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NO. 24820-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN DUNCAN,

Appellant.

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

The Honorable Craig J. Matheson

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting unfairly prejudicial evidence that appellant would not undergo another examination by the State's psychologist during pretrial discovery.

2. The trial court abused its discretion in admitting unfairly prejudicial evidence that the person appellant planned to live with, if released, is a child molester and precluding appellant from presenting evidence that the person has not reoffended and is succeeding in the community.

3. The trial court violated appellant's due process right to meaningful cross-examination of witnesses by precluding defense counsel from cross-examining the State's expert about the treatment program at the Special Commitment Center (SCC).

4. The trial court violated appellant's due process right to present evidence in his defense by not allowing appellant's expert to testify about the treatment program at SCC.

5. Cumulative error denied appellant his constitutional right to a fair trial.

Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion in admitting unfairly prejudicial evidence that appellant would not submit to an examination by the State's psychologist during pretrial discovery when the State was not entitled to another evaluation?

2. Did the trial court abuse its discretion in admitting unfairly prejudicial evidence that the person appellant planned to move in with, if released, is a child molester and then not allowing appellant to present evidence that the person has not reoffended and has succeeded in the community?

3. Did the trial court violate appellant's due process right to meaningful cross-examination of witnesses by precluding defense counsel from cross-examining the State's expert on testimony he presented during direct examination about the sex offender treatment program at SCC?

4. Did the trial court violate appellant's due process right to present evidence in his defense by precluding expert testimony essential to his defense that he discontinued treatment at SCC because it was unmeaningful?

5. Did cumulative error deny appellant his constitutional right to a fair trial?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On March 22, 1996, the State filed a petition alleging that appellant, Bryan Duncan, was a sexually violent predator under RCW 71.09. CP 1870-71. At a hearing on August 30, 1996,² the court found probable cause to believe that Duncan was a sexually violent predator and ordered his custodial detention at the Special Commitment Center (SCC). 5RP³ 33. Following numerous continuances, a commitment trial was held before the Honorable Craig J. Matheson on 10/21/2005 to 11/14/2005. 19RP - 32RP. On November 14, 2005, a jury found that the State proved beyond a reasonable doubt that Duncan was a sexually violent predator and the court ordered Duncan committed to SCC.⁴ CP 29-31. Duncan filed this timely appeal. CP 13.

¹ There are 2134 pages of transcripts containing the facts underlying Bryan Duncan's commitment. In accord with RAP 10.3(a)(4), the Statement of the Case addresses facts and procedure relevant to the issues presented for review.

² Duncan waived his right to a probable cause hearing within seventy-two hours pursuant to RCW 71.09.040 (2). CP 1848-50.

³ There are 32 verbatim report of proceedings: 1RP - 3/27/96; 2RP - 4/5/96; 3RP - 5/10/96; 4RP - 8/23/96; 5RP - 8/30/96; 6RP - 9/26/96; 7RP - 2/1/00; 8RP - 5/9/00; 9RP - 6/20/00; 10RP - 9/11/00; 11RP - 1/12/01; 12RP - 2/14/01; 13RP - 7/27/01; 14RP - 2/1/02; 15RP - 1/22/04; 16RP - 2/4/05; 17RP - 5/3/05; 18RP - 10/18/05; 19RP - 10/21/05; 20RP - 10/24/05; 21RP - 10/25/05; 22RP - 10/26/05; 23RP - 10/31/05; 24RP - 11/1/05; 25RP - 11/2/05; 26RP - 11/3/05; 27RP - 11/4/05; 28RP - 11/7/05; 29RP - 11/8/05; 30RP - 11/9/05; 31RP - 11/10/05; 32RP - 11/14/05.

⁴ According to the court reporter for the proceedings on 11/14/05, there was no court reporter present when the jury returned from deliberations and rendered its verdict.

2. Substantive Facts

Officer Barry Gilk testified that he was a police officer with the city of Richland in 1992 when he was dispatched to an apartment on a complaint of alleged child molestation. Gilk spoke with two mothers and their children whose ages were between three or four and nine or ten. 23RP 671-73. Based on their allegations against Duncan, Gilk and Sergeant Thompson went to Duncan's apartment to conduct an investigation. Duncan, who was 16 years old at the time was living with his father. Duncan answered the door and immediately denied any wrongdoing. Gilk and Thompson asked him to come down to the police station for questioning. Duncan and his father came to the station for an interview. 23RP 674-75. During the interview, Duncan admitted to the allegations that he committed sex acts with the young boys. 23RP 676. Gilk learned that Duncan associated with the younger children because kids his age picked on him and Gilk observed that "he may have been developmentally disabled a little bit . . . not up to his chronological age." 23RP 682-83. After the interview, Gilk took Duncan to the Juvenile Justice Center and booked him on a charge of child molestation. 23RP 680.

Officer Allan Knox testified that he was assigned to the detective division of the Kennewick police department in June 1992. Knox went to

the Juvenile Justice Center to question Duncan about new allegations. 23RP 684-85. He met with Duncan in a private room and Duncan told him about several sexual contacts with small children in the neighborhood where he lived. 23RP 686. Most of the sexual contacts occurred when Duncan was 13 years old. 23RP 693. Duncan also disclosed that he had been having sexual contact with his younger brother. 23RP 689-90. Knox recalled that Duncan was "somewhat slow" and a little different than most kids his chronological age. Knox acknowledged that developmentally disabled people are not reliable reporters most of the time. 23RP 692-93. After the interview, Knox forwarded his report to the Richland police. 23RP 692.

Psychologist, Dr. Lesley Rawlings, testified that he interviewed Duncan in March 1996; conducted psychological testing; and reviewed police reports, medical records, psychological and psychiatric evaluations, and institutional disciplinary records. 25RP 1052-53. The information that Rawlings reviewed included a report by Duncan's forensic therapist that he recently disclosed having sexual fantasies about children. 27RP 1356-57, 1369-71, 1381-83. Rawlings diagnosed Duncan with schizophrenia and a severe form of pedophilia which predisposes him to commit sexual offenses against children. 25RP 1073-75. To determine Duncan's risk of reoffending, Rawlings used actuarial risk assessment

instruments known as Static 99, MnnSOST-R, and So-Rag. 25RP 1107. Duncan scored a six on the Static 99 which put him in the highest risk category, having a reconviction rate of 52% over a period of 15 years. Duncan's results on the MnnSOST and So-Rag were consistent with the Static 99 in indicating that he was more likely than not to reoffend. 25RP 1115.

Rawlings emphasized that Duncan's refusal to participate in treatment at SCC increased his risk of reoffending, "it's a concern because he hasn't learned or internalized the kinds of skills that potentially could help him to control his behavior." 25RP 1127. Rawlings concluded that Duncan suffers from a mental abnormality which causes him serious difficulty in controlling his sexually violent behavior, and he is more likely than not to commit sexually violent predatory acts if not confined in a secure facility. 25RP 1127-28.

Dr. Paul Spizman testified that he is a psychologist employed by the State as a forensic evaluator at SCC, which has about 225 residents who are detained or civilly committed. 27RP 1403-05. Stating that he was familiar with Duncan's files and records, Spizman was concerned that Duncan has moved in and out of the treatment program at SCC, "I didn't see any indication that he has fully invested himself for any significant period of time." 27RP 1405-08. Spizman underscored the importance of

treatment for sex offenders, "They have certain risk factors. They need to learn how to manage those risk factors." 27RP 1415.

During cross-examination, defense counsel asked, "Doctor, you had an opportunity to talk about treatment at some length. How would you measure success for treatment?" 27RP 1424. The State objected when Spizman began explaining the different phases of the treatment program and the court ruled that such evidence was irrelevant. 27RP 1423-26.

Psychologist, Dr. Richard Wollert, testified that actuarial instruments such as the SORAG, MnnSost-R, and Static 99 cannot reliably predict the recidivism rate for juvenile offenders like Duncan. 29RP 1764, 1768-69. Wollert explained that the human brain is not fully developed until sometime after age 18, "[a]nd the parts of the brain that develop last are those parts of the brain that have do with maturity of judgment, with impulse control, with thinking about the consequences on one's self and others." 29RP 1777-78. Citing studies showing that low recidivism rates for juvenile offenders "are a consistent finding over five decades," Wollert concluded that the risk of Duncan reoffending is far below the more likely than not standard to classify him as a sexually violent predator. 29RP 1769-72.

During cross-examination on conditions that might impact a released sex offender's risk of reoffending, the State asked Wollert about Duncan's plans if he were released. Over defense counsel's objection, the court allowed Wollert to respond that Duncan planned to live with [Clarence Deon] Walls, who had a criminal history of sexual offenses against children. 29RP 1811-15.

Psychologist, Dr. Robert Halon, testified that he interviewed Duncan at SCC and administered the Rorschah, known as the inkblot test. 30RP 1936-39. Halon diagnosed Duncan as developmentally disabled, "[E]verything you see in this man can be explained by a pervasive developmental disorder in him, not a mental disorder. This is the way Mr. Duncan is as a human being." 30RP 1950. He disagreed with Dr. Rawlings' diagnosis of Duncan as a schizophrenic and pedophile. 30RP 1947-49, 1974-75. Halon concluded that Duncan suffers from a developmental disability, not a mental abnormality. 30RP 2006.

Stating that he was familiar with the treatment program at SCC, Halon began explaining that the treatment is not effective because it is not individualized. The State objected and the court ruled that Halon's opinion about treatment at SCC was irrelevant. 30RP 2004-06.

Bryan Duncan was thirty years old at the time of trial. 23RP 585. Duncan testified that he has been regularly meeting with his therapist at

SCC for the last five years. 28RP 1492. Although he generally had a good relationship with his therapist, the administration at SCC would not allow him to discuss sex offender issues with her. 28RP 1492-94. He recently met with her to discuss a relapse prevention plan, and she misunderstood him when he asked what he should do if his sexual fantasies reoccur. 28RP 1496-97. Duncan explained why he discontinued treatment at SCC, "I don't want to quit learning about how to solve my sexual deviancy problem since it is an ongoing thing throughout my life, but the thing is that there is no meaningful treatment at the Special Commitment Center." 30RP 1913.

C. ARGUMENT

1. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT DUNCAN FITS THE CRITERIA OF A SEXUALLY VIOLENT PREDATOR AND HAS SERIOUS DIFFICULTY CONTROLLING HIS BEHAVIOR.

Involuntary commitment is a "massive curtailment of liberty." Vitek v. Jones, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1263, 63 L. Ed. 2d 552 (1980).

To civilly commit a person as a sexually violent predator, the State must prove the following elements beyond a reasonable doubt: (1) that the person has been convicted of or charged with a crime of sexual violence, (2) that he suffers from a mental abnormality or personality disorder, and

(3) that such mental abnormality or personality disorder makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.060(1); RCW 71.09.020(16); In re Detention of Kelley, 133 Wn. App. 289, 295, 135 P.3d 554 (2006). The State must also prove beyond a reasonable doubt that the person has serious difficulty controlling his behavior. Kansas v. Crane, 534 U.S. 407, 412-13, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002); In re Detention of Thorell, 149 Wn.2d 724, 742, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990, 124 S. Ct. 2015, 158 L. Ed. 2d 496 (2004).

2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING UNFAIRLY PREJUDICIAL EVIDENCE.

All relevant evidence is admissible. ER 402; Hayes v. Wieber Enterprises, Inc., 105 Wn. App. 611, 617, 20 P.3d 496, (2001). Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401; Hayes, 105 Wn. App. at 617.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403; State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). In determining whether or not there is prejudice, the linchpin word is “unfair.” Id.

Federal law, state law, and commentators agree that “unfair prejudice” results from evidence which is “dragged in” for “the sake of its prejudicial effect.” Carson v. Fine, 123 Wn.2d 206, 223-24, 867 P.2d 610 (1994) (quoting United States v. Roark, 753 F.2d 991, 994 (11th Cir. 1985)).

The trial court’s decision on the relevance and prejudicial effect of the evidence may only be reversed upon a manifest abuse of discretion. State v. Rupe, 101 Wn.2d 664, 686, 683 P.2d 571 (1984).

a. Evidence that Duncan Refused Subsequent Examination.

Reversal is required because the trial abused its discretion in admitting irrelevant and unfairly prejudicial evidence that Duncan would not submit to another examination by the State’s psychologist during pretrial discovery.

A person not yet determined to be a sexually violent predator cannot be compelled to undergo an examination by the State’s expert during pretrial discovery in civil commitment proceedings under chapter 71.09 RCW. Detention of Marshall v. State, 156 Wn.2d 150, 154, 125 P.3d 111 (2005); In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

During redirect examination of its expert, Dr. Lesley Rawlings, the State questioned him about having another opportunity to evaluate Duncan:

Q. Doctor, you saw Mr. Duncan in 1996?

A. Correct.

Q. And you have not seen him since?

A. That's correct.

Q. Would you have liked [an] opportunity to update your evaluation of him by meeting with him?

A. Yes.

Q. And what stopped you from doing that?

26RP 1328.

At this point, defense counsel requested a side bar asserting that he was going to make a motion for a mistrial. Counsel argued that the State was not entitled to another examination, "All it does is open up a situation where: Gosh, what's he hiding? That casts a pall on my client. The current case law in our state does not require him to do that. How do you cure that?" 26RP 1331. The State conceded that it would withdraw the question but the court decided to recess for the day, "Let's think about it overnight." 26RP 1331-32.

Argument resumed the following morning without the presence of the jury. The State argued that because the defense has asserted that Dr. Rawlings' opinion is based on records and reports written by other people, he should have an opportunity to explain that Duncan would not

meet with him again. Defense counsel renewed his argument that such testimony would be unfairly prejudicial. 26RP 1338-39.

The court agreed with the State:

What we have here is the fact that this case has been extended over an extensive period of time for my [sic] number of reasons, and a subsequent interview probably would have been appropriate. It wasn't done, and it wasn't done because apparently the defendant wouldn't consent to it. And I think the state's entitled to show that. Why they didn't do it was not because they were inept or incompetent or lazy or anything like that. So I think in fairness to the state and -- and the defense has raised a point that this was all based on hearsay reports, which they need to do. I mean you have to do that. But I think that we get closer to the truth by frankly putting it out there and let the jury decide, and they're entitled to know that this professional's opportunity to have a subsequent interview was denied.

26RP 1340.

Thereafter, the State continued its examination of Rawlings:

Q. When we broke yesterday I was just in the process of asking you whether you would like to have had an opportunity to meet with Mr. Duncan again.

A. Yes.

Q. That is yes, you would have liked to?

A. Yes, you were asking me that, and yes, I would like to have.

Q. And did you request an opportunity to interview him again?

A. I did through the Attorney General's Office.

Q. And were you able to interview him?

A. No.

26RP 1341.

The trial court admitted the evidence based on its erroneous conclusion of law. The court's ruling that a subsequent interview would have been appropriate disregards the Washington Supreme Court's holding that the State is not allowed another examination during pretrial discovery and evidence of such an examination is inadmissible. Marshall, 156 Wn.2d at 154; Williams, 147 Wn.2d at 476. Accordingly, because the State had no right to another examination, evidence that Duncan would not meet with Rawlings again was irrelevant and consequently unfairly prejudicial, casting Duncan in a negative light before the jury. The evidence implied that Duncan had reason to be apprehensive about another evaluation and that he was being less than honest and open about his rehabilitation. The prejudicial effect upon the jury was apparent by the nature of the jury's question for Duncan, "Why did you choose not to be evaluated for this trial?"⁵ 30RP 1921.

The trial court abused its discretion because evidence that Duncan would not undergo another examination was not relevant and unfairly prejudicial. Hayes, 105 Wn. App. at 617-18.

- b. Evidence that Duncan Planned to Move In With a Child Molester If Released.

⁵ By agreement of the parties, the jurors were allowed to question the witnesses.

Reversal is required because the trial court abused its discretion in admitting unfairly prejudicial evidence that if released, Duncan planned to move in with a child molester.

Evidence may be unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action. Carson, 123 Wn.2d at 223 (citing 1 J. Weinstein & M. Berger, Evidence sect. 403[03], at 403-36 (1985)). Unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors. Lockwood v. AC & S, Inc., 109 Wn.2d 235, 257, 744 P.2d 605 (1987); State v. Cameron, 100 Wn.2d 520, 529, 674 P.2d 650 (1983).

During cross-examination of defense expert, Dr. Richard Wollert, the State asked him about Duncan's plans upon release:

Q. . . . [D]o you know what Mr. Duncan's plans are if he is not committed and is released into the community?

A. No.

Q. As I understand it he plans to live with Mr. Walls. You know something about Mr. Walls, don't you?

A. I do know Mr. Walls, yes.

Q. What is Mr. Walls' criminal sexual history?

A. Mr. Walls --

30RP 1811.

At this juncture, defense counsel requested a side bar and objected to the State's line of questioning. The State argued that evidence of

Duncan's plans if he is unconditionally released is relevant to his recidivism risk. 30RP 1813. Defense counsel argued that if the court allows such evidence then he should be allowed to present evidence that Walls was a juvenile offender who was released, has not reoffended, and is being successful in the community. 30RP 1812-14. The State conceded, "If the Court doesn't want me to go there, I won't go there." 30RP 1813.

However, the court ruled that evidence of Duncan's relationship with Walls was relevant and it did not open the door for the defense to present further evidence:

MR. ROSS: I'm just going to ask if Mr. Walls has a history involving sex crimes against children, and that's all I'm going to do.

THE COURT: OK. All right.

(Heard in open court):

Q. One question about Mr. Walls. Does Mr. Walls have a criminal history of sexual offenses against children?

A. Yes.

30RP 1815.

Clearly, evidence that Walls was a child molester was unfairly prejudicial and "dragged in" for the "sake of its prejudicial effect." Hayes, 105 Wn. App. at 618. The trial court failed to balance whether the

probative value of the evidence was substantially outweighed by the danger of prejudice. Under the balancing process of ER 403, the balance may be tipped towards exclusion “if the undesirable characteristics of the evidence are very pronounced.” Rice, 48 Wn. App. at 13. The prejudicial effect upon the jury was evident from its question for Duncan, “Dr. Wollert stated that Mr. Walls is a child molester. What would you do if you found out that Mr. Walls was sexually molesting children at the apartment you would be sharing with him?” 30RP 1916.

The court’s error was compounded by unfair exclusion of defense evidence that Walls was released, had not reoffended, and was succeeding in the community. Furthermore, the court’s error allowed the State to repeatedly emphasize during closing argument that Duncan plans to move in with Walls, “another child molester.” 32RP 2083, 2084, 2095.

The trial court abused its discretion in admitting evidence that Walls was a child molester because the evidence was unfairly prejudicial with the effect of provoking an emotional response rather than a rational decision by the jury. Carson, 123 Wn.2d at 223.

3. THE TRIAL COURT VIOLATED DUNCAN'S DUE PROCESS RIGHT TO MEANINGFULLY CROSS-EXAMINE THE STATE'S EXPERT WITNESS.

The trial court violated Duncan's due process right to meaningfully cross-examine the State's expert, Dr. Paul Spizman, about the sex offender treatment program at SCC.

The sexually violent predator statute is civil in nature, so the right to confrontation does not apply. In re Detention of Brock, 126 Wn. App. 957, 963, 110 P.3d 791 (2005). However, freedom from bodily restraint has always been at the core of the liberty interest protected by the due process clause of the fourteenth amendment to the United States Constitution. In re Detention of Thorell, 149 Wn.2d at 731; U.S. Const. amend. XIV, sect. 1. Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). Thus, due process may guarantee the right to cross-examine witnesses even if the confrontation clause does not apply directly. In re Brock, 126 Wn. App. at 963. The primary interest secured by the Confrontation Clause is the right of cross-examination, "the principal means by which the believability of a witness and the truth of his testimony are tested." State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998) (quoting Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)).

During direct examination, the State's expert, Dr. Spizman, testified that Duncan was not under treatment at SCC, "From my review of the documents he has moved in and out a few times of treatment. I didn't see any indication that he has fully invested himself for any significant period of time in the treatment program." 27RP 1407.

Spizman underscored the importance of sex offender treatment:

The way I look at it is that people offend sexually because of deficits they have, or I think dynamic risk factors have probably been discussed so far. They have certain risk factors. I would never say that somebody has successfully completed sex offender treatment because it's an ongoing ability to apply the positive, appropriate coping strategies to manage their risk. So I would say that somebody is in a different stage of treatment: Beginning, middle, ending stage of treatment.

27RP 1415.

During cross-examination, defense counsel asked Spizman to explain how one would advance through the different levels of treatment and clarify how success in treatment is measured, which prompted an objection from the State. The court ruled that evidence of the success or failure of the treatment program at SCC was irrelevant. 27RP 1424-25.

The trial court abused its discretion in denying defense counsel the right to cross-examine Spizman about a subject matter raised by the State.

ER 611(b).⁶ Spizman's testimony implied that Duncan remains a risk because he has refused sex offender treatment at SCC. Consequently, counsel had a right to cross-examine Spizman further about how the treatment program benefits sex offenders. Furthermore, the evidence was relevant because Duncan's defense was that he discontinued treatment because it was not meaningful. "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is relevant evidence." Hayes, 105 Wn. App. at 617 (citing Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978); Maicke v. RDH, Inc., 37 Wn. App. 750, 752, 683 P.2d 227 (1984), rev. denied, 102 Wn.2d 1014 (1984)).

The court discounted defense counsel's argument during side bar that the jury should not "be left with the impression that if you go to SCC and you put your mind to treatment that somehow that results in an LRA or being out, because that simply isn't the facts." RP 1423. The jury was indeed left with that impression, as reflected by its question for Duncan, "Why would you want to avoid sexual offender treatment if you want to leave the SCC?" RP 1913.

⁶ ER 611 (b) in relevant part:

Scope of Cross Examination. Cross Examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

Reversal is required because the court violated Duncan's due process right to meaningful cross-examination, excluding evidence relevant to his defense.⁷

4. THE TRIAL COURT VIOLATED DUNCAN'S DUE PROCESS RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE.

The trial court violated Duncan's due process right to present evidence by excluding expert testimony on whether the treatment program at SCC benefited Duncan who is developmentally disabled.

The right to present evidence in one's defense is a fundamental element of due process. State v. Ellis, 136 Wn.2d 498, 527-28, 963 P.2d 843 (1998). This due process right applies in involuntary commitment proceedings. In re Detention of Skinner, 122 Wn. App. 620, 630, 94 P.3d 981 (2004), rev. denied, 153 Wn.2d 1026, 110 P.3d 213 (2005).

Defense expert, Dr. Robert Halon diagnosed Duncan as developmentally disabled. 30RP 1950. He testified that he has been to the Special Commitment Center at least six times and was familiar with the sex offender treatment program. 31RP 2002-04. Halon began explaining that the treatment program is not individualized for those with developmental disabilities. 31RP 2003.

⁷ As historically cited in many cases by the courts, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore on Evidence sect. 1367 (3rd ed. 1940).

This prompted the State to request a side bar asserting that defense counsel was apparently going to have Halon testify about the quality of treatment at SCC which was irrelevant. Defense counsel clarified that he wanted “the doctor to give his opinion on whether the treatment which is available, given his understanding of it, has any applicability for Bryan Duncan.” 31RP 2004. The court ruled that Halon’s opinion about the treatment program at SCC was not relevant because “it would be too much of a side issue.” 31RP 2006.

The trial court abused its discretion by excluding Halon’s expert opinion in support of Duncan’s defense that the treatment at SCC was not meaningful. Duncan testified that he could never progress in treatment:

[I]t becomes frustrating at times when you have to sit there and continue through the same modules like three years in a row, four years in a row, five years in a row, six years, eight years in a row, when you know you passed this module and you’ve completed this module, and yet the Special Commitment Center and the administration and the psychologist team is making you do that module repeatedly.

30RP 1913.

Furthermore, Duncan had a right to present evidence in response to testimony provided by Rawlings and Spizman. 27RP 1406-08, 1415-16; 25RP 1126-27. During Rawlings’ testimony, the jury asked, “So his inaction of treatment at SCC then is Bryan’s action or decision to not

improve? Is that right?" Rawlings replied, "Yes, he's made a choice. He's made a decision not to participate in treatment, and he's made a choice not to address the problems that he has. His inaction prevents him or he's made the choice to not acquire the skills to not learn how to better regulate his sexual behavior." 27RP 1395. Halon would have provided expert testimony to the contrary. 27RP 2004-06.

Halon's expert opinion was essential to Duncan's defense that he discontinued treatment at SCC because it was not helpful nor meaningful. By excluding Halon's testimony, the court violated Duncan's due process right to present evidence in his defense. Consequently, reversal is required.

5. REVERSAL IS REQUIRED BECAUSE CUMMULATIVE ERROR DENIED DUNCAN HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The cumulative error doctrine applies when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial and warrants reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992).

Here, an accumulation of errors affected the outcome of the commitment trial: 1) the court admitted unfairly prejudicial evidence that

Duncan would not undergo a subsequent examination by the State's psychologist; 2) the court admitted unfairly prejudicial evidence that the person Duncan planned to live in with if released is a child molester and precluded evidence that the person has not reoffended and was succeeding in the community; 3) the court violated Duncan's due process right to meaningful cross-examination of the State's expert witness; and 4) the court violated Duncan's due process right to present evidence in his defense by excluding expert testimony.

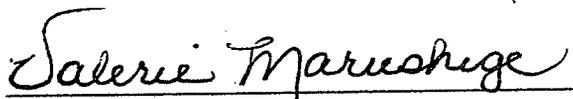
Reversal is required because cumulative error denied Duncan his constitutional right to a fair trial.

D. CONCLUSION

For the reasons stated, Bryan Duncan's trial was fundamentally unfair. This Court should reverse the trial court's commitment order and remand for a new trial.⁸

DATED this 6th day of October, 2005.

Respectfully submitted,


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⁸ Courts have always been careful not to minimize the importance and fundamental nature of an individual's right to liberty. Foucha v. Louisiana, 504 U.S. at 80.