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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 27520-5-III

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

In re Det. of Kevin Coe,
STATE OF WASHINGTON,
Respondent,
v.
KEVIN COE,
Appellant.

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

The Honorable Kathleen M. O'Connor, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant received ineffective assistance of counsel.
2. The court erred in admitting expert signature analysis testimony offered to prove appellant committed unadjudicated offenses.
3. The court erred in admitting evidence derived from the Homicide Investigation Tracking System (HITS) database offered to prove appellant committed unadjudicated offenses.
4. The trial court erred in finding "Dr. Keppel also relied on the HITS database to corroborate his conclusion." CP 891.
5. The trial court erred in ruling "I find the 'signature analysis,' including the use of the HITS database, to be reliable and sufficiently unique that it may be considered by the court and, ultimately the jury, with respect to the identity of the perpetrator." CP 892.
6. The trial court erred in ruling "With respect to victims 1 through 9 and 11 through 18, I find, by a preponderance of the evidence that the perpetrator was Mr. Coe. Therefore, these incidents can be admitted at trial under ER 404(b) for the purpose of proffering evidence of identity to the jury." CP 896.
7. The trial court erred in ruling the signature analysis and the HITS information "is the type of information upon which Dr. Phenix may reasonably rely. She may consider Dr. Keppel's report. She may also

consider HITS information for the same reason as found elsewhere in this opinion." CP 897.

8. The trial court erred in admitting evidence of certain unadjudicated offenses due to the court's improper admission of the signature analysis and HITS evidence.

9. The trial court erred in allowing the State's expert witness to rely on unadjudicated offenses as the basis for her opinion that appellant met the criteria for involuntary commitment under chapter 71.09 RCW.

10. The trial court erred in allowing the State's expert witness to disclose to the jury the bases for her opinion that appellant met the commitment criteria where those bases consisted of unadjudicated offense information not substantively admitted at trial.

11. The trial court violated appellant's constitutional due process right to confront the witnesses against him through examination.

12. Cumulative error violated appellant's constitutional due process right to a fair trial.

Issues Pertaining to Assignment of Errors

1. Technical terms must be defined in the jury instructions so that the jury does not involuntarily commit someone using the wrong legal standard. Was defense counsel ineffective in failing to request an

instruction defining the term "personality disorder," thereby allowing the jury to speculate on the meaning of an element of the State's case?

2. The court admitted expert testimony that the same person committed numerous rapes, which the State relied upon to show appellant was the perpetrator. Where the expert's signature analysis did not meet the legal test for proving appellant's identity through a unique modus operandi, did the trial court commit prejudicial error in admitting the expert's testimony?

3. The court admitted HITS evidence purporting to show appellant committed numerous unadjudicated rape offenses based on the statistical rarity of an identified modus operandi. Did the trial court commit prejudicial error in admitting this evidence because (1) the HITS data did not meet the legal test for showing identity through a unique modus operandi; (2) the HITS data was hearsay; and (3) the HITS data was unreliable?

4. The court allowed numerous victims of unadjudicated rape offenses to testify. The relevance of their testimony depended on the admissibility of the signature analysis and HITS evidence purporting to identify appellant as the perpetrator of those offenses. Did the trial court err in allowing the victims to testify based on the erroneous admission of the signature analysis and HITS evidence?

5. The court allowed the State's expert witness to rely on unadjudicated rape offenses as the basis for her opinion that appellant met the criteria for involuntary commitment. The expert improperly relied on the signature analysis and HITS data in determining Coe was the perpetrator in these offenses. Is reversal required because such reliance tainted the expert's opinion, resulting in a distorted and misleading opinion being presented to the jury?

6. The court allowed the State's expert to disclose the basis for her opinion to the jury by pointing to numerous offenses nowhere established by substantive evidence. Is reversal required because the jury likely viewed these offenses as substantive evidence rather than merely a basis for the expert's opinion?

7. The court allowed the State to present evidence of unadjudicated offenses through the State's expert witness, even though appellant never had the opportunity to cross examine the victims of those offenses. Is reversal required because the court violated appellant's constitutional due process right to confront the witnesses against him through cross examination?

B. STATEMENT OF THE CASE

Over a quarter century ago, the State wrongly obtained criminal convictions on four counts of first degree rape against Kevin Coe. State v.

Coe, 101 Wn.2d 772, 774, 684 P.2d 668 (1984). These counts involved Sherrill South, Julia Harmia, Mary Strange, and Diane Fitzpatrick. CP 4107. The Supreme Court reversed these convictions due the prosecutor's violation of discovery rules and accumulation of evidentiary errors, including the improper use of hypnotically aided witness testimony. Coe, 101 Wn.2d. at 785-86, 788-89. The jury at the first trial acquitted Coe of raping Jean Carrico and Cheri Hughes. CP 460.

At a second trial, Coe was convicted of three counts of first degree rape.¹ State v. Coe, 109 Wn.2d 832, 834, 750 P.2d 208 (1988). The Supreme Court reversed the counts involving Strange and Fitzpatrick due to improper admission of their post-hypnotic identification testimony but affirmed the third count involving Harmia. Id. at 834-36, 850. Coe received a 25 year sentence of confinement. Id. at 836.

On August 30, 2006, the State filed a petition seeking Coe's involuntary commitment pursuant to chapter 71.09 RCW, shortly before Coe was due to be released. CP 1-2. A jury rendered a verdict in favor of the State and the trial court entered an order indefinitely confining Coe. CP 3503-04, 6746-47. This appeal follows. CP 3505-07.

¹ The trial court dismissed the count involving South because the jury was unable to reach a verdict. Coe, 109 Wn.2d at 835.

A central issue in the case was whether the State could show Coe was the perpetrator of numerous unadjudicated rape offenses, including rapes for which Coe did not stand convicted. CP 458-628, 888-898, 904-907, 3780-3987, 3988-4096. Coe made only one admission concerning rape, but did so under circumstances that cast doubt on its credibility. CP 3664-68. Dr. Robert Wetzler testified in Coe's second criminal trial that Coe told him he "did" the Fitzpatrick rape during a pre-sentencing interview and evaluation after conviction in the first trial. CP 3513-17. This admission was made as part of an unsuccessful strategy to be sent to Western State Hospital instead of being sentenced. Coe, 109 Wn.2d at 842-43; CP 3516, 3529, 3542, 3664-68. Coe recanted this admission. CP 3664-68; 1RP² 3043-44. He denied raping anyone. 1RP 3083-84.

Some of the women could not identify Coe as the perpetrator.³ Some identified other men as the perpetrator.⁴ Others identified Coe in

² The verbatim report of proceedings is referenced as follows: 1RP (consisting of 26 consecutively paginated volumes) - 9/6/06; 1/12/07; 2/15/07; 7/13/07; 8/23/07; 1/11/08; 2/13/08; 6/16/08; 6/17/08; 7/18/08; 8/15/08; 9/9/08; 9/11/08; 9/12/08; 9/15/08; 9/16/08; 9/17/08; 9/18/08; 9/22/08; 9/23/08; 9/24/08; 9/25/08; 9/29/08; 9/30/08; 10/1/08; 10/2/08; 10/6/08; 10/7/08; 10/8/08; 10/9/08; 10/13/08; 10/14/08; 10/15/08; 10/16/08; 3/13/08 (vol. 23); 10/11/06, 12/21/07 and 9/8/08 (vol. 24); 12/18/06 & 12/19/06 (vol. 25); 8/29/07, 9/11/07, 12/5/07 & 1/18/08 (vol. 26); 2RP - 2/1/08; 3RP - 4/7/08.

³ These women included: Shelly Hall (Monahan) (CP 481, 503); Margaret Duffy (CP 486-87, 503-04); and Elizabeth Aldridge (CP 518).

the past but their identifications were tainted by hypnosis.⁵ Some witnesses made some sort of identification of Coe as the possible perpetrator, but those identifications were not certain⁶ or made under circumstances that cast doubt on their credibility.⁷

The State sought to link Coe to 20 unadjudicated rapes, in addition to the Harmia rape for which he was convicted, by presenting evidence in the form of a signature analysis conducted by Dr. Robert Keppel and statistical results obtained from the Homicide Investigation Tracking

⁴ These women included: Joanne Torland (CP 483-85); Dorcas Thulean (CP 485, 503); Sherry Jones (CP 490); Jennifer Caley (CP 494-95); Mary Strange (CP 497); Fitzpatrick (CP 499); Carrico (CP 510); Paige Kenney (CP 513); and Gretchen Camp (CP 522).

⁵ These women included Torland (CP 483, 503); South (CP 492, 504); Strange (CP 497-98, 505); and Fitzpatrick (CP 499-50, 505). The trial court ruled, pursuant to agreement by the parties, that hypnotized witnesses could not give any post-hypnosis identifications of Coe and that post-hypnotic statements were inadmissible. CP 6597. The trial court also ruled the State's experts could not rely on any such post-hypnotic identifications or statements in rendering their opinions. CP 2155-56.

⁶ Jaima Estey did not positively identify Coe and said she was not sure between two individuals in a lineup, one of whom was Coe. CP 512. Carrico identified Coe from a photo lineup only after prodding from a detective. CP 510-11.

⁷ Such identifications included those of Torland (CP 483-84); Teresa Kerbs (CP 519-20); Camp (CP 522-23), and Mary LaRue (CP 515). Torland identified Coe after learning he was on trial for rape. CP 483. Camp initially identified another man. CP 522. After seeing Coe's photo in the paper, she identified Coe as the person who looked closest to the one who raped her. CP 522-23. Her identification of Coe became more certain after watching Coe's criminal trial. CP 523. LaRue and Kerbs did not identify Coe when viewing a lineup in 1981 but testified at the commitment trial that Coe was the perpetrator. 1RP 2283-84, 2366-68, 2377-78.

System (HITS) database. Keppel believed the Harmia offense exhibited an unusual signature, and reported finding the same signature in 17 unadjudicated rapes. CP 4444, 4448. The Attorney General's Office searched the HITS database containing information on 8100 rape offenses and obtained results purporting to show Coe committed the rapes identified by Keppel as well as three others. CP 3868-3873. Over defense counsel's objection, the trial court allowed admission of Keppel's signature analysis and HITS results into evidence. CP 892, 898, 3992-4001.

9 of the 21 victims linked to Coe by means of the HITS results and signature analysis testified at trial.⁸ The rapes occurred in the South Hill neighborhood of Spokane.⁹ Four of these women were raped after getting off buses.¹⁰ Two were raped while jogging.¹¹ Some were raped by a jogger.¹² Coe lived in the South Hill neighborhood and was a jogger. 1RP 2529-30, 2543; 1RP 3011-27. On one occasion in 1980, police saw Coe darting amongst trees in the vicinity of a police decoy set up as part of the

⁸ Hall (Monahan) (1RP 2255-66); Kerbs (1RP 2267-84); Torland (1RP 2339-2346); Duffy (1RP 2347-2356); LaRue (1RP 2356-2381); Strange (1RP 2382-2391); South (1RP 2392-2404); Harmia (1RP 2406-2418) and Fitzpatrick (1RP 2501-2514).

⁹ Hall (1RP 2256); Kerbs (1RP 2268); Torland (1RP 2340-41); Duffy (1RP 2348-49); LaRue (1RP 2357-58); Strange (1RP 2384); South (1RP 2393-94); Harmia (1RP 2407-08); Fitzpatrick (1RP 2503-04).

¹⁰ Kerbs (1RP 2268-69); South (1RP 2393-94); Harmia (1RP 2408); Fitzpatrick (1RP 2503-04).

¹¹ Duffy (1RP 2348-49); Strange (1RP 2384).

¹² Strange (1RP 2385); South (1RP 2394); Harmia (1RP 2408-10).

investigation into a series of rapes on South Hill. 1RP 2419-2432. Coe said he attempted to investigate the rapist by following bus lines or jogging around while his mother followed him. 1RP 3051-60.

The State also presented substantive evidence of two incidents involving indecent liberties,¹³ one incident of indecent exposure,¹⁴ two incidents involving exhibition of a dildo,¹⁵ and one rape not included in the signature analysis or HITS results.¹⁶

Dr. Amy Phenix, a licensed psychologist and professional evaluator of sexually violent predators (SVP), testified on behalf of the State. CP 6122, 1RP 3065, 3070, 3073. Dr. Theodore Donaldson, a licensed clinical psychologist specializing in forensic psychology, testified on behalf of Coe. 1RP 3440.

Dr. Phenix opined Coe suffered from three mental abnormalities: (1) paraphilia, not otherwise specified, nonconsenting females with sadistic traits; (2) paraphilia not otherwise specified, urophilia and coprophilia; (sexual arousal to urine and feces during sexual activity); and (3) exhibitionism. 1RP 3118-19, 3142. Dr. Phenix also opined Coe suffers from a personality disorder (not otherwise specified), which

¹³ Rita Stephens (1RP 2195-2211); Robin Taggert (1RP 2239-54).

¹⁴ John Little saw Coe run past some women while exposed. 1RP 2432-2447.

¹⁵ Mary Gullickson (1RP 2448-57); Ann Jacksich (1RP 2514-2527).

¹⁶ Diane Jones (1RP 2212-2226-39).

included traits of antisocial personality disorder, narcissistic personality disorder, and histrionic personality disorder. 1RP 3159. Phenix testified the combination of the diagnosed mental abnormalities and personality disorder (nos) made Coe more than likely to reoffend. 1RP 3174-75, 3194, 3212. Phenix relied on the time period of 1966 to 1981 in support of her opinion that the 61 year old Coe *currently* had arousal to nonconsensual sex. 1RP 3207, 3252-54.

In arriving at her opinion that Coe was an SVP, Phenix relied on 32 criminal offenses for which Coe had not been convicted in addition to the Harmia offense for which he was convicted. 1RP 3084-85; CP 6750.¹⁷ Phenix reached her opinion by assuming Coe was the perpetrator of these 33 offenses. 1RP 3214, 3240, 3247, 3257. Phenix relied on the HITS results obtained by the Attorney General's Office and Keppel's signature analysis in forming her opinion, in addition to whatever other evidence sufficiently linked Coe to the crimes in her own mind. 1RP 3098-3100, 1RP 3131, 3214-21.

Dr. Donaldson disagreed with Phenix's assessment and opined Coe did not suffer from a mental abnormality or personality disorder that made him likely to reoffend. 1RP 3490, 3513-14. Overall, Donaldson found

¹⁷ CP 6750 lists the 33 offenses relied on by Phenix and was admitted as an illustrative exhibit at trial. 1RP 3086-87. It is attached as appendix A.

insufficient evidence to conclude whoever perpetrated the rapes was really aroused by nonconsent. 1RP 3460, 3554-57, 3464-65.

Coe refused to submit to a court-ordered penile plethysmograph as part of Phenix's evaluation. 1RP 3134. The parties entered into a stipulation, which read in part that the "jury may infer from Mr. Coe's refusal that he is deviantly aroused by forcible, nonconsensual sexual contact with adult women." CP 279-81, 286-87; 1RP 3133-36. Phenix took this stipulation as an admission that Coe was aroused to nonconsensual sex. 1RP 3136-37. Donaldson did not make this inference. 1RP 3550.

Donaldson thought Coe probably had a histrionic narcissistic personality disorder, but did not agree with Phenix's determination of antisocial personality disorder traits was a marked feature of his personality structure. 1RP 3489-90, 3582-83. A personality disorder is a risk factor, but its presence does not mean someone is likely to reoffend. 1RP 3486-87, 3492.

Phenix believed those suffering from a qualifying mental abnormality could hide their symptoms for 25 years while incarcerated and that mental disorders could be suppressed. 1RP 3155, 3234-35, 3270. She admitted Coe had not shown any signs of sexual deviance while

incarcerated, but believed he was able to suppress his disorder during the past quarter century. 1RP 3271; 1RP 3691-92.

Donaldson thought otherwise. 1RP 3493-96. Coe had shown no signs of paraphilia for 27 years, which was strong evidence that he never had it in the first place or that it was in total remission. 1RP 3493-96.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO ENSURE THE COURT INSTRUCTED THE JURY ON THE DEFINITION OF PERSONALITY DISORDER.

Juries must not be allowed to deliberate in ignorance of the law. Defense counsel did not request an instruction defining "personality disorder," a disputed element of the case. Reversal is required because counsel's failing allowed the jury to invent its own meaning of this technical term in reaching a verdict.

a. "Personality Disorder" Is A Technical Term That Needed To Be Defined For The Jury.

In order to prove that Coe is an SVP, the State was required to show Coe suffers from either a mental abnormality or a personality disorder that makes him that made him likely to engage in predatory acts of sexual violence if not confined to a secure facility. RCW 71.09.020(18); RCW 71.09.060(1). The jury was instructed as to this requirement. CP 3480 (Instruction 5).

Dr. Phenix diagnosed Coe with personality disorder (nos) and several mental abnormalities that made him likely to reoffend. Donaldson opined Coe did not suffer from any mental abnormality or the personality disorder (nos) diagnosed by Phenix. Donaldson believed Coe probably suffered from narcissistic/histrionic personality disorder but it did not make him likely to reoffend.

The jury was further instructed on the definition of "mental abnormality," which is defined by statute. CP 3481 (Instruction 6). At the time of Coe's trial, "personality disorder" was not defined by statute.¹⁸ It was, however, defined in the Washington Administrative Code, which adopted the definition of found in the Diagnostic and Statistical Manual of Mental Disorders (DSM). WAC 388-880-010.

Moreover, the Supreme Court recognized long ago that "personality order" is a term of art found in the DSM and employed by

¹⁸ The legislature has since enacted a provision defining the term. "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist." RCW 71.09.020(9) (Laws of 2009, ch. 409, § 1). This amendment reflects the DSM definition of "personality disorder." In re Det. of Pouncy, ___Wn.2d___, ___P.3d___, 2010 WL 817369 at *8 (filed March 11, 2010) (citing Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 629 (4th ed.1994)).

specialists in the psychiatric field. In re Pers. Restraint of Young, 122 Wn.2d 1, 49-50, 857 P.2d 989 (1993). In Young, the petitioners argued various terms in the SVP statute were unconstitutionally vague. Id. at 49. The Court observed due process required "clear standards to prevent arbitrary enforcement by those charged with administering the applicable statutes." Id. The Court held the SVP statute was not unconstitutionally vague because the term "mental abnormality" was defined by statute. Id. In addition, the Court cited to the DSM in support of its position that the term "personality disorder" has "a well-accepted psychological meaning." Id. at 50. The "definitions" of these two terms provided the fact finder sufficient guidance as it sought to properly apply those standards to the particular set of facts before it. Id.

The court in Coe's case instructed the jury on the meaning of "mental abnormality." Neither party requested the trial court to instruct the jury on the meaning of "personality disorder."

Coe had the right "to have a jury base its decision on an accurate statement of the law applied to the facts in the case." State v. Miller, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). Because the role of the trial court is to explain the law of the case to the jury through instruction, "[t]he trial court may not delegate to the jury the task of determining the law." State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992). Trial courts

must therefore define technical words and expressions used in jury instructions. State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). "The technical term rule attempts to ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law." State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). The technical term rule likewise ensures individuals are not involuntarily committed by a jury that misunderstands the SVP criteria. In re Det. of Pouncy, __ Wn.2d __, __ P.3d __, 2010 WL 817369 at *4 (filed March 11, 2010).

The term "personality disorder" is a technical term because it is not one in common usage and is beyond the experience of the average juror. Pouncy, 2010 WL 817369 at *4. "It is a term of art under the DSM that requires definition to ensure jurors are not 'forced to find a common denominator among each member's individual understanding' of the term." Id. (quoting State v. Allen, 101 Wn.2d 355, 362, 678 P.2d 798 (1984)). In Pouncy, the trial court committed reversible error in failing to instruct the jury on the definition of "personality disorder" because there was no way to ascertain whether the jury used a proper definition. Id.

Jurors in Coe's case were also faced with the dilemma of having to hammer out a definition of personality disorder among themselves and

there is no way to determine they agreed upon a proper definition in the absence of sufficient guidance from the trial court.

b. Defense Counsel Was Ineffective In Failing To Request An Instruction Defining "Personality Disorder."

The failure to define a technical term is generally not an error of constitutional magnitude that can be raised for the first time on appeal. Scott, 110 Wn.2d at 691. However, "[a] claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Thomas, 109 Wn.2d at 229. Those facing involuntary commitment have a statutory and due process right to counsel and courts apply the Strickland standard to determine whether counsel was ineffective. In re Det. of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); Jenkins v. Dir. of Virginia Ctr for Behavioral Rehab., 271 Va. 4, 16, 624 S.E.2d 453 (Va. 2006); U.S. Const. amend. V and XIV; RCW 71.09.050(1); RCW 10.101.005.

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant.

Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226.

The strong presumption that defense counsel's conduct is not deficient is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). There is no legitimate reason why defense counsel failed to ensure the jury was instructed on the correct meaning of "personality disorder."

The complicated science of human psychology is beyond the ken of the average juror. In re Det. of Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006). Allowing the jury to invent its own meaning of the term as it deliberated on Coe's fate did not advance Coe's defense in any way and allowed him to be committed for a perceived condition that did not comply with the legal requirement for commitment.

A definition of "personality disorder" was readily available to counsel at the time of Coe's trial. That definition was found in the DSM. Supreme Court case law and the WAC endorsed that definition as correct.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to

undermine confidence in the outcome. Id. Coe "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id.

Courts have found the failure to define a technical term to be harmless error where the term did not implicate an element of the charge at issue. See, e.g., State v. Thompson, 47 Wn. App. 1, 10, 733 P.2d 584 (1987), State v. Bledsoe, 33 Wn. App. 720, 727, 658 P.2d 674 (1983). But here, whether the State proved Coe suffered from a personality disorder that made him likely to reoffend was very much at issue.

Coe's theory of the case was that he had neither a personality disorder nor mental abnormality that makes him likely to commit predatory acts of sexual violence. The State's theory of the case was that Coe's personality disorder, in combination with the diagnosed mental abnormalities, made Coe likely to reoffend.

The jury found Coe met the criteria for an SVP, but the verdict did not specify whether the jury believed Coe suffered from a mental abnormality or a personality disorder, or both. If the jury agreed Coe suffered from a personality disorder, there is no way of knowing what definition the jury used in reaching this conclusion. Pouncy, 2010 WL 817369 at *4. The jury was not instructed on what personality disorder meant. Reversal is required when there is no way to ascertain the jury

considered a proper definition of a disputed technical element in reaching its verdict. Id.; Allen, 101 Wn.2d at 362. The error here is sufficient to undermine confidence in the outcome.

2. THE COURT WRONGLY ADMITTED SIGNATURE ANALYSIS EVIDENCE GIVEN BY THE STATE'S EXPERT BECAUSE THE IDENTIFIED SIGNATURE DID NOT PASS THE STRINGENT TEST OF UNIQUENESS NEEDED TO PROVE IDENTITY.

Evidence offered to show identity by establishing a unique modus operandi is relevant to the trier of fact only if the method employed in the commission of the crimes is so unique as to constitute a signature. The trial court erred in admitting expert testimony that such a signature was present in Coe's case because the expert's signature analysis did not meet the legal requirements for showing a unique modus operandi.

- a. A Hired Gun Identified A Signature By Which To Link Coe to Unadjudicated Rapes.

Dr. Keppel is paid to identify unique behaviors and come to a conclusion. 1RP 2986. He said it was "easy" to identify a signature. 1RP 2891. When the State asked the percentage of crimes in which he was able to identify a signature, Keppel responded "Well, I find it quite a bit because that's why they hire me." 1RP 2892. The State hired Keppel for Coe's commitment case. 1RP 2892.

Keppel described a "signature" as "a unique combination of behaviors that emerges across two or more offenses." CP 4412. According to Keppel, the signature may include aspects of modus operandi (MO) and ritual. CP 4412. MO refers to the way in which a particular criminal operates and encompasses all behavior needed to procure a victim and complete the criminal act without being identified or apprehended. CP 4410, 4424; 1RP 2886. Ritual behaviors are unnecessary to accomplish the crime but are symbolic and express the offender's motivation. CP 4411; 1RP 2890.

Keppel concluded 18 rapes, including the Harmia rape, had the same signature and that the same person raped those women. CP 4413-14, 4425-31, 4444-48; 1RP 2935. In looking at these 18 rapes, Keppel determined some MO characteristics remained the same but that others changed from one rape to the next. CP 4424. Keppel described the MO in this case as follows: (1) "the rapist" approached victims in different areas of South Hill in Spokane in the early hours and in the evening hours; (2) the age of the victims varied, ranging from 14 to 51 years old; (3) "the rapist" chose women who were walking or jogging; (4) the women were raped in isolated outdoor locations; and (5) the perpetrator escaped. CP 4424; 1RP 2973-74.

Keppel testified the MO did not need to be unique. 1RP 2974. He agreed there was nothing particularly striking or unique about the MO he described for the offenses at issue in Coe's case. 1RP 2975.

Keppel was not a psychologist but felt comfortable categorizing the perpetrator as a "power assertive rapist" who expressed his emotions and power needs through control of the victims. CP 4424; 1RP 2987-88. The ritual in Harmia's case consisted of the following: (1) intimidation; (2) co-opting victim compliance; (3) Coe taking off his own clothes; (4) necessity for intercourse and/or ejaculation; and (5) questioning or engaging victim in conversation. CP 4425. According to Keppel, this combination of elements constituted a signature. 1RP 2899.

Defense counsel moved to exclude Keppel's testimony because it did not establish the rapes were so unique as to meet the signature requirement under ER 404(b). CP 533, 544-60, 574-75, 578. The court concluded Keppel's signature analysis was reliable and "sufficiently unique" to be considered by the jury on the issue of identity. CP 892, 898.

b. The Signature Analysis Did Not Establish The Features Of The Crimes Were Unique Enough To Prove The Identity Of The Perpetrator.

Evidentiary decisions regarding admissibility of expert testimony and whether prior offenses qualify under the modus operandi exception to ER 404(b) are reviewed for abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 177, 163 P.3d 786 (2007); Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991). The trial court's evidentiary

decision is reviewed for abuse of discretion only if the trial court correctly interprets the evidentiary rule at issue. Foxhoven, 161 Wn.2d at 174.

ER 404(b) provides evidence of other crimes may be admissible to prove identity. ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982).

When determining whether evidence is admissible under ER 404(b), the trial court must first find the alleged misconduct occurred by a preponderance of the evidence. Foxhoven, 161 Wn.2d at 175. Evidence of other wrongful acts may be admitted pursuant to ER 404(b) only if the State first establishes a connection between the defendant and those acts. State v. Norlin, 134 Wn.2d 570, 577, 951 P.2d 1131 (1998). "The necessary connection between the defendant and the prior act must be established by a preponderance of the evidence." Id.

When evidence of other bad acts is introduced to show identity by establishing a unique modus operandi, the evidence is relevant "only if the method employed in the commission of both crimes is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." Foxhoven, 161 Wn.2d at 176 (quoting State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002)). Prior acts are not admissible for

this purpose merely because they are similar, "but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused." Foxhoven, 161 Wn.2d at 176 (quoting Coe, 101 Wn.2d at 777).

The test of uniqueness to establish identity is "stringent." Coe, 101 Wn.2d at 778. The modus operandi used to prove identity "must be so unusual and distinctive as to be like a signature." Id. at 777. "The requirement that the evidence be distinctive or unusual insures that the evidence is relevant." Id. at 777-78.

Expert testimony is admissible only if it is helpful to the trier of fact. ER702; In re Guardianship of Stamm, 121 Wn. App. 830, 838, 91 P.3d 126 (2004). Expert testimony must be relevant to be admissible under ER 702. In re Det. of Duncan, 142 Wn. App. 97, 109, 174 P.3d 136 (2007), aff'd, 167 Wn.2d 398, 219 P.3d 666 (2009). Irrelevant evidence has no probative value. State v. Cameron, 100 Wn.2d 520, 531, 674 P.2d 650 (1983). Irrelevant expert evidence is unhelpful to the trier of fact. Duncan, 142 Wn. App. at 109.

Keppel's testimony was offered and admitted to establish Coe committed other rape offenses. The features identified by Keppel do not meet the stringent test for showing the presence of a signature. His expert testimony was therefore irrelevant under ER 402 and unhelpful to the jury under ER 702.

First, the combination of behavioral features identified by Keppel as constituting the unique signature was, by Keppel's own account at trial, missing in some cases. 1RP 2976. Keppel first testified he found the same signature present in 18 cases. 1RP 2904-05. But he later admitted the ritualistic behaviors that constituted the signature were not present in all of the offenses. 1RP 2976. The Paige Kenney and Dorcas Thulean offenses were missing both the second signature element of co-opting victim compliance and the third element of the perpetrator taking off his own clothes. 1RP 2911, 2914-15. Offenses involving Joanne Torland, Elizabeth Aldridge, Sherry Jones, Gretchen Camp, Sherry South, Jennifer Caley, Mary Strange, and Diane Fitzpatrick were all missing the third element of Coe taking off his own clothes. 1RP 2912, 2920, 2923, 2925, 2926, 2928, 2932, 2933. The Jean Carrico offense was missing the second element of co-opting victim compliance. 1RP 2907.

Of the 18 offenses identified by Keppel as exhibiting a unique signature, only seven had the complete combination of five ritualistic elements that comprised the identified signature. When confronted at trial on this point, Keppel testified all cases still had the same signature despite a number of them missing some elements because in some cases the missing information needed to support the element could be attributed to the incompleteness of the records upon which he relied. 1RP 2976. When

asked how many of the five signature elements needed to be present before he could say offenses were linked, Keppel said it varied from case to case. 1RP 2913. Keppel believed there could be such "strong linkage" amongst three of the five that it did not matter if the other two were not present. 1RP 2913-14.

The absence of a signature element in some offenses shows that the same signature was not present in 11 of the 18 offenses. To establish signature-like similarity, the distinctive features must be shared between the crimes. Thang, 145 Wn.2d at 643. If an offense fails to exhibit similar features as another offense, then the same signature by definition is not present in each offense.

The five elements identified by Keppel as constituting the signature do not meet the stringent test for showing the presence of a signature in those seven offenses that actually have all five elements. Of the five signature elements identified by Keppel, four of them are ordinary incidents of rape. A perpetrator's intimidation of a victim, the perpetrator's act of taking off his clothes to effectuate the rape, and intercourse "and/or" ejaculation during the rape are not unusual methods of perpetrating a rape.

The fourth element, impressively described as "co-opting victim compliance," in actuality amounts to nothing more than telling victims to be

quiet and not scream or telling the victims to take off their clothing. CP 4426, 4428, 4445. Again, these are ordinary incidents of rape.

The above elements do not establish a unique calling card, even when considered with the element of "questioning or engaging the victim in conversation." Keppel conceptualized the relevant point of similarity between the offenses as engaging each victim in conversation or asking them questions. It is true the perpetrator in various offenses spoke to the victim on sexual topics. But the things that were said or the questions that were asked on sexually oriented topics were not the same across offenses. CP 4417-24, 4431-4444.

Factors relevant to similarity include commission of the crimes within a short time frame, geographical proximity, and similar clothing. Thang, 145 Wn.2d at 643. The offenses occurred in the South Hill neighborhood of Spokane. CP 4413-14. But the date of offenses ranged from April 1978 to February 1981. There was no short time frame here. There was no pattern to the offense dates. The time of offense on a particular day varied significantly.¹⁹ The perpetrator's clothing was not the same across all offenses in terms of footwear, pants, coats, and the like. CP 4417-24, 4431-4444.

¹⁹ CP 4413-14, 4417-23, 4431-4443.

Other dissimilarities are present in comparing the offenses. Descriptions of the attacker ranged anywhere between 20-35 years old, 5' 8" to 6' 2", and 150 to 180 pounds. CP 4417-24, 4431-4444. Descriptions of the perpetrator's build, hair color and hairstyle also varied. Id. The perpetrator took money from the victim or expressed a desire to do so in some offenses.²⁰ There was no money aspect in the other cases. Some women were raped after getting off the bus.²¹ Others were not. In some cases the perpetrator was jogging before initiating the rape.²² In other cases the perpetrator was not jogging. In some cases the perpetrator shoved a hand, sometimes gloved, down their throat.²³ Id. The women in other cases were subdued without that action.

It is always possible to find common features between offenses by making generalizations about different details, ignoring or discounting differences in the details, and then conclude there is something unique about the combination of generalized behaviors. Keppel's analysis shows it is

²⁰ Diane Fitzpatrick (CP 4423); Dorcas Thulean (CP 4436); Mary LaRue (CP 4437); Sherry Jones (CP 4432).

²¹ Harmia (CP 4417-18); Mary South (CP 4420); Dorcas Thulean (CP 4434); Teresa Kerbs (CP 4440); Jennifer Camp (CP 4443).

²² South (CP 4420); Strange (CP 4428); Elizabeth Aldridge (CP 4438).

²³ Harmia (CP 4418); Carrico (CP 4419); South (CP 4420); Strange (CP 4421); Fitzpatrick (CP 4422); Joanne Torland (CP 4433); Paige Kenney (CP 4433); Teresa Kerbs (CP 4441). Acquaintances testified Coe wore gloves and Virginia Perham, Coe's former girlfriend, said Coe owned oven mitts. 1RP 2529-30, 2532, 2543-44; CP 3602-09, 3626. Coe denied owning gloves and said he owned one oven mitt. CP 3653-55.

possible to do this. But that does not mean the identified signature meets the stringent legal requirements necessary to show identity through ER 404(b).

Dissimilar features of the compared crimes, if any, must be taken into account in determining whether the crimes establish a signature. Thang, 145 Wn.2d at 643, 645. In Thang, the shared features of the offenses included (1) both cases involved theft of a purse and jewelry; (2) both victims were elderly; (3) in both cases, the perpetrator remarked "the bitch is dead" and (4) both victims were repeatedly kicked. However, there were also several dissimilarities between the two crimes that prevented the finding of a unique signature: (1) they occurred 18 months apart; (2) they took place in different parts of the state; (3) one victim was kicked three times and the other until she died; (4) entry occurred through a door in one case, through a window in the other; (5) the perpetrators fled in the victim's car in one case, by foot in the other. Id. at 645.

Thang illustrates a defect in the trial court's evidentiary ruling. The trial court did not address the impact of dissimilarities between the offenses. The court did not correctly apply the rule. A trial court abuses its discretion when applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); Foxhoven, 161 Wn.2d at 174.

Coe's case compares favorably to Thang and other cases where a signature was non-existent even though there were similarities between offenses. See, e.g., State v. Smith, 106 Wn.2d 772, 778-79, 725 P.2d 951 (1986); State v. Eastabrook, 58 Wn. App. 805, 814, 795 P.2d 151 (1990).

Coe's case stands in contrast to those where a signature was properly determined to be present because the method of committing the offense was truly unique. See, e.g., State v. Russell, 125 Wn.2d 24, 68, 882 P.2d 747 (1994) (each murder involved a victim killed by violent means who was then sexually assaulted and posed, naked, with the aid of props; murders occurred within a few weeks of one another in small geographic area).

Substantial similarity between crimes is not enough to satisfy the unique modus operandi requirement. State v. DeVincentis, 150 Wn.2d 11, 18-21, 74 P.3d 119 (2003). "[W]hen identity is at issue, the degree of similarity must be at the highest level and the commonalities must be unique because the crimes must have been committed in a manner to serve as an identifiable signature." Id. at 21. Any doubt about admissibility should be resolved in favor of Coe. Thang, 145 Wn.2d at 643. For the reasons set forth above, the trial court erred in ruling the signature analysis was "reliable and sufficiently unique that it may be considered by the court and, ultimately the jury, with respect to the identity of the perpetrator." CP 892.

c. Improper Admission Of The Expert's Signature Analysis Unfairly Influenced The Outcome.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only if the evidence is trivial and of minor significance in reference to the evidence as a whole. Id.; State v. Oswalt, 62 Wn.2d 118, 122, 381 P.2d 617 (1963).

The State described Keppel's signature analysis as "[a]n important piece of evidence" linking Coe to the unadjudicated rapes. CP 3772-73. The assistant attorney general (AAG) sang Keppel's praises in closing argument, placing his testimony in the category of "the best evidence possible for deciding the issues in this case." 1RP 3761-62. In acknowledging the lack of physical evidence such as fingerprints connecting Coe to the crimes, the AAG told the jury they had something "just as good; we have the psychological imprint that was left at the scene. It's like a brain print." 1RP 3762.

There is often an inherent danger with expert testimony unduly biasing the jury "because of its aura of special reliability and trust." United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir.1973). Keppel was offered as a respected authority. The jury was undoubtedly impressed by

his credentials, which the State made a point of presenting in extended detail. 1RP 2175-77; 1RP 2871-85.

The New Jersey Supreme Court in State v. Fortin recognized the potential for reflexive acceptance and misuse of an expert's signature analysis testimony given his authoritative credentials and the seeming application of scientific-like analysis that undergirded his opinions. State v. Fortin, 178 N.J. 540, 583, 843 A.2d 974 (N.J. 2004). Keppel's testimony, although presented as the application of criminal investigative techniques, was couched in the aura of behavioral science. Indeed, Dr. Phenix described Keppel's signature analysis as "scientific." 1RP 3098-99. The AAG in closing argument told the jury Keppel's signature analysis was just as good as hard forensic science based on physical evidence, likening Coe's behavior to a psychological fingerprint left at the scene of the offenses. The jury likely attached great weight to this testimony, presented by a professional linkage expert, in determining Coe committed a number of rapes.

The impact of the sheer number of other rape offenses wrongly linked to Coe by means of Keppel's expert analysis cannot be described as trivial. Hearing that Coe committed a few rapes is different than hearing Coe committed a great many rapes. It is human nature to infer a person must have a mental abnormality or personality disorder that makes him rape when

that person commits so many rapes over a long period of time. Without Keppel's testimony, the jury, even if it had independent evidence before it linking Coe to these other offenses, may not have been so inclined to find a link. Keppel's testimony tilted the likelihood that jurors would find Coe to be an SVP decidedly in favor of the State.

The signature analysis evidence also bolstered the credibility of the rape victims who identified Coe as their attacker at trial. Of the eight unadjudicated rape victims who testified at trial, only two, LaRue and Kerbs, identified Coe as the perpetrator. 1RP 2283-84; 1RP 2366-67, 2377-78. The identifications proffered by Kerbs and LaRue for the first time at Coe's commitment trial more than 25 years after the events at issue suffered from credibility problems due to the extremely long passage of time before either woman offered up an identification, and only then once Coe had been criminally convicted and then ultimately identified as an SVP by the State. 1RP 2283-84; 1RP 2366-67.

Keppel's testimony also made it more likely that the jury would accept Coe's admission to raping Fitzpatrick as the truth, as opposed to accepting Coe's explanation that he did not rape anyone but that he proffered an admission in order to obtain an alternative criminal sentence.

The erroneous admission of Keppel's testimony also bolstered Dr. Phenix's opinion in the eyes of the jury. She relied on Keppel's analysis in

determining Coe was the rapist in the numerous offenses identified by Keppel. Phenix in turn relied on this determination in opining Coe met the SVP criteria. The jury, already impressed by Keppel's wrongfully admitted expert testimony, were more likely to believe an SVP evaluator's opinion grounded in part on testimony having a "aura of special reliability." Amaral, 488 F.2d at 1152.

Reversal is required because the improperly admitted signature evidence likely impacted the jury's deliberations.

3. THE COURT ERRED IN ADMITTING HITS EVIDENCE BECAUSE IT DID NOT ESTABLISH THE PRESENCE OF A UNIQUE SIGNATURE, IT CONSISTED OF INADMISSIBLE HEARSAY, AND IT WAS OTHERWISE UNRELIABLE AND MISLEADING.

The trial court wrongly admitted evidence from the Homicide Investigation Tracking System (HITS) database which purported to show Coe committed numerous rapes for which he was not convicted. The evidence suffered from gross defects and was unfairly prejudicial.

- a. The State Created Evidence To Identify Coe As The Perpetrator In Unadjudicated Offenses.

Defense counsel made a motion to exclude evidence of all offenses for which the State could not prove Coe was the perpetrator. CP 458-628. In response, the State unveiled results obtained from the HITS database as

a means to link Coe to numerous rapes for which he had not been convicted. CP 3868-3873.

HITS includes a sexual assault database consisting of 8100 cases, primarily from Washington, but also from 10 other states and Canada. CP 3868, 4055, 4370. The HITS Unit is part of the Attorney General's Office. CP 3868. Dr. Keppel created the HITS program in 1987 and helped devise a federal version of the program known as ViCAP (Violent Criminal Apprehension Program). CP 4407; Russell, 125 Wn.2d at 69 n.14. The HITS program was designed to be an investigative tool for law enforcement agencies. 1RP 3949-50, 3960, 3993, 4370.

Law enforcement agencies voluntarily report sexual assaults to the HITS unit. CP 4370-71. A HITS investigator completes a HITS sexual assault form for a particular offense based on reports provided by police. CP 3869, 4371. Offense data is also forwarded from the Department of Corrections or local law enforcement when certain criminal offenders are due to be released. 1RP 3898-99.

The HITS form contains over 180 discrete variables used to "code" an offense. CP 4025-402, 4370-71, 4378-4391. The coded information from the HITS form is entered into the HITS database. CP 4371.

Tamara Matheny, a HITS investigator, is employed by the Attorney General's Office. CP 3989, 4369. She works on the floor below

Todd Bowers, one of two prosecuting attorneys in Coe's case. CP 3989; 1RP 2692. Her job is to enter information into the database based on the police reports she receives and run queries as part of criminal investigative efforts to identify shared modus operandi characteristics among cases in the database. CP 4369, 4371; 1RP 3926.

In early 2006, DOC sent Matheny six cases for which Coe was originally charged (Carrico, Harmia, Fitzpatrick, Strange, Hughes, and South). 1RP 3929-31, 3958-59. Before receiving these six cases, there were no cases involving Coe in the database. 1RP 3963.

In preparing for Coe's commitment trial, Bowers provided Matheny with police, investigative, and medical reports regarding 18 additional rapes he believed Coe committed. 1RP 3931-32. At his request, Matheny queried the HITS database in an effort to link Coe to offenses for which Coe had not been convicted. CP 4372.

Seven "data points" were identified as present in the rape of Julia Harmia, the offense for which Coe was convicted. CP 4372. These data points and corresponding answers associated with the Harmia offense were as follows: (1) race of offender (white); (2) sex of offender (male); (3) offender was known by or an acquaintance of victim (no); (4) initial contact site (outdoors); (5) initial contact site same as sexual assault site (yes); (6) force used during assault (immediately upon victim contact); (7)

offender asked the victim questions about personal life: "moderate, quite a bit or excessive." CP 4372.

After Matheny entered the data that she determined was present in the cases presented to her, she ran 10 to 15 preliminary search queries modified by different questions asked of the database. 1RP 3980-81.²⁴ Bowers determined the criteria and parameters of the preliminary queries. 1RP 3940. Matheny conducted preliminary runs at his request. 1RP 3939. The preliminary runs came back with some different cases than the final three runs but she could not say how many because the preliminary search results were not saved. 1RP 3981-82. She did not keep a record of the discarded queries and none was provided to the defense. CP 3991, 3998. Matheny maintained, without any way to verify the assertion, that the preliminary runs were very similar or redundant to other questions in the same run, and by narrowing down the number of questions she was able to get the same "types of results." 1RP 3943.

How to code an offense was far from science. In a given case there could be differences of opinion between the HITS analysts and law enforcement and between HITS analysts themselves as to how an offense

²⁴ At trial, Matheny testified she possibly ran as many as 20 preliminary runs. 1RP 2719.

should be coded on the HITS form. 1RP 3886, 3901, 3961, 3969-72, 3976-77, 3983-84.

The HITS supervisor described the preliminary queries as a way to "filter" out information while retaining the "essence" of the crime. 1RP 3906. After the preliminary queries were done, Matheny conducted three final queries or "runs" for Bowers. 1RP 3942.

Bowers determined the search parameters of the final three runs. 1RP 3942. Of the 8100 cases in the sexual assault database, 26 cases, including the Harmia offense, matched the data point criteria entered by Matheny at Bowers' direction for the first of the final three queries. CP 4372-73. These 26 cases represent .3 percent of the total number of cases in the database. CP 4372. The State sought to link Coe as the perpetrator to 21 of those cases. The 21 offenses encompassed the 17 offenses identified by Keppel as exhibiting a unique signature. CP 3871.

The search was then "narrowed" by adding two items and corresponding answers to the database query: (1) was a weapon used in the offense (yes); and (2) the weapon used was a cutting or stabbing instrument. CP 4373-74. 16 cases turned up, representing .19 percent of the 8100 cases in the database. CP 4374. The State sought to link Coe as the perpetrator to 15 of those offenses. Keppel had already identified those 15 offenses as exhibiting a unique modus operandi. CP 3872.

The search was then "narrowed" one last time by adding the following question and corresponding answer: the use of weapon was merely implied. CP 4375. 14 cases turned up, representing .17 percent of the 8100 cases in the database. CP 4375. Keppel had already identified these 14 offenses as exhibiting a unique modus operandi. CP 3872.

The defense argued the HITS data should be excluded because it was unreliable, misleading and unfairly prejudicial. CP 3988-4007. Defense counsel maintained Bowers manipulated the data and manufactured statistical evidence to support Dr. Keppel's conclusion that the same person committed 17 other rapes. CP 3990-92, 3997. Bowers instructed Matheny to repeatedly query the HITS database until they determined the data points necessary to "hit" on the cases the State wanted to link to Coe. CP 3997.

The defense further pointed out Matheny looked for factors that were common among all the reported rapes and entered only those factors as data into the HITS database. CP 3989-91. She did not enter data that was not shared among the 21 rapes. CP 3989-91, 4003. Matheny chose what data to enter into the database and chose what data to omit, which deviated from standard procedure. CP 3990-91, 4003-06, 4046.

The defense also argued the statistics were not well-founded in part because the HITS database did not contain anything near the actual number

of rapes that had occurred in Washington since the 1970's. CP 4006-07; 1RP 4035. The database of 8100 was too small to be reliable. CP 4007. Moreover, HITS did not track any case linkage error rate. CP 4000.

The trial court ruled the HITS evidence was admissible at trial. CP 892, 898. According to the court, "[i]n this case, HITS was used to query MO and ritual characteristics and assemble the data in a meaningful way." CP 892. The court believed the HITS database was reliable and allowed the HITS results to be considered by the jury with respect to the identity of the perpetrator. CP 892, 898. Shrugging off defense argument that the manner in which the State obtained its results precluded admission, the court stated "Like any other database, what is input into it and what is queried is influenced by the people doing the work. This goes to the weight which should be given to this evidence, not its admissibility."²⁵ CP 891. The court cited Russell, which stated "these programs are nothing more than sophisticated record-keeping systems" and that "there is no prohibition against using well-founded statistics to establish some fact that will be useful to the jury." CP 891-92; Russell, 125 Wn.2d at 69-70.

Armed with the trial court's ruling, the State presented evidence to the jury that the final three "runs" identified Coe as the perpetrator of

²⁵ The court elsewhere remarked "this database is only as good as what goes into it. And if there's error going in, there's error coming out." 1RP 2623.

unadjudicated offenses based on the series of statistical results purporting to show that only .3, .19, and .17 percent of the 8100 cases in the database matched Coe's modus operandi. 1RP 2684-88.

b. The HITS Evidence Was Inadmissible Because It Did Not Pass The Legal Test For Establishing Identity Through A Unique Modus Operandi.

The State maintained the HITS data showed "the manner in which many of these crimes were committed was very unique" and the "combination of variables present in a particular crime describes the unique *modus operandi* of the person who committed the crime." 1RP 4037; CP 6114-15.

The defense recognized the HITS evidence was being presented as a form of modus operandi evidence and argued it failed to establish the manner in which the rapes were committed reached the level of unique signature needed to prove identity. CP 3992, 4001.

The HITS search criteria used to identify Coe as the perpetrator were not nearly "so unusual and distinctive as to be like a signature." Foxhoven, 161 Wn.2d at 176; CP 4002-03. They are even more ordinary than the different features identified by Keppel. Comparison with other case law shows the test for uniqueness is not satisfied here. See C. 2. b. supra. The State was unable to cite a single case where a unique signature was found on the basis of even remotely similar facts.

A unique modus operandi was not shown through the HITS results for another reason. Proper application of the signature rule requires dissimilarities in offenses be taken into account. Thang, 145 Wn.2d at 643, 645. Matheny only entered data from offenses that were common to all offenses. As explained by the HITS supervisor, the preliminary queries such as those run by Matheny in Coe's case were a way to *filter out* information while retaining the "essence" of the crime. 1RP 3906. At trial, Matheny acknowledged she did not ask questions about whether the perpetrator wore a mask, wore gloves, masturbated, had sexual dysfunction, or had trouble obtaining an erection. 1RP 2722-25. These features were present in many of the crimes identified as linked to Coe. She acknowledged fewer cases would have turned up in the HITS runs if she had asked these questions and different results would have been obtained. 1RP 2722-25.

The trial court failed to recognize the existence of this problem as she ruled on the admissibility of the HITS evidence. The court failed to grasp that the "signature" purported to be shown by the HITS results in 21 cases derived from the failure to take into account dissimilarities between the offenses. A trial court abuses its discretion when applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. Quismundo, 164 Wn.2d at 504; Foxhoven, 161 Wn.2d at 174.

The State sought to justify admission of the HITS evidence by claiming the offenses were unique "in the sense that less than .3% of the 8100 cases in the HITS database shared the modus operandi characteristics exhibited in the Julia H. rape." CP 6115. This is not the legal test for establishing a unique modus operandi to prove identity. No court has ever held statistics show a signature.

Russell is distinguishable. In Russell, the HITS and ViCAP searches were offered only to support an expert's conclusion that the criminal behavior of posing bodies of murder victims in staged positions constituted a signature. Russell, 125 Wn.2d at 776-77. In addressing the defendant's contention that the trial court improperly admitted questionable statistical evidence, the Court specifically noted HITS and ViCAP were used solely to support the expert's claim that posing was a rare occurrence and that the expert relied more on case materials and personal expertise in forming a conclusive opinion. Id. at 777.

Unlike Russell, here the State introduced the search results of HITS as independent evidence that Coe committed the other offenses. Keppel, the State's expert witness, did not rely on the HITS analysis in offering his signature analysis opinion.

In this regard, it must be noted the trial court in its pretrial memorandum decision wrongly found Keppel "relied on the HITS

database to corroborate his conclusion." CP 891. This is not an accurate reflection of the record. Keppel created the HITS database in 1987. CP 4407. But Keppel did not rely on the HITS results in his pretrial signature analysis report to support his opinion that Coe was the perpetrator. CP 4406-4449. Keppel did not rely on the HITS results in his trial testimony and he never vouched for its accuracy in Coe's case.

c. The HITS Evidence Was Inadmissible Hearsay.

Defense counsel objected to the HITS evidence on the ground that it was not based on well-founded statistics, it was unreliable, and any probative value was outweighed by unfair prejudice. CP 3992-4007. In lodging this objection, Coe advanced the argument that the HITS evidence was hearsay, citing People v. Hernandez, 55 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (Cal. Ct. App. 1997). CP 3995-96, 3999.

The issue in Hernandez was whether evidence obtained from "Sherlock," an in-house computer system maintained by the sex crimes unit of the San Diego Police Department (SDPD) for investigative purposes, has been properly admitted to prove the defendant was the one who committed the two rapes for which he was charged. Hernandez, 55 Cal. App. 4th at 227. Hernandez held the trial court abused its discretion by admitting the SDPD crime analyst's testimony concerning her Sherlock

database search because the method of data analysis rested on inadmissible hearsay evidence. Id. at 228, 240-41.

Similar to HITS, the Sherlock method of data analysis involved a crime analyst who searched a sex crime database for matching offenses by selecting certain modus operandi variables. Id. at 229. Like HITS, the Sherlock database derived from the purported "relevant facts" contained in police reports, "whatever those may be." Id. at 240. The Hernandez court held observations of victims and witnesses who have no official duty to observe and report the relevant facts are hearsay when contained in a police report. Id. at 241.

The methods of data analysis used in HITS and Sherlock bear striking similarities. Coe's defense counsel argued "As in Hernandez, the HITS sexual assault database contains information based on multiple levels of hearsay and interpretation of 'facts' are involved between the time an incident occurs and the time a case is coded and entered into the HITS database." CP 3999. In a sexual assault investigation, the victim provides an account of the incident to a police officer, who in turn incorporates the victim's allegations into a summary of events. If the police report is transferred to the HITS unit, an employee of the Attorney General's office reviews the police report and codes the sexual assault form. Information contained in the form is then entered into the HITS database. CP 3999.

The trial court, in ruling the HITS evidence would be admissible at trial, ignored counsel's argument that this evidence was based on inadmissible hearsay. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions. ER 802.

Direct quotation of an out of court statement on the stand is not the only means of putting hearsay into evidence. State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001); State v. Johnson, 61 Wn. App. 539, 546, 811 P.2d 687 (1991). "Inadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify." Martinez, 105 Wn. App. at 782.

Nor does the fact that the HITS database is composed of information derived from police reports shield the database from the hearsay rule. A police officer's investigative summary is not an admissible business record. State v. Hines, 87 Wn. App. 98, 101-02, 941 P.2d 9 (1997). Moreover, the admission of additional hearsay within a police report must be independently justified as non-hearsay or as an exception to the hearsay rule. ER 805; State v. Monson, 53 Wn. App. 854, 862-63, 771 P.2d 359, affd, 113 Wn.2d 833, 784 P.2d 485 (1989). A

victim's narrative account of what happened contained in a police report is hearsay. Monson, 53 Wn. App. at 862.

The HITS database is composed of information obtained from police reports on rapes. What witnesses reported about a given rape incident is hearsay. Those hearsay statements are incorporated into the HITS database by means of a coding procedure. The HITS database is composed of over 8100 hearsay accounts of rape. At trial, the State presented the substance of those out-of-court statements via the HITS results.

Matheny said it was consistent with HITS policy to perform HITS runs for prosecutors. 1RP 3940. The rule is that information gathered and recorded solely for purposes of litigation is generally inadmissible as a business record because the record may be untrustworthy. 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 803.38 at 98 (5th ed. 2007) (citing Owens v. City of Seattle, 49 Wn. 2d 187, 194, 299 P.2d 560 (1956)).

Moreover, "[t]he hearsay exception for business records does not include information received from a third party." 5C Tegland, § 803.39 at 101. In this case we have over 8100 third parties providing information to the "business." "The business records exception permits admission of a record containing double hearsay only if the third party is a member of the business organization and has a duty to supply the information on the

form." State v. Mason, 31 Wn. App. 680, 684, 644 P.2d 710 (1982). That criterion is not satisfied here.

The prosecution in Hernandez argued the Sherlock information was admissible under the business exception to the hearsay rule because sex crimes detectives relied on Sherlock on a daily basis to do their jobs solving sex crimes. Hernandez, 55 Cal. App. 4th at 240. The Hernandez court rejected that argument, reasoning "the fact that hearsay evidence is put into a log and then again into a computer in the normal course of business does not render such evidence nonhearsay when it is retrieved from the computer even when most of the requirements" of the business record exception are met. Id. at 241.

The New Jersey Supreme Court reached the same conclusion in State v. Fortin, where the ViCAP form was completed and a search carried out in the database years after the crime in question for the sole purpose of assisting the prosecution of the defendant. State v. Fortin, 189 N.J. 579, 604-05, 917 A.2d 746 (2007).

HITS is the Washington version of ViCAP. Russell, 125 Wn.2d at 69 n.14. In Coe's case, the HITS forms for the offenses to which the State sought to link Coe were not filled out until more than a quarter century had passed from the date of the offenses and only then at the behest of the

prosecution. The HITS forms were inadmissible hearsay and could not qualify under the business records exception.

The Court in Russell affirmed admission of HITS evidence referenced in conjunction with expert testimony on signature analysis. Russell is distinguishable. The defense in Russell did not object to the HITS evidence on hearsay grounds, perhaps because it was only offered as the basis for expert opinion. Coe objected on hearsay grounds. Russell is therefore not controlling. An appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises that theory. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

The State will argue a hearsay objection was not preserved for review. That argument should be rejected. Defense counsel cited Hernandez to the trial court and applied its legal reasoning to the facts of Coe's case to show the HITS results constituted hearsay. CP 3995-96, 3999. Nothing more was needed to preserve the error for review.

The reason why the hearsay objection was not highlighted was because the trial court was supposed to be making a preliminary determination under ER 104 on whether the HITS results could be used to show identity under ER 404(b). The State insisted that the court was not ruling on the issue of whether the HITS results themselves were

admissible at trial. 1RP 4036. The State stressed the court was not bound by the formal rules of evidence in making its preliminary ER 404(b) determination. 1RP 199.

The distinction is significant. The court may rely on hearsay evidence in making a preliminary determination of admissibility under ER 104. 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 104.4 at 124 (5th ed. 2007). That is a different question than whether the hearsay evidence itself is admissible at trial. The trial court ruled the HITS results could be considered, not only by the court in making its preliminary determination, but also by the jury with respect to the identity of the perpetrator. CP 892. The trial court had the obligation to resolve the hearsay argument advanced by Coe's counsel before ruling the jury could hear the HITS evidence.

If this Court finds counsel did not properly raise a hearsay objection, then counsel provided ineffective assistance. Stout, 159 Wn.2d at 377; RCW 10.101.005; U.S. Const. amend. V and XIV. No legitimate reason for failing to properly raise a hearsay objection is conceivable. Counsel was trying to keep the evidence out and a hearsay objection would have accomplished that goal. For the reasons set forth at C. 3. e., infra, the error is sufficient to undermine confidence in the outcome.

d. The HITS Evidence Was Unreliable And The Court Erred In Shifting The Burden Of Proof Onto The Defense To Show Its Unreliability.

"Evidence which is unreliable has little or no probative value and is not helpful to the trier of fact and, therefore, is inadmissible." State v. Huynh, 49 Wn. App. 192, 196, 742 P.2d 160 (1987). Defense counsel challenged the HITS evidence on the basis that it was unreliable and therefore its prejudicial value outweighed any probative value. CP 3992-4007. The court erred in admitting the HITS evidence for this reason.

During the course of oral argument on the admissibility of the HITS evidence, defense counsel said she did not believe the statistics were "well-founded" in part because the HITS database did not contain the actual number of rapes that had occurred in Washington since the 1970's. 1RP 4035. The court interrupted counsel's presentation, stating "what you believe isn't important, *it's what you demonstrated to me through evidence. And I don't have any evidence whatsoever on the statistical validity of the studies.* I know I have anecdotal evidence about what they do, but *nobody has presented me anything that indicates statistically it's invalid.* I kind of thought may be that was something I would hear today. But I did not, so I think it is important that you understand that, that *that is not in front of me at this point.* So we have to confine your arguments to what evidence you provided to the Court." 1RP 4035-36 (emphasis added).

The State, which sought admission of the HITS evidence, had the burden of proof on the issue of whether the HITS evidence should be admitted. See 5 Tegland, § 104.4 at 123. The trial court, however, required the defense to show the HITS evidence was statistically invalid before she would consider it as an issue in ruling on its admissibility. This was error.

The State had the burden of producing evidence of showing the HITS results were statistically valid. This was a necessary foundation to the admissibility of the HITS results. A trial court abuses its discretion when it applies the wrong legal standard to the evidence. Reese v. Stroh, 128 Wn.2d 300, 310, 907 P.2d 282 (1995).

The "burden of proof" encompasses two separate burdens: (1) producing evidence on a particular issue and (2) persuading the trier of fact that a particular fact is true. In re Det. of Skinner, 122 Wn. App. 620, 629, 94 P.3d 981 (2004). A proponent of evidence must meet its burden of production before the court determines whether the proponent can admit evidence as part of its preliminary determination under ER 104(a). Skinner, 122 Wn. App. at 629; In re Dependency of C.B., 61 Wn. App. 280, 282-83, 810 P.2d 518 (1991). ER 104(a) requires the trial judge to make an independent determination as to whether the factual foundation for the admission of evidence is sufficient. State v. Guloy, 104 Wn.2d 412, 419-20, 705 P.2d 1182 (1985).

The State did not lay the necessary foundation to show the reliability of the HITS evidence. HITS results were not infallible. 1RP 3918. Mistakes were made. 1RP 3918. The HITS Unit, however, kept no statistics on false positive results. CP 4074; 1RP 3919.

Reliability problems run deeper. The California Supreme Court in People v. Prince recognized the Sherlock evidence in Hernandez lacked "a proper foundation establishing that the data entered into the computer was accurate and complete." People v. Prince, 40 Cal. 4th 1179, 1228, 57 Cal. Rptr. 3d 543, 156 P.3d 1015 (Cal. 2007).

The HITS database also omits pertinent evidence. It is incomplete. HITS contains approximately 8100 cases of rape offenses occurring since the 1960's from Washington as well as 10 other states and Canada. Because police agencies voluntarily report rape offenses to the HITS unit, and because most sex offenses go unreported,²⁶ the HITS database contains fewer offenses than the actual number of offenses that happen in Washington. The State offered no testimony showing the limited pool of approximately 8100 cases provided a statistically valid sample on which to base a conclusion couched in mathematical terms.

The HITS unit began collecting data on rape cases beginning in 1992. 1RP 3876. The HITS database contains a small fraction of the

²⁶ 1RP 3195; 1RP 3812, 3898.

actual number of rapes, reported or otherwise, that occurred around the same time Coe is alleged to have committed his offenses. CP 4006; 1RP 3951-52, 3896-97, 3920, 3986; cf. Fortin, 189 N.J. at 603 (ViCAP results skewed because only a fraction of the actual number of rapes was entered into database). If additional rapes were included in the database, more offenses may have matched the criteria searched for by the State. The final numbers statistical numbers produced by the State would not have been so impressive.

The HITS database suffers from other defects that render any result unreliable. In Fortin, the ViCAP evidence was inadmissible because the state could not show the FBI agent's searches were based on an "unbiased generation of data." Fortin, 189 N.J. at 604. The FBI agent input a ViCAP form for the nine-year-old crime only through the importuning of the prosecutor's office, which was preparing for the defendant's murder trial. Id. That ViCAP form was not submitted in the course of an ordinary investigative routine but rather for litigation purposes — to find a match with the murder for which the defendant stood trial. Id. Although the state maintained that the description of the crime on the ViCAP form was "unassailable," it could not be "known in hindsight how the information would have been entered into the system for normal recordkeeping and investigative purposes." Id. In conducting a fair trial, courts must ensure

only reliable evidence is submitted to the jury consistent with evidentiary rules. Id. at 606.

The HITS evidence suffers from the same flaw. As in Fortin, the State cannot show in hindsight how the information would have been entered into the database if it had been entered in the course of normal recordkeeping and investigative procedures. The State's claim that there was nothing unusual about the manner in which the data surrounding these other offenses was entered and created amounts to little more than saying the evidence should be admitted because the government should be trusted to be objective. That is not the standard for admissibility.

This case is a classic example of the fox guarding the henhouse. Bowers fed matching criteria to Matheny to run the HITS search for similar crimes. The danger is that Bowers designed the search to enable a predetermined outcome. Protestations to the contrary are unavailing because they are incapable of being independently confirmed.

The Hernandez court simply could not find "the police department's daily internal procedure of having an employee take 'facts' from police reports of sex crimes, put those 'facts' into a sex crimes log, and in turn input those 'facts' into Sherlock converts those facts contained in the police officer's sex crimes reports into competent, reliable, trustworthy evidence

that is admissible at trial." Hernandez, 55 Cal. App. 4th at 240-41. This Court should reach the same conclusion for the HITS evidence here.

In Hernandez, the investigating detective gave the search criteria to the crime analyst to identify Hernandez as the perpetrator. In Coe's case, the prosecuting attorney general gave the search criteria to a fellow employee to identify Coe as the perpetrator. When asked at trial if Matheny found it merely coincidental that the last HITS run done at Bowers' request matched the women who were the subject of the commitment trial, Matheny answered "I think Mr. Bowers knew what he was trying to find and asked me to do it." 1RP 2726.

Hernandez recognized use of the Sherlock results to prove the perpetrator's identity was part of a "vicious cycle" of circular reasoning. Hernandez, 55 Cal. App. 4th at 243. The prosecution via the analyst's testimony was using evidence of other crimes not yet linked to Hernandez to prove his identity and provide that link. Id. "Such circuitous 'bootstrap' reasoning to bolster the prosecution case is impermissible and allowed the prosecutor to get before the jury what was in effect other crimes evidence without first requiring proof that Hernandez's 'signature' was connected with the other crimes." Id. The same circular reasoning is present in Coe's case. The State used evidence of other rapes not yet linked to Coe to link him to those other rapes.

Applications of mathematical techniques to prove a fact at issue must be "critically examined in view of the substantial unfairness to a defendant which may result from ill conceived techniques with which the trier of fact is not technically equipped to cope." People v. Collins, 68 Cal.2d 319, 332, 66 Cal. Rptr. 497, 438 P.2d 33 (Cal. 1968). The trial court here failed to engage in any sort of critical examination of the HITS evidence, dismissing its defects as going to weight rather than admissibility. The court was wrong. The defects went to admissibility.

The HITS results ultimately paraded before the jury lacked probative value because the State failed to demonstrate their reliability. The prejudice, however, was real. The State used its bogus mathematical results to convince the jury that Coe committed numerous other offenses as a matter of statistical certainty. The HITS evidence was inadmissible under ER 403 because the danger of unfair prejudice outweighed its probative value.

In addressing the use of HITS and ViCAP evidence under ER 702, the Court in Russell noted "there is no prohibition against using well-founded statistics to establish some fact that will be useful to the trier of fact." Russell, 125 Wn.2d at 70 (citing State v. Briggs, 55 Wn. App. 44, 62-63, 776 P.2d 1347 (1989) (citing Collins, 68 Cal.2d at 332)). The record before the Supreme Court in Russell was sufficient for it to find the

HITS evidence well founded when that evidence was used in conjunction with an expert's signature analysis. On that record, the HITS database appeared to be "nothing more than sophisticated record-keeping systems." Russell, 125 Wn.2d at 70.

As set forth above, the record in this case shows the HITS method of data analysis is something more than a record keeping system. Hernandez and Fortin, decided after Russell, demonstrate this. The record in Coe's case shows the HITS statistics, which were not relied on by the State's signature analysis expert, were not well founded nor were they helpful to the trier of fact. For the reasons set forth above, the trial court erred in ruling "use of the HITS database" was "reliable and sufficiently unique that it may be considered by the court and, ultimately the jury, with respect to the identity of the perpetrator." CP 892.

e. Improper Admission Of HITS Evidence Influenced The Outcome.

"Mathematics, a veritable sorcerer in our computerized society, while assisting the trier of fact in the search for truth, must not cast a spell over him." Collins, 68 Cal.2d at 320. Coe's case does not involve the same kind of analytical error found in Collins, but the same proposition holds true. Coe's case demonstrates mathematical evaluation of

circumstantial evidence unfairly distorts a jury's view of the evidence when improperly applied.

HITS gave a false aura of computer infallibility in its identification of Coe as the perpetrator of the crimes against seventeen other women. Hernandez, 55 Cal. App. 4th at 241. "Confronted with an equation which purports to yield a numerical index of probable guilt, few juries could resist the temptation to accord disproportionate weight to that index." Collins, 68 Cal.2d at 330. The jury likely attached great weight to a mathematical conclusion that Coe committed other rapes.

In addressing the prejudicial effect of Sherlock evidence, the court in Hernandez recognized "[t]he devastating effect on Hernandez's right to a fair trial by the admission of such 'pseudo-scientific' testimony, which basically elevated multiple layers of hearsay spit out by a computer system named Sherlock to truth, to bolster [the credibility of victim testimony] cannot be overstated." Hernandez, 55 Cal. App. 4th at 243-44. The same problem presents itself here. Dr. Phenix described the HITS analysis as "scientific." 1RP 3098-99. The State used the improperly admitted HITS evidence to bolster the link between Coe and other offenses and emphasized this link in urging the jury to find Coe met the SVP criteria. 1RP 3775, 3778, 3781-83, 3787-91.

For the same reasons described in relation to the signature analysis evidence in C. 2. c. supra, the HITS evidence also bolstered the credibility of Dr. Phenix's expert opinion as well as the rape victims who identified Coe as their attacker at trial (LaRue and Kerbs). The improperly admitted HITS evidence likely impacted the verdict.

4. THE COURT'S IMPROPER ADMISSION OF HITS EVIDENCE AND KEPPEL'S EXPERT TESTIMONY ON SIGNATURE ANALYSIS LED TO ITS ERRONEOUS ADMISSION OF RAPE TESTIMONY.

The court's wrongful admission of the expert signature analysis and HITS results prejudiced Coe because it allowed the State to present unadjudicated rape victim testimony as substantive evidence against him.

a. The Relevancy Of Unadjudicated Rapes Could Not Have Been Established At Trial Had The Court Properly Excluded The HITS And Signature Analysis Evidence.

Had the trial court correctly ruled the HITS and signature analysis evidence was inadmissible, there would have been insufficient evidence introduced at trial linking him to a number of offenses backed by victim testimony. Testimony regarding these other offenses would not have been admitted because their relevance could not have been established at trial.

ER 104 provides in relevant part:

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of

evidence shall be determined by the court, *subject to the provisions of section (b)*. In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(emphasis added).

ER 104(a) allows the trial court to use inadmissible evidence in its preliminary determination of whether a fact is established by a preponderance of the evidence. Guloy, 104 Wn.2d at 420. But that does not mean irrelevant evidence gets to the jury. By its own terms, admissibility determinations under ER 104(a) are subject to the conditional relevance requirements of ER 104(b).

"In many trial situations, evidence is not relevant unless its relevance is demonstrated by other evidence." 5 Teglund, § 104.6 at 125. Evidence is said to be conditionally relevant in this sense. The proponent of conditionally relevant evidence must "connect" that evidence with other evidence to ultimately establish admissibility. Id. at 126.

With reference to ER 104(b), the evidence ultimately admitted is called the primary evidence. State v. Soper, 135 Wn. App. 89, 97, 143

P.3d 335 (2006). Evidence offered for the purpose of demonstrating the relevance of the primary evidence is called the foundation evidence. Id.

In Coe's case, the primary evidence consisted of the other offenses for which Coe had not been convicted. The foundation evidence necessary to demonstrate Coe was the perpetrator of those other offenses comprised the HITS and signature analysis evidence, in addition to any other evidence the court relied on to determine Coe was the perpetrator by a preponderance of the evidence. Under ER 104, the relevance of the primary evidence was conditioned on the foundation evidence.

The rules of evidence apply to proof of facts offered as foundational facts to demonstrate the relevance of the primary evidence. 5 Teglund, § 104.3 at 121. That is, the relevancy requirement of ER 402 is enforced through ER 104(b). Soper, 135 Wn. App. at 100.

The State cannot parade past the jury a litany of prejudicial bad acts connected to the accused only by unsubstantiated innuendo. See, e.g., United States v. Cote, 744 F.2d 913, 914, 916 (2d Cir. 1984) (reversal required where government failed to connect up evidence as required by FRE 104(b)). Evidence is ultimately admissible only if it is relevant under ER 401. See, e.g., State v. Dixon, 159 Wn.2d 65, 78-79, 147 P.3d 991 (2006) (relevancy of fact A was dependent on proof of fact B; trial court

properly excluded evidence of fact A because defense could not prove fact B with admissible evidence).

The relevance of the primary evidence could not be established at trial under ER 104(b) unless the foundation evidence showing Coe was the perpetrator was also admitted into evidence. Had the trial court correctly ruled the signature analysis and HITS results were inadmissible, eyewitness testimony regarding a number of other offenses would not have been admitted as substantive evidence.

Within the group of offenses for which Coe had not been convicted but which were linked to him by the signature analysis and HITS results, only eight victims of those offenses testified at trial: Hall (Monahan); Torland; LaRue; Duffy; Kerbs; South; Strange; and Fitzpatrick.

There was evidence that Coe admitted raping Fitzpatrick. She would have properly been allowed to testify regardless of the admissibility of HITS evidence and the signature analysis because the foundation evidence was sufficient to show Coe was the perpetrator.

Evidence of other offenses, however, would have been barred. Of the group consisting of Torland, Duffy, South and Strange, the substantive evidence admitted at trial identifying Coe as the person who raped these women consisted of the HITS evidence and the signature analysis. Without that foundation evidence, there was not enough to show the relevance of

those four offenses at trial. The State could not establish Coe was the perpetrator if it could not "connect up" the offenses themselves with the HITS results and signature analysis.

In its preliminary ruling, the trial court identified blood evidence linking Coe to some of the victims, including Torland, Duffy and South. CP 894-95. The blood evidence in relation to these three women was never admitted as substantive evidence at trial. It was only introduced as the basis for Phenix's opinion. CP 3478; 1RP 3110-11, 3223. As such, it was only hypothetical evidence, not to be treated as true by the jury. The State failed to "connect" Coe to the Torland, Duffy and South by means of blood evidence substantively admitted at trial.

In its preliminary ruling, the trial court found Coe was linked to the South rape by means of DNA evidence. CP 895. The court, however, later excluded this DNA evidence from being admitted at trial because the State did not notify the defense before consuming the evidence during the testing process. 1RP 348-56. The DNA evidence was not used to demonstrate the relevancy of this offense at trial.

The Hall offense was linked to Coe by means of the signature analysis and HITS evidence, as well as blood type evidence. CP 894. This blood type evidence was substantively admitted at trial in relation to Hall but it did not establish Coe was her attacker. 1RP 3640-55. 40 percent of the

population shared the same characteristic exhibited by the blood evidence. 1RP 3654. Without the signature analysis and HITS results, this blood type evidence standing alone does not show Coe was the perpetrator by a preponderance. Millions of other men share the same characteristic.

In sum, the State could not have established the relevancy of the unadjudicated offenses involving Hall, Torland, Duffy, South and Strange at trial had the court correctly refused to admit the HITS results and Keppel's opinion into evidence. Evidence of these other offenses consisting of eyewitness testimony should not have been admitted.

b. The Court Wrongly Determined The State Proved Coe Was The Perpetrator By A Preponderance Of The Evidence Under ER 404(b) As A Preliminary Matter.

The court erred in making its preliminary determination that the State had proven by a preponderance of the evidence that Coe was the perpetrator of all the offenses at issue here.²⁷ In making preliminary evidentiary determinations, the court is not bound by formal rules of evidence such as the prohibition against hearsay. 5 Tegland, § 104.4 at 124.

There is no authority, however, for the proposition that a court, in ruling the State satisfied its burden of proving the identity of a perpetrator

²⁷ The court ruled "With respect to victims 1 through 9 and 11 through 18, I find, by a preponderance of the evidence that the perpetrator was Mr. Coe. Therefore, these incidents can be admitted at trial under ER 404(b) for the purpose of proffering evidence of identity to the jury." CP 896.

under ER 404(b), may properly rely on irrelevant and unreliable evidence in making that determination. Even where the requirements for demonstrating the existence of a fact are most relaxed, such as when authenticating a document for later admission at trial, the information demonstrating the fact at issue must be reliable. State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007).

In addition, irrelevant evidence has no probative value. Cameron, 100 Wn.2d at 531. For these reasons, the court here could not properly rely on Keppel's signature analysis or the HITS results in determining whether the State proved Coe was the perpetrator of unadjudicated offenses by a preponderance of the evidence.

Of the eight unadjudicated rape victims who testified at trial, only LaRue and Kerbs identified Coe as the perpetrator at trial. 1RP 2283-84; 1RP 2366-67, 2374, 2377-78. LaRue and Kerbs, however, would not have been allowed to testify at trial had the trial court correctly ruled the HITS results and signature analysis could not be taken into consideration in meeting the preponderance standard. This is because the court, in making its preliminary determination, found Kerbs and LaRue were unable to identify Coe. CP 895.

In sum, of the eight unadjudicated rapes backed by witness testimony, only one of them (Fitzpatrick) retained relevance and would have

been put before the jury as substantive evidence had the trial court correctly excluded the HITS and signature analysis evidence from trial.

c. Improper Admission Of Rape Victim Testimony Influenced The Outcome.

Where a court erroneously admits improper evidence, the error is not harmless unless the reviewing court can find within reasonable probability that the trial's outcome would have been the same had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Prior victim testimony allows the jury "to assess the mental state of the alleged SVP, the nature of his or her sexual deviancy, and the likelihood that he or she will commit a crime involving sexual violence in the future." In re Det. of Turay, 139 Wn.2d 379, 401, 986 P.2d 790 (1999). In holding evidence surrounding previous crimes committed by the petitioners was properly admitted, the Young Court recognized "the testimony presented by the victims was compelling, and, therefore, had a substantial effect on the jury" and that, "[i]n assessing whether an individual is a sexually violent predator, prior sexual history is highly probative of his or her propensity for future violence." Id.

It is for these very reasons that admission of rape victim testimony in Coe's case was so prejudicial. The jury should not have heard seven of the eight victims testify about the unadjudicated rape offenses. While the

jury heard evidence of Coe's history of non-rape offenses, the psychological impact of hearing numerous rape victims testify about the circumstances under which Coe allegedly raped them cannot be denied. Rape is of a different magnitude. And while the jury would still have heard Harmia and Fitzpatrick testify about their experiences, hearing two rape victims testify is different than hearing nine rape victims testify. A reasonable jury is more likely to conclude a person who has only raped twice is just a criminal rather than mentally ill. Jurors were more likely to conclude Coe met the SVP definition after they heard nine rape victims testify: Reversal is required.

5. THE COURT ERRED IN ALLOWING DR. PHENIX TO RELY ON UNRELIABLE EVIDENCE, WHICH RESULTED IN A TAINTED AND MISLEADING OPINION BEING PRESENTED TO THE JURY.

Dr. Phenix's improper reliance on the HITS results and Keppel's signature analysis tainted her expert opinion that Coe met the SVP criteria. Phenix formed her opinion based on evidence that she should never have been allowed to rely upon. The jury heard that malformed opinion and the improper bases for it in assessing whether Coe met the SVP criteria.

Admissibility of expert testimony is governed by ER 702 and 703. ER 702 provides "If 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." ER 702 involves a two-step inquiry: whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact. Reese, 128 Wn.2d at 306.

ER 703 provides "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." (emphasis added). The phrase "reasonably relied upon" requires the information underlying an expert's opinion must be sufficiently reliable and trustworthy to form the basis for an expert's opinion. 5B Karl B. Teglund, Washington Practice: Evidence Law and Practice § 703.1 at 226; § 703.5 at 238 (5th ed. 2007).

Dr. Phenix relied on the signature analysis and HITS evidence as the basis for concluding Coe committed numerous other offenses in addition to the one for which he was criminally convicted. CP 3776-77, 3770; 1RP 3098-99, 1RP 3214-21. Phenix then analyzed those rape offenses to reach her conclusion that Coe was an SVP. 1RP 3098-99, 1RP 3131, 3214-21.

Phenix testified both linkage methods seemed a reasonable basis on which to form her opinion. 1RP 3220. She described them as "scientific analyses" which were "very, very helpful in giving me another data point to know that I can rely on that offense, or not, as an offense perpetrated by the individual that I am evaluating." 1RP 3098-99.

Phenix did not give equal "weight" to the 33 offenses she relied on in forming her opinion, explaining she gave an offense more weight the more evidence there was that Coe was the perpetrator. 1RP 3100. She was most confident in the offenses linked to Coe by the HITS and signature analyses in combination with an identification or "sufficient" circumstantial evidence. 1RP 3100, 1RP 3217-18.

Phenix at one point testified she saw some very particular behaviors that she had rarely seen, and "just to my eye," it was clear to her, without signature analysis or HITS, that the same individual perpetrated these offenses. 1RP 3278-79. When challenged that she had no training in investigating crimes or specific training in modus operandi identification, Phenix backtracked, explaining there were many areas in which she had no specific training and therefore relied on "the scientific evidence" given to her by those who are experts in a particular area. 1RP 3279. She placed particular reliance on the signature analysis and HITS

results in cases where identification was weak. 1RP 3301, 3353-53 (e.g., Camp, Carrico, Hughes).

Phenix's belief that Coe was predisposed to commit criminal sexual acts was "based on the fact that he committed so many acts that were nonconsensual." 1RP 3268. Phenix also relied on the number of offenses in support of her personality disorder diagnosis. 1RP 3172.

Defense counsel argued Dr. Phenix should not be permitted to rely on Keppel's signature analysis or the HITS results because these pieces of evidence were irrelevant and unreliable. CP 578, 599-602; 4014. Defense counsel further argued such reliance would result in an untrustworthy opinion barred by ER 403. The trial court ruled "Dr. Phenix may reasonably rely upon Dr. Keppel's Signature analysis report on her evaluation" and, by inference, that she could rely on the HITS evidence as well. CP 889, 892, 898.

ER 702 and ER 703 embody general reliability standards. Reese, 128 Wn.2d at 308. ER 703 "permits the trial judge to assess the reliability of the underlying facts or data upon which the expert's opinion is based." State v. Maule, 35 Wn. App. 287, 295, 667 P.2d 96 (1983). Proffered expert testimony must be carefully evaluated to ensure it is indeed helpful to the fact finder as required by ER 702. Stamm, 121 Wn. App. at 838.

"An opinion formed on inadequate or unreliable grounds cannot be helpful." Id.

The court erred in ruling the signature analysis and HITS information is "the type of information upon which Dr. Phenix may reasonably rely" and therefore could consider Dr. Keppel's report and the HITS information in forming her opinion. CP 897.

As argued in section C. 3. supra, the HITS evidence purporting to link Coe to 20 unadjudicated rapes is unreliable. Yet Phenix relied on this evidence in determining Coe committed them, which in turn formed her opinion that Coe met the SVP criteria. Reliance on unreliable evidence is unreasonable reliance under ER 703 and results in an opinion unhelpful to the trier of fact under ER 702.

As argued in section C. 2. supra, Keppel's signature analysis purporting to link Coe to 17 unadjudicated rapes was irrelevant and should not have been presented to the jury because it did not meet the legal test for establishing identity through a unique modus operandi. Yet Phenix relied on this irrelevant evidence in forming her opinion that Coe committed at least 17 unadjudicated offenses and that those offenses showed he met the SVP criteria. Reliance on irrelevant evidence that does not actually prove what it purports to prove is unreasonable reliance under ER 703 and results in an opinion unhelpful to the trier of fact under ER 702.

Phenix's improper reliance on evidence purporting to link Coe to numerous unadjudicated offenses resulted in an opinion that was misleading to the jury and unfairly prejudicial under ER 403. Phenix never should have been allowed to rely on the HITS and signature analysis evidence in forming her opinion. But she was, and the jury was allowed to weigh the value of her testimony based on the erroneous belief that the bases for that opinion were permissible.

A misleading expert opinion increases the likelihood of an erroneous verdict. Psychiatric testimony is central to the ultimate question of whether a person suffers from a mental abnormality or personality disorder that makes him likely to reoffend. Young, 122 Wn.2d at 58. When an expert reasonably relies on information in forming her opinion, the opinion assists "the trier of fact to understand the evidence or to determine a fact in issue." ER 702. But an expert's opinion should be based on relevant and reliable evidence before it is put in front of the jury. Stamm, 121 Wn. App. at 838.

The jury here evaluated Phenix's expert testimony in light of her assumption that Coe committed numerous other offenses. Her opinion may have been quite different had the trial court appropriately prevented her from relying on the HITS and signature analysis evidence. At no time did Phenix maintain she would conclude Coe had mental abnormalities and a

personality disorder that made him likely to reoffend even if she did not rely on the factual predicate that he committed 20 unadjudicated rapes linked to Coe by means of the faulty HITS and signature analysis evidence. 1RP 3248. Phenix relied on those unadjudicated offenses as the foundation for her opinion. This is why it was misleading to the jury.

The State accurately described whether evidence could be presented on other offenses and whether Phenix could rely on those other offenses in forming her opinion that Coe met the SVP criteria as "a critical issue" in the case. CP 3772. The jury, in assessing the value of Phenix's opinion, likely gave it more credence than it deserved because she relied on a number of rape offenses improperly linked to Coe by means of Keppel's signature analysis and HITS. Even if she did reach the same ultimate conclusion, her testimony would have looked quite different in the eyes of jurors had she concluded Coe was an SVP based only on his commission of a few rape offenses rather than many. Reversal is required because this error likely influenced the outcome.

6. THE COURT ERRED IN ALLOWING DR. PHENIX TO DISCLOSE UNADJUDICATED OFFENSES AS THE BASIS FOR HER OPINION BECAUSE THE JURY LIKELY CONSIDERED THOSE OFFENSES AS PROOF THAT COE COMMITTED THEM.

The trial court wrongly allowed Dr. Phenix to disclose a number of unadjudicated offenses nowhere established by substantive evidence as a

basis for her expert opinion. The error was prejudicial because the jury probably viewed this underlying information as evidence that Coe actually committed these offenses, thus increasing the likelihood that it would find Coe met the SVP criteria.

- a. The Court Permitted Dr. Phenix To Disclose Unadjudicated Sex Offenses As The Bases For Her Expert Opinion Even Though A Number Of Victims Did Not Testify At Trial And Much Of The Evidence Was Not Substantively Admitted Elsewhere.

The defense argued Dr. Phenix should only be permitted to rely on the testimony of witnesses whose testimony is admitted at trial, citing State v. Martinez for the proposition that while "the trial court may allow disclosure of underlying facts or data, 'courts have been reluctant to allow the use of ER 705 as a mechanism for admitting otherwise inadmissible evidence as an explanation of the expert's opinion.'" CP 4013 (quoting State v. Martinez, 78 Wn. App. 870, 879, 899 P.2d 1302 (1995)). The defense maintained the State should not be permitted to admit the testimony of individuals who are deceased or cannot be found because it violated Coe's

right to due process and the admission of otherwise inadmissible evidence through its expert violated ER 705.²⁸ CP 4015.

The court ruled there was no due process violation,²⁹ but did not directly address Coe's ER 705 argument. CP 905-07. The defense later requested Phenix not be permitted to testify that Coe committed any sexual assaults other than in instances where there is a conviction or admissible evidence that Coe committed the offense. CP 1380-85. The defense cited In re Det. of Marshall for the proposition that admissible evidence must support Phenix's conclusions. CP 1383; In re Det. of Marshall, 156 Wn.2d 150, 163, 125 P.3d 111 (2005). The defense argued the State's intended use of Dr. Phenix as a conduit for inadmissible evidence would violate ER 703 and 705. CP 1385.

The State maintained Dr. Phenix's reference to the numerous unadjudicated offenses linked to him by various means "is appropriate given that the Court has . . . determined that these unadjudicated crimes are *substantively* admissible because it has been proven by a preponderance of the evidence that Mr. Coe committed these offenses." CP 6518. Even if

²⁸ ER 705 provides "The expert may testify in terms of opinion or inference and give reasons therefor[e] without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination."

²⁹ Challenge to the trial court's due process ruling is presented in section C. 6., infra.

they were not substantively admissible, Phenix could still rely on them and explain their significance to the jury to explain how she reached her conclusions in the case under ER 703 and ER 705. CP 6519 (citing Marshall, 165 Wn.2d at 163).

The court denied the defense motion, saying the issue of whether Phenix could rely on the contested information and present it to the jury as the basis for her opinion had already been decided against Coe based on previous rulings. 1RP 2111-12. In actuality, the previous ruling involving these offenses only allowed Phenix to rely on these offenses in forming her opinion, but did not address whether Phenix could disclose them to the jury while testifying. CP 904-07.

Dr. Phenix relied on 33 sexual offenses allegedly committed by Coe as the basis for her opinion that Coe had a mental abnormality and personality disorder that made him likely to reoffend. 1RP 3112-14, 3213-14; CP 6750. Of those 33 offenses, Phenix disclosed the details of 20 specific offenses as part of the State's case in chief.³⁰ 13 of those 20 victims

³⁰ Durgan (1RP 3087-88; 1RP 3128); Olivet (1RP 3088-89; 1RP 3149); Estey (1RP 3089-92; 1RP 3142-43); Anderson (1RP 3089-92; 1RP 3142-43); O'Malley (1RP 3092-93); Roscoe (1RP 3093-94); Harris (1RP 3094-95); Littlestest (1RP 3095-96); Helmbrecht (1RP 3097); Little (1RP 3097-98); Stephens (1RP 3127-28); Jones (1RP 3128); Hall (1RP 3140, 3146); Carrico (1RP 3146); Lennick (1RP 3146; 1RP 3173); LaRue (1RP 3146-47); Aldridge (1RP 3146-47); Kerbs (1RP 3146; 1RP 3173); Camp (1RP 3146-47); Strange (1RP 3173).

did not testify.³¹ Evidence of offenses related to those 13 victims was not admitted as substantive evidence at trial, except for HITS evidence relating to Lennick. 1RP 2679-83.

The trial court instructed the jury that when Dr. Phenix testified, some information was admitted as part of the basis for her opinion and that it could only use this testimony for the purpose of deciding what credibility or weight her opinion deserved. CP 3478; 1RP 3085-86; 1RP 3748-49. The jury was instructed not to consider evidence admitted to show the basis for her opinion as proof that the information relied upon by Phenix was true. Id.

b. The Court Should Not Have Permitted Disclosure Due To The Danger That The Jury Would Misuse The Evidence For An Impermissible Purpose.

ER 703 provides the facts or data upon which an expert bases an opinion or inference, if reasonably relied upon, "need not be admissible in evidence," while ER 705 allows an expert to relay the factual basis for her opinion to the jury in appropriate circumstances. This does not mean all information relied upon by an expert should automatically be recounted at trial. Stamm, 121 Wn. App. at 838. "[C]ourts have been reluctant to allow the use of ER 705 as a mechanism for admitting otherwise inadmissible evidence as an explanation of the expert's opinion." State v. Anderson, 44

³¹ Durgan; Olivet; Estey; Anderson; O'Malley; Roscoe; Harris; Littlenest; Helmbrecht; Carrico, Lennick; Aldridge; Camp.

Wn. App. 644, 652, 723 P.2d 464 (1986). Expert testimony "must not be used as a vehicle to present and reiterate otherwise inadmissible hearsay." Stamm, 121 Wn. App. at 838.

"An expert can testify regarding the basis for his opinion for the limited purpose of showing how he reached his conclusion only if the probative value of the basis for the opinion is not substantially outweighed by its prejudicial nature." State v. Acosta, 123 Wn. App. 424, 436, 98 P.3d 503 (2004). Whether an expert is permitted to disclose the basis for her expert opinion under ER 703 and 705 involves balancing the information's probative value in assisting the jury to weigh the expert's opinion with the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes.

Much of the evidence of unadjudicated offenses in this case was admitted under ER 703 only to support Phenix's expert opinion. "While ER 703 allows an expert to base an opinion on facts or data reasonably relied on by experts in their field, even if these facts or data are otherwise inadmissible, when the court admits such testimony it is not substantive evidence." Martinez, 78 Wn. App. at 879.

The jury in Coe's case was given a limiting instruction in an effort to make apparent the distinction between the permissible use of evidence revealed as the basis for Phenix's opinion and the impermissible use of

treating that evidence as proof that Coe was responsible for them in the way they were described by Phenix. But given the sheer amount of evidence offered through Phenix, the likelihood that the jury would maintain this distinction and disregard the underlying information for its truth seems remote.

A limiting instruction under some circumstances may be "a recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." Bruton v. United States, 391 U.S. 123, 134 n.8, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932)). In those circumstances, the limiting instruction is nothing more than a "judicial lie" — a placebo device that satisfies form while violating substance. Bruton, 391 U.S. at 134 n.8; Nash, 54 F.2d at 1007.

Courts nevertheless often indulge in the "sanctioned ritual" that jurors are capable of using evidence for one permissible purpose while disregarding it for an impermissible one as a matter of practical expediency. United States v. DeSisto, 329 F.2d 929, 933 (2d Cir.1964); Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 78 L. Ed. 196 (1933). In short, jurors are presumed to follow instructions. State v. Dent, 123 Wn.2d 467, 486, 869 P.2d 392 (1994). But this presumption has limits. Id. "[T]here are some contexts in which the risk that the jury will not, or cannot, follow

instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Id. (quoting Bruton, 391 U.S. at 135-36).

Those limits were stretched to the breaking point in Coe's case. "The provisions of ER 703 are particularly problematic in SVPA proceedings. Typically, experts review thousands of pages of records and reports prior to testifying at trial. Trial courts must take great care to ensure that the provisions of ER 703 are not so loosely or broadly applied so as to undercut the primary goal of the Rules of Evidence, the enhancement of the truth-seeking function." In re Det. of Post, 145 Wn. App. 728, 747 n.12, 187 P.3d 803 (2008), review granted, 166 Wn.2d 1033, 217 P.3d 782 (2009).³²

The jury in Coe's case heard a good deal of evidence technically offered for the sole purpose of explaining the basis for Phenix's opinion that Coe met the SVP criteria. The subtle discrimination between evidence offered to show the basis for expert opinion and evidence offered to show Coe was actually responsible for those offenses was "a feat beyond the compass of ordinary minds." Shepard, 290 U.S. at 104.

³² Phenix relied on 74,000 pages of records in arriving at her opinion, including police reports, probation officer reports, mental health records, SCC records, legal records, witness depositions, and Coe's writings. 1RP 3077-79.

People v. Coleman, 38 Cal.3d 69, 211 Cal. Rptr. 102, 695 P.2d 189 (Cal. 1985) is instructive. In that case, defense psychiatrists relied in part on letters written by the defendant's wife to assist in their evaluation of the defendant's mental condition in a case where the defense was insanity. Coleman, 38 Cal.3d at 92. The California Supreme Court held the trial court abused its discretion by permitting the State to question the defense experts on the contents of the letters in which the defendant's wife claimed that he had previously threatened her with violence. Id. at 93. Limiting instructions directed the jury to consider matters on which the expert relied not for its truth but only to show the basis for the opinion, but they "were not adequate to insure that the letters would be used only for proper purposes both because of the inflammatory nature of the hearsay involved and because *the letters could effectively undermine the expert's opinions only if their allegations were true.*" Id. at 94-95 (emphasis added).

The same type of problem presents itself here. Evidence of numerous unadjudicated offenses presented through Phenix's expert testimony was likely to make a great impression on the minds of jurors. In this case, the limiting instruction did not provide adequate assurance that the jury could actually perform the "mental gymnastic" of compartmentalizing its consideration of the evidence underlying Phenix's opinion to the specific

purpose of assessing expert credibility rather than the impermissible purpose of assessing the truth of the underlying evidence.

The prejudice to Coe is that the jury treated evidence of offenses upon which Phenix relied and which were not elsewhere substantively admitted for their truth as substantive evidence that Coe committed them. Substantive evidence that the accused committed sexual offenses has great impact on juries in SVP cases. Young, 122 Wn.2d at 53.

It is true that Phenix also relied on other offenses that were substantively admitted elsewhere, but her opinion was an all or nothing affair. Her opinion that Coe met the SVP criteria was based on the assumption that he committed 33 offenses. She never testified she would have arrived at the same conclusion had she determined Coe committed fewer offenses. This increased the likelihood of jurors treating offenses relayed through Phenix's opinion as substantive evidence because the jury, in trying to make sense of the bases of her opinion, could only look to her testimony for evidence of the offenses not substantively admitted anywhere.

Marshall recognized ER703 was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence. Marshall, 165 Wn.2d at 163. In that case, Dr. Phenix was properly permitted to relay otherwise inadmissible hearsay evidence to the jury as part of her opinion.

Id. at 163-64. Significantly, however, evidence of the offenses committed by Marshall was substantively admitted. Id. at 164.

Coe's case is different. Phenix relayed hearsay evidence of numerous unadjudicated offenses to the jury but many of those offenses were nowhere established by substantive evidence. The jury was deprived of an independent basis to assess the truth of these offenses, which increases the likelihood that the jury treated the offenses for their truth as presented through Phenix's testimony. The jury had nowhere else to turn to make an assessment it needed to make.

The limiting instruction in Coe's case did not cure the problem of jurors treating these offenses as substantive evidence. Rather, the instruction itself engendered confusion because it directed the jury to do two contradictory things. It told the jury to evaluate the credibility and weight of Phenix's expert testimony by taking Phenix's sources of information into account, but simultaneously directed the jury not to consider the facts upon which she relied for their truth. CP 3478; 1RP 3085-86; 1RP 3748-49.

The jury could not properly assess the value of Phenix's opinion without first assessing the truth of the bases for her opinion. Evidentiary rules designed to allow the use of evidence for one purpose but not another and their corollary limiting instructions often "have their source very often in considerations of administrative convenience, of practical

expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." Shepard, 290 U.S. at 104.

Coe's case illustrates the proposition. The risk of confusion created by revelation of evidence involving unadjudicated offenses that was not elsewhere substantively admitted was too great. Disclosure of this evidence through Phenix's opinion invited the jury to consider it for its truth. Under the circumstances of this case, the jury was ill equipped to resist the invitation. Reversal is required.

7. THE COURT VIOLATED COE'S DUE PROCESS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT ALLOWED THE JURY TO HEAR EVIDENCE OF OTHER OFFENSES LINKED TO COE DESPITE THE FACT THAT COE NEVER HAD THE OPPORTUNITY TO EXAMINE THE VICTIMS OF THOSE OFFENSES.

The trial court violated Coe's constitutional due process right to confront the witnesses against him through cross examination when it allowed the State to present evidence of unadjudicated sex offenses to the jury even though Coe never had the opportunity to examine the victims of those offenses. U.S. Const. amend. V and XIV, Wash. Const. art. I, § 3.

a. The Court Denied Defense Counsel's Motion To Exclude Evidence Based On The Due Process Right To Confrontation.

Defense counsel moved on due process grounds to exclude evidence of unadjudicated offenses involving victims that Coe did not have the opportunity to cross examine either in pre-trial deposition or at trial. CP 457, 612-28, 4015. The defense argued Dr. Phenix should not be allowed to rely on or make reference to these offenses. 612-28, 4015.

The trial court denied the motion, ruling Coe had no due process right to examine the witnesses against him and that Dr. Phenix could rely on these offenses in explaining the basis for her opinion that Coe met the SVP criteria. CP 905-07. According to the trial court, "this is the type of information upon which Dr. Phenix would reasonably rely in rendering her opinion under ER 703/705. Undoubtedly, Dr. Phenix will be cross-examined extensively on her opinion and the bases thereof. This gives the Respondent the opportunity to raise his issue about the information through that process." CP 906.

The eight victims at issue were Mary Olivet, Diana Anderson, Claudia Harris, Darria Lennick, Paula C., Roberta B., Valerie Littlest, Karen H., and CeeCee K. CP 905. All of these individuals for one reason or another were unavailable to testify or be deposed, except for Karen H., whose status was unclear. CP 905. Out of this group, Phenix ultimately

relied on offenses involving Lennick (two rapes; CP 3820, 3834-36), Anderson (rape; CP 3805-06), Littlenest (attempted rape; CP 3849-50), Olivet (indecent exposure; CP 3800-01), and Harris (indecent exposure; CP 3814) in forming her opinion. CP 6750. She disclosed offenses involving these women to the jury as the basis for her opinion.³³ Lennick, who was raped twice, was also part of the HITS results. CP 6750.

b. The Right To Confront Adverse Witnesses By Means Of Cross Examination Is Fundamental To A Fair Commitment Trial.

"Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection." In re Det. of Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003). Although involuntary commitment proceedings are civil, "due process may guarantee the right to cross-examine witnesses even if the confrontation clause does not apply directly." In re Det. of Brock, 126 Wn. App. 957, 963, 110 P.3d 791 (2005).

Coe raises a due process claim here. He does not base his claim on the right to confrontation secured by the Sixth Amendment. The rationale for why confrontation through cross examination is important, however, is articulated in cases addressing the Sixth Amendment Confrontation Clause.

³³ Olivet (1RP 3088-89; 1RP 3149); Anderson (1RP 3089-92; 1RP 3142-43); Harris (1RP 3094-95); Littlenest (1RP 3095-96); Lennick (1RP 3146; 1RP 3173).

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (quoting 5 Wigmore, Evidence § 1395 at 123 (3d ed. 1940)). The ultimate goal of the Confrontation Clause "is to ensure reliability of evidence" by testing it "in the crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." Id.

Testing the reliability of witness testimony is best determined by cross examination in SVP commitment trials as well. Brock, in holding an SVP did not have the right to confront the State's expert witnesses through cross examination at the annual show cause hearing, distinguished such hearings from full blown commitment trials that require fact-finding and weighing of the evidence. Brock, 126 Wn. App. at 966.

c. Coe Had The Due Process Right To Cross Examine The Witnesses Against Him Under A Mathews Balancing Test.

The trial court ruled Coe did not have a due process right to examine the five witnesses identified above, relying on In re Det. of Stout, 159 Wn.2d 357, 150 P.3d 86 (2007). A trial court's interpretation of case law

is reviewed de novo, as is a constitutional confrontation challenge: State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004); State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

In Stout, the State presented testimony from T.D., one of Stout's victims, at the commitment trial in the form of two depositions. Stout, 159 Wn.2d at 368. Stout held "an SVP detainee does not have a due process right to confront a live witness at a commitment trial, nor does he have a due process right to be present at a deposition." Id. at 374. In reaching that holding, the Court distinguished the right to cross-examine from the right to confront witnesses after having previously been allowed examination. Id. at 368-69.

The Court accordingly reviewed Stout's confrontation claim apart from his right to cross examine. Id. at 368 ("At the outset, we note that Stout had two separate opportunities to cross-examine T.D. No controversy exists before this court as to cross-examination. Accordingly, we review only Stout's confrontation claim."). The Court's holding was that SVP defendants have no right to confront the witnesses against them at trial was premised "on whether any purpose is served in recognizing a due process right to confrontation where cross-examination has been achieved." Id. at 369 n.9.

Coe's case is different. He never had the opportunity to examine any of the alleged victims at issue here. His right to confront the witnesses against him by means of cross examination remains intact.

Proper application of the Mathews³⁴ balancing test shows it. To determine what process was due, the Stout Court applied the Mathews test, "which balances (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures." Stout, 159 Wn.2d at 370. Looking solely at the claimed right to confront witnesses at trial after examination had already been achieved before trial, the Stout Court determined the balance tipped in favor of the State. Id. at 370-72.

The first Mathews factor weighed "heavily" in Stout's favor because he indisputably had a significant interest in his physical liberty. Stout, 159 Wn.2d at 370. This factor weighs heavily in favor of Coe.

The second Mathews factor in Stout's case weighed in favor of the State because "there would be little value in adding a confrontation right to the procedural safeguards available to an SVP detainee," given that the

³⁴ Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

goals of ensuring the veracity of witness testimony and allowing the fact finder to judge the witness's demeanor had been accomplished without confrontation at the commitment trial or deposition. Id. at 371. That is, T.D. was deposed under oath at the deposition, "so her veracity is as guaranteed as if she had testified at trial." Id. The fact finder at the commitment trial had an opportunity to observe the victim's demeanor during questioning because the second deposition was successfully videotaped. Id.

In contrast, there would have been value in allowing Coe to confront the witnesses against him at trial by cross examination because he never had the opportunity to test the veracity of their accounts by means of cross examination in the first place. No victim was deposed and so there was no guarantee of veracity. Furthermore, unlike in Stout, the jury at Coe's commitment trial did not have an opportunity to observe the victim's demeanor in any manner.

The third Mathews factor in Stout's case weighed in favor of the State because the State has an interest in (1) protecting the community from sex offenders who pose a risk of reoffending; (2) streamlining commitment procedures and avoiding the heavy financial burden that would be attendant with requiring live testimony of out-of-state witnesses like T.D.; and (3) ensuring the availability of testimony that may come

from witnesses who are no longer in the area or easily accessible. Id. at 371-72. In sum, "it is unduly burdensome to require the State to build its case around a right to confrontation that adds only marginal protection for an SVP against liberty deprivation." Id. at 372.

The balancing process comes out differently in Coe's case. Where, as here, the accused never achieved examination before trial, the right to confront witnesses through cross examination at trial adds meaningful protection against wrongful liberty deprivation. The State certainly has an interest in protecting the community from sex offenders who pose a risk to reoffend, but whether a sex offender poses a risk to reoffend is the very thing at issue in a commitment trial. The value of confrontation through cross examination remains when the State relies on victim accounts never subject to cross examination to help prove the accused has a mental condition that makes him likely to reoffend.

Division One in In re Det. of Allen relied on Stout for the categorical proposition that due process does not require an SVP detainee be permitted to confront a live witness. In re Det. of Allen, 142 Wn. App. 1, 2, 4, 174 P.3d 103 (2007). For the reasons set forth above, that reading of Stout is too simplistic and should be rejected.

Where, as here, an expert bases his opinion on out of court statements and discloses those statements to the jury, due process requires

that the defendant have the opportunity to confront the individual who made them. The jury was instructed that it was the sole judge of credibility, and that in considering a witness's testimony, it may consider a number of relevant circumstances. CP 3474-75. But witnesses relayed through Phenix's testimony were shielded from these traditional means of scrutinizing the accuracy of their statements. In Coe's case, the jury needed to consider the credibility of the witnesses offered against him. Determining credibility is a critical part of the jury's role, and the ability of the jury to observe the demeanor of a witness is a crucial part of determining credibility. Stout, 159 Wn.2d at 382-83 (Madsen, J. concurring).

d. The State Cannot Shield Witnesses From Examination By Ushering Hearsay Statements Into Evidence By Means Of Expert Opinion.

In responding to Coe's due process argument below, the State maintained Coe had no right to cross examine the witnesses against him because the State sought only to use evidence of offenses related to those witnesses as the basis for Phenix's expert opinion rather than as substantive evidence. 1RP 235-36. The court noted this evidence was not being offered as substantive evidence. CP 906.

This argument fails for two reasons. First, the two rapes involving Lennick were admitted as substantive evidence through the HITS results. CP 3820-21, 3834-36, 4124-26.

Second, the State cannot do an end run around the constitutional right to cross examine a witness by pointing to evidentiary rules regarding expert opinion and the legal fiction that juries do not assess the truth of sources upon which the expert relies to form an opinion.

The intersection between the right to confrontation and expert testimony is an evolving area of the law. In State v. Lui, Division One rejected a criminal defendant's claim that his Sixth Amendment right to confront the witnesses against him was violated when the State's expert testified based partially on forensic evidence developed by others. State v. Lui, 153 Wn. App. 304, 306, 221 P.3d 948 (2009). Division One found no confrontation violation because the data on which the expert relied and disclosed to the jury was not offered for its truth and the defendant had a full opportunity to test the basis and reliability of the testifying expert's opinions and conclusions through cross examining the expert. Id. at 306, 318-25.

The Supreme Court granted Lui's petition for review. That Court will ultimately decide whether Division One's analysis in Liu is sound. In the meantime, this Court should reject the reasoning in Lui as flawed because it elevates form over substance and fails to take into account the interests protected by being able to directly examine those witnesses whose statements form the basis for an expert's opinion.

Division One advanced the same type of analysis in State v. Mason, reasoning out of court statements repeated by witnesses at trial were not offered for their truth and thus were not subject to the confrontation clause. State v. Mason, 127 Wn. App. 554, 566, 126 P.3d 34 (2005), aff'd, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). The Supreme Court disapproved of that simplistic approach, agreeing with Mason that "courts ought to guard against any 'backdoor' admission of inadmissible hearsay statements." Mason, 160 Wn.2d at 921.

The Supreme Court was "not convinced a trial court's ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis. To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge." Id. at 922. Use of evidentiary rules regarding hearsay may, like the old talisman of "reliability," subject the right of confrontation to judicial abuse. Id. at 921-22. That a trial court's "hearsay ruling was reasonable does not preclude deciding the statement was intended to establish a fact and that it was reasonable to expect it would be used in a prosecution or investigation; in other words that it was testimonial." Id. at 922.

The Supreme Court's warning in Mason finds compelling application in cases involving experts who relay testimonial statements to

the jury as the basis for their opinion. New York's highest court reversed a defendant's conviction because his constitutional right to be confronted with the witnesses against him was violated when a psychiatrist who testified for the prosecution recounted statements made to her by people who were not available for cross-examination. People v. Goldstein, 6 N.Y.3d 119, 122, 810 N.Y.S.2d 100, 843 N.E.2d 727 (N.Y. 2005). The psychiatrist, hired by the state to assess the defendant's mental stability, told the jury what she was told by six people she interviewed that the defendant was not insane at the time of the offense. Id. at 122-23. The state claimed there was no confrontation problem, contending the interviewees' statements to the psychiatrist were not hearsay because they were not offered to prove the truth of what the interviewees said, but rather only admitted to show the basis for the expert's opinion and in that way help the jury in evaluating the expert's opinion. Id. at 127.

The court rejected this theory because "[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context." Id. at 127-28 (citing David H. Kaye et al., The New Wigmore: Expert Evidence § 3.7 at 19 (Supp. 2005) ("[T]he factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run

around a Constitutional prohibition.")). The court could not see how the jury could use the statements of the interviewees to evaluate the expert's opinion without accepting as a premise either that the statements were true or that they were false. Id. at 127. Since the prosecution's goal was to buttress its expert's opinion, "the prosecution obviously wanted and expected the jury to take the statements as true." Id. at 128.

In other words, the practical effect of these testimonial statements trumped the empty formalistic theory that sought to evade the practical effect. In practice, juries cannot meaningfully and fairly assess the value of an expert's opinion without considering whether the bases for that opinion are true. It is logically impossible.

Consistent with Goldstein, the jury, in evaluating Dr. Phenix's opinion, needed to evaluate the truth and accuracy of the statements on which she relied. The weight of Dr. Phenix's opinion depended on the accuracy and substantive content of those statements. "[T]o pretend that expert basis statements are introduced for a purpose other than the truth of their contents is not simply splitting hairs too finely or engaging in an extreme form of formalism. It is, rather, an effort to make an end run around a constitutional prohibition by sleight of hand." Jennifer L. Mnookin, Expert Evidence and the Confrontation Clause After Crawford v. Washington, 15 J.L. & Poly 791, 822 (2007).

e. The State Cannot Overcome The Presumption Of Prejudice By Showing The Error Was Harmless Beyond A Reasonable Doubt.

"Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." Guloy, 104 Wn.2d at 425. Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Evidence of the unadjudicated offenses at issue here, input into HITS or relayed as the basis for Phenix's opinion, was important to the State's case. Phenix wanted to rely on them in forming her opinion and the State wanted the jury to hear about them in an effort to bolster Phenix's credibility in the eyes of jurors.

Coe was unable to cross examine the witnesses at issue. For the reasons set forth above, cross examination of Phenix regarding what these witnesses said was a constitutionally inadequate substitute. Coe had the right to attack the credibility of the unavailable witnesses and the veracity of their accounts by examining the witnesses themselves.

Evidence that Coe met the SVP criteria was not overwhelming. The existence of a number of offenses linked to Coe did not mean the

evidence against him was overwhelming. The SVP proceeding is not a criminal proceeding. The difference between the criminal sex offender and a mentally ill one is a distinction upon which expert psychiatric testimony is needed, regardless of the number of criminal offenses committed. In an SVP proceeding, "psychiatric testimony is central to the ultimate question of whether a person suffer from a mental abnormality" and for this reason is helpful to the trier of fact. Young, 122 Wn.2d at 58. Dr. Phenix and Dr. Donaldson presented diametrically opposed opinions on the central issue of whether Coe had a mental condition that made him likely to reoffend.

In conducting a harmless error analysis, this Court must assume "the damaging potential of the testimony was fully realized." State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006). The State cannot overcome the presumption that the violation of Coe's right to confrontation prejudiced the outcome of the case.

8. CUMULATIVE ERROR VIOLATED COE'S
CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR
TRIAL.

The state and federal constitutions guarantee the right to due process of law. U.S. Const. amends. V and XIV; Wash. Const. art. I, § 3. Those subject to involuntary commitment are entitled to due process

protection. Thorell, 149 Wn.2d at 731-32. Due process requires a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. Coe, 101 Wn.2d at 788-89; State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even where some errors are not properly preserved for appeal, this Court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

As set forth above, an accumulation of errors affected the outcome of Coe's trial. These errors include (1) ineffective assistance in failing to request instruction on the meaning of "personality disorder;" (2) improper admission of Dr. Keppel's signature analysis; (3) improper admission of HITS evidence and ineffective assistance in failing to properly object to this evidence on hearsay grounds; (4) improper admission of unadjudicated rape offenses; (5) Dr. Phenix's improper reliance on unreliable information to form the basis for her opinion; (6) Dr. Phenix's improper presentation of inadmissible evidence as the basis for her opinion; and (7) violation of Coe's constitutional due process right to cross-examine the witnesses against him.

D. CONCLUSION

For the reasons stated above, Mr. Coe requests that this Court vacate the commitment order and remand for a new trial.

DATED this 14th day of April, 2010.

Respectfully Submitted,

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APPENDIX A

VICTIMS - DR. PHENIX'S EVALUATION

	Offense Date	Victim's Name	ID	Linkage Methods			Admit
				HITS	Sig	Blood	
1.	1966 May 1	Rita Stevens	ID				
2.	1971 May 28	Diane Jones	ID				
3.	1977 Mar 18	Colleen Durgan	ID				
4.	1978 Apr 25	Jean Carrico	ID	HITS	Sig		
5.	Nov 26	Robin Taggart	ID				
6.	Dec 19	Mary Olivet	ID				
7.	1979 Jun 17	Jaima Estey	ID				
8.	Jun 17	Diana Anderson	ID				
9.	Aug 15	Patricia O'Malley	ID				
10.	Sep 10	Shelly Hall		HITS	Sig		
11.	Oct 6	Jeanie Roscoe	ID				
12.	Oct 29	Claudia Harris	ID				
13.	Dec 6	Paige Kenney		HIT3	Sig		
14.	Dec 11	Joanne Torland		HITS	Sig	A	
15.	Dec 29	Dorcas Thulean		HIT3	Sig		
16.	1980 Feb 16	Darria Lennick	ID	HITS	Sig		
17.	Mar 11	Mary LaRue	ID	HIT3	Sig	A	
18.	Apr 4	Margaret Duffy		HIT3	Sig	A	
19.	May 13	Elizabeth Aldridge		HIT2	Sig		
20.	Jun 20	Teresa Kerbs	ID	HIT3	Sig		
21.	Jul 20	Sherry Jones		HIT3	Sig		
22.	Aug 26	Gretchen Camp	ID	HIT3	Sig		
23.	Aug 30	Sherry South		HIT3	Sig	A	
24.	Oct 23	Julia Harmia	ID	HIT3	Sig	A	
25.	Nov 30	Jennifer Caley		HIT3	Sig	A	
26.	Dec 16	Valerie Littlest	ID				Admit
27.	Dec 17	Cheri Hughes	ID	HIT3	Sig	A	
28.	1981 Jan 2	Ann Jaksich	ID				
29.	Feb 5	Mary Strange		HIT3	Sig		
30.	Feb 9	Diane Fitzpatrick		HIT3	Sig	A	Admit
31.	Feb 28	John Little	ID				
32.	Mar 1	Julie Helmbrecht	ID				
33.	Mar 8	Mary Gullickson	ID				

