Phenix's testimony about the basis for her opinion. As part of Phenix's opinion Martin met the commitment criteria, Phenix relied on hearsay in department of corrections (DOC) records indicating that while undergoing sex offender treatment in DOC, the group leader thought Martin was excusing himself too frequently from group; the leader surmised Martin was aroused by discussions surrounding the group's offending behavior and was excusing himself to go masturbate in the bathroom. 1RP 48.

Defense counsel moved to exclude this from Phenix's testimony on grounds it was inadmissible hearsay and impossible to cross-examine at this late date. 1RP 47-48. The DOC record was very old and no one was ever interviewed about it. Nonetheless, the court ruled defense counsel's objection went to the weight of the evidence, not its admissibility. The court

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quotation marks omitted) (quoting In re Pers. Restraint of Young, 122 Wn.2d 1, 56, 857 P.2d 989 (1993)).

reasoned defense counsel could elicit the weaknesses of the evidence on cross-examination, and the court would provide a limiting instruction directing the jury to consider the evidence solely as a basis for Phenix's opinion, not for its truth. 1RP 49-50.

2. Historical Facts

Martin was treated horribly as a child. 2RP 116. His mother worked long hours leaving Martin in the care of his alcoholic father, Wilbur Martin (Wilbur). 4RP 71, 80, 163. Martin's father emotionally, physically and sexually abused him from the time he was a toddler until his mother and father finally divorced. 4RP 73-74, 80, 116, 161, 163.

Martin's half-sister Scheryl Dean remembered one abusive incident in particular, when Martin was a toddler. 4RP 74. As Martin lay in his bed, being fussy, Wilbur picked up a Presto log and was about to bludgeon Martin with it when their mother walked in. 4RP 74-75. She started to scream and Wilbur dropped the log. 4RP 75. Dean believed the elder Martin meant to kill his young son. 4RP 75.

Dean also recalled observing numerous squirrel bites Martin endured from being put in his father's flying squirrel cage. 4RP 77, 89. Dean was surprised Martin was never removed form his

parents' care; he always had bruises and other physical injuries. 4RP 79.

According to Dean, by age 9 or 10, Martin was withdrawn, angry and acting out. 4RP 79; see also 4RP 162. She associated Martin's problems with his father's abuse. 4RP 79.

In his deposition for trial, Martin admitted he was 10 years old when he first sexually offended against a child; it was a 4-year-old girl. 2RP 27; Ex 21. Martin was on leave from a juvenile facility when he noticed the girl, who lived in the same Vancouver, Washington apartment complex as Martin's mother. Ex 21. Martin admitted he persuaded the girl to accompany him into the laundry room, where he pulled down her pants and touched her vagina. Ex 21. Martin was caught and sent to Echo Glen. Ex 21.

According to state's expert Phenix, there was documentation in the records indicating that at age 14, Martin attempted to molest another 4-year-old girl, at knifepoint. 2RP 165. During his deposition, however, Martin denied ever chasing someone with a knife. Ex 21.

Martin testified he next offended against a child when he was 16 and living with his mother and step-father. Ex 22. It was a 6-year-old neighbor boy who lived down the street. Martin admitted

that when the child came over, Martin coaxed him into the garage, where he performed oral sex on him.[5] Ex 21. Again, Martin was caught and sent to a juvenile facility. Ex 21.

Martin believed that at some point beforehand, but while still 16 years old, he had been receiving psychological treatment at Morrison Child and Family Services in Portland. Ex 21. He was accused of abusing a 5-year-old girl who was also receiving treatment there. Ex 21. Martin admitted touching her breasts. Ex 21.

Martin was incarcerated for a nonsexual offense as an adult between 1980 and 1984. 3RP 20-21. Upon his release, he began frequently engaging in voyeurism. 3RP 9. According to Phenix, the records reflected that Martin engaged in the practice approximately once a week between 1984 and 1991. 3RP 9-10. In his deposition, Martin admitted he had many victims of this behavior, at least 50. Ex 25. This behavior led to the last conviction for which Martin was incarcerated, before his transfer to the SCC. 2RP 57.

On October 22, 1991, Kathy Lane was working at Fred Meyer in Vancouver, Washington. 2RP 29. She took a quick break

[5] According to Phenix, the records indicated the child alleged the abuse happened on multiple occasions. 2RP 166.

during her shift to use the public restroom; it was closer to her register than the employee restroom. 2RP 29. Lane thought there may have been children playing outside the bathroom; possibly by a fountain. 2RP 35.

While in the bathroom stall, Lane looked down and saw a man on the floor looking up at her. 2RP 30. Lane testified she was shocked, but looked the man square in the eyes. 2RP 30. He looked surprised and grabbed her ankle with his free hand. It looked to Lane that the man was using his other hand to masturbate; his pants were pulled down. 2RP 30-31. When Lane kicked the man and screamed, he immediately got up and started running. 2RP 32. Lane ran after him, yelling, "Get that guy." 2RP 32.

While in pursuit, Lane's shoes kept slipping and she had to desist. 2RP 33. Police asked her to identify someone they had detained in the parking lot about fifteen minutes later, however. 2RP 33. She positively identified the man, later identified as Martin. 2RP 33; Ex 23.

Martin was convicted of burglary, as well as indecent exposure for the incident. He was out on bail awaiting sentencing when, on April 8, 1992, he committed the offense that would later

qualify him for involuntary commitment under Chapter 71.09 RCW. 1RP 11-12; Ex 23.

Martin testified he felt like his life was over. 2RP 50; Ex 23. His face was in the paper and everyone knew what he had done in the Fred Meyer bathroom. He was extremely depressed. Ex 23. Martin testified he went to the Portland Fred Meyer intending to commit another act of voyeurism. Ex 23. While there, however, he observed 2-year-old Heidi and her mother. Heidi had wandered away from her mother and was alone. Ex 23.

Martin testified it was the opportunity that attracted him to Heidi and he formed the idea to kidnap and molest her. Ex 23. Martin took Heidi by the hand and headed toward the door, intending to take her to his truck. Ex 23. He never got past the door, however, as he was immediately stopped by security. Ex 23. Martin pled guilty to attempted sexual abuse of a child and second degree kidnapping under Oregon law.[6] 1RP 11-12; 2RP 51; Ex 23.

At the time of the commitment trial, Martin had been incarcerated for the past 20 years, ten with Washington's DOC[7] and

[6] The state relied solely on the attempted sexual abuse of a child as the qualifying offense, as the Oregon kidnapping offense was not comparable to a sexually violent offense in Washington. 1RP 13-20.

ten at the Special Commitment Center.[8] 4RP 191. He was 51 years old. 3RP 150.

SCC Medical Director Leslie Sziebert has treated Martin over the years for psychiatric issues, such as depression. 4RP 97, 102, 110. In Sziebert's opinion, Martin carries a heavy burden from his developmental years. 4RP 103. Sziebert characterized Martin

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[7] After serving time on the Oregon offenses, Martin was incarcerated in Washington for the preceding burglary and indecent exposure convictions, for which he had been awaiting sentencing at the time of the 1992 offenses. 2RP 57.

[8] The state previously filed a petition to commit Martin in 2003, which precipitated his transfer to SCC. CP 7. The petition was filed in Thurston County by the Attorney General's (AG's) office. CP 7. After Martin lost a motion to dismiss on grounds the AG did not have authority to file the petition in Thurston County, as Martin had committed no offense there, he agreed to a bench trial on stipulated facts and was committed. CP 7-8. Ultimately, the Washington Supreme Court agreed the AG's office did not have authority to file the petition in Thurston County and remanded the case for dismissal. In re Detention of Martin, 163 Wn.2d 501, 182 P.3d 951 (2008). The AG filed a new petition in Clark County, where Martin previously committed a sexual offense, although it was not a sexually violent offense. CP 1-2, 5-6; RCW 71.09.020(17). At the time, the statute granted authority to file the petition only in a county where the individual had been charged or convicted of a sexually violent offense. Former RCW 71.09.030. During the pre-trial stages of this case, Martin again moved to dismiss the petition. CP 54-57. In 2009, however, while the case was still pending, the Legislature amended the statute to allow the AG to file a petition in any county where the individual was charged or convicted of an offense that would qualify as a recent overt act, if the only sexually violent offense charge occurred in a jurisdiction other than Washington. RCW 71.09.030(2)(iii).

as an ambivalent patient, however; while Martin recognizes the need for help to work through his childhood trauma, he is reluctant to talk about his childhood. 4RP 104-105, 134. While medication management had improved Martin's mood, Sziebert testified they had not yet achieved "normal mood" yet.[9] 4RP 102. Nonetheless, Sziebert viewed Martin as relatively stabile and well-adjusted.[10] 4RP 111-112.

According to Sziebert, Martin began engaging in treatment when he first arrived in 2003. 4RP 97-98. Martin attended treatment continuously from 2003 until 2011, with the exception of some short stints during which he reportedly was not making satisfactory progress in cohort group and asked to take a break. 4RP 98; see also 4RP 196-202; 5RP 9-11. Martin's treatment formally ended in 2011, when he and his cohort group facilitator reached a stalemate on the issue of Martin's qualifying or "index" offense involving Heidi in 1992. 4RP 99.

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[9] If released, Martin would need ongoing medication management to treat his depression, in Sziebert's opinion. 4RP 127. In that vein, Sziebert testified he would provide a referral to the appropriate community mental health center for continued treatment. 4RP 130.

[10] Martin was categorized as low-management at the facility. 4RP 115, 185.

In that vein, psychologist Joseph Mitrovich, who led Martin's cohort group for the six months preceding Martin's termination, testified Martin refused to prepare and present an "offense chain" for the index offense, which would address the events leading up to, during and after the offense, as well as the thoughts and behaviors accompanying those events, including sexual fantasies, masturbation habits, etc. 2RP 88-89, 91-92, 94, 97. Martin expressed fear – as his commitment trial loomed – that his statements most likely would be used against him.[11] 2RP 94, 97, 102, 104, 124.

Indeed, his attorney counseled him not to discuss the offense and wrote a letter to his treatment providers asking if there was an alternate form of treatment or assignment Martin could work on during the interim. 3RP 122; 5RP 23-26. Defense counsel was informed that offense-specific cohort group was the only treatment modality available at the SCC. 5RP 26. Consequently, when Martin – as directed by counsel -- continued to refuse to discuss his

[11] There is no confidentiality between doctor and patient at the SCC; every statement is documented with the understanding it will be shared with the prosecutor's office. 2RP 127-128; 5RP 13.

thought processes and events leading up to the index offense, he was terminated from treatment. 2RP 102-103.

Despite Martin's supposed lack of progress,[12] Mitrovich acknowledged Martin admitted his offenses, admitted his offending behavior is a very real issue for him and also disclosed that substance abuse and depression were part of the circumstances leading up to his offenses.[13] 2RP 123, 134. During his deposition, Martin acknowledged he would need ongoing treatment and indicated he planned to continue with sex offense-specific treatment, if released, as well as some kind of chemical dependency support group.[14] Ex 25; Ex 26.

Sziebert testified Martin voluntarily began a regime of Depo Lupron in 2010; the drug suppresses testosterone production. 4RP

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[12] Significantly, treatment notes from earlier providers were much more positive regarding Martin's progress than Mitrovich's testimony. See e.g. 5RP 26-30. Manley testified the lack of confidentiality also presents a barrier to treatment progress. 5RP 32.

[13] In his deposition, Martin provided the further insight that depression and substance abuse, in turn, would lead to deviant fantasies, which he would act out on. Ex 25. Martin testified that he has since learned how to intervene and stop deviant fantasies and that as a result of his Depo Lupron medication, such are rarely an issue. Ex 25, 26.

[14] Martin participated in substance abuse treatment in DOC, as well as at the SCC. 3RP 16.

118. Although its primary use is to treat prostate cancer, its off-label use is "arousal management." 4RP 117, 119. Martin receives the drug intravenously once every three months.[15] 4RP 119. As of November 2010, Martin's testosterone level was reduced to that of a prepubescent child. 4RP 120.

Sziebert testified the drug provides an opportunity for an individual to become less sexually occupied. 4RP 125. Sziebert believed it has worked for Martin and should continue to work for him. 4RP 126. Martin testified he would want to continue his treatment with Depo Lupron, if released. Ex 26.

If released, Martin would have social support on the outside, including his sister, family friends and fellow church members. 4RP 17, 65-66; Ex 26. Husband and wife ministry leaders Roger and Beverly McKown had befriended Martin ten years earlier, when he first arrived on McNeil Island. 4RP 11, 41, 43. Roger McKown served time in prison as a young man and wanted to help others in the same situation. 4RP 42. As part of that vision, he and his wife

[15] Sziebert testified the shots are rather expensive, $1,000.00 a piece. 4RP 121-22. However, defense expert Manley testified there is an oral version of the drug that is cheaper. 5RP 71. Manley also testified he knew of a doctor in private practice within the community who prescribed the drug for its off-label purpose to

founded Agape Message Prison Ministries ("AM/PM"), which is associated with the Seventh Adventist Day Church. 4RP 9-10, 42.

The McKowns hold AM/PM church services once a week at McNeil and once a month host a movie night there. 4RP 10-11. Martin has attended their services since his arrival, and the McKowns consider him a good friend. 4RP 12. The McKowns are also acquainted with Martin's sister and met his mother before her death in January 2008. 4RP 12, 64, 71.

If Martin were released, the McKowns planned to assist him in every way they could, especially with finding a job and stable place to live until he and his sister could move in together. 4RP 18-20, 41-42. Martin's sister Scheryl Dean testified she and her brother are very close and plan to live together in a two-bedroom house after Martin finds a job.[16] 4RP 65-67. The two planned to

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former SCC residents who were living in the community on a less restrictive alternative. 5RP 73-74.

[16] Martin has work history, both in and outside of DOC and the SCC. 3RP 27; 4RP 169. He testified he would like to work in finish carpentry, which he learned and did well at in DOC. Ex 26; 4RP 169. Martin had saved $1,500.00 from his work at the SCC to help tide him over until he found a job. Ex 26; 3RP 88.

help each other, as both have limited mobility.[17] 4RP 64, 65, 83. Dean has been sober for twenty years. 4RP 80.

The McKowns were aware of Martin's offense history and testified they would not hesitate to report him to DOC or other authorities if they suspected he was not abiding by the rules of his release, such as abstaining from alcohol or frequenting places he should not. 4RP 15, 22-23, 28-29, 47, 49-51. Martin's sister testified similarly. 4RP 92-93.

3. State's Expert

Psychologist Amy Phenix evaluated Martin in 2003 and again, in the spring of 2012. 2RP 155. Using the criteria outlined in the fourth edition of the Diagnostic and Statistic Manual of Mental Disorders (DSM-IV), Phenix diagnosed Martin with pedophilia, voyeurism and antisocial personality disorder. 2RP 164; 3RP 9, 18. She also diagnosed Martin with marijuana and alcohol dependence. 3RP 15-16. However, Phenix testified only the disorders of pedophilia and voyeurism affected Martin's volitional

[17] Sziebert testified Martin's right knee has severe degenerative arthritis. Martin has been approved for surgical knee replacement, which Sziebert testified would be scheduled in the event of his official commitment. 4RP 99. Phenix testified both of Martin's knees needed replacement. 3RP 152-53.

control to the extent necessary to qualify as mental abnormalities under the commitment statute.[18] 3RP 32-38, 113.

In concluding Martin suffers from pedophilia, Phenix relied on three findings. First, she found that for a period of over six months, Martin had recurrent, intensive fantasies, urges or behavior involving children. 2RP 164. As support, Phenix relied on Martin's offending behavior against children, which began at age 10 and ended in 1992, when he was incarcerated for the Fred Meyer kidnapping. 2RP 165-67.

Second, Phenix found Martin had arousing sexual fantasies about children, which he had acted out on, as evidenced by his prior offenses. 2RP 168. As support, Phenix relied on Martin's self report during the deposition in which he stated he suffers from pedophilia and acknowledged the potential to be aroused by children. 2RP 167; Ex 20. She also relied on DOC records

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[18] For purposes of involuntary commitment, the individual must have a "mental abnormality," which is defined as:

> a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

reporting Martin discussed such sexual fantasies in sex offender treatment. 2RP 167.

Finally, Phenix found support for the diagnosis in the fact Martin's life was essentially ruined by such behavior. 2RP 169. Phenix was confident Martin suffered from pedophilia at the time of the commitment trial, as she claimed it is an enduring, lifelong condition, much like a sexual orientation. 2RP 171.

Phenix nonetheless acknowledged there are people who commit acts of molestation against children who are not, in fact, pedophiles. 3RP 3. Phenix conceded that most people who commit such acts are not pedophiles, but are experimenting, disinhibited by substance abuse and not thinking clearly, acting under emotional strain or prompted by situational circumstances. 3RP 3-4.

In Martin's case, Phenix believed he acted pursuant to pedophilia as opposed to some other reason, relying in large part on previously administered PPG tests. 3RP 5, 8. According to Phenix, Martin's PPG test in 1984 showed sexual arousal to

children, as did another PPG test in 2004.[19] 3RP 8; see also 3RP 62, 125-26.

Regarding her diagnosis of voyeurism, Phenix's conclusion was based on her evaluation of the same criteria governing pedophilia, i.e. recurrent behavior, urges or fantasies, whether Martin acted on them and whether those behaviors negatively impacted his life. 3RP 9-12.

Although Phenix acknowledged that voyeurism is usually a hands-off offense (3RP 13), she claimed Martin showed signs he was crossing over into hands-on offending, as evidenced by the fact he grabbed Kathy Lane's ankle in the Fred Meyer bathroom. 3RP 13-14. In her opinion, the diagnosis therefore qualified as a "mental abnormality" for purposes of commitment. 3RP 37. In Phenix's opinion, pedophilia and voyeurism make Martin likely to engage in predatory acts of sexual violence if not confined in a secure facility. 3RP 38.

In attempting to predict whether Martin was more likely than not to reoffend, Phenix relied on the Static-99 Revised (R), which Phenix calculated as giving Martin a score of 9 points. 3RP 42, 50.

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[19] Manley testified the 2004 PPG showed Martin was significantly more aroused to images of adult females than to children. 5RP 71.

Phenix testified a score of 6-or-more points puts someone in the high-risk category of offenders. 3RP 50. Of those in the high-risk category who scored 9 points, 52.4 percent committed a new sexual offense within 5 years and 61.9 percent reoffended within 10 years. 3RP 51.

Because the Static-99 looks at historic risk factors that are not subject to change despite the possibility of changed circumstances, Phenix also considered the SRA-FV, a list of dynamic circumstances that can lower someone's risk. 3RP 58-59. According to Phenix, these factors actually showed an increase in Martin's risk of reoffense. 3RP 70. It was during her discussion of these dynamic risk factors that Phenix testified about Martin's alleged arousal during sex offender treatment group in DOC. 3RP 63, 78.

4. Defense Expert

Psychologist James Manley evaluated Martin in late 2011 and early 2012. 4RP 154, 158-159. In several respects, he agreed with Phenix's findings. Like Phenix, Manley diagnosed Martin with voyeurism (in remission), antisocial personality disorder, and marijuana and alcohol dependence (in remission). 4RP 179-80;

5RP 34, 38. Manley parted company with Phenix, however, when it came to her diagnosis of pedophilia. 5RP 39.

While Manely noted Martin had victimized other children during his formative years, up until age 16, Manley viewed Martin's behavior as reactive to the abuse he endured himself, as opposed to exemplative of pedophilia. 4RP 174. Manley also noted that when humans are abused, brain development slows and can slow down the social maturation process as well. 4RP 175.

Moreover, Manley found it particularly telling that there was never any aforethought or planning to Martin's offenses against children. 4RP 176. To Manley, they seemed an instantaneous reaction to an opportunistic situation. 4RP 176; 5RP 41. And significantly, with the exception of the 1992 offense, Martin's offenses against children were committed when he was a minor himself. 4RP 176. According to the DSM-IV, one criteria for pedophilia is that the individual be at least of age 16. 4RP 176.

In Manley's opinion, Martin's offenses were more about anger and power than a paraphilia. 4RP 176; 5RP 42. As support, Manley noted there was no indication in the records that Martin ever attempted to cultivate relationships with children or adults with children to gain access to them. 4RP 177. In other words, Martin

did not engage in "grooming" behavior typically associated with pedophiles. 5RP 41.

Furthermore, as an adult, Martin had a long-standing intimate relationship with a peer-aged female, before his last incarceration. 4RP 177-79. As an adult, Martin also frequented adult female prostitutes. 4RP 177. It was also somewhat telling to Manley that Martin apparently made his way past children in an effort to peep on Kathy Lane. 5RP 42. These circumstances undercut a finding that Martin has had a persistent sexual interest in children, as would be expected of a pedophile. 4RP 177-79; 5RP 40, 69.

Instead, the circumstances more likely showed that Martin has a history of child molestation brought about by what Manley characterized as "a perfect storm," i.e. situational opportunity, alcohol or drugs as a disinhibitor and sexual reactivity to his own abuse. 5RP 41-43. While child molestation is harmful, it is a legal definition describing behavior, not a mental disorder. 5RP 79-80. In Manley's opinion, Martin did not have a mental abnormality qualifying him for involuntary commitment. 5RP 39, 78.

Although Manley did not diagnose Martin with a mental abnormality that predisposed him to criminal sexual acts – as

required for commitment – Manley nevertheless performed a risk assessment using the same actuarial instrument as Phenix, the Static-99 R. 4RP 159. Manley actually gave Martin one point higher than that calculated by Phenix. 5RP 61. Despite this, Manley disagreed that Martin was more likely than not to reoffend, in part due to problems inherent with the actuarial instrument itself, i.e. the fact that no one in the study group was over age 50, as well as the fact that the instrument measures all incidents of sexual reoffense, including those that are not predatory or hands-on. See e.g. 5RP 45-53, 63-65. Moreover, it was Manley's opinion that due to aging and sobriety, Martin was capable of controlling his behavior. 5RP 80-81. In short, Manley did not believe Martin met either of the criteria required for commitment. 5RP 95.

In an attempt to abide by the court's ruling regarding the polygraph evidence but also to offer some evidence Manley's opinion was objectively reasonable, defense counsel sought to elicit the fact Manley had relied on some objective testing in formulating his opinion. 5RP 85-86. The attempt ended in the prosecutor's objection, however:

> Q. [Ann Stenberg, defense counsel] And then finally, Doctor, considering your clinical review – oh,

> just one more question before I go to the final conclusion.
>
> With regard to your own evaluation of Mr. Martin, were you concerned about Mr. Martin's current fantasy life and whether it still incorporated children?
>
> A. During my assessment that concerned crossed my – yes, I was concerned about that.
>
> Q. And did you send Mr. Martin out for any objective testing on that particular question?
>
> A. I did.
>
> Q. And were you –
>
> MR. ROSS [prosecutor]: Objection; move to strike.

5RP 85.

Outside the presence of the jury, the prosecutor elaborated that "objective testing" was code for polygraph and therefore should not be allowed. 5RP 85. The court agreed, reiterating Manley could testify only that "he relied on an interview between Mr. Martin and somebody else and that Mr. Martin made certain statements which for purposes of his opinion, Dr. Manley assumed to be accurate. That's it." 5RP 87.

In response, defense counsel lamented that the credibility of Manley's opinion was crucial to the defense case and that it would

be completely lacking without any evidence that he took some precaution to ensure the accuracy of Martin's statement:

> Your Honor, I am only trying to ask for the leeway to allow my expert to rightly suggest to this jury that he took the precautionary step of sending Mr. Martin out for some sort of check on the issue of whether he continued to have masturbatory fantasies about children.
>
> Dr. Manley's credibility is being evaluated by this jury and I think that that was a responsible step as a professional. He needed to have that question answered for himself. So I would like to be able to continue the part of the question which goes to, did you ask him to be reviewed or tested. If the court doesn't like "tested," I'll take that out. But did you ask for a review on the issue of childhood masturbatory fantasies. If the court recalls, Dr. Phenix maintains that that is the single clue we have from Sheldon Martin and his continued symptom of pedophilia is that he fantasizes about children. Dr. Manley had him polygraphed on this issue and he passed that polygraph which was important to Dr. Manely in his final opinion.

5RP 89.

The court held steadfast to its ruling, however, reasoning that polygraphs are inadmissible in Washington, "either directly or indirectly." 5RP 89.

Thus, when court reconvened before the jury, the court granted the state's motion to strike Manley's preceding testimony. 5RP 91. When Manley's direct resumed, he explained that he arranged for Martin to be interviewed about whether he currently

entertained masturbatory fantasies about children. 5RP 92. Manley indicated Martin's responses at the interview indicated he did not. 5RP 92-93. Manley testified this information was critical to his developing opinion. 5RP 94.

At the close of Manley's testimony, the jury was given an opportunity to pose potential questions for the court to ask Manley. Perhaps not surprisingly, the jury wanted to know why Manley trusted Martin's self report. 5RP 155. The court ruled it would not allow the question, however:

> THE COURT: All right. Question to Dr. Manley, why do you trust Mr. Martin's self-report from interviews? I wouldn't ask that question or allow that question to be asked by an attorney.

5RP 155.

D. ARGUMENT

THE COURT'S RULING EXCLUDING THE POLYGRAPH EVIDENCE AS A BASIS FOR THE DEFENSE EXPERT'S OPINION DENIED MARTIN OF HIS RIGHT TO PRESENT A DEFENSE AND TO A FAIR TRIAL.

Whether Martin suffered from pedophilia was the central issue in the case. Manley's opinion Martin did not suffer from the disorder was based in large part on the polygraph Martin took in which no deception was indicated when he responded no to the question of whether he currently entertained sexual fantasies about

children. The state acknowledged that even its experts routinely rely on polygraphs in conducting their own evaluations. The evidence was therefore admissible as it was of the sort reasonably relied upon by other experts in Manley's field and formed the basis of his opinion. ER 703. The trial court erred in excluding this critical defense evidence.

The sexually violent predator statute is considered civil in nature. In re Personal Restraint of Young, 122 Wn.2d 1, 23, 857 P.2d 989 (1993). Nevertheless, an individual's liberty interest is fundamental in nature and due process applies. See United States v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987); In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003); U.S. Const. amend. XIV, § 1. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 437 (1992); see also In re Detention of Thorell, 149 Wash.2d 724, 731, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990, 124 S.Ct. 2015, 158 L.Ed.2d 496 (2004).

The right to present evidence in one's defense is a fundamental element of due process. State v. Ellis, 136 Wash.2d

498, 528, 963 P.2d 843 (1998). This due process right applies in SVP commitment proceedings. In re Detention of West, 171 Wn.2d 383, 417, 256 P.3d 302 (2011) (Madsen, J., concurring) (West has a constitutional right to "'a meaningful opportunity to present a complete defense'," which includes vigorous cross-examination) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)); see also In re Detention of Skinner, 122 Wash.App. 620, 630, 94 P.3d 981 (2004).

Generally, the right to present evidence in one's defense is subject only to the following limits: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the state's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. See Washington v. Texas, 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

The evidence no deception was indicated when Martin responded he no longer fantasizes about children was undeniably relevant as it bore on the primary issue in the case – whether

Martin suffers from pedophilia. Phenix based her opinion in large part on the previously administered PPG tests, which reportedly indicated sexual arousal to children. 3RP 125-26.

In contrast, Manley based his contrary opinion – that Martin does not suffer from pedophilia – in large part on the polygraph evidence. Concededly, the general rule in Washington has been that polygraph testimony is inadmissible absent stipulation by both parties. State v. Sutherland, 94 Wash.2d 527, 529, 617 P.2d 1010 (1980); State v. Woo, 84 Wash.2d 472, 527 P.2d 271 (1974). But Martin was not asking to admit the polygraph as evidence for its truth, i.e. that he does not fantasize about children, but as one of the bases for Manley's opinion that he does not suffer from pedophilia – just as Phenix was allowed to testify about her reliance on the PPG or DOC records. Without evidence of the polygraph, Manley's opinion was stripped of any appearance of objectivity and credibility. Unlike the state's expert, Manely appeared to require no objective testing whatsoever to give an opinion.

And reliability aside, the prosecutor acknowledged that state's experts routinely rely on polygraph evidence in their evaluations, because their *patients* believe in the reliability of such testing. As a result, those undergoing an evaluation respond more

honestly to questions posed during a polygraph. Accordingly, the fact that Martin responded as he did during the polygraph has independent relevance, regardless of any results and thus, lent credibility to Manely's opinion Martin did not suffer from pedophilia. In short, it was highly relevant evidence bolstering the defense expert's opinion.

And although evidentiary rules must give way where constitutional rights are at stake,[20] such was not required here, as the evidence was also admissible under ER 703, which provides:

> The facts of 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.

As conceded above, polygraph evidence is generally not admissible in Washington. Again, however, Martin was not seeking to admit the evidence for its truth, but rather, as a basis for Manley's opinion. Moreover, as the prosecutor conceded, it is of

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[20] See e.g. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (constitutional right for defendant to present hearsay evidence in certain circumstances); State v. Anderson, 107 Wash.2d 745, 733 P.2d 517 (1987) (rules of evidence do not "circumscribe the limits of constitutional rights").

the type of evidence reasonably relied upon by experts in Manley's field in forming opinions on involuntary commitment. Therefore, it should have been admitted as a basis for Manley's opinion, for the same reasons PPGs and actuarial instruments are admitted as bases for experts' opinions regarding commitment. See In re Detention of Halgren, 124 Wn. App. 206, 98 P.3d 1206 (2004).

In Halgren, Division One considered the admissibility of actuarial and PPG testing as a basis for an expert's opinion. Over Halgren's objections under Frye, ER 702, ER 703, and ER 403, the trial court admitted testimony concerning risk prediction actuarial instruments and the results of a penile plethysmograph test (PPG). In re Halgren, 124 Wn. App. at 211.

On appeal, Halgren argued the trial court erred in admitting the expert testimony concerning the actuarial tests under ER 702 and ER 403. Halgren, 124 Wn. App. at 219. Despite the "potential predictive shortcomings" of actuarial tests, Division One ruled the trial court properly admitted the evidence, as those shortcomings went to the weight of the evidence, not its admissibility:

> The trial court ruled the actuarial evidence admissible under ER 702[21] and ER 403, concluding that "[t]he jury will be able to understand the weaknesses in the logic [of actuarial instruments], the strong points and the weak points. It's all going to be there on display for them to evaluate and make of [it] what they will." This ruling was entirely proper.
>
> Halgren's arguments concerning the reliability of the instruments go to their weight, not their admissibility.

Halgren, 124 Wn. App. at 220.

In his challenge to the expert's testimony about the PPG result, Halgren argued that the PPG is generally not accepted in the scientific community as a tool to predict a sex offender's likelihood to reoffend, which the state's expert did not dispute. Halgren, 124 Wn. App. at 222. Again, however, the court held Halgren's argument went to the weight of the evidence, not its admissibility:

> But the results of the PPG, standing alone, were never offered or admitted. Rather, the State offered the PPG results under ER 703 through the testimony of Dr. Wheeler as one of several bases concerning his comprehensive sex offender

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[21] 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.

> evaluation that informed his opinion on Halgren's risk to reoffend.
>
> . . .
>
> Dr. Wheeler acknowledged on cross-examination that there is limited evidence that the PPG itself predicts recidivism. He noted that the PPG is but one variable that mental health professional use in concert with other factors to predict recidivism, but that the PPG itself is not a predictor of future behavior.
>
> . . .
>
> Furthermore, Halgren's contention that the PPG is unreliable goes to the weight and not the admissibility of the evidence.

Halgren, 124 Wn. App. at 222-223.

There is no basis to view the polygraph evidence relied upon by Manley any differently that the tests relied upon by the experts in Halgren. It was one piece – an important one – of what helped inform his opinion. Indeed, other jurisdictions have admitted polygraph evidence as a basis for an expert's opinion. See e.g. United States v. A & S Council Oil Co., 947 F.2d 1128 (4th Cir. 1991) (trial judge erred in prohibiting defense counsel from cross-examining the psychiatrist as to the bases of his opinion, including inquiry about the government witness' polygraph result; the polygraph evidence was admissible as an attack on the psychiatrist's opinion); In the matter of A.J., 877 N. E. 2d 805 (Ct. App. Indiana 805) (testimony of expert as to his recommendations

for treatment which were based, in part, on polygraph results, was admissible).

Moreover, the court's ER 403[22] concerns here were adequately remedied by its limiting instruction – which it gave not only during Phenix's testimony, but during Manley's as well (2RP 156; 4RP 160; see also CP 160). Just as Martin was allowed to elicit the weaknesses of the DOC records concerning Martin's treatment and reported arousal during group (relied upon by Phenix), the prosecutor could have elicited the weaknesses associated with the polygraph. The court's ruling that defense counsel's objections to the hearsay evidence relied upon by Phenix went to its weight not its admissibility is utterly at odds with its ruling excluding the polygraph evidence relied upon by Manley. "What is sauce for the goose is sauce for the gander." State v. Bourgeois, 133 Wash.2d 389, 402, 945 P.2d 1120 (1997) (quoting United States v. LeFevour, 798 F.2d 977, 984 (7th Cir.1986)).

And importantly, the court's slippery slope concerns were misplaced. In the next case foreshadowed by the court, the

[22] Under ER 403, 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."

polygraph evidence sought to be admitted might not carry the same importance it did here. The circumstances here were particularly unique in that Martin was undergoing treatment with Depo Lupron, which rendered a current PPG an inadequate test to assist Manley in formulating an opinion. The polygraph was therefore the only objective test available. Under the circumstances, it had such heightened probative value that even under the ER 403 balancing test, it should have been admitted, as its high probative value was not outweighed by the danger of unfair prejudice, considering the necessity of the evidence to the defense expert's opinion and the availability of a limiting instruction and cross-examination by the state.

In any event, when an individual's constitutional right to present evidence is at stake, it cannot be abridged except in the most compelling circumstances, such as where its admission will be so prejudicial as to disrupt the fairness of the fact-finding process. In contrast, in the case foreshadowed by the court, the state has no constitutional rights. Its liberty is not at stake. Accordingly, it is not entitled to the same deference.

This Court should hold, consistent with ER 703 and In re Halgren, that polygraph evidence may be admitted as a basis for

the defense expert's opinion, when under the specific circumstances of the case, the defendants' right to introduce relevant evidence is not outweighed by the state's interest in precluding admission of evidence so prejudicial as to disrupt the fairness of the fact-finding process.

Such was the case here, as the evidence was highly relevant and its admission not so prejudicial as to disrupt the fairness of the fact-finding process, in light of the court's limiting instruction and the state's ability to cross-examine the defense expert about any weaknesses in the evidence – the same tools provided the defense to challenge the evidence relied upon by the state's expert. Unfortunately, it was the exclusion of the polygraph evidence that disrupted the fairness of the fact-finding process as it unfairly tipped the balance in the state's favor. The trial court therefore erred in excluding the evidence.

Because Martin was deprived of his due process right to present a complete defense, the error asserted is of constitutional magnitude. A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional

error is presumed prejudicial and the state bears the burden of proving the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). Considering that the excluded evidence would have lent credibility to Manley's opinion Martin did not suffer from pedophilia – the most contested issue in the case – and that the jury inquired as to the reason Manley trusted Martin's self-report, the state cannot meet that burden here.

But even under the standard applied to evidentiary errors, reversal is required, as there is at least a reasonable probability the outcome of the trial would have been different had the error not occurred. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999) (An evidentiary error requires reversal if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred).

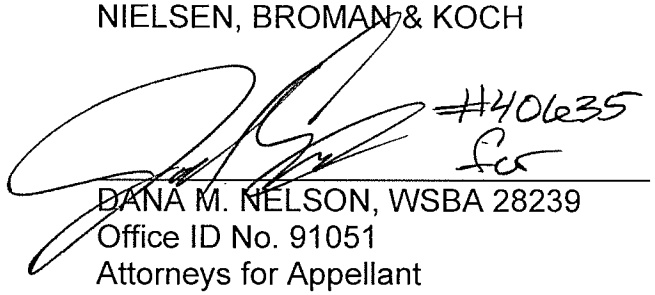
E. CONCLUSION

Because the court's ruling excluding the polygraph evidence deprived Martin of a meaningful opportunity to present a complete defense, this Court should reverse the order of commitment and remand for a new trial.

Dated this 4th day of February, 2013

Respectfully submitted

NIELSEN, BROMAN & KOCH



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for

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Attorneys for Appellant

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

In re Commitment of Sheldon Martin,	)	
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 43757-1-II
	)	
SHELDON MARTIN,	)	
	)	
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 4TH DAY OF FEBRUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATE MAIL.

[X] SHELDON MARTIN
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF FEBRUARY 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 04, 2013 - 2:41 PM

Transmittal Letter

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Court of Appeals Case Number: 43757-1

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