

NO. 42292-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL ANDREW GEIER,

Appellant.

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STATE OF WASHINGTON
BY 
DEPT. OF JUSTICE

COURT OF APPEALS
DIVISION II

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

The Honorable Kathryn J. Nelson

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Did the trial court err in denying appellant's motion for a mistrial?
2. Did the trial court error in sealing jury questionnaires without properly conducting a Bone-Club analysis?

Issues Pertaining to Assignments of Error

1. Did the trial court err in denying appellant's motion for a mistrial where the State violated a motion in limine precluding prior bad acts which denied appellant a fair trial?
2. Did the trial court err in failing to conduct a Bone-Club analysis before jury questionnaires in violation of the right to an open and public trial?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On May 15, 2008, the State filed a petition seeking the involuntary commitment of appellant, Paul Andrew Geier, as a sexually violent predator. CP 1-2. On August 29, 2008, the trial court entered a stipulated order finding probable cause and directing custodial detention

¹ There are 16 volumes of verbatim report of proceedings: 1RP - 05/27/08; 2RP - 08/29/08; 3RP - 07/30/10; 4RP - 05/23/11; 5RP - 05/24/11; 6RP - 05/25/11; 7RP - 05/26/11; 8RP - 05/31/11; 9RP - 06/01/11; 10RP - 06/02/11; 11RP - 06/06/11; 12RP - 06/07/11; 13RP - 06/08/11; 14RP - 06/09/11; 15RP - 06/13/11; 16RP - 06/14/11.

and evaluation of Geier. CP 117-19. Following a commitment trial before the Honorable Kathryn J. Nelson, on June 14, 2011, a jury found that the State proved beyond a reasonable doubt that Geier is a sexually violent predator and the court entered an order committing Geier to the Special Commitment Center (SCC) in the custody of the Department of Social and Health Services. CP 631-33. Geier filed a timely appeal. CP 634-36.

2. Substantive Facts²

a. Motions in Limine

During pretrial motions, the court granted an agreed motion in limine to preclude questions of any prior bad acts or crimes of petitioner's and respondent's witnesses. 4RP 35-36.

b. Trial Testimony

Dr. Harry Hoberman, a forensic and clinical psychologist, reviewed the record in Geier's case and interviewed him in 2006 and 2010. 6RP 165, 190-95. He examined police reports, criminal history records, court documents, Department of Corrections treatment records, Special Commitment Center records, and reviewed depositions. 6RP 196-97, 200-01. The court documents included a certified copy of a

² In accordance with RAP 10.3(a)(4), the facts are limited to those relevant to the issues presented for review.

judgment and sentence reflecting that Geier pled guilty to three counts of rape of a child in the first degree committed in 1991. 7RP 217-22. Dr. Hoberman described a chart from the Sex Offender Treatment Program at Twin Rivers Correctional Center where Geier disclosed numerous incidents of sex offenses against children. 7RP 232-36. When Dr. Hoberman asked Geier about these incidents in the 2006 interview, Geier agreed with the chart of his sexual offending history but later disputed its accuracy in the 2010 interview. 7RP 236-43.

Dr. Hoberman applied the criteria in DSM-IV³ using information contained in Geier's record and his interviews to conclude that Geier suffers from a non-exclusive form of pedophilia. 7RP 247-55. He also diagnosed Geier with antisocial personality disorder finding that Geier met six of the seven criteria described in DSM-IV. 7RP 261-62. During his interviews with Geier, Dr. Hoberman administered three psychological tests: the Minnesota Multiphasic Personality Inventory (MMPI-2), the Millon Clinical Multiaxial Inventory (MCMI), and Multiphasic Sex Inventory, Roman Numeral II, commonly used in clinical and forensic evaluations. 7RP 291. He also tested for psychopathic traits using a test called the Psychopathy Checklist Revised

³ Diagnostic and Statistical Manual published by the American Psychiatric Association primarily used for diagnosis. 7RP 244.

(PCL-R). 7RP 302. The checklist is “a rating scale,” ranging from zero, a very low score of psychopathy, up to forty, the highest score. 7RP 303. Geier scored a 27 when Dr. Hoberman evaluated him in 2006 and scored a 31 in his 2010 evaluation. 7RP 307.

Dr. Hoberman concluded that Geier’s pedophilia meets the legal definition of a mental abnormality, and based on Geier’s disclosures, his mental abnormality causes serious difficulty controlling his sexually violent behavior. 7RP 312-19, 323-26. He explained that the combination of Geier’s antisocial personality disorder and pedophilia increases his risk for future sexually violent predatory acts. 7RP 332-38. Dr. Hoberman used three actuarial instruments to assess Geier’s risk of reoffending: the Static-99, Minnesota Sex Offender Screening Tool Revised (MnSOST-R), and Sex Offender Risk Appraisal Guide (SORAG), which are regularly used by experts in Washington. 9RP 572. Dr. Hoberman opined that Geier’s mental abnormality and personality disorder “causes him serious difficulty and control and that make him more probable than not to sexually re-offend if not confined to a secure facility, and that he would be more probable than not to commit predatory acts of sexual violence if not confined to a secure facility.” 10RP 681-82.

Melissa Sayer was formerly employed as a sex offender treatment specialist at the Twin Rivers Facility of the Monroe Correctional Complex. 8RP 367. Sayer worked as therapist for the Sex Offender Treatment Program (SOTP) which involved group therapy and individual therapy, and she treated Geier for about six months in 2005. 8RP 374-75, 382. Sayer explained a chart that she created which documented Geier's disclosure of numerous sexual offenses against children. 8RP 386-89. During her time as Geier's treatment provider, "he was minimally getting by" and he had difficulty regulating his anger and anxiety, but a willingness to continue treatment is a positive sign. 8RP 398, 403, 437-38.

Deborah LaRowe-Prado works as a psychology associate at the Special Commitment Center. 9RP 451-52. Geier entered treatment at the SCC in 2009 and was assigned to her caseload in 2010. 9RP 461. While in treatment, Geier refused to follow rules, argued with group leaders, and was temporarily suspended from treatment February to May 2011 for violating restrictions, lying, and yelling at other group members. 9RP 466-71. During group therapy in October or November 2010, Geier admitted that he had sex with other residents, which is a violation of SCC rules. 9RP 479, 482. He revealed that if he kept lying "about his sexual activity at SCC and was released, he would likely re-offend."

9RP 489. Despite his admissions, Geier continued to violate subsequent restrictions that were administratively imposed. 9RP 489-93.

Dr. Robert Halon, a psychologist, met with Geier three times, reviewed his record, and wrote a report in October 2008 and September 2010. 12RP 995-96. As part of the evaluation process, he reviewed psychological tests, Department of Corrections reports, the Twin Rivers Sexual Offender Treatment Program summaries, SCC files, police reports, and criminal history summaries. 9RP 997-98. Dr. Halon also administered several psychological tests: the Shipley Institute of Living Scales, the MMPI-2, 16 Personality Factors Fifth Edition (16-PF-5), and the Rorschach Inkblot test. 9RP 999. The MMPI-2 which tests for mental disorders revealed “no mental disorder of any kind, no evidence that he doesn’t know what he’s doing whenever he’s doing it.” 9RP 999, 1005. The Rorschach Inkblot Test confirmed that Geier had no mental disorder that was interfering with his ability to think logically and coherently. 9RP 1011.

Dr. Halon noted that Dr. Hoberman gave Geier the MCMI-II psychological test in 2006 which was “defunct” and no longer in use because it gave false impressions of mental disorders and personality disorders. 9RP 1014-15. Dr. Hoberman also administered the PCL-R which is problematic because it is a test for research purposes not for

forensic purposes and is “a very complicated instrument, not very reliable in terms of scoring.” 9RP 1017-20. The Static-99 should not be used because it does not take into consideration the change in the base rates of recidivism or the age differences or the reduction in recidivism due to age. 9RP 1039.

For his 2010 evaluation, Dr. Halon reviewed the results of Geier’s penile plethysmograph (PPG) which verified that Geier has switched his fantasies from children to adults because he had no arousal to children but had significant arousal to adult males. 9RP 1020-21. Although Dr. Halon diagnosed Geier with pedophilia, he has no mental disorder that would make him act out on his pedophilic interests. 9RP 1099, 1107. Dr. Halon opined that Geier does not suffer from a mental abnormality or a personality disorder that meets the criteria of a sexually violent predator. 9RP 1108, 1116-17.

Paul Geier began serving his sentence with the Department of Corrections in 1992 and he immediately signed up for sex offender treatment but was not allowed to enter treatment until 18 months before his earned early release date. 15RP 1420-22, 1433. In 1996, he repeatedly requested a transfer to Twin Rivers Corrections Center to enroll in its voluntary sex offender program. 15RP 1435-43. In 2002, he was screened for the SOTP at Twin Rivers and went through an

orientation in 2004. 15RP 1465-66, 1476-77. Geier earned early release in 2005 and was assigned to a parole officer and treatment provider. 15RP 1496. During his civil commitment, Geier has received support from his brother, his spiritual advisor, a longtime friend who helped him when he was a juvenile, and a support group of registered sex offenders who have been succeeding in the community since being released. 15RP 1497.

c. Motion for a mistrial.

During the cross-examination of Dr. Halon, the State raised questions about his psychology license from California and asked him if his license had been revoked due to a complaint filed against him by the California Board of Psychology. 13RP 1187-89. Following a discussion outside the presence of the jury, Geier's counsel moved for a mistrial arguing that the State violated a motion in limine precluding bad acts of witnesses. 13RP 1197. The court denied the motion concluding that "licensure missteps" are not bad acts. 13RP 1203-05.

d. Jury Questionnaires

During trial, the court brought to the parties that if the jury questionnaires are sealed, the court must do a Bone-Club analysis. 8RP 445. The State responded that it had "standard Bone-Club findings and conclusions" and would speak with counsel and probably present an

agreed order. 8RP 446. At the end of trial, the court entered an agreed order sealing the jury questionnaires. 16RP 1654; CP 610-12.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING GEIER'S MOTION FOR A MISTRIAL WHERE THE STATE REVEALED PREJUDICIAL EVIDENCE IN VIOLATION OF A MOTION IN LIMINE.

Reversal is required because the State revealed prejudicial evidence in violation of a motion in limine which deprived appellant of a fair trial.

When considering a motion for a mistrial, the proper inquiry is whether the accused was denied a fair trial. State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). A mistrial should be granted only when the accused has been so prejudiced that nothing short of a new trial can ensure that the accused will be tried fairly. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). Only errors affecting the outcome of the trial will be deemed prejudicial. Id. In determining whether the trial irregularity affected the outcome, appellate courts examine: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Here, the State made a motion in limine to preclude questions of any bad acts or crimes of the petitioner's witnesses, stating that it appears that the defense agrees and "wants it to apply to both witnesses, Petitioner's and Respondent's witnesses." 4RP 35. Defense counsel concurred and the court granted the motion as agreed. 4RP 36.

During trial, the State conducted a cross-examination of Dr. Halon who testified as an expert witness for the defense:

Q. And you have a psychology license in the state of California, correct?

A. Correct.

....

Q. And you've previously had your license revoked in California; is that correct?

A. No. My license has never been revoked.

Q. You had the license revoked and then the revocation was stayed, correct?

A. Well, that means that the license is not revoked.

Q. Did you enter into a stipulated order, a disciplinary order and stipulated settlement with the state of California in 1999?

A. Yes, ma'am.

Q. And the order indicates that your license is revoked but the revocation was stayed, correct?

A. Yep. That's the language that has to be in there because the State is not allowed to go into a stipulated settlement of any kind without that language.

Q. And that the stipulated settlement that you entered into was based on a complaint that was filed against you by California Board of Psychology in 1998?

A. That's correct.

Q. And there were about four allegations in that complaint?

13RP 1188-89.

The State's line of questioning prompted defense counsel to object and request to be heard outside the presence of the jury. 13RP 1189.

Defense counsel argued that the State violated the motion in limine to exclude prior bad acts of witnesses. The State responded that the motion had nothing to do with experts, arguing that Dr. Halon's license revocation is well known and goes to credibility. 13RP 1191-92. The court referred to the State's written motions in limine which provided that any evidence of prior bad acts are precluded until an offer of proof is made and the court rules on its admissibility. 13RP 1192. Defense counsel pointed out that she sent an e-mail to the State inquiring whether it was going to use any information against Dr. Halon. 13RP 1199. The State acknowledged that it received an e-mail but did not

interpret the e-mail as a request for further information about Dr. Halon.
13RP 1200-01.

Defense counsel moved for a mistrial, arguing that State failed to make an offer of proof before introducing evidence of prior bad acts in violation of the motion in limine and the error could not be cured. 13RP 1197. The court recognized that the State failed to make an offer of proof but denied the motion, concluding that “licensure missteps” are not bad acts and “is precisely the type of information that is allowed in order to have the jury fully and fairly evaluate the expert witness.”
13RP 1203-05.

The court allowed the State to question Dr. Halon further and he acknowledged that as part of the stipulated settlement, he agreed to a three-year probation and monitoring, paid a fine, and took an ethics course. 13RP 1206-07.

The trial court erred in denying the motion for a mistrial because the record substantiates that the State violated the court’s in limine ruling which precluded evidence of prior bad acts. The State’s violation constitutes a serious irregularity because as the our Supreme Court emphasized in State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996), the courts “do not condone cavalier violation of trial court pretrial rulings” and such violations may be “so flagrantly prejudicial as

to be incurable by instruction.” Clearly, the evidence was not cumulative and after the evidence was revealed, the error could not be cured.

Given the fact that Dr. Halon’s expert testimony was vital to Geier’s defense, he was denied a fair trial because the highly prejudicial evidence cast Dr. Halon in a bad light before the jury. Furthermore, the State used the evidence in closing argument to discredit Dr. Halon and seal its case against Geier:

[W]hat do we know about Dr. Halon? Well, he takes issue with Dr. Hoberman’s psychological testing. That’s based on Dr. Halon’s own personal opinion. And you are the sole judges of credibility. And what do we know about Dr. Halon? We know that he was fired from the California Department of Mental Health after being there for less than five months. We know that his license was revoked, and that revocation was then stayed while he was put on probation for three years. He had to pay a fine. He had to have another psychologist supervise him. He had to take an ethics course. This is what we know about Dr. Halon.

14RP 1638.

The importance of Dr. Halon’s testimony is abundantly clear, particularly where he disputed key aspects of Dr. Hoberman’s testimony, the State’s primary witness. Consequently, Geier was substantially prejudiced and he is entitled to a new and fair trial. Johnson, 124 Wn.2d at 76.

2. THE TRIAL COURT ERRED BY SEALING THE JURY QUESTIONNAIRES WITHOUT FIRST CONDUCTING THE REQUIRED BONE-CLUB ANALYSIS.

Article I, section 10 of the Washington Constitution provides that “Justice in all cases shall be administered openly.” Division One of this Court recently concluded in State v. Tarhan, 159 Wn. App. 819, 246 P.3d 580 (2011), that a trial court must conduct a Bone-Club⁴ analysis before sealing jury questionnaires and the court’s failure to do so violates the public’s right to open and accessible court proceedings under article I, section 10. 159 Wn. App. at 834. The court held that the appropriate remedy is to remand the case for reconsideration of the sealing order in light of Bone-Club and other relevant authority. 159 Wn. App. at 835. Tarhan filed a petition for review arguing that sealing

⁴ The trial court must perform a weighing test consisting of five criteria:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

of the jury questionnaires without a Bone-Club hearing violates the right to an open and public trial which constitutes structural error warranting a new trial. The Washington Supreme Court accepted review and a decision is pending (Supreme Court No. 85737-7).

Here, during trial, the court brought to the attention of the parties that “if the jury questionnaires are to be sealed, the court must do a Bone-Club analysis.” 8RP 445. The State responded that it had “a standard Bone-Club findings and conclusions and stuff, so Counsel and I can talk about that, and we’ll probably present an agreed order to that effect.” 8RP 446. The court replied, “Okay. Well, if everyone thinks that’s appropriate, that’s certainly something the Court would entertain.” 8RP 446. At the end of trial, the court entered an agreed order sealing the jury questionnaires without conducting a Bone-Club analysis on the record. 16RP 1654; CP 610-12.

The court’s order contains findings of fact and conclusions of law which address the Bone-Club factors and concludes that “The analysis required for sealing jury questionnaires pursuant to *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37, 640 P.2d 716 (1982) has been made by the Court. CP 611. To the contrary, the record establishes that the court did not perform a Bone-Club analysis and merely signed the agreed

order presented to court. 14RP 1654. The court's failure to properly conduct a Bone-Club hearing violates Wash. Const., article I, section 22 and article I, section 10 which protects the right to a public trial. The violation of the right to an open and public trial is a structural error and the remedy is a remand for a new trial. See State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009).

Geier is aware of this Court's decisions in State v. Smith, 162 Wn. App. 833, 262 P.3d 72 (2011)(the court did not err in sealing the jury questionnaires without a Bone-Club analysis) and In re Stockwell, 160 Wn. App. 172, 181 248 P.3d 576 (2011)(sealing of jury questionnaires does not constitute structural error). However, he respectfully requests that this Court stay its decision on this issue pending a decision by the Washington Supreme Court.

D. CONCLUSION

“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, 540 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982)).

For the reasons stated, this Court should reverse and remand for a new commitment trial.

DATED this 2nd day of March, 2012.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Paul Andrew Geier

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kristie Barham, Office of Attorney General, 800 5th Avenue, Suite 2000, Seattle, Washington 98104 and Paul Andrew Geier, Special Commitment Center, P.O. Box 88600, Steilacoom, Washington 98388.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of March, 2012 in Kent, Washington.


VALERIE MARUSHIGE

Attorney at Law
WSBA No. 25851

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STATE OF WASHINGTON
BY 
IDENTIFICATION DIVISION