

63263-9

63263-9

NO. 63263-9-I

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

In re Detention of Charles Lee Johnson,

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LEE JOHNSON,

Appellant.

2009 AUG 31 PM 4:31  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE

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

The Honorable George Bowden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motions for a directed verdict and to set aside the verdict rendered.
2. The trial court erred by admitting prejudicial hearsay.
3. The trial court violated appellant's right to cross examine witnesses.
4. Prosecutor misconduct denied appellant a fair trial.
5. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

Appellant is 72 years old. The State sought to maintain his indefinite involuntary commitment under Chapter 71.09 RCW.

1. The only expert who examined appellant testified his medical condition meant he was not more likely than not to reoffend. No expert testified appellant was more likely than not to reoffend. Did the trial court err in denying the defense motions for a directed verdict and to set aside the verdict rendered where no expert testified appellant lacked volitional control or was more likely than not to reoffend?

2. A Special Commitment Center (SCC) nurse practitioner testified about a statement appellant allegedly made to another unnamed, non-testifying nurse. The alleged statement was that appellant might not take his medications in order to look sicker at trial. The trial court ruled

appellant's objection, while well-founded, was untimely, and therefore refused to strike the testimony. Later, the trial court held over appellant's objection that the testimony, having come before the jury, was available to the State for closing argument. The State twice referenced appellant's alleged statement in closing argument. Was refusal to strike the hearsay testimony and to disallow its use in closing argument prejudicial error?

3. Appellant's attorney attempted to cross-examine the same SCC nurse using nursing notes from other SCC caregivers. The nurse acknowledged reviewing and relying on the notes. The trial court disallowed the cross-examination, concluding appellant's counsel was attempting to use the notes "for the truth of the matter asserted." Was the refusal to allow such cross-examination error?

4. Closing argument by the prosecutor drew numerous objections from appellant's counsel. All were overruled. Was it error to permit the prosecutor to argue, over objection, so as to: 1) misstate evidence; 2) bring inadmissible, perhaps nonexistent evidence before the jury; and 3) inflame the passions and fears of the jurors?

5. Did the use of inadmissible hearsay, denial of the right to cross-examine witnesses against him, and the prosecutor's misconduct cumulatively impair appellant's constitutional right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

On August 21, 1998, Appellant Charles Lee Johnson was committed as a sexually violent predator (SVP). CP 211; 3RP 8-9.<sup>1</sup> Johnson has resided at the SCC ever since. 3RP 8-9, 48. He is now 72 years old and suffers from end-stage liver disease. CP 211-12.

In January 2009, Dr. Mark McClung – the expert assigned to complete Johnson's yearly evaluation – reported Johnson no longer met criteria as an SVP because of his declining health and, to a lesser extent, his age. CP 209-33; 5RP 133, 179. Dr. McClung made his report to his immediate supervisor, Dr. Bruce Duthie, who accepted Dr. McClung's opinion. 3RP 11, 17; 5RP 133; 6RP 52-53.

Two weeks after Dr. McClung completed his report, the Senior Clinical team at the SCC met and reviewed his conclusions. 4RP 157-59; 5RP 133-34. The team unanimously agreed with Dr. McClung's report, and, because Johnson no longer met the commitment criteria, recommended unconditional release. 4RP 158-59; 5RP 134; 6RP 53. Dr. Richards, the SCC superintendent and final authority on whether the Department of Health and Human Services (DSHS) supports

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<sup>1</sup> There are eight volumes of the Verbatim Report of Proceedings, cited as follows: 1RP – 2/23/09; 2RP – 2/24/09; 3RP – 2/25/09; 4RP – 2/26/09; 5RP – 2/27/09; 6RP – 3/2/09; 7RP – 3/3/09; and 8RP – 3/25/09 (defense motion to dismiss).

unconditional release, declined to accept the recommendation without additional testing. 3RP 11; 4RP 135-41; 5RP 134-35; 6RP 53.

From February 23 to March 3, 2009, a jury trial was held to determine whether Johnson was an SVP. See generally 1RP-7RP. The only examining expert called by the State was Dr. McClung, who testified to actuarial's, according to which Johnson arguably was at high risk to reoffend. 5RP 103-08, 110, 117-19, 165-70, 173.

But Dr. McClung also testified at length to his own conclusion, which was that the strict actuarial's did not take into account the effects of Johnson's end-stage liver disease or his advanced age. 5RP 110-15, 119, 129-35, 140-65, 174-179; 6RP 33-52, 55, 60, 62-64. Based on his evaluation of Johnson, Dr. McClung repeatedly opined Johnson was not more likely than not to reoffend. 5RP 132, 133, 169, 179; 6RP 48, 55.

Dr. Richards, the SCC superintendent, testified only generally about risk assessment, and not about Johnson specifically. 4RP 120-23, 141-56, 166-71; 5RP 7-47, 55-67. Dr. Richards acknowledged that Dr. McClung's report was competent and acceptable. 4RP 157. Dr. Richards acknowledged he had not evaluated Johnson, had no particular concerns about Johnson, and unambiguously stated he had no opinion whether Johnson met the commitment criteria. 4RP 150-51, 156; 5RP 27, 38.

After the State rested, Johnson moved for judgment as a matter of law because the State failed to produce any expert who testified that Johnson lacked volitional control or was more likely than not to reoffend, and therefore failed to prove beyond a reasonable doubt that Johnson was an SVP. CP 53-62; 6RP 101-17. The trial court reserved its ruling. 6RP 118-19. Johnson then rested without calling any witnesses. 6RP 123-24.

The jury found Johnson was an SVP. CP 10; 7RP 66-67. Post-trial, the court denied Johnson's combined motion for judgment as a matter of law/motion for directed verdict. CP 4; 8RP 26-32. Johnson appeals. CP 5-6.

## 2. Specifics of Trial Testimony

The State called a total of five witnesses: 1) the examining doctor, Dr. McClung; 2) SCC Superintendent Dr. Richards; 3) liver transplant expert Dr. Jorge Reyes; 4) SCC nurse Randall Griffith; and 5) Johnson. The State also introduced portions of two transcripts from Johnson's 1998 commitment trial; these included testimony by Johnson and one of his victims.

### *a. Dr. Mark McClung*

Dr. McClung is a psychiatrist with a consultant contract with the SCC. 3RP 7. He is also a member of "Senior Clinical," the team of senior clinicians who review yearly evaluations. 4RP 121. Over the course of

two days, Dr. McClung repeatedly testified Johnson was, in his opinion, not more likely than not to reoffend. 5RP 132, 133, 169, 179; 6RP 48, 55.

About ten people do all the yearly evaluations at the SCC, and all the evaluators other than Dr. McClung are psychologists without a medical degree. 3RP 9-10, 12-13; 5RP 124-25. Consequently, Dr. McClung's direct supervisor at SCC, Dr. Duthie, frequently assigns those case to McClung which – like Johnson's – involve other medical issues. 3RP 12; 5RP 124-25.

Dr. McClung was familiar with Johnson's case, as he had been in charge of Johnson's medications when Johnson arrived at the SCC in 1998, and so saw him every three to five months for a number of years. 5RP 126, 175; 6RP 54-55. For the evaluation, Dr. McClung reviewed Johnson's annual evaluations from 2003 through 2008, progress reports for the past few years, prior polygraph and plethysmograph testing, and the discovery from Johnson's original commitment trial. 3RP 24-25; 5RP 126-27. He also interviewed Johnson, his current therapist and psychiatrist, and Johnson's primary care provider Randall Griffith; as well as applied actuarial testing to Johnson. 3RP 25; 5RP 127-28.

Dr. McClung testified Johnson admitted molesting some 14 minors between 1957 and 1984. 5RP 71, 73. He also acknowledged Johnson suffers from both pedophilia and antisocial personality disorder. 5RP 73-

74, 81-84. This combination of diagnoses “mak[e] someone a more high-risk offender.” 5RP 95. During the review, Dr. McClung found records documenting various misbehavior by Johnson, including failure to follow rules in the military, being unfaithful during marriage, numerous criminal convictions – some of which were sexual, and some of which were violent, and failure to follow release conditions. 5RP 84-88. In general, Dr. McClung described Johnson’s general attitude as “very poor” and “pugnacious.” 5RP 92, 93.

Dr. McClung applied the Static-99 and the SORAG actuarial tests to Johnson. 5RP 103-07, 171-72. Under the old norms for the Static-99, Johnson statistically measures as “high risk,” which measures him as 52% likely to reoffend within the next 15 years, the highest category under the Static-99. 5RP 103-04, 106, 115-18. Under the new norms for the Static-99, however, Johnson rescored as a “6,” which gave him a likelihood of reoffense of only 37.3% in the next ten years, and only 27.7% in the next five years. 5RP 117-19, 168-71, 173; 6RP 46-47.

On the SORAG, Johnson scored as 75% likely to reoffend within 7 years and 89% likely to reoffend within 10 years. 5RP 107. Dr. McClung noted, however, that the SORAG over predicts sexual reoffenses', because

it is designed to predict all violent offenses, not just sexual ones. 5RP 107, 109-10.<sup>2</sup>

Dr. McClung said actuarial measurements needed to be tempered with clinical judgment. 5RP 107, 128-29. Dr. McClung agreed that a person who actuarially tested as 89% likely to reoffend in 10 years would not change in that measurement even if in a coma and incapable of re-offending, 99 years old, or otherwise unlikely to live for any lengthy period of time. 5RP 111-12. Actuarial testing is “very useful [and] very helpful” for determining if an offender is a low, medium, or high-risk offender, but many things not measured by the actuarial’s impact an evaluator’s opinion of actual risk. 5RP 129-30.

Dr. McClung believed advanced age and medical issues both impacted Johnson’s likelihood to reoffend, with the medical issues being “by far the most important factors.” 5RP 130.<sup>3</sup> Specifically, Johnson’s end-stage liver disease caused significant mental decline and also a loss of libido, both of which impacted Dr. McClung’s evaluation of Johnson’s risk to reoffend. 5RP 158.

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<sup>2</sup> Johnson had a significant history of violent, non-sexual offenses.

<sup>3</sup> As regarded Johnson’s age, Dr. McClung noted although opinions in the scientific community vary, persons released after age 60 reoffend at significantly lower risk than actuarials predict. 5RP 130-31. There are some high-risk offenders similar to Johnson who might reoffend even after reaching an advanced age, and Dr. McClung opined Johnson would still meet criteria if he were a healthy, robust 72-year old. 5RP 130-32; 6RP 33. With Johnson’s significant medical issues, however, Dr. McClung believed Johnson was not more likely than not to reoffend. 5RP 131-33.

Dr. McClung saw Johnson every one to three months and had observed a gradual deterioration in Johnson's cognition. 5RP 147. Johnson was speaking and thinking more slowly, and having greater difficulty finding correct words. 5RP 147-48. Although persons with end-stage liver disease can vary day-by-day and even hour-by-hour in their cognition due to small changes in ammonia level, Johnson's files and Dr. McClung's interviews with other caregivers corroborated the observation that Johnson had been undergoing a consistent decline over the past year and a half. 5RP 148-51, 176, 178-79.

Johnson's mental decline had caused a radical change in Johnson's outlook. 5RP 150-51. While Johnson was still antisocial, his aggression had greatly reduced, as had his interest in being uncooperative or inappropriate with the SCC staff. 5RP 151, 177-78; 6RP 35-36. Dr. McClung found Johnson's "world had gotten smaller," that he was far more interested and involved in his comfort and his day-to-day life, and had largely lost the ability to strategize or carry out a plan. 5RP 151-52, 176. Johnson was far more interested in getting from his bed to the commode comfortably than he was in his power struggles with staff or other inmates, which he had once obsessed over. 5RP 176-78; 6RP 37.

Dr. McClung also noted Johnson's arousal and libido had dropped significantly due to the disease. 5RP 140-42, 155. Dr. McClung

explained this was partially because Johnson's production of testosterone had dropped to low levels due to age and liver disease, and also because Johnson felt physically poor much of the time. 5RP 141-46, 155; 6RP 64.

Johnson also has significant physical symptoms from liver disease. 5RP 153-54. Dr. McClung observed Johnson become weaker and slower over time. 5RP 175-76. According to SCC records, Johnson was more fatigued, had more falls and dizziness, and occasional tremors and shakiness. 5RP 153-54.

Johnson is frail. For example, distended blood vessels in his neck could easily break, especially if his medications are not given properly. 5RP 156-57; 6RP 63-64. Johnson's platelet count is low, causing a risk of heavy bleeding, and his disease places him more at risk for infections. 5RP 156-57. Dr. McClung noted someone recently gave Johnson a Motrin, which led to acute renal failure and hospitalization. 5RP 157-58.

Dr. McClung pointed out that because Johnson's hepatitis would not respond to conventional treatment, his medical state was expected to decline further over time. 5RP 154-56; 6RP 62-63. According to Johnson's most recent liver reports, he was likely to die in the next three years. 5RP 112-14; 6RP 43-44. Furthermore, Dr. McClung observed that any failure to follow his strict medical regimen – involving diet, fluid

restriction, and medications – would rapidly worsen Johnson’s mental faculties and probably speed his death. 5RP 152-53, 156-57, 178.

Dr. McClung testified that application of an actuarial assessment requires training and that laypersons cannot properly evaluate a person under an actuarial. 5RP 158-61. Dr. McClung talked specifically about certain limitations of the actuarial’s – for example, the developer of the Static-99 has stated the test should only be applied “very cautiously” to offenders older than 60. 5RP 163-64; 6RP 49, 60.

The State questioned Dr. McClung about other issues not measured by actuarial stressors that might increase Johnson’s risk of reoffense, such as situational stressors, substance abuse, and the number of prior victims. 5RP 180-85; 6RP 16-20, 25-32. Dr. McClung acknowledged the existence of such considerations, and in some cases, the possible application of them to Johnson. 5RP 180-85; 6RP 16-20, 25-32. None of these considerations, however, changed Dr. McClung’s opinion that Johnson was not more likely than not to reoffend. 6RP 33, 48, 55.

*b. Dr. Henry Richards*

Dr. Richards, the SCC superintendent, declined to accept Dr. McClung's and the senior clinical team's recommendation unconditionally discharged Johnson. 4RP 140-41, 158-59. Dr. Richards recommended

two additional tests be performed on Johnson - a penile plethysmograph (PPG) and neuropsychological testing. 4RP 162-63; 5RP 134.

The PPG was subsequently completed. 5RP 137-38. Results were “inconclusive” because Johnson's response to the test was so low. 4RP 163-64; 5RP 138. Johnson responded sexually only one time during the test, the response was only 7%, and it was to an adult unclothed woman. 5RP 138-40; 6RP35. At the time of trial, neuropsychological testing had not been performed and Dr. Richards still had not accepted the clinical team's unanimous recommendation to release Johnson. 4RP 164-65.

Dr. Richards testified extensively but generically about risk evaluation. 4RP 143-55; 5RP 7-26, 28-37, 55-67. He discussed many specific risk factors, including the possible effect of psychosocial stressors like sickness, loss of a loved one, loss of structure or social support, and lack of housing. 4RP 155-53. He also testified about a number of factors known to apply to Johnson, such as his large number of admitted offenses, his dropping out of treatment, his relatively youthful age at his first offense, his relatively advanced age at his last offense, and his acknowledged interest in children. 5RP 45-47.

Dr. Richards also testified about the limitations of a number of studies on sex offender risk assessment, including the inability to discover some reoffenses'. 4RP 149-52; 5RP 16, 17-21, 28-36, 55-56, 63-66. Dr.

Richards noted the differing opinions by experts of the effect of aging on risk predicting, and acknowledged that all studies in the field show a significant drop in recidivism after age 60. 4RP 149-53, 166-71; 5RP 7-17, 19, 22, 41, 43-44.

Dr. Richards acknowledged actuarial prediction does not take into account many factors, such as age and health. 4RP 22-24. A person in a permanent vegetative state, for example, would still have the same likelihood to reoffend as a healthy and awake person if their “static factors” remained the same. 5RP 22-24. Dr. Richards testified that all evaluators take into account factors such as age and health, in addition to actuarial’s, when making a competent risk prediction. 5RP 25.

Dr. Richards agreed Dr. McClung's report was competent and acceptable. 4RP 157. He also admitted he had not personally evaluated Johnson, had no particular concerns about Johnson, and that he had no opinion whether Johnson continued to meet the commitment criteria. 4RP 156; 5RP 27, 38.

*c. Dr. Jorge Reyes*

Dr. Reyes is a liver transplant surgeon for the University of Washington. 4RP 13-16, 19-20. In December 2007, Dr. Reyes reviewed a hepatologist's report from September 2007 and agreed with the transplant committee that Johnson was not then a suitable transplant

candidate because, in part, he was not sick enough. 4RP 4-7, 10-11, 21-27.<sup>4</sup>

Dr. Reyes noted Johnson suffered from both cirrhosis of his liver and hepatitis C. 4RP 34-35. The subtype of hepatitis C Johnson suffers from is particularly difficult to treat, and conventional treatments for the hepatitis C have failed. 4RP 41-43.

Dr. Reyes admitted he had not reviewed any lab reports for Johnson dated later than September 2007, and he did not know Johnson's current medical condition. 4RP 29-32, 34-36.

*d. Randall Griffith*

SCC nurse practitioner Griffith met Johnson in 2004, and has been his primary medical caregiver ever since. 4RP 63-65. Griffith noted Johnson's extensive medication needs, as well as the extreme vigilance necessary to monitor his liver disease. 4RP 70-72, 77. For example, in November 2008, Johnson fell and broke his arm and another caregiver gave him a tablet of Motrin. 4RP 72-73, 76-77, 88-89; 5RP 157-58. The medication "tipped the balance" between Johnson's liver and kidney function, and as a result, Johnson was hospitalized for acute renal failure. 4RP 76-77; 5RP 157-58. Griffith said that any significant variation in

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<sup>4</sup> Dr. Reyes and the committee's primary reason for rejecting Johnson for transplant was not Johnson's health, but rather his likely noncompliance with the strict requirements for post-transplant treatment. 4RP 25-27. For example, Johnson had a long history of noncompliance with requirements to abstain from alcohol use. 4RP 26.

Johnson's medical care or stopping his medications would likely cause renal failure or other complications, such as high blood pressure rupturing the varicose veins in his neck. 4RP 85-86.

Griffith acknowledged Johnson is sometimes subject to mental confusion and loss of coordination due to high ammonia levels. 4RP 72, 79, 81-83. Griffith opined, however, that Johnson was "functioning fine" on most days. 4RP 67. Griffith specified this meant Johnson was dressed appropriately, had bathed, combed his hair, put on his nametag properly, and did not have difficulty finding words. 4RP 67. Griffith said he believed Johnson had "average" cognitive abilities for a 72-year-old -- "we all slow down a bit." 4RP 69. He also, over objection, said Johnson had the physical strength to control someone smaller and weaker than himself. 4RP 69.

*e. Charles Lee Johnson*

Johnson testified only briefly as a witness for the State. 3RP 48-56. Johnson acknowledged his crimes and acknowledged dropping out of treatment after he learned "whatever [he] thought was important." 3RP 48. Johnson said he never hurt the children involved, and he did not realize his crimes would affect them psychologically until after he had been in treatment for three years. 3RP 48-49.

Johnson said that if released from the SCC, he would get a job. 3RP 51. Johnson's hand was injured at the time of trial, but he claimed that once it healed he would be able to work as a mason. 3RP 51-52. Johnson said he had about \$800 in the bank and was eligible for social security benefits. 3RP 54.

The State read portions of a 1998 deposition by Johnson into the record. 6RP 65-86. In the deposition, Johnson described the facts of his 1978 conviction for first degree sexual abuse, in which he invited a seven or eight year old girl – the daughter of his neighbor – into his apartment. 6RP 66. Johnson ordered her to undress, then lay on top of her and ejaculated on her. 6RP 66-68. The child was crying when he got up, and Johnson speculated the child was afraid she would be in trouble because she wasn't supposed to be there. 6RP 68-69.

In the deposition Johnson also described the facts of his 1983 conviction for indecent liberties, when he drove a seven-year-old girl, her twin brother, and their young friend to the park. 6RP 69-71. While at the park, the two boys went elsewhere, and Johnson claimed he talked the little girl into allowing him to fondle her. 6RP 71-72. He had gotten on top of her and was “rubbing on” her when the boys came back. 6RP 72-73. Afterwards, he took the children to the store, continuing to touch the

little girl on the way, and offered each of the children a candy bar if they wouldn't tell anyone about his activities. 6RP 73-74.<sup>5</sup>

Johnson also talked about the facts of a 1992 conviction for communicating with a minor for immoral purposes during the deposition, in which he took a two year-old girl with him to pick blackberries. 6RP 81-82. When the girl's mother approached, she found Johnson on his knees in front of her daughter, and her daughter had her pants down. 6RP 82-84. Johnson said he had only been holding the child up while she urinated and denied any sexual contact occurred. 6RP 82-84.

In his deposition Johnson also acknowledged additional, uncharged sexual contact with other little girls. 6RP 77-78. He estimated such contact had occurred ten additional times. 6RP 78. He would meet the children at parks, playgrounds, or the like, and perhaps buy the children ice cream, candy, or a soda pop in order to gain their trust. 6RP 78-81.

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<sup>5</sup> The other transcript read to the jury contained portions of this victim's 1998 testimony. 6RP 86-95. The victim generally confirmed Johnson's version of events, with minor variations. 6RP 89-94.

C. ARGUMENTS

1. THE TRIAL COURT SHOULD HAVE GRANTED JUDGMENT IN JOHNSON'S FAVOR AS A MATTER OF LAW BECAUSE NO EXPERT TESTIFIED JOHNSON WAS A SEXUALLY VIOLENT PREDATOR. .

Simply stated, no expert testified Johnson was a sexually violent predator. Dr. McClung repeatedly opined Johnson was not more likely than not to reoffend. Dr. Richards, Dr. Reyes, and Nurse Griffith all either explicitly stated that they had no opinion or did not testify on the subject at all because they were not qualified to do so.<sup>6</sup> Absent a qualified expert's opinion that Johnson met the criteria for involuntary commitment under Chapter 71.09 RCW, the evidence was insufficient, as a matter of law, to continue Johnson's indefinite commitment as an SVP. This Court should therefore conclude the trial court erred in denying Johnson's motions for a directed verdict and to set aside the verdict rendered, reverse Johnson's commitment order and remand with instructions that Johnson be immediately released from confinement at the SCC.

Motions for a directed verdict or to set aside a verdict rendered are treated as motions for judgment as a matter of law. CR 50(a)(1); (b);

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<sup>6</sup> See 4RP 48 (Dr. Reyes testifies he has no expertise in SVP evaluation); 4RP 59, 61 (out of the presence of the jury, State agrees Griffith cannot testify to either Johnson's diagnoses or his likelihood to reoffend); 4RP 156; 5RP 23, 38 (Dr. Richards testifies he has not evaluated Johnson, has not specific concerns about him, and has no opinion as to his status as an SVP).

Guijosa v. Walmart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001). “Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” Guijosa, 144 Wn.2d at 915, (quoting Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). “Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” Guijosa, 144 Wn.2d at 915 (quoting Brown v. Superior Underwriters, 30 Wn. App. 303, 306, 632 P.2d 887 (1980)). When reviewing such a motion, the reviewing court applies the same standard as the trial court. Guijosa, 144 Wn.2d at 915 (citation omitted).

Here, the State was required to prove, beyond a reasonable doubt, that Johnson: 1) lacked volitional control; and 2) was more likely than not to reoffend if not confined. RCW 71.09.020(18); Kansas v. Crane, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L.Ed.2d 856 (2002) (requiring proof of “lack of volitional control” in all sexual predator commitment proceedings in order for such proceedings to meet federal constitutional due process requirement). The State produced Dr. McClung as their only examining expert, and Dr. McClung testified repeatedly that Johnson was not more likely than not to reoffend, and because of the effects of his illness on his

libido, really lacked any desire to reoffend. 5RP 132, 133, 140-46, 155, 158, 169, 179; 6RP 48, 55, 64. This testimony does not provide “substantial evidence:” 1) of lack of volitional control or 2) that Johnson was more likely than not to reoffend. All the other witnesses for the State either testified explicitly that they had no opinion on these two issues, or else did not testify to them at all.

At both the motion for a directed verdict and the motion to set aside the verdict rendered, Johnson repeatedly referenced the Washington Supreme Court's holding that:

[A] diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for a jury to find a serious lack of control. Such a diagnosis, however, when coupled with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a jury to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP.

In re Detention of Thorell, 149 Wn.2d 749, 761-62, 72 P.3d 708 (2003)(emphasis added), cert. denied, 541 U.S. 990 (2004); see also State v. Post, 145 Wn. App. 728, 755, 187 P.2d 803 (2008) (same).

Here, no expert opined Johnson currently lacked volitional control. Indeed, the gist of Dr. McClung’s testimony was that Johnson was neither capable of nor particularly interested in re-offending. Because there was

no such evidence, the finding that Johnson was an SVP was improper under Thorell.

Even if Thorell is not directly on point, a multitude of persuasive caselaw demonstrates the reasonableness of a requirement that a qualified expert agree with the conclusion the State asks the jury to reach:

In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson.

Berger v. Sonneland, 144 Wn.2d 91, 110, 26 P.3d 257 (2001) (citing Harris v. Groth, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) and 5A Teglund, WASHINGTON PRACTICE: EVIDENCE § 300 (1982)); see also McCormick, EVIDENCE § 13, at 58 (5<sup>th</sup> ed. 1999) (assistance requires the expert to draw inferences from the facts “which a jury could not draw at all or as reliably”). A prediction of future dangerousness – a procedure both Dr. McClung and Dr. Richards agreed required clinical judgment and the application of actuarial’s by a trained person<sup>7</sup> – is not a matter that should be determined without reliance on expert opinion.

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<sup>7</sup> The Thorell Court, in finding actuarial instruments admissible under the Frye standard, also noted the application of such actuarials required training:

The actuarial approach evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense which may be adjusted (or not) by expert evaluators considering potentially important factors not included in the actuarial measure.

149 Wn.2d at 753 (emphasis added, internal citations omitted).

A few Washington SVP cases appear to assume expert testimony will be presented to jurors in support the State's theory of the case. For example, this Court noted that "[d]etermining whether a particular person possesses [a mental abnormality as defined by RCW 71.09] is based upon the complicated science of human psychology and is beyond the ken of the average juror." In re Detention of Bedker, 134 Wn. App. 776, 779, 145 P.3d 442 (2006) (emphasis added). And in a dissent on entirely different grounds, Justice Morgan noted:

In Washington, RCW 71.09 is the statute under which a defendant may be committed as a sexually violent predator. It requires that the constitutionally-mandated element of current dangerousness be evidenced not just by expert testimony, but also by a recent act.

In re Detention of Greenwood, 130 Wn. App. 277, 289, 122 P.3d 747 (2005)(emphasis added), review denied, 158 Wn.2d 1010 (2006).

Non-SVP cases can also be instructive. For example, our State Supreme Court held in a criminal sentencing case that a finding of future dangerousness could only be made with the assistance of expert testimony. State v. Pryor, 115 Wn.2d 455, 799 P.2d 244 (1990).

In Pryor, the trial court imposed an exceptional sentence based on the defendant's alleged "progressively predatory" behavior. Id. at 449. But on review, the Court noted a finding of "predatory" behavior equated to a finding of "future dangerousness." 115 Wn.2d at 453-54. The Court

further noted that testimony of a mental health expert was required to prove “future dangerousness,” in part because a criminal defendant’s lack of amenability to treatment was an inherent part of such a showing. Id. at 453-55. See also State v. Strauss, 119 Wn.2d 401, 420-21, 832 P.2d 78 (1992) (applying Pryor, Court reversed exceptional sentence where trial court concluded defendant was not amenable to treatment absent supporting expert testimony).

Pryor and Strauss both conclude expert testimony is required in the complex arena of psychological pathology. See also State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998) (raising diminished capacity defense requires producing an expert witness who can establish “a mental disorder that impaired the ability to form the specific intent”); Addington v. Texas, 441 U.S. 418, 429, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1975) (“[w]hether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists”) (emphasis in original). Other cases have held that proof of otherwise complex, disputed points may require an expert’s opinion, for example in malpractice cases, experts must opine as to the standard of care. See, e.g., Berger, 144 Wn.2d at 110-11 (causation of emotional distress required proof by expert testimony); Seybold v. Neu, 105 Wn. App. 666, 676, 19

P.3d 1068 (2001) (because of the difficulty of establishing risks and thereby the materiality of any given lack of disclosure, a cause of action premised on lack of informed consent requires expert testimony on those issues).

Moreover, a number of cases from Massachusetts are directly on point and the rationale behind those should be adopted by this Court. In re Johnstone, 453 Mass. 544, 903 N.E.2d 1074 (Mass. 2009); Commonwealth v. Dube, 59 Mass. App. Ct. 476, 796 N.E.2d 859 (Mass. App. Ct. 2003); Commonwealth v. Bruno, 432 Mass. 489, 735 N.E.2d 1222 (Mass. 2000). In Bruno, the Massachusetts Supreme Court discussed the standard of proof in a probable cause hearing in a case where the Commonwealth sought to detain an individual as a suspected “sexually dangerous person.” 735 N.E.2d at 1237-38. The Court held due process required some supporting evidence from expert witnesses:

The evidence [at probable cause hearing] must [prove] the person currently “suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses.” Whether a person suffers from a mental abnormality or personality defect, as well as the predictive behavioral question of the likelihood that a person suffering from such a condition will commit a sexual offense, are matters beyond the range of ordinary experience and require expert testimony.

735 N.E.2d at 1237-38 (internal citations omitted).

Next, in Dube, a case remarkably similar to Johnson's, the Commonwealth sought in two separate cases to commit the appellants as "sexually dangerous" people, even though they were found by their respective Commonwealth-appointed examiners to not be sexually dangerous.<sup>8</sup> 796 N.E.2d at 862. The Commonwealth did not present affirmative evidence of dangerousness, but sought commitment based on evidence elicited via impeachment of the examiner, whose base opinion was that the appellants were not likely to engage in sexual offenses if released. Id. at 861, 867. The Court scorned this argument:

"[W]here the tribunal is faced with a fact-finding problem, we confide ourselves to a rational process[.]" Adherence to a rational process typically requires not only expert testimony regarding general principles with which lay-people are unfamiliar, but also testimony regarding "inferences from highly technical or specialized facts which the fact-finder ... would not be competent to draw."

....

In a rational process, one cannot prove a case by producing opinions directly contradicting the conclusion one seeks to have the fact-finder reach. Disbelief of such opinions simply furnishes no "basis for a finding the other way." Consequently, the Commonwealth cannot prove that a person is sexually dangerous by producing the expert testimony of someone who opines that he is not.

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<sup>8</sup> The Massachusetts statute defines a "sexually dangerous person" almost identically to Washington's "sexual predator." The Massachusetts statute defines such a person as any person who has been "convicted of...a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility." G.L. c. 123A, § 1(i). Compare RCW 71.09.020(18).

796 N.E.2d at 868. The Court thus determined both petitions for commitment were properly dismissed prior to trial given the lack of expert testimony supporting the commitment. Id at 868-69.

The most recent decision, In re Johnstone, took the holding of Dube and Bruno even further. In Johnstone, the Court first explained that the Community Access Board (CAB) is a group of two psychologists or psychiatrists, plus three employees of the Massachusetts department of corrections. 903 N.E.2d at 1077. The CAB is tasked with both conducting annual reviews of persons committed as sexual predators and also administering a “community access program,” which appears to constitute the Massachusetts equivalent of LRAs (less restrictive alternatives) in Washington. Id.

In Johnstone, two qualified examiners were, per Massachusetts law, assigned to examine the appellant to determine if he was still sexually dangerous after some years of commitment. 903 N.E.2d at 1076. The examiners determined he was not. Id. The CAB, however, unanimously disagreed. Id. At a jury trial on the matter, one member of the CAB who was, by law, a “qualified examiner,” but who had not examined the appellant, testified as to why he believed appellant was still dangerous. 903 N.E.2d at 1076. A motion for a directed verdict was rejected, and the appellant was subsequently recommitted by the jurors. Id.

Johnstone asserted he could not be committed unless one of his two assigned qualified examiners found him to be sexually dangerous. 903 N.E.2d at 1079. On the other hand, the Commonwealth argued that although Bruno and Dube required expert testimony to show dangerousness, nothing in the law required the expert testimony come from the persons examining the appellant; instead, such evidence could come from another expert – namely, the expert from the CAB. Id.

The Massachusetts Supreme Court disagreed. 903 N.E.2d at 1080-81. While evidence from the CAB was certainly admissible, it was not by itself sufficient to show dangerousness under the law. Id. If the actual examiners of the appellant agreed he was no longer sexually dangerous, the motion for a directed verdict should have been granted. Id.

Other States have made similar findings, albeit usually in dicta or without explanation. For example, one case from Nebraska simply holds expert testimony is required to find a person to be a “mentally disordered sex offender.” State v. Harris, 236 Neb. 783, 463 N.E.2d 829, 836-37 (Neb. 1990). A Wisconsin court noted, in affirming the admission of expert evidence in an SVP-type proceeding: “The court could not predict Lalor's propensities to reoffend in a vacuum. The court required the assistance of the expert testimony and the studies that such experts employ.” In re Commitment of Lalor, 261 Wis.2d 614, 661 N.W.2d 898,

905 (Wis. App.), review denied, 671 N.W.2d 848 (2003). See also Beasley v. Molett, 95 S.W.3d 590, 598 (Tex. App. – Beaumont, 2002) (where state constitution provided that a person could not be committed without expert testimony, appellate court upheld constitutionality of SVP-type act despite lack of explicit requirement of expert testimony; reading requirements of the statute together with constitutional requirements “indicate the legislature intended there be competent medical or psychiatric testimony to support an involuntary commitment under the Act...” (emphasis added)); In re Care and Treatment of Cokes, 107 S.W.3d 317 (Mo. App. 2003) (where State expert testified SVP-type respondent had mental disorder rendering him likely to reoffend, but did not include requirement that such reoffenses were likely to be predatory and violent, Court rejected State’s argument that jurors could conclude the same from the lay and expert evidence at trial, holding: “[e]xpert testimony is necessary ‘[w]hen jurors, for want of experience or knowledge of the subject under inquiry, are incapable of reaching an intelligent opinion without outside aid’”).

Counsel could find no cases indicating a person could be committed in an SVP-type case where no expert witness supported such commitment. Probably the only reason there are not more cases nationwide requiring an expert support an SVP-type commitment is that

courts assume the State would not bring such a petition without expert testimony in support. See 6RP 118; 8RP 26-27 (trial court says Johnson's case is in an "unusual posture"); 1RP 16 (trial court asks prosecutor how he might prevail, because the court is "concerned that we not waste scarce resources here").

Common sense dictates that most jurors, presented with a confirmed child molester and given free rein to determine future dangerousness, are going to find in favor of commitment. But if the State cannot present even a single expert who will testify the respondent lacks volitional control or is more likely than not to reoffend, that outcome violates due process. Because the State failed to produce any substantive evidence that Johnson currently lacked volitional control or that he was more likely than not to reoffend, the trial court should have granted the motion for judgment as a matter of law. Guijosa, 144 Wn.2d at 915. This Court should therefore reverse.

2. THE TRIAL COURT DENIED JOHNSON HIS RIGHT TO CONFRONT WITNESSES WHEN IT REFUSED TO STRIKE INADMISSIBLE HEARSAY, AND SUCH HEARSAY WAS PREJUDICIALLY USED AGAINST HIM.

During redirect, SCC Nurse Practitioner Griffith testified in such a way that it appeared non-hearsay statements by Johnson were going to be elicited, but suddenly, a hearsay statement by another person came out

instead. Johnson's counsel objected, but such objection was overruled.

As timing is at issue here, the exchange is contained in full below:

Q: Have you, in the last couple of weeks, had a conversation with Mr. Johnson when he's talked about taking his meds in preparation for trial?

A: Yes. On Monday we talked about that.

Q: This Monday?

A: Yes, sir.

Q: Before he got here?

A: Yes, sir.

Q: What did he tell you?

A: I learned from the nursing staff that he had told them that he wasn't going to take his medications because he felt that if he were sicker at trial, things would go better for him.

Q: So if he didn't take his meds, he may look sicker?

A: Yes, sir.

Q: And may he some implications for him?

A: That was the impression that I got.

KAESTNER:<sup>9</sup> Object to hearsay. It should be stricken, Your Honor.

STERN: Thank you, sir.

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<sup>9</sup> Amy Kaestner was Johnson's attorney. Paul Stern was the prosecutor.

COURT: Overruled. The objection's untimely.

STERN: That's all I need to ask.

4RP 91 (emphasis added). On recross, Griffith acknowledged he had no reason to believe Johnson had stopped taking his medication. 4RP 93-94.

After the jury was excused, Johnson's attorney reiterated her objection to the hearsay, and again asked it be stricken. 4RP 101. The trial court declined, stating:

COURT: Yeah. Your objection was well founded it simply was untimely. You allowed all of the information to come in without an objection. The bell was rung, and that's why I – I denied or overruled your objection when it was raised in the presence of the jury.

It simply was too late for me to undue [sic] the damage by eliciting what would otherwise be objectionable hearsay.

KAESTNER: I still think the Court could order it stricken.

COURT: I could, and I'm not choosing to do so. You need to act as an attorney and make a timely objection if you want me to keep out inadmissible evidence.

....

My observation was that you sat on your hands while all that testimony was elicited three or four different questions. And that's the only reason why I did not sustain your objection at the time that it was raised. It was just a question of timeliness.

...

KAESTNER: I would ask that it not be allowed to be argued in closing as substantive evidence, however.

COURT: Well, it's in evidence because it wasn't timely objected to, so I'll deny that motion.

4RP 101-02.

Subsequently, the State twice referenced this hearsay evidence near the end of its closing argument:

He's feeling pretty good. He also says maybe I won't take my pills and come to court and look sick so people will have a little sympathy for me.....Because that's who he is. The manipulative guy.

7RP 39.

The comment that I think is so overwhelming the importance of the comment so overwhelming [sic] when he talks about maybe I won't take my meds so I'll look better or I'll look worse for you so it will be better for him is the ultimate irony of this lifelong child molester who maybe was trying to get your sympathy. What I said in opening is very true here today. The very thing that he claims makes him so sick, he's old, is the very thing that will make him so dangerous.

7RP 41.

Obviously, the statement made by the unnamed member of the nursing staff to Griffith was inadmissible hearsay. ER 801(c), ER 802. Indeed, the trial court even acknowledged as much. 4RP 101-02.

Moreover, the questions asked by the prosecutor did not seem to lead to inadmissible hearsay, so there was no warning such hearsay would be elicited until it had arrived in the courtroom. 4RP 91. While the prosecution was unfortunately permitted to briefly underscore the testimony, even an impeccably timed objection could scarcely have

prevented the initial testimony. 4RP 91. The trial court's impression that defense counsel "sat on her hands" was perhaps based upon the many questions leading up to the testimony – none of which would be expected to lead to hearsay at all. 4RP 91.<sup>10</sup>

As this testimony was plainly inadmissible hearsay, the only remaining question is whether it was prejudicial to Johnson. It was, whether under the evidentiary or constitutional standard.

- a. *This Court Should Reverse because Johnson's Right to Confront Witnesses Under the Washington Constitution was Denied.*

A criminal defendant has a constitutional right under the Washington constitution to confront the witnesses against him. Washington State Constitution art. 1, § 22 (amend. 10). Although Washington courts have found the constitutional right to confront witnesses does not apply at SVP trials,<sup>11</sup> the right should apply because Johnson's liberty interests were at issue. See, e.g., State v. Dahl, 139 Wn.2d 678, 686, 990 P.2d 396 (1999) (defendant has a limited right to confrontation in parole revocation hearing); State v. Abd-Rahmaan, 154

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<sup>10</sup> Interestingly, on a different day, the trial court overruled a different objection as "untimely." During redirect testimony by Dr. Richards, the State asked whether Dr. Barbaree (not a witness at trial, but a researcher cited favorably by McClung and unfavorably by Richards) was a "frequent witness for the defense." SRP 66. Dr. Richards responded, "Yeah, I do know that." SRP 66. The defense objected as irrelevant, and the court responded that the objection was "not timely, so it's overruled." SRP 66. As that objection was made immediately, its "untimeliness" is not evident from the record.

<sup>11</sup> In re Detention Of Stout, 159 Wn.2d 357, 369, 150 P.2d 86 (2007).

Wn.2d 280, 288, 111 P.3d 1157 (2005) (defendant has a limited right to confrontation in sentencing modification proceedings).

If Johnson's right to confront witnesses was denied, then the error requires reversal unless the State can prove it was harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). The State cannot meet this burden; therefore, this Court must reverse.

*b. This Court Should Reverse because, Even Under the Non-Constitutional Standard, the Error was Prejudicial as Evidenced by the Prosecution's Use of the Testimony.*

This Court, however, need not reach the constitutional question of whether the right to confront witnesses applies in SVP trials, because the error is reversible under the evidentiary standard. State v. Mora, 138 Wn.2d 43, 54 n.9, 977 P.2d 564 (1999) (Court need not reach constitutional issues if non-constitutional ones are dispositive). Improperly admitted evidence requires reversal if, within reasonable probabilities, the erroneously admitted evidence materially affected the trial's outcome. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

Johnson's entire theory of the case was that, while he might otherwise be dangerous, the ravages of his illness made him either unable

to reoffend or, indeed, even uninterested in re-offending. If Johnson were shown to be faking the severity of his illness, it would utterly destroy his case. The fact that the prosecuting attorney underscored the testimony not once but twice at the end of his closing argument indicates its great value to the State. 7RP 39, 41. In fact, the prosecutor described the statement's "overwhelming...importance." 7RP 41. Moreover, without an expert supporting its position, the State's case was not strong; in ruling on the motion for a directed verdict, even the trial court recognized that the State's case was "unusual if not also weak." 6RP 11.

The inadmissible hearsay implied Johnson was faking his illness, the only basis for the trial and the asserted basis for his release. In closing, even the prosecutor focused on it as being an "overwhelming" piece of evidence. 7RP 39, 41. In this case, admission of such hearsay was not harmless. Smith, 106 Wn.2d at 780. This Court must therefore reverse.

3. THE TRIAL COURT INAPPROPRIATELY LIMITED CROSS-EXAMINATION OF GRIFFITH, THEREBY DEPRIVING JOHNSON OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL

Nurse practitioner Griffith opined Johnson was "doing very well." 4RP 67. The defense attempted to use nursing notes to impeach this opinion. 4RP 94-100. Some of the nursing notes were made by others on the SCC staff, and the State objected on hearsay grounds. 4RP 96-97.

Outside the presence of the jury, Griffith was asked whether he took such notes into consideration. 4RP 103. Griffith explained that he did, but took the notes by certain caregivers with “a little grain of salt.” 4RP 103-05, 108. The trial court, however, ruled that the defense was attempting to use the notes for the truth of the matter asserted and excluded them as a basis for cross-examination: “He’s testified that he considers these records, but not that it has any bearing on his opinion.” 4RP 109.

Although Griffith was partially a fact witness who had personally observed Johnson, he was also an expert witness. As Johnson’s primary care provider at the SCC, Griffith certainly was a witness “qualified as an expert by knowledge, skill, experience, training, or education,” who could talk in great detail about Johnson’s care. ER 702. Many times during his testimony, Griffith was asked his opinion of Johnson’s condition, as well as his opinion of what would happen during various hypothetical situations, such as Johnson’s hypothetical use of alcohol or failure to take his medications. These questions, and also the trial court’s summary of the positions of the parties on this matter, show Griffith was treated as both a fact and an expert witness. 4RP 98-100.

As an expert, Griffith could be impeached by anything he relied upon to formulate his opinions. ER 705. Even though he minimized his

reliance, Griffith repeatedly admitted he relied upon the nursing notes, both for purposes of treatment and for the formation of his opinions:

Q: Mr. Griffith, do you routinely review the nursing notes?

A: Yes.

...

Q: So you rely on the nursing notes in order to determine how you're going to treat him the next visit.

A: It does play a part, yes.

4RP 96

Q: So you routinely review the nursing notes that are taken?

A: Yes.

Q: Do you rely on those notes to determine how you're going to treat Mr. Johnson?

A: I rely on myself.

Q: O.K. So you –

A: But I take it into consideration. The same way I look at his vital signs or his weight. It's a complex picture, and I use every discernable benefit that I have to put that picture together. Just one part of the puzzle.

Q: But you do consider other nurses' notes in the record when you consider Mr. Johnson's entire picture?

A: Yes. The same way I consider the consultant notes....

4RP 103.

Later, when the State reiterated its objection that the notes be excluded because Griffith hadn't relied upon them, the witness testified again that he relied upon the notes:

STERN: The question that still hasn't been asked is do any of these notes impact your opinion about his cognitive – you know, about the fact that he's doing well?

THE WITNESS: Yes.

STERN: O.K.

KAESTNER: So that's what I would like to ask him in front of the jury.

4RP 108.

The trial court nonetheless indicated that the notes were being offered, not for impeachment, but for their "substantive truthfulness." 4RP 109.<sup>12</sup> It therefore excluded any use of them. 4RP 109.

Although persons being detained under Chapter 71.09 RCW have fewer rights than criminal defendants, they do have the right to cross-examine witnesses at their probable cause hearings. RCW 71.90.040(3). Presumably, this right does not evaporate at their subsequent trial. RCW

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<sup>12</sup> Ironically, the nursing notes could have been admitted as substantive evidence under RCW 5.45.020. Notes in a medical file can be admitted as substantive evidence through a different caregiver than the one who made the notes, as long as they are of a type routinely relied upon by that caregiver. *State v. Garrett*, 76 Wn. App. 719, 725, 887 P.2d 488 (1995) (treating physician could testify to notes by emergency room doctor because the treating physician routinely relied upon such items in his patients' medical files). However, because Johnson's attorney only attempted to use the notes for impeachment purposes, only that issue is reviewed herein. 4RP 97.

71.90.050. See also In re Detention of Keeney, 141 Wn. App. 318, 169 P.3d 852 (2007) (noting adequate safeguards protect the right to liberty at SVP trials, in part because other protections – such as the right to cross-examine witnesses – are in place).

Because commitment under Chapter 71.09 RCW is a civil, not criminal, proceeding, some trial rights might not apply. Stout, 159 Wn.2d at 368-69. But due process may guarantee certain procedures, for example cross-examining witnesses, because of the significant deprivation of liberty at stake. Id. at 369. A reviewing court considers three factors to determine whether a person’s due process rights were violated by a procedure undertaken by a trial court: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the value of additional procedural safeguards; and (3) the governmental interest, “including costs and administrative burdens of additional procedures.” Id. at 370 (citing Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L. Ed. 2d 18 (1976)).

As noted by the Supreme Court in Stout, the first factor weighs heavily in favor of a respondent in an SVP proceeding because such respondents have a great interest in freedom. 159 Wn.2d at 370. However, in Stout the respondent asserted he had the right to personally confront his prior victim instead of the court relying on her deposition. Id.

at 362, 368. In such a case, the Supreme Court found the second and third factors weighed in favor of the State, because 1) many procedural safeguards existed to protect the respondent's rights, including the fact that his attorney was able to cross-examine the witness during her deposition; and 2) an "undue burden" would be placed on the State if it had to transport out-of-state witnesses like Stout's past victim back to the State for live testimony, particularly because SVP procedures often occur many years after the prior trials. Id. at 370-72.

Here, unlike Stout, all three factors weigh in favor of permitting the full right to cross-examination. Witness Griffith was already testifying in the court and he had not been previously cross-examined by Johnson. Not permitting Johnson the right to fully cross-examine Griffith: 1) increased the risk of erroneous deprivation of the appellant's liberty interest because Griffith's testimony was never tested by appropriate examination; and 2) served no state interest in efficiency or conservation of resources because Griffith was already present in the courtroom testifying. Under Stout and Mathews, the right to cross-examine a witness who is present and testifying for the State should apply to SVP respondents.

Here, due process required that Johnson be permitted to fully cross-examine Griffith. See Stout, 159 Wn.2d at 369-70; Mathews, 424

U.S. at 334. Johnson's position at trial was that he was too ill to be able to reoffend or to be even interested in re-offending. Erroneously prohibiting thorough cross-examination of a State witness who claimed Johnson was "doing very well" could not be harmless, even under the less demanding evidentiary standard. This error therefore requires reversal.

4. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT, THEREBY VIOLATING JOHNSON'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL

Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Thus, inflammatory remarks, incitements to vengeance, exhortations to join a war against crime or drugs, or appeals to prejudice or patriotism are forbidden. State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 895 P.2d 423 (1995).

In closing argument, a prosecuting attorney has wide latitude to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006).

If a court finds a prosecutor committed misconduct, then the specific behavior is reviewed to determine whether it prejudiced the

defendant. State v. Thomas, 142 Wn. App. 589, 593, 174 P.2d 1264, review denied, 164 Wn.2d 1026 (2008). Prejudice occurs where there is “a substantial likelihood that the misconduct affected the jury's verdict.” Thomas, 142 Wn. App. at 593. In determining prejudice, the Court must weigh the seriousness of the misconduct against the strength of the State’s case. State v. Avendano-Lopez, 79 Wn. App. 706, 712, 904 P.2d 325 (1995), review denied, 129 Wn.2d 1007 (1996).

If a defendant fails to object, he waives any issue of prosecutorial misconduct unless it was “so flagrant or ill-intentioned” that it caused prejudice that could not have been cured by a trial court's admonishment. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Here, Johnson’s attorney repeatedly objected to the argument by the prosecuting attorney, so this heightened standard does not apply. See 7RP 25-40.

In closing the prosecutor’s argument drew a total of eleven objections over only nineteen pages of transcript. 7RP 24-42. The trial court did not sustain any of the objections, nor did the trial court ever give any of the typical cautionary instructions to the effect that this was argument or tell the jury to disregard any evidence not sustained by the testimony. See 7RP 24-42.

In fact, by refusing to sustain repeated defense objections to improper argument, the court may have actively augmented its prejudicial impact by lending the court's imprimatur to the remarks. Perez-Mejia, 134 Wn. App. at 920 (citing State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (court's ruling lent aura of legitimacy to prosecutor's misconduct)). This Court must therefore consider that the Court's overruling of all the objections below increases the likelihood that the misconduct affected the jury's verdict.

*a. Mischaracterization of Testimony by Dr. McClung*

The State argued:

One instrument [the Static-99], 52 percent. Now, Ms. Kaestner, I'm sure, is going to tell you that it's bad to use the old norms. You ought to use the new numbers. Who the heck knows, except Dr. McClung says, you know, the old numbers [*have?*] more child molesters in that group.

KAESTNER: Objection. Dr. McClung –

STERN: That's exactly –

KAESTNER: Old norms were not appropriate.

STERN: Your Honor, I'm going to object to speaking objections. She'll have a chance to make her own observations.

COURT: The objection by Ms. Kaestner is overruled. The objection by Mr. Stern is sustained. Please ask for a sidebar if you want to have a speaking objection.

7RP 32-33.

This argument clearly mischaracterized Dr. McClung's testimony. The State gives the impression that Dr. McClung favored the old norms, but in fact Dr. McClung unambiguously testified that the makers of the Static-99 had clearly indicated the old norms were not to be used and that he agreed. 5RP 116, 117, 167. Moreover, he testified that the new norms measure both convictions and charges, so they are actually more complete than the old norms. 5RP 175. By blatantly mischaracterizing the testimony, Mr. Stern committed misconduct.

*b. Inviting the Jury to Consider Charging and Trial Procedures not in Evidence.*

The State argued:

[Referring to Johnson's prior release] Hey, how did he do? Reconvicted for sex offense the following year. Now, keep in mind that's reconvicted within the following year. You know how fast trials work. That means he did it, somebody told, he got caught, he got arrested, he got charged, and was convicted.

KAESTNER: Objection. This is improper argument.

COURT: Overruled.

7RP 35.

There was no evidence elicited at trial as to the procedures followed in any of Johnson's prior criminal cases. Asking the jury to speculate about how long it would take Johnson to be reconvicted when no

evidence was before them was misconduct. Perez-Mejia, 134 Wn. App. at 916.

*c. Mischaracterization of Testimony by Dr. Reyes*

The State argued:

[Describing testimony by liver transplant expert Dr. Reyes,] Not sick enough for a transplant when I saw him in '07. Well, you have an opinion about how he's doing? Do you recall his testimony? He'll likely live a normal life.

KAESTNER: Objection. This is not substantive evidence.

STERN: His opinion is substantive evidence, Ms. Kaestner.

COURT: It's argument, counsel. The objection is overruled.

STERN (continuing): His opinion was, my opinion, he'll likely live a normal life.

7RP 37-38. The State's argument grossly overstates Dr. Reyes' position. Dr. Reyes stated that if Johnson's MELD score had not changed, and if it continued to not change, then that MELD score indicated a relatively low likelihood of death from liver disease in the next year. 4RP 27, 28, 45, 50-51. Thus, with no change, Johnson would perhaps live out a normal lifetime for a person without liver disease, although Dr. Reyes never characterized this as a "normal life." 4RP 28.

Moreover, Dr. Reyes emphasized frequently that he had no knowledge of Johnson's current MELD score, and that MELD scores could become worse in a matter of months, if not more quickly. 4RP 29, 32, 34, 36, 45, 46. Dr. Reyes also stated that a given MELD score was not predictive at all after one year, and the MELD score had been taken in September 2007, significantly more than a year before Johnson's trial. 4RP 45, 46. Because Mr. Stern grossly overstated his witness's testimony, he committed misconduct.

*d. Arguing Facts not in Evidence Anywhere in the Record*

The State argued:

The thing with [name of the victim from the 1983 offense] that also tells you he's a manipulative guy is remember what he said I think I was in his deposition that was read to you. He said at first I denied doing it. Thought I could beat the charges. Later he's under evaluation that you heard. He admitted –

COURT: Just a second. There's an objection. Do you have any grounds for your objection?

KAESTNER: There's no basis in evidence that was presented regarding the [name of victim] offense.

COURT: Overruled.

STERN (continuing): Later, subsequent evaluation he admitted to the evaluator that he had done it, hoped he could just beat the rap.

7RP 39-40.

There is absolutely nothing in the deposition or in Johnson's testimony that supports this argument. See 3RP 45-53; 6RP 66-86. By arguing such a prejudicial fact that appears nowhere in the record, Mr. Stern thereby committed flagrant misconduct. Perez-Mejia, 134 Wn. App. at 916.

*e. Blatant Appeal to Passions and Fears of the Jurors*

The State argued: If you find that we haven't proven this thing, he gets unconditionally released. Unconditional. He can go to the park. He can give the kids candy. He can take them for rides. Take them in the bushes.

KAESTNER: Objection. This is improper argument.

STERN: Exactly what the facts are.

COURT: Overruled.

STERN (continuing): He can have that experience with folks like [previous victim] and say, oh, look at that nice one there. Look at that nice guy. Sure, you can take care of my kid.

7RP 40-41.

It is hard to imagine a more blatant appeal to the fears and passions of the jurors than one that starts with: "If you find that we haven't proven this thing...." and ends with the appellant in the bushes with a new little girl. By blatantly preying on jurors' fears that they will, by releasing

Johnson, be the cause of another molestation, the prosecutor committed misconduct.

*f. Given the Nature of the Misconduct and the Weakness of the State's Case, this Court Must Find that the Misconduct was Prejudicial.*

The State did not have a strong case for commitment. This was recognized by the court as early as the motions in limine, when the court asked the State to explain how it could possibly obtain a commitment given that the only examining expert would opine that Johnson was not more likely than not to reoffend. 1RP 16. Repeatedly, the trial court noted that the case was in an unusual, “if not weak,” posture, given that no expert testified to the conclusion sought by the State. 6RP 118; 8RP 26-27. Despite this obvious weakness, the trial court permitted the case to go to the jury.

But this weakness should not be overlooked when examining the effects of prosecutorial misconduct (not to mention evidentiary errors) on the case. See Belgarde, 110 Wn.2d at 507; Thomas, 142 Wn. App. at 593; Perez-Mejia, 134 Wn. App. at 916. This Court should reverse.

5. CUMULATIVE ERROR WARRANTS REVERSAL.

The evidentiary errors discussed in C.2 and C.3., as well as the prosecutorial misconduct discussed in C.4., all affected Johnson's right to due process and a fair proceeding.

The "cumulative error doctrine" states that while some errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors may require a new trial. See, e.g., 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 (1990).

Johnson maintains that any of these errors independently warrant a new trial. But even if they do not, as all three trial errors adversely affected his due process right to a fair proceeding, their combined prejudice requires a new trial.

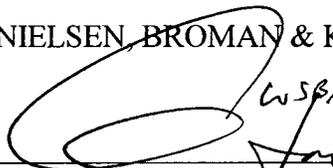
D. CONCLUSION

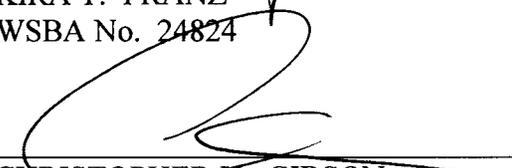
This Court should reverse and remand for entry of an order that Johnson no longer meets the criteria for indefinite commitment under Chapter 71.09 RCW because the State failed to prove either a lack of volitional control or that Johnson was likely to reoffend if not confined. In the alternative, this court should reverse and remand for a new trial because evidentiary errors and/or prosecutorial misconduct deprived Johnson of a fair trial.

DATED this 31st day of August, 2009.

Respectfully Submitted,

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

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IN RE DETENTION OF: )

CHARLES LEE JOHNSON, )

Appellant. )

COA NO. 63263-9-1

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**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 31<sup>ST</sup> DAY OF AUGUST, 2009, 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 STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] CHARLES LEE JOHNSON  
SPECIAL COMMITMENT CENTER  
P.O. BOX 88600  
STEILACOOM, WA 98388

2009 AUG 31 11:41 AM  
CLERK OF COURT  
STATE OF WASHINGTON  
SEATTLE

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF AUGUST, 2009.

x Patrick Mayovsky