NO. 42552-1-II

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

IN RE DETENTION OF

DARNELL McGARY, Appellant.

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

The Honorable Ronald Culpepper Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously excluded testimony about an actuarial test under ER 703.

2. The State's Attorney committed prosecutorial misconduct when he misrepresented the facts to the jury and improperly appealed to their sense of "fairness" rather than properly focusing on the law.

3. Cumulative error deprived McGary of his right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred by ruling that testimony about an actuarial instrument was inadmissible under ER 703 where the defense expert relied on an actuarial test in forming his opinion of the type commonly relied upon in the field and the State's challenges to the tool went to the weight of the evidence, not its admissibility.

2. Whether the misconduct of the State's Attorney during cross-examination and closing argument deprived McGary of his constitutional right to a fair trial.

3. Whether cumulative error deprived McGary of his right to a fair trial.

C. STATEMENT OF THE CASE

1. Case History

In 1987 and 1988, Darnell McGary pled guilty to three offenses that qualify as "violent sex offenses" under RCW 71.09: two counts of first degree rape and one count of indecent liberties by forcible compulsion. Supp. CP, Stipulation and Order, at 4.[1] McGary was 17 years old at the time of the first of these offenses and 18 years old at the time of his third, encompassing a 10 month period. 7RP 884. He was 41 years old at the time of trial here. *See* Supp. CP, Annual/Triennial Report, at 1.

McGary served almost nine years' incarceration, from 1989 until 1997. Supp. CP, Annual/Triennial Report, at 24. In 1992, McGary developed delusions that the prison guards were attempting to kill him and attacked two of the guards. 7RP 889, 891. Although the DOC sent McGary to the hospital for observation, he was returned to prison without being treated for a

[1] The full title of this document is Stipulation to Civil Commitment as a Sexually Violent Predator; Findings of Fact, Conclusions of Law and Order of Commitment. For ease of citation, it will be referred to as the Stipulation.

psychological condition. 7RP 889, 891. McGary was first diagnosed with paranoid schizophrenia in 1994. 5RP 423.

McGary was sent to the Special Commitment Center at the end of his sentence in 1995. 7RP 892. In April of 1998, before he was scheduled for release, the State first filed a petition for his civil commitment under RCW 71.09. *State v. McGary*, 128 Wn.App. 467, 470, 116 P.3d 415 (2005). McGary was committed to SCC pending trial. *McGary*, 128 Wn.App. at 470.

While at SCC awaiting trial, McGary's delusions became critical and in 2000, McGary was involuntarily committed under RCW 71.05 to Western State Hospital (WSH) for treatment of paranoid schizophrenia. 7RP 893-94, McGary, 128 Wn.App. at 470-71. The State dismissed its RCW 71.09 petition without prejudice. McGary, 128 Wn.App. at 471. He was at WSH for several months and received treatment and medication for his schizophrenia. 7RP 893-94. McGary responded well to medication and returned to treatment at SCC in 2000. 7RP 893-94.

In February of 2005, McGary stipulated to commitment under RCW 71.09. Supp. CP, Stipulation. In return, the State promised to release McGary to a Less Restrictive Alternative (LRA) with housing at the Secure Community Transition Facility (SCTF).

Supp. CP, Stipulation, at 3. The Stipulation stated that McGary "currently suffers from Schizophrenia and Antisocial Personality Disorder," that his personality disorder (but not his schizophrenia) "causes him serious difficulty controlling his sexually violent behavior;" and his "personality disorder makes him more likely than not to engage in predatory acts of sexual violence if he is not confined to a secure facility." Supp. CP, Stipulation, at 4.

Based on this stipulation, the trial court concluded: "Respondent's Antisocial Personality Disorder is a serious mental disorder that causes him serious difficulty controlling his behavior;" and "Respondent's mental abnormality makes him more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility." Supp. CP, Stipulation, at 5. McGary was therefore ordered committed under RCW 71.09. Supp. CP, Stipulation at 5.

McGary did well in therapy and reached the highest and last stage of therapy in 2006. Supp. CP, Order on Release, 7RP 902-3. McGary sought and was granted release on an LRA and transferred to the less structured SCTF building in preparation for release. Supp. CP, Order on Release, 7RP 902-3.

While there, McGary began to have problems with his medication and controlling his schizophrenia. 7RP 902-3. McGary asked to be returned to the more structured environment of SCC. 7RP 902-3. On March 30, 2005, the State moved to revoke McGary's LRA, alleging two violations, (1) that McGary was not complying with psychiatric treatment because he had refused his medication since March 17, 2005, and that, (2) upon his request for transfer back to SCC, he could not continue in treatment in the community as ordered. Supp. CP, Petitioner's Motion to Revoke, at 2-3. On April 11, 2005, the LRA was revoked. Supp. CP, Order Revoking Less Restrictive Alternative Placement.

In 2010, Dr. Megan Carter, Psy.D., a psychologist employed by DSHS, SCC, conducted the required DSHS annual review to determine if McGary still meets the criteria of RCW 71.09 for commitment. Supp. CP, Annual/Triennial Report, at 1. In her report filed on March 18, 2010, Dr. Carter, found that McGary no longer met the criteria for involuntary commitment under RCW 71.09. Supp. CP, Annual/Triennial Report, at 20. Dr. Carter's report states:

> Mr. McGary has a diagnosis of Paraphelia NOS and Schizophrenia, coupled with Antisocial and Psychopathic personality traits. The above noted

dynamic risk factors have historically intermingled with aspects of these diagnoses, leading to Mr. McGary's elevated risk of sexual reoffending. Over the last several years, however, we have seen a decrease in both his dynamic risk factors and the various symptoms associated with his mental disorders. It has been several years since Mr. McGary has received any behavioral management reports for overt acting out behavior. He has been stable on his psychotropic medication for several years and there have been no concerns of severely disruptive psychotic processes, although there continue to be lower level symptoms. As has been previously noted, Mr. McGary does at times demonstrate sexually themed symptoms including others targeting him for sexual advances. However, these symptoms cause him anxiety and he reports such symptoms to staff members. He does not appear to have ay intentions on acting out on these symptoms and actually reports a decrease in sexual functioning when he experiences anxiety. It should also be noted that it is not unusual for those with a diagnosis of schizophrenia to incorporate paranoid themes of experiences from their environment (e.g. sexual themes in a SVP facility, themes including somatic complaints related to medication). Additionally, no sexual themes were documented for Mr. McGary over this last review period. There has been no documented sexual acting out behavior on Mr. McGary's part since his last offense in 1992.

With regard to his antisocial and psychopathic traits, Mr. McGary has demonstrated a decrease in these symptoms over many years. He has been able to adequately function in his vocational activities, recreational activities, and generally socializes appropriately with both staff and peers. While Mr. McGary continues to demonstrate some more subtle symptoms of antisocial belief systems, he has also demonstrated his attempts to be compliant. For example, although he believes he is no longer in need

> of treatment, he has rejoined the treatment program in an attempt to comply with recommendations from professionals with whom he has worked. Mr. McGary also agreed to participate in an interview with this evaluator, despite reported recommendations from his legal counsel to not participate and his refusal to participate in past years. Thus, it appears that Mr. McGary's antisocial behavior and to some degree his attitudes have decreased over time. As these factors were prominent risk factors at the time of his offenses, it may be assumed that a decrease in antisocial behavior and to a lesser degree attitude would indicate a decrease in risk for sexual reoffense at this time.
>
> This combination of mental abnormalities and personality disorder at one time impaired Mr. McGary's ability to control his behavior and placed him at high risk for sexually violent offenses in the absence of any therapeutic or other intervention. However, based upon the above information, **I cannot determine to a reasonable degree of psychological certainty that he continues to meet the criteria as a Sexually Violent Predator.**

Supp. CP, Annual/Triennial Report, at 18-19 (emphasis in original).

Following Dr. Carter's report, McGary moved for dismissal of the commitment order. Supp. CP, Motion for Dismissal of Commitment Order and for Unconditional Release. On April 6, 2010, McGary was granted a trial on the issue of whether he currently meets the criteria for commitment under RCW 71.09 or must be unconditionally released. Supp. CP, Order Granting Evidentiary Hearing.

Following trial, a jury found that McGary continued to meet the criteria for involuntary commitment. 8/22/11RP 5. This appeal timely follows.

2. Psychiatric Testimony:

A. *Treating Doctors:*

Dr. Brian Judd, who treated McGary at SCC from late 2004 to March 2005, testified that he treated McGary during the LRA transition. 2RP 55, 67. Dr. Judd testified that in winter of 2005, after seven months in a transition facility, McGary asked to return to SCC because he was worried about where he would be living, the level of supervision in the community, and the stressors of transition. 2RP 76. McGary was also experiencing problems with stabilizing his Schizophrenia on medication. 2RP 86. McGary was sent back to SCC to manage his medication levels. 2RP 86. McGary did stabilize with medication, but according to Dr. Judd, he lost interest in pursuing the LRA. 2RP 86. Dr. Judd testified that McGary was eligible for an LRA and was compliant with treatment, but McGary made the decision to stipulate to involuntary commitment under RCW 71.09. 2RP 82.

Dr. Judd testified that McGary was compliant with treatment. 2RP 82. He stated that although there is no cure for paraphelia,

studies have shown that as a person ages, he is less likely to act out in a violent fashion. 2RP 99. While Dr. Judd treated McGary, he said he saw no symptoms of paraphelia—leading him to conclude that if McGary suffered from paraphelia, it was "managed." 2RP 99.

Dr. Robert Saari testified that he treated McGary for the two years preceding his LRA. 8RP 1087. He testified that McGary's treatment was "robust" and he was "impressed" with McGary's efforts in treatment. 8RP 1090. Dr. Saari disagreed with McGary's paraphelia diagnosis because there was no evidence that McGary had sexually deviant thoughts or fantasies. 8RP 1093, 1105. Dr. Saari also testified that he did not believe that McGary suffers from antisocial personality disorder. 8RP 1114. Dr. Saari testified that in his opinion, McGary was being treated at SCC for a condition he does not have—paraphelia—rather than the condition he does have—schizophrenia. 8RP 1106.

Dr. Leslie Hutchins treated McGary at SCC from April of 2009 through September of 2010. 2RP 159. Dr. Hutchins testified that McGary had not been engaging fully enough in treatment. 2RP 159-60. Dr. Hutchins admitted that prior to being assigned to Dr. Hutchins' group, McGary had fully complied with and completed the

treatment program at SCC. 2RP 159, 193. However, Dr. Hutchins believed that his treatment program was superior to the treatment program that had previously been in place at SCC. 2RP 160. Dr. Hutchins testified that the reason McGary was not successful in his treatment group was that McGary believed he had completed treatment and was ready to be released. 2RP 171.

Dr. Hutchins testified that his concern about McGary was that when he is not medicated, he can become violent. 2RP 171. Dr. Hutchins conceded that when on medication, McGary does not get into trouble or harm others. 2RP 171. Dr. Hutchins also admitted that McGary had not had any behavioral problems while Dr. Hutchins had been treating him. 2RP 185.

Dr. Leslie Sziebert, testified that he had been treating McGary's schizophrenia for 10 years at SCC. 2RP 103. Dr. Sziebert testified that the treatment team at SCC disagreed with Dr. Carter's report concluding that McGary could not be confined under the definitions of RCW 71.09. 2RP 117. Dr. Sziebert said his concern was that McGary would not take his anti-psychotic medications if released. 2RP 106, 143.

Dr. Sziebert testified that in 2005, McGary's transition between medications disrupted his transition to an LRA and

McGary showed aggression. 2RP 114. During that time, in February of 2005, McGary "confronted" a staff member with a "heavy bar." 2RP 109. Dr. Sziebert testified that McGary had not had any other violent incidents since the 2005 incident. 2RP 138. McGary had consistently taken his medication since 2005. 2RP 139-40.

Dr. Vincent Gollogly served as clinical director of SCC for eight years, until 2005, and was involved in McGary's treatment during his tenure. 7RP 786, 791. Dr. Gollogly testified that after 2000, McGary did very well at SCC and was recommended for an LRA. 7RP 789-90. He testified that he had agreed to treat McGary in his private practice if McGary were released. 7RP 791. Dr. Gollogly had confirmed with Dr. Sziebert that McGary was currently stable on his medications. 7RP 804. Dr. Gollogly said that he would require McGary to see a psychiatrist and take his medication as a condition of treatment. 7RP 795. He would also require that McGary attend AA or NA meetings. 7RP 799. Dr. Gollogly was familiar with two organizations in the community that could work with McGary to provide psychiatric care. 7RP 796.

B. *DSHS Evaluations:*

Dr. Megan Carter, whose evaluation led to the need for a trial, evaluated McGary for DSHS, but was called by the defense. 6RP 652. Dr. Carter had evaluated McGary twice for SCC. 6RP 659. In her first evaluation in 2009, she concluded that McGary met the criteria for commitment under RCW 71.09. 6RP 659, 665. In evaluating McGary for the 2010 review, Dr. Carter found it significant that McGary was engaging in some treatment and had not had any behavioral write-ups for years. 6RP 669-670. Dr. Carter noted that although McGary did not respond well to Dr. Hutchins' treatment style for group therapy, he had completed the "True thoughts" program, was engaged in the "Barriers to discharge" program, and had participated in the sex offender treatment program for a couple of months. 6RP 669-70. Dr. Carter testified that but that SCC had no mechanism for McGary to transfer to another counselor. 6RP 688.

Dr. Carter applied the Static-99R actuarial assessment, using a 1992 prison infraction as the index offense. 6RP 674-76. She scored McGary at a seven, in the high range. 6RP 678. Dr. Carter concluded that even though the actuarial tool scored in the

high range, the Static-99R had limited value for McGary because it measures historical risk since McGary had 20 years without reoffense, it was not accurate in predicting his current risk. 6RP 698. Thus, she opined, although McGary posed some risk of reoffense, he was not "more likely than not" to reoffend and therefore did not meet the criteria of RCW 71.09. 6RP 733.

Dr. Carter concluded that McGary no longer met the criteria for commitment under RCW 71.09 because: (1) it had been a very long time since there had been any sexual behavior issues; (2) McGary's paraphelia diagnosis was disputed; and (3) McGary's schizophrenia could not be connected to sexual offending. 6RP 680-82. Dr. Carter testified that although there is some risk that McGary would not continue to take his medication in the community, this does not contribute to his risk of sexual offending because historically, his delusions were not sexual and his reaction to them was to withdraw from people, not approach them. 6RP 680-82.

Dr. Stephen Marquez evaluated McGary for SCC in December of 2010. 3RP 227. Dr. Marquez testified that he did not believe that McGary's condition had "changed enough" for him to recommend a less restrictive alternative or discharge. 3RP 240.

Dr. Marquez' main concern was that he believed McGary would go off his medication if not monitored. 3RP 230, 282. McGary had told Dr. Marquez that if released, he would seek assistance in the community to manage his medication. 3RP 286. Dr. Marquez testified that the reasons for his conclusion were: (1) McGary had "no substantial insight into his mental illness," 3RP 240; and (2) McGary had been diagnosed with antisocial personality disorder, 3RP 241. Dr. Maquez testified that these two factors led to a higher risk of reoffense. 3RP 240-41.

Dr. Marquez admitted that he did not see any reports of McGary engaging in sexual behavior with other residents, 3RP 264, McGary has good day-to-day behavior, 3RP 265, and shows no sign of conflict with peers, 3RP 266. McGary had an excellent rating for the quality his work at SCC and his attendance. 3RP 266-67.

C. *Expert Testimony:*

Dr. Douglas Tucker, evaluated McGary for the State in preparation for trial. 5RP 369, 6RP 642. Dr. Tucker testified that McGary met the criteria for continued commitment under RCW 71.09. 5RP 528. Dr. Tucker diagnosed McGary with: (1) Paraphelia non-specified, 5RP 398; (2) Paranoid Schizophrenia,

5RP 423; (3) Anti-social personality disorder, 5RP 438, (4) Drug addiction, 6RP 578-79. In Dr. Tucker's opinion, McGary's diagnoses in combination make it difficult for him to control his sexually violent behavior. 5RP 454.

Dr. Tucker conducted various actuarial assessments to support his opinion of McGary's likelihood to reoffend. 5RP 378. Specifically, he applied the Static-99R; Static-2002R; and the MnSOST-R. 5RP 474. Based on the actuarial risk assessments, Dr. Tucker opined that McGary was likely to engage in sexual violence if not confined. 5RP 457-58. Dr. Tucker testified that according to the results of the Static-99R, McGary scored as a seven, with a chance of reoffending in 5 years is 37%; 48.5% in ten years. 5RP 491. In the Static 2002R, McGary's chance of reoffending was 29.3% in 5 years and 40% in 10 years. 5RP 496. Dr. Tucker scored McGary on the MnSoST-R, at an 88% chance of reoffense. 5RP 498. In reaching these numbers, Dr. Tucker testified that he had placed McGary in the high risk grouping, doubling the scores. 8RP 1077.

The biggest factor in McGary's higher scores on the actuarial tools was the use of the uncharged incident as the "index offense"—a prison infraction where McGary allegedly tried to

coerce a fellow male inmate into a sexual relationship. 6RP 567. Dr. Tucker testified that if he had not used that uncharged incident as the index offense, the next possible choice was the convictions in 1987-88, which would have dropped McGary's scores "significantly." 6RP 571.

Dr. Tucker also testified that he believed there to be a "strong correlation" between the chance of sexual reoffense and diagnosis of a psychotic disorder. 5RP 521. He opined that McGary's "psychopathy" score was high, which could contribute to a high rate of recidivism. 5RP 515-17.

Dr. Tucker acknowledged that some of McGary's mental disorders were in remission. 6RP 577. McGary had not used drugs at all since being at SCC. 6RP 579. He had not had behavior write-ups since 2005. 6RP 576. He had reached the highest level of treatment completion at SCC prior to his release to LRA. 6RP 583.

Dr. Richard Wollert evaluated McGary for the defense in preparation for trial. 7RP 879. He testified that McGary does not meet the criteria for continued commitment under RCW 71.09. 8RP 980.

Dr. Wollert testified that McGary's diagnoses of schizophrenia and antisocial personality disorder do not meet the definition of a "mental abnormality" under RCW 71.09 because these mental conditions have not caused McGary to act out sexually or sexually offend. 7RP 897. Dr. Wollert noted that McGary's delusions have not been sexual, nor were they command delusions. 7RP 898. Dr. Wollert opined that McGary did not suffer from antisocial personality disorder. 7RP 906. Dr. Wollert also testified that McGary did not meet the diagnostic criteria for paraphelia. 7RP 911.

Dr. Wollert also used several actuarial tests in forming his opinion of McGary's potential for reoffense, including the Static-99, Static-99R, Static-2002R, and the PCL-R.[2] 7RP 918-19. Dr. Wollert opined that the 1992 prison infraction should not be treated as an "index offense" in these tests because the facts available do not clearly show that it is the equivalent of a sexual assault, as required under the test criteria. 7RP 925. However, Dr. Wollert calculated McGary's score both ways—with the 1992 infraction as

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[2] Dr. Wollert was prevented by court ruling from using the test he originally relied on in forming his opinion and which he testified was the best tool for evaluating the declining risk of recidivism in aging offenders, the MATS-1. See 7RP 858. The court had ruled this testimony inadmissible under ER 704. 7RP 866-67.

an index offense and with McGary's 1988 convictions as the index offenses. 7RP 927. Dr. Wollert testified that when the convictions are treated as the index offenses, McGary scores at a level three. 7RP 927. Dr. Wollert noted that when McGary was scored on the Static-99R at SCC in 2004, he scored at a level 4. 7RP 902. Again, in 2006, McGary scored a three or four on the Static 99. 7RP 905. Dr. Wollert testified that if the prison infraction is used as the index offense, McGary's score goes up to a seven. 7RP 929.

On the Static-2002R, Dr. Wollert testified that he scored McGary in the moderately-low range—a four. 8RP 972-73. If Dr. Wollert treated the prison incident as the index offense, McGary scored at a five, in the moderate range. 8RP 973. On the various tests, Dr. Wollert found that McGary's potential for reoffense ranged from an 8.3% chance of reoffense up to a high of 26.5% chance. 8RP 975.

Dr. Wollert also administered the PCL-R test for "criminal thinking." 7RP 934. Dr. Wollert found that McGary's score on this test was in the average range for prison offenders. 7RP 950. Dr. Wollert testified that he scored McGary lower on this test than Dr. Tucker because Dr. Wollert weighed McGary's behavior in the last

10 years more heavily than his behavior prior to incarceration more than 20 years ago, while Dr. Tucker did the opposite. 8RP 959.

Dr. Wollert testified that McGary had engaged in a substantial amount of treatment at SCC. 8RP 964. He stated that three years of treatment is sufficient in that it is more than enough time to reach a relapse-prevention plan. 8RP 962. He noted that it is appropriate at some point in treatment to move on to secondary treatment such as substance abuse prevention. 8RP 962.

D. *Testimony about McGary's Diagnoses:*

1) Schizophrenia*:*

McGary was first diagnosed with paranoid schizophrenia in 1994, after his incarceration. 5RP 423. The mental health professionals agree on this diagnosis. 2RP 64, 3RP 271, 5RP 423, 6RP 692, 8RP 1106. Many of the witnesses expressed concern that McGary's schizophrenia would not be managed well enough in the community and that he could decompensate if he went off his medication. 5RP 425, 426. However, the schizophrenia antedated McGary's sexual offense convictions. 5RP 423, 6RP 699. Dr. Carter testified that the schizophrenia could not be connected to McGary's offenses, did not appear connected to sexual behavior, and did not add to McGary's potential to reoffend sexually. 6RP

681-82. Dr. Wollert also testified that there was no evidence that McGary's schizophrenia caused him to offend sexually. 7RP 897.

2) Paraphelia:

The validity of McGary's paraphelia diagnosis was "debated" among the psychiatric professionals both at SCC, and at trial. 2RP 65, 6RP 680-81, 7RP 895. In the twelve psychological evaluations McGary had prior to 2002, only five of the evaluations diagnosed McGary with paraphelia, seven did not. 7RP 895, 997. After McGary's LRA fell through in 2002, the evaluators listed paraphelia as one of his diagnoses. 8RP 996. McGary's last two DSHS annual reviews stated that his paraphelia was in remission. 8RP 994. Dr. Tucker testified that the paraphelia diagnosis in general is controversial in the mental health field and not generally recognized as a mental disorder outside his specialty. 5RP 404. Even in the specialty, the "non-specified" type is very controversial when applied to behavior between adults. 5RP 404. The diagnosis of paraphelia non-specified is not included in the most recent revision of the DSM. 6RP 592. The criteria for the diagnosis is: (1) sexual disorder for more than six months involving intense recurring sexual arousal fantasies about raping women; (2) happens more than once; (3) leading to distress or impairment. 5RP 404-5, 411.

McGary consistently denied having any deviant sexual fantasies. 5RP 412, 3RP 271. According to Dr. Marquez, Polygraph testing indicated McGary told the truth when he denied having rape fantasies. 3RP 264. Dr. Tucker testified he believed McGary was having fantasies because he looked at McGary's past convictions and felt there was a pattern indicating fantasies. 5RP 412, 417-18. Dr. Tucker also relied on McGary's past convictions in concluding that he met factors two and three. 5RP 412, 413.

Dr. Carter noted that McGary's paraphelia diagnosis was disputed. 6RP 680-81. Dr. Carter's opinion was that McGary's paraphelia was in remission. 6RP 692. She noted that McGary had not had any sexual misbehavior noted for twenty years. 6RP 692. Dr. Carter also confirmed that there was no evidence that McGary had aberrant sexual fantasies and that polygraphs confirmed his reports that he does not have rape fantasies. 6RP 692.

Dr. Wollert testified that McGary does not have paraphelia. 7RP 911. Significant to this opinion for him was that McGary had never attempted to repeat his sexual offending against women since his three convictions in 1987-88, and there was no evidence of "recurring or focused preoccupation with sex," as required for the

diagnosis. 7RP 913-15. Dr. Wollert also noted that McGary was still a very young man at the time of his offenses and that drug use was a factor in his crimes. 7RP 916-17.

Dr. Saari also testified that McGary does not have paraphelia. 8RP 1093, 1105. Dr. Saari stated that there was no evidence that McGary was having deviant sexual fantasies. 8RP 1106. He said although he has had patients hide their fantasies in treatment, McGary was "one of the rare cases where I thought this man legitimately doesn't have these urges." 8RP 1106. McGary was the only patient he had ever worked with at SCC that he believed had been misdiagnosed. 8RP 1107.

3) Antisocial Personality Disorder:

Several evaluators noted a diagnosis of antisocial personality disorder. 2RP 64, 5RP 438, 6RP 693, 7RP 895. McGary had a criminal history during his teenage years prior to his incarceration. Supp. CP, Annual/Triennial Report, at 22. However, Dr. Carter testified that McGary did not currently have behavior issues—he tried to comply and did not become violent. 6RP 693-95. Both Dr. Carter and Dr. Wollert noted that studies show that this disorder decreases with age, particularly over the age of forty. 6RP 694, 7RP 909.

Dr. Wollert did not diagnose McGary with antisocial personality disorder and testified that even if it was present there was no evidence that McGary's antisocial personality disorder caused him to act out sexually. 7RP 897, 906. In Dr. Wollert's opinion, McGary did not show antisocial behavior when medicated. 7RP 907.

4) Marijuana and Alcohol Dependency:

Substance abuse was identified as one of McGary's diagnoses. 2RP 65, 6RP 692. However, Dr. Carter testified that there was no evidence of any substance abuse for fifteen years—confirmed by frequent urinalysis tests. 6RP 692-93. Therefore, Dr. Carter opined that this diagnosis was not applicable. 6RP 692-93. Dr. Tucker also implied this diagnosis was in remission because McGary had not used drugs at all since being at SCC. 6RP 579.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY RULING THAT TESTIMONY ABOUT AN ACTUARIAL INSTRUMENT WAS INADMISSIBLE UNDER ER 703.

Just before McGary's expert witness, Dr. Wollert, was set to testify at trial, the State moved to exclude from Dr. Wollert's testimony any reference to an actuarial instrument called the MATS-1, which Dr. Wollert had relied on in assessing McGary's

future dangerousness under RCW 71.09. 7RP 769. The State argued that this evidence was not admissible under ER 703 because, in the State's opinion, that particular actuarial instrument was not "generally accepted" or used routinely by others in the field. 7RP 775. The Defense objected to excluding the actuarial instrument, pointing out that the State's arguments went to the weight of the evidence, not its admissibility. 7RP 779-80. The defense argued that the MATS-1 met the test for admissibility under ER 703 because it was the type of tool commonly used by those in the field—an actuarial test that had been peer-reviewed and published—and was relied upon by Dr. Wollert in reaching his opinion. 7RP 779-80.

In voir dire testimony, Dr. Wollert, a licensed psychologist,[3] testified that actuarial tests are commonly used in the field to evaluate future dangerousness. 7RP 826. He testified that all actuarial tests have been developed by psychologists who compile the data, select characteristics for comparison, and cross-validate the results. 7RP 826-28. Sometimes the data and tests are presented at conferences, or published in peer-reviewed journals. 7RP 828, 831. For example, the most commonly used actuarial

[3] The state did not object to Dr. Wollert's qualifications as an expert.

table, the Static-99, was developed in 1999 by two psychologists. 7RP 833. It was peer-reviewed and cross-validated. 7RP 833.

Dr. Wollert testified that he and two other psychologists, Dr. Jacqueline Waggoner, Dr. Elliott Cramer, began developing the MATS-1 in 2005, and published the test and data in a peer reviewed journal, "Law Probability and Risk" in 2006. 7RP 836. They had compiled data from 9,305 incarcerated sex offenders, gathered from two different sources. 7RP 836. Half of that data was obtained from the Static-99 tables, 7RP 852, and the other half from another source, 7RP 853. Their actuarial table and the risk items that pertained to their data set were again published in a peer-reviewed journal for the Association for the Treatment of Sexual Abusers in 2010. 7RP 837. It had been presented at conferences internationally. 7RP 840. The "items" for comparison in the MATS-1 were six items of the ten items included in the Static-99, adding to these the age of the offender. 7RP 837, 843. Dr. Wollert testified that it is commonly recognized in the field that age is strongly correlated with the rate of recidivism. 7RP 837-38. Further, at the time of trial, Dr. Wollert was personally aware of at least six other experts in the field who were using the MATS-1 to

evaluate recidivism.[4] 7RP 838, 846, 858-59. According to Dr. Wollert, the model was developed using standard probability and statistics models. 7RP 841. The full sample rates of recidivism in the MATS-1 are not substantially different from the Static-99. 7RP 844. Dr. Wollert testified that he relied on the MATS-1, along with other information, in making his assessment in this case. 7RP 858.

The court ruled that Dr. Wollert's testimony about the MATS-1 was inadmissible under ER 703 because it was not "of a type of test reasonably relied on by experts in the field." 7RP 866-67.

The trial court erroneously excluded the MATS-1 under ER 703. While the admissibility of expert opinion is subject to the abuse of discretion standard, State v. Nation, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002), that discretion must be based on tenable grounds and reasons. State v. Athan, 160 Wn.2d 354, 376, 158 P.3d 27 (2007) (Abuse of discretion occurs when the trial court's decision is based on untenable grounds or untenable reasons).

In *Thorell,* the Washington Supreme Court considered "whether actuarial instruments may be admitted to aid in the

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[4] Dr. Wollert had not conducted a survey—these were the other individuals who had approached him to tell him they were using the MATS-1. Dr. Wollert testified that there are only about 100 experts in this area nationally. 7RP 859.

prediction of future dangerousness and, if these instruments are admitted, whether *Frye* or Evidence Rule (ER) 702 is the appropriate test of their reliability." State v. Thorell, 149 Wn.2d 724, 730, 72 P.3d 708 (2003). The court held that "actuarial instruments may be admitted if they satisfy the requirements of ER 702." Thorell, at 731. Opposition to the evidence of actuarial instruments "went to the weight of the evidence rather than its admissibility." Thorell, 149 Wn.2d at 756. Specifically, the experts' disagreement as to the reliability of actuarial assessments goes to the weight of this evidence, not its admissibility. Thorell, 149 Wn.2d at 756 (citing In re Det. of Campbell, 139 Wn.2d 341, 358, 986 P.2d 771 (1999)).

The Thorell court noted that "[b]ecause actuarial models are based on statistical analysis of small sample sizes, they have a variety of potential predictive shortcomings." Thorell, 149 Wn.2d at 753. The parties disputed whether actuarial tests depended on novel scientific evidence. Thorell, 149 Wn.2d at 754. The State contended that "actuarial instruments are not novel scientific evidence, so the trial court need not conduct a *Frye* hearing." Thorell, 149 Wn.2d at 754, 72 P.3d 708. In that case, the State argued that "the methods and procedures used to construct actuarial instruments are well accepted in the scientific community

and that [the defendant's] arguments go to weight rather than admissibility." Thorell, 149 Wn.2d at 754. The court concluded that "we reiterate that the *Frye* standard has been satisfied by ... actuarial determinations of future dangerousness." Thorell, at 756.

ER 702 provides: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "In the case of scientific testimony, the expert (1) must qualify as an expert, (2) the expert's opinion must be based upon a theory generally accepted in the relevant scientific community, and (3) the testimony must be helpful to the trier of fact." State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003) (citations omitted). Under ER 702, questions related to reliability may be considered by the court under the "helpfulness to the jury" standard of admissibility. State v. Copeland, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996); State v. Janes, 121 Wn.2d 220, 235-36, 850 P.2d 495 (1993).

ER 703 provides the standard for the admission of evidence of bases of opinion testimony by experts:

The facts or data in the particular case upon which an

> expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ER 703 is, in other words, not an exclusionary rule, but rather is a mechanism to admit otherwise inadmissible hearsay. See 1A Wash. Prac., § 35:5, citing *Evidence*, Tegland, §§ 703.1, 703.2 (explaining the purpose and scope of ER 703 is to allow an expert to explain the basis of his or her opinion even though the opinion is not based on the expert's firsthand observations).

> "The 'reasonably relied upon' language in Rule 703 should not be confused with the *Frye* rule, which requires general acceptance in the scientific community. The *Frye* rule relates to the scientific principles and techniques employed by the expert in reaching an opinion. By contrast, Rule 703 relates to the factual information relied upon by the expert …."

1A Wash. Prac., § 35:5, (quoting *Evidence*, Tegland, § 703.2). Moreover, according to Tegland: "The admissibility of an expert's opinion under Rule 703 should not be confused with the weight of that opinion after it is admitted as evidence . . ." 1A Wash. Prac., § 35:5, (quoting *Evidence*, Tegland, § 703.2). Under ER 703, the issue is not whether the actuarial instrument is reliable, but whether it constitutes information that is "of a type" relied on by experts in

the field.

There is no question that actuarial instruments are "of the type" of information used by evaluators in RCW 71.09 cases. *See* Thorell, 149 Wn.2d at 755-756. It is uncontroverted in this case that Dr. Wollert used accepted scientific methods to develop the test and the development of the test mirrors other commonly-used versions—specifically, it was developed by psychologists, peer-reviewed, cross-validated, and published.

If the State has problems with the MATS-1, then those problems are properly addressed in cross-examination because they go to weight, not admissibility. *See* Thorell, 149 Wn.2d at 756 (the experts' disagreement as to the reliability of actuarial assessments goes to the weight of this evidence, not its admissibility), (citing In re Det. of Campbell, 139 Wn.2d 341, 358, 986 P.2d 771 (1999)).

If the State's argument was that the MATS-1 is not a reliable instrument, then that is a *Frye* argument. Since the State below continually used the *Frye* terms, arguing that the MATS-1 was not "generally accepted" in the field, it does appear the State was attempting to make a *Frye* argument, re-packaged as an ER 703 argument. See 7RP 769-71. Thorell makes it clear that actuarial

instruments are admissible and not subject to a *Frye* hearing. Thorell, at 756. Since Thorell, Washington courts have consistently held that all sorts of actuarial tables are admissible under *Fry* and ER 702. See, e.g., In re Det. of Strauss, 106 Wn. App. 1, 20 P.3d 1022 (Div. I, 2001); In re Det. of Halgren, 124 Wn. App. 206, 98 P.3d 1206 (Div. I, 2004); In re Det. of Taylor, 132 Wn. App. 827, 837, 134 P.3d 254 (Div. II, 2006); In re Det. of Robinson, 135 Wn. App. 772, 146 P.3d 451 (Div. I, 2006).

The MATS-1 was admissible under ER 702 and ER 703 because it was of a type commonly relied on by experts—an actuarial tool—and Dr. Wollert relied upon the test in reaching his opinion. Therefore, the trial court abused its discretion in excluding Dr. Wollert's testimony about the MATS-1 actuarial instrument because that decision is in direct conflict with precedent and the evidence rules.

The trial court's erroneous exclusion of Dr. Wollert's testimony about the MATS-1 was prejudicial to McGary's ability to put on a defense. Dr. Wollert testified that the MATS-1 was the best test to use and was the basis for his opinion that McGary's chance of recidivism declines with age and takes into account declining rates of recidivism generally over the past 20 years. 7RP

841, 858. Thus, even though Dr. Wollert eventually testified to the results of other actuarial tests, erroneously excluding his testimony about the results in the MATS-1 prejudiced his ability to fully testify to the basis of his opinion. This prejudiced McGary's defense.

Moreover, the cross-examination and closing argument of the State's attorney compounds the prejudice of the erroneous exclusion. Following the trial court's ruling excluding the MATS-1 instrument one day before he testified, Dr. Wollert conducted several other actuarial tests on McGary, including the Static-99, Static-99R, Static-2002R and PCL-R. 7RP 918-19. The State challenged Dr. Wollert repeatedly in cross-examination regarding the late date of his scoring on the additional actuarial tests. 8RP 1002, 1043, 1046. Then, in closing, the State expressly argues that the fact that Dr. Wollert did not administer these tests until the day before his testimony lessened the credibility of his testimony as an expert. 8RP 1142-43.

> [State's attorney]: You heard Dr. Wollert got this case about two-and-a-half years ago. When did he score the PCL-R? Tuesday night. When did he score the Static-2002R? Last night. We had his reports. Mr. Buder deposed him awhile back to find out what his opinions would be, and then he sandbagged us. He came in, and he did those things before he testified without us knowing about it. We found out when you found out when he testified, and we got sand all in our

> hair. That happens sometimes in courtrooms. We just pick up and move on. That was not right. It wasn't right.

8RP 1143. So, not only did the State argue that Dr. Wollert's expertise is in question due to the late testing, the State also argued that it was "not fair" to the State that the test results were not available before testimony. 8RP 1143. Because the jury was not told why Dr. Wollert had waited to conduct the other actuarial tests—because the actuarial test he had relied on had been excluded—the State's argument unfairly undermined McGary's defense.

Consequently, the trial court's erroneous suppression of Dr. Wollert's testimony regarding the MATS-1 requires reversal and a new trial.

ISSUE 2: THE STATE'S ATTORNEY MISCONDUCT DURING CROSS-EXAMINATION AND CLOSING ARGUMENT DEPRIVED MCGARY OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

A prosecutor has "a special duty in trial to act impartially in the interests of justice and not as a 'heated partisan.'" State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993) (*quoting* State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984)). The criminal prosecutorial misconduct standard applies to proceedings held under RCW 71.09. *See* In re Detention of Sease, 149 Wn. App. 66,

81, 201 P.3d 1078 (2009). Reversal is required where the prosecutor's actions were improper and had a prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Misconduct is prejudicial if there is a substantial likelihood that it affected the verdict. State v. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993). Where there has been no objection below, the proponent must also show that the misconduct was flagrant and ill-intentioned and could not be cured by the trial court's admonishment. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

A prosecutor's remarks in closing are flagrant and highly prejudicial when they deliberately appeal to the jury's passion and prejudice and encourage a verdict that was not based on properly admitted evidence. State v. Belgarde, 110 Wn.2d 504, 507-8, 755 P.2d 174 (1988). In this case, the State's Attorney misrepresented the facts to the jury and improperly appealed to their sense of "fairness" rather than properly focusing on the law. The State's Attorney argued to the jury that Dr. Wollert's testimony was unreliable an not to be trusted because he had conducted actuarial testing just before giving his testimony. Specifically, he argued:

You heard Dr. Wollert got this case about two-and-a-

> half years ago. When did he score the PCL-R? Tuesday night. When did he score the Static-2002R? Last night. We had his reports. Mr. Buder deposed him awhile back to find out what his opinions would be, and then he sandbagged us. He came in, and he did those things before he testified without us knowing about it. We found out when you found out when he testified, and we got sand all in our hair. That happens sometimes in courtrooms. We just pick up and move on. That was not right. It wasn't right.

8RP 1143. In this argument, he is referring to his extensive cross-examination of Dr. Wollert on this very point. The State challenged Dr. Wollert repeatedly in cross-examination regarding the late date of his scoring on the additional actuarial tests. 8RP 1002, 1043, 1046.

The State's Attorney's closing argument and cross-examination constituted flagrant and ill-intentioned misconduct because the State's Attorney is misrepresenting the facts to the jury. The State's Attorney knew what the jury did not—that it is the State's motion to exclude Dr. Wollert's testimony about the MATS-1, which was made on the eve of his testimony, that necessitated the additional testing and the timing of it. Thus, this argument not only misrepresents the facts, it relies on facts not in evidence by implying that the Defense has somehow violated the rules of

discovery.[5]

Furthermore, the State's Attorney's closing argument erroneously invited the jury to decide the case based grounds other than the facts and law. It was misconduct to appeal to the jury to consider how Dr. Wollert allegedly "sandbagged" the State. *See* State v. Belgarde, 110 Wn.2d 504, 507-8, 755 P.2d 174 (1988). The State is making an emotional appeal to the jury, which is expressly not allowed. It was therefore flagrant misconduct to make this improper argument.

Moreover, the misconduct was highly prejudicial to the case because the issue of McGary's future dangerousness, as well as his paraphelia diagnosis, were hotly debated between the experts at trial. Thus, the credibility of the competing experts was the central issue at trial. A corrective instruction by the judge could not have corrected the State's improper argument because after already hearing the cross-examination on this point by the State and then having the defense expert essentially smeared on cross-

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[5] At closing, the State may draw reasonable inferences from the evidence. State v. Millante, 80 Wn. App 237, 250, 908 P.2d 374 (1995). The State may not, however, offer new facts under the guise of argument. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Arguments based on facts not in evidence are improper. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003).

examination, the damage to the expert's credibility could not be undone by an instruction.

Consequently, the State's Attorney's misconduct in closing argument requires reversal in this case.

3. CUMULATIVE ERROR DEPRIVED MCGARY OF HIS RIGHT TO A FAIR TRIAL.

The combined effects of error may require a new trial even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996). In this case, the errors combined to enhance the unfair prejudice to the appellant, and his convictions should be reversed even if the court should find that the errors do not individually require reversal.

E. CONCLUSION

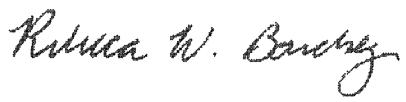
The commitment order under RCW 71.09 should be reversed in this case because the trial court's error in erroneously excluding Dr. Wollert's testimony about the MATS-1 and the

prosecutorial misconduct of the State's Attorney prejudiced McGary's defense and deprived him of a fair trial.

DATED: March 19, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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CERTIFICATE OF SERVICE

I certify that on March 19, 2012, I caused a true and correct copy of this Appellant's Brief to be served on the following via first class mail:

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