72392-8

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Division I
State of Washington

NO. 72392-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DETENTION OF

GREGORY JAEGER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **The expert-like testimonials tainted the panel on the ultimate issue and a juror's uncured fainting during the State's opening statement prejudiced Gregory Jaeger's right to a fair trial and impartial jury.**

a. Mr. Jaeger's trial should be measured against the constitutional rights to a fair trial by an impartial jury.

Gregory Jaeger was entitled to a fair trial by an impartial jury. As our Supreme Court affirmed in *In re Det. of Stout*, "individuals facing commitment, especially those facing SVP commitment, are entitled to due process of law before they can be committed." 159 Wn.2d 357, 369, 150 P.3d 86 (2007). As set forth in the opening brief, *In re Det. of Young* applies procedural due process trial rights to civil committees, including the right to a unanimous jury verdict. *In re Det. of Young*, 122 Wn.2d 1, 42-49, 857 P.2d 989 (1993), *superseded by statute on other grounds as recognized in In re Det. of Thorell*, 149 Wn.2d 724, 746, 72 P.3d 708 (2003); *see* Op. Br. at 14. Recently, the Court called it "well settled that civil commitment is a significant deprivation of liberty, and thus individuals facing SVP commitment are entitled to due process of law." *In re Det. of Morgan*, 180 Wn.2d 312, 320, 330 P.2d 774 (2014). Accordingly, this Court should consider whether in light of all the extra-record matters that arose during voir dire and opening statements, Mr. Jaeger had a fair trial before an impartial jury.

In its response brief, the State does not address the cases and argument that demonstrate Mr. Jaeger's trial was heard by a partial jury. *Compare* Op. Br. at 14-22 *with* Resp. Br. at 14-15. Rather, the State baldly argues that the constitutional right to a fair trial by an impartial jury does not apply to this civil commitment trial. Resp. Br. at 14-15. The cases relied on by the State in its short discussion do not support that assertion. *Id*. (citing *In re Det. of Reyes*, 184 Wn.2d 340, 347-48, 358 P.3d 394 (2015), discussing application of other Fifth and Sixth Amendment rights to 71.09 proceedings, and *In re Det. of Law*, 146 Wn. App. 28, 48-49, 204 P.3d 230 (2008), discussing the presumption of innocence without citing constitutional provision but citing cases applying the Fifth Amendment).[1] In light of the authority discussed above and in the opening brief, the State's argument is wrong.

[1] In addition to the due process protections discussed above, Mr. Jaeger is entitled to a presumption of innocence as part of the due process protections. *In re Det. of Ross*, 102 Wn. App. 108, 117-18, 6 P.3d 625 (2000) (assuming without deciding the presumption of innocence derived from right to fair trial applies to ch. 71.09 proceedings), *reversed on other grounds by In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). However, because the due process right to a fair trial by an impartial jury plainly applies, the Court need not rely upon the due process right to a presumption of innocence.

b. The four inflammatory occurrences that infected the proceedings with extrinsic evidence necessitate a new trial.

The constitutional issue the State does not substantively address is significant. "[A]n essential element of a fair trial is an impartial trier of fact—a jury capable of deciding the case based on the evidence before it." *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). Mr. Jaeger was entitled to be tried before a jury "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Even if only one juror was unduly biased or prejudiced by the events that occurred, Mr. Jaeger was denied these rights. *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1997). Three jurors told the panel that their (or a friend's) professional experience taught them "once a sex offender, always a sex offender."

Juror 61 stated,

> Over the last twenty-five years [as a police officer with the King County Sheriff], I've worked with our sexual assault unit, both in writing the letters we send out to the public as well as attending all the meetings we have for the public. In the districts I patrolled, it was common practice that we go by the registered sex offender's homes and check on them as part of my daily work.

7/1/14 RP 32- 33. In front of the venire, he continued that his experience would cause him to be unfair and partial in this case. 7/1/14 RP 33. He said he felt like he "need[ed] to watch out for these guys." 7/1/14 RP 33.

The very likely impression this gave to the jurors eventually seated is that they, too, needed to "watch out for these guys" like Mr. Jaeger.

With regard to these comments by Juror 61 (and the additional comments by Jurors 2 and 117), the State ignores the "expert-like" source from which they derived. *See* Resp. Br. at 15-17. While several lay jurors expressed negative opinions about sex offenders, the effect of these casual opinions pale in comparison to the prejudicial effect of statements from a non-testifying expert. *Mach*, 137 F.3d at 633, 634 (emphasizing the prejudicial impact of inflammatory statements purportedly based on "years of experience"). The source of two of the extrinsic opinions, police officers, carries "a special aura of reliability." *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001). This makes it even more likely that the jurors credited the extra-record opinions. Moreover, the fact that several jurors came in with preconceived notions only substantiates the certainty that all three expert-like opinions infected the jury, rendering it partial to the State.

Juror 2 reinforced Juror 61's professional viewpoint, by telling the venire that a deputy sheriff friend "had said if someone, as a young person stealing cars, when they get older most likely won't be doing that and could quit. But he said when it's something sexual there is no cure for that. And I have always kind of held those feelings." 7/2/14 RP 66-67.

Additionally, Juror 117 reported that when he worked in an "institution," a "pedophile . . . was discharged, released . . . And within that week he was found with a boy, little boy in the front seat of his car ready to commit again." 7/2/14 RP 47-48. The State declines to respond substantively to the argument that Jurors 2 and 117's comments also prejudiced Mr. Jaeger's right to a fair trial. Resp. Br. at 18-19. This Court cannot accept the State's invitation to ignore the inflammatory remarks made by these additional unsworn experts. Like Juror 61, Juror 2 repeated an opinion of an experienced police officer. Juror 117 provided a visual example to support the "once a sex offender, always a sex offender" argument that ensured Mr. Jaeger's indefinite commitment.

Beyond even these major events, the seated jury also witnessed Juror 5's physical, fainting response to opening statements. The court did not excuse Juror 5, grant a requested mistrial, or otherwise ensure the fainting did not infect the jury's perception of the evidence. Before any evidence had been presented, this jury had a panoply of extrinsic matters to use to commit Mr. Jaeger.

The State responds to Juror 5's fainting by recounting the evidence eventually presented at trial. Resp. Br. at 20. However, the problem with the juror's conduct was precisely that the episode or its emotional impact could not lawfully be considered by the jury like evidence can. Yet, the

trial court took no steps to ensure the jurors remained impartial: the court did not inquire whether the incident affected the impartiality of the other jurors, it did not instruct the jury to disregard the episode and it denied a mistrial. 7/7/14 RP 89-90.

In *Mach v. Stewart*, the Ninth Circuit reversed on habeas review where a single member of the venire opined on the defendant's guilt through "expert-like" comments derived from her professional experience. 137 F.3d at 632-34. In light of the statements themselves, "the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, the court presumed "that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused." *Id*. at 633. Like in Mr. Jaeger's case where the comments went to the ultimate issue of likelihood of reoffense, in *Mach*, the "extrinsic evidence was highly inflammatory and directly connected" to the defendant's guilt. *Id*. at 634. The court held the error was likely structural, but applied harmless error analysis in an abundance of caution and reversed, without considering the weight of the government's evidence, because the statements had to have a tremendous impact on the jury's verdict. *Id*.

The analogous situation occurred during Mr. Jaeger's voir dire, but it occurred three times. If reversal was required in *Mach*, it is surely

required here. Tellingly, the State does not address *Mach* at all. Not only did voir dire here contain greater error than in *Mach*, Mr. Jaeger's jury was also exposed to a fellow juror fainting during opening statements. Despite the State's attempt to characterize the evidence as overwhelming, the case was closely contested. Mr. Jaeger presented two expert witnesses who opined he was not likely to reoffend if released. 7/23/14 RP 28-149; Exhibit 214 (Novick Brown); 7/21/14 RP 50-186 (Kellaher). He also presented a release plan that had been extensively vetted and prepared. *E.g.*, Exhibit 332; 7/23/14 RP 80-81 (Brown testifies play is "very conservative" and "probably the most comprehensive, focused, targeted treatment plan I have ever seen in my 20 years' experience in this field"); 7/24/14 RP 47-49; Op. Br. at 12-13. Individually or in the aggregate, these four instances (Jurors 2, 61 and 117's expert-like comments before the panel and Juror 5's fainting)—occurring before any evidence was presented—denied Mr. Jaeger the fair trial by impartial jury to which he was entitled.[2]

[2] Even if not rising to the level of a constitutional violation, the Court should hold the trial court abused its discretion in denying a mistrial in light of these inflammatory, extra-record occurrences.

2. **The improper exclusion of evidence also requires a new trial.**

a. <u>The trial court improperly limited Mr. Jaeger's expert's testimony.</u>

The trial court improperly excluded evidence from Mr. Jaeger's expert that he was more susceptible to victimization and grooming by other committees because of his diagnoses. The State presented evidence of Mr. Jaeger's behavior at the SCC in an effort to show he would be a risk in the community. 7/23/14 RP 14-15. Mr. Jaeger should have been permitted to bring in Natalie Novick Brown's testimony to rebut this evidence. Notably, the State does not address this argument.

But the State does note that "the jury must consider the level of risk the [respondent] poses *to the community* if he is *not* confined." Resp. Br. at 24. Dr. Brown's excluded testimony was relevant to this determination. The crux of her testimony would have been that the behaviors the State emphasized were not behaviors Mr. Jaeger would exhibit in the community. This was not an attempt to critique the SCC or demonstrate a risk to Mr. Jaeger if he remained confined. *See* Resp. Br. at 24; *In re Det. of Turay*, 139 Wn.2d 379, 404, 986 P.2d 790 (2010); 7/23/14 RP ("we are not saying anything about what's going to happen if he's kept at the SCC").

The State's second, and final, argument as to why the trial court properly excluded this evidence is belied by the record. *See* Resp. Br. at 23-24. The State argues the trial court correctly "observed" that "the evidence did not support an expert opinion that [Mr.] Jaeger's sexual contact with other residents at the SCC was the result of grooming or victimization." Resp. Br. at 23. However, Mr. Jaeger's case manager at the SCC testified to an incident where another resident goaded Mr. Jaeger with a "smart comment" and may have physically impeded his egress. 7/9/14 RP 110, 135-36. The case manager also testified that many of the older residents at SCC are interested in Mr. Jaeger. 7/10/14 RP 60-61. The evidence further showed Mr. Jaeger told his case manager he "was letting people violate his body." 7/10/14 RP 59-60. Mr. Jaeger's history of victimization at Maple Lane was also introduced. 7/8/14 RP 50.

Further, Dr. Brown was uniquely qualified to opine on the researched effect of fetal alcohol spectrum disorder on Mr. Jaeger's range of conduct. *See* 7/23/14 RP 15 (describing source of Brown's expert opinion). Although the State's witness may not have described Mr. Jaeger's conduct in the same way, Mr. Jaeger should have been afforded the opportunity to rebut his case manager's portrayal. 7/9/14 RP 119-77.

b. The trial court improperly excluded evidence that Mr. Jaeger would apply for the community protection program if released .

The trial court also improperly excluded evidence that Mr. Jaeger would apply to the community placement program if released from the SCC. Mr. Jaeger recognizes that his argument on appeal is narrower than that made at trial. But it is not a new argument, it was raised below. At trial, Mr. Jaeger sought to admit evidence about the community placement program, including that he would apply to it if released. *E.g.*, Motions Vol III RP 259, 262-64 (testimony that application to program is central to release plan). The trial court ruled by excluding all evidence related the community placement program, including that Mr. Jaeger would apply to it if released. Motions Vol III RP 366-79; Motions Vol IV RP 392-402 (oral ruling). Evidence that he would apply to the community placement program was relevant to Mr. Jaeger's motivation not to reoffend and comports with RCW 79.09.060(1) and *In re Det. of Mulkins*, 157 Wn. App. 400, 237 P.3d 342 (2010). This evidence was considered by the trial court when it excluded wholesale all reference to the community placement program. Motions Vol III RP 259, 262-64 (testimony that application to program is central to release plan). The trial court was wrong to exclude it. It is properly before this court on review.

The State's remaining argument is not addressed to this evidence. Resp. Br. at 27-30. Instead, the State reargues the issue in *Mulkins*, 157 Wn. App. 400. As explained in Mr. Jaeger's opening brief, evidence he would apply to the community placement program is admissible as a matter that "would exist" upon release and is evidence consistent with *Mulkins* and RCW 71.09.060(1). Op. Br. at 25-28. He should have been allowed to introduce it to the jury.[3]

3. **Prosecutorial misconduct in closing argument denied Mr. Jaeger a fair trial.**

Mr. Jaeger disagrees with the State's characterization of the prosecutor's rebuttal argument and with the effect of the argument on the viability of the trial. *See* Resp. Br. at 34-42.

In his rebuttal, the prosecutor made four improper arguments, each objected to. First, the court sustained Mr. Jaeger's objection to the prosecutor's disparaging of the respondent's expert. Although the State seeks to argue this was only improper opinion testimony, the objection was not so limited at trial. 7/28/14 RP 185 (general objection in front of jury), 189 (Jaeger's counsel refers to "improper argument"). This part of the rebuttal argument began when the prosecutor offered his opinion on

[3] If the Court nonetheless upholds the trial court's ruling, the Court should consider the constitutional infirmities of RCW 71.09.060(1) as set forth in Mr. Jaeger's opening brief. Op. Br. at 28-30.

Dr. Kellaher's credentials and testimony: "That's the kind of thing that a professional witness does to fluff up a resumé, to get some credibility when she comes in here and gives those rather absurd opinions in a case like this." 7/28/14 RP 182. The disparagement continued as the prosecutor bolstered his own expert's credentials: "Dr. Hoberman's credentials in comparison are stellar. He actually was a real professor at the University of Minnesota . . . . I didn't ask him if he got paid. I didn't think I had to." 7/28/14 RP 183. The prosecutor continued, "She disgraced herself in this courtroom by doing that." 7/28/14 RP 185. These statements of personal belief, at least the last of which the prosecutor admitted, and disparagement of a respondent's witness are misconduct. 7/28/14 RP 190; *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011); *State v. Thorgerson*, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011); *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996).

The prosecutor also committed misconduct by shifting the burden to Mr. Jaeger when the State bore the burden. *See State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986). The prosecutor argued the respondent failed to present his own evidence to combat the State's sexual deviancy evidence:

> And I think the most glaring weakness in the defense case was their abject, complete refusal to face head on in any substantive way the enormous volume of evidence that the State presented in this case that establishes these tremendous sexual deviancies.
>
> Pedophilia, of course, being the most important, the diaper fetish being very important, but the coporphilia and urophilia ---
>
> Ms. Faller: Your Honor, I object.
>
> The Court: Overruled.

7/28/14 RP 177-78. Then, the prosecutor argued that Mr. Jaeger did not even call to testify the professional who worked with the family to develop the release plan, Dr. Becker. 7/28/14 RP 186-87. Mr. Jaeger's objection was again overruled, imbuing the argument with legitimacy. *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (court's overruling objection "lent an aura of legitimacy to what was otherwise improper argument").

The prosecutor committed further misconduct by misstating the law, relying on facts not in evidence, and inflaming the jurors' passions and prejudices. Here the prosecutor argued,

> And that just comports with your common sense. The more deviant somebody is, the more they dwell on these various deviant practices and urges, the more sick they are, the greater likelihood of reoffense. That's the connection.

7/28/14 RP 178.

There is a substantial likelihood these improper arguments affected the jury's verdict in this closely contested case. Op. Br. at 36-37. The resulting indefinite commitment order should be reversed.

4. **Mr. Jaeger relies on his opening brief for the remaining arguments.**

The opening brief adequately addresses Mr. Jaeger's remaining arguments: the indefinite commitment premised on conduct occurring while his juvenile development continued violates substantive due process, the statutory preponderance of the evidence standard violates due process, and the errors in the cumulative require reversal. Op. Br. at 37-50. Mr. Jaeger will not repeat them here.

B. CONCLUSION

Mr. Jaeger was denied a fair trial by an impartial jury due to the extent of expert-like testimony during voir dire on the central issue of whether Mr. Jaeger was likely to reoffend if not committed and the uncured prejudice from Juror 5's fainting during the State's opening argument. The prosecutor further contributed to the need for a new trial by inserting his opinion, disparaging Mr. Jaeger's expert, shifting the burden, relying on facts not in evidence, inflaming the jury's prejudices, and misstating the law. The trial court's evidentiary rulings also hamstrung Mr. Jaeger's case. On these bases, independently or

cumulatively, and due to the constitutional infirmities raised in the opening brief, Mr. Jaeger's indefinite commitment should be reversed.

DATED this 7th day of March, 2016.

Respectfully submitted,

__s/ Marla L Zink_____
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE THE DETENTION OF	)	
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GREGORY JAEGER,	)	NO. 72392-8-I
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APPELLANT.	)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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