

SUPREME COURT NO. 85965-5

IN THE SUPREME COURT OF WASHINGTON

IN RE DETENTION OF KEVIN COE:

STATE OF WASHINGTON,

Respondent,

v.

KEVIN COE,

Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2011 OCT 31 AM 8:12
D. DENNIS R. CARPENTER
CLERK

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

The Honorable Kathleen M. O'Connor, Judge

SUPPLEMENTAL BRIEF OF PETITIONER KEVIN COE

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	3
1. COE HAD THE CONSTITUTIONAL DUE PROCESS RIGHT TO CONFRONT THROUGH CROSS EXAMINATION VICTIMS OF OFFENSES THAT HE DID NOT HAVE THE OPPORTUNITY TO PREVIOUSLY EXAMINE.....	4
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.....	12
3. THE HITS EVIDENCE WAS INADMISSIBLE BECAUSE IT DID NOT ESTABLISH THE PRESENCE OF A UNIQUE SIGNATURE, CONSISTED OF INADMISSIBLE HEARSAY, AND WAS OTHERWISE UNRELIABLE AND MISLEADING.	16
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Gourley v. Gourley</u> , 158 Wn.2d 460, 145 P.3d 1185 (2006).....	6
<u>Group Health Co-op. of Puget Sound, Inc. v. Dep't of Revenue</u> , 106 Wn.2d 391, 722 P.2d 787 (1986).....	16
<u>In re Det. of Coe</u> , 160 Wn. App. 809, 250 P.3d 1056 (2011).....	3, 5, 12, 16, 18
<u>In re Det. of Stout</u> , 159 Wn.2d 357, 150 P.3d 86 (2007).....	4, 5, 7-9
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	12
<u>State v. Lui</u> , 153 Wn. App. 304, 221 P.3d 948 (2009), <u>review granted</u> , 168 Wn.2d 1018, 228 P.3d 17 (2010)	10
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	14, 15
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	12, 13
<u>State v. Hines</u> , 87 Wn. App. 98, 941 P.2d 9 (1997).....	16
<u>State v. Kyлло</u> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	19
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	15

TABLE OF AUTHORITIES

Page

WASHINGTON CASES (CONT'D)

State v. Mason,
127 Wn. App. 554, 126 P.3d 34 (2005),
aff'd, 160 Wn.2d 910, 162 P.3d 396 (2007),
cert. denied, 553 U.S. 1035, 128 S. Ct. 2430, 171 L. Ed. 2d 235 (2008) ... 9

State v. Mason,
160 Wn.2d 910, 162 P.3d 396 (2007),
cert. denied, 553 U.S. 1035, 128 S. Ct. 2430, 171 L. Ed. 2d 235 (2008). 10

State v. Monson,
53 Wn. App. 854, 771 P.2d 359,
aff'd, 113 Wn.2d 833, 784 P.2d 485 (1989)..... 16

State v. Thang,
145 Wn.2d 630, 41 P.3d 1159 (2002)..... 12, 13, 15

FEDERAL CASES

California v. Green,
399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)..... 4

Goldberg v. Kelly,
397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)..... 7

Mathews v. Eldridge,
424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)..... 5, 6

OTHER STATE CASES

In re MH-2008-000867,
225 Ariz. 178, 236 P.3d 405 (Ariz. 2010) 6

People v. Goldstein,
6 N.Y.3d 119, 810 N.Y.S.2d 100, 843 N.E.2d 727 (N.Y. 2005)..... 10, 11

TABLE OF AUTHORITIES

	Page
 <u>OTHER STATE CASES (CONT'D)</u>	
<u>People v. Hernandez</u> , 55 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (Cal. Ct. App. 1997), <u>review denied</u> (Aug. 27, 1997)	16, 18
<u>State v. Fortin</u> , 189 N.J. 579, 917 A.2d 746 (N.J. 2007).....	16
<u>Vann v. State</u> , 229 P.3d 197 (Alaska Ct. App. 2010).....	10
<u>Wood v. State</u> , 299 S.W.3d 200 (Tex. Crim. App. 2009)	10
 <u>RULES, STATUTES AND OTHERS</u>	
5 John Henry Wigmore, Evidence § 1367 (3d ed. 1940)	4
Chapter 71.09 RCW.....	2
ER 404(b).....	12
ER 801(c).....	16
ER 805	16
U.S. Const. amend. V	4
U.S. Const. amend. XIV	4
Wash. Const. art. I, § 3	4

A. ISSUES

1. 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. Did the court violate 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 offenses even though Coe never had the opportunity to examine the victims?

3. Was expert testimony that the same person committed numerous rapes inadmissible because the evidence relied on by the expert did not meet the legal test for proving identity through a unique signature?

4. Was evidence derived from the HITS database purporting to show Coe committed numerous unadjudicated rapes based on the statistical rarity of an identified modus operandi inadmissible because the data failed the legal test for showing identity and was unreliable hearsay? Was counsel ineffective in failing to properly lodge a hearsay objection?

5. Was the testimony of numerous victims of unadjudicated rape offenses inadmissible because the relevance of their testimony depended on the improperly admitted expert signature analysis and HITS evidence purporting to identify Coe as the perpetrator?

6. Did the State's expert evaluator improperly rely on the signature analysis and HITS data in determining Coe was the perpetrator in these offenses, resulting in a distorted and misleading opinion being presented to the jury?

7. Did the court err in allowing the State's expert to disclose the basis for her opinion to the jury by pointing to numerous offenses nowhere established by substantive evidence?

8. Did cumulative error violate Coe's constitutional due process right to a fair trial?

B. STATEMENT OF THE CASE

Shortly before Kevin Coe finished his 25 year prison sentence for the rape of Julia Harmia, the State sought Coe's involuntary commitment under chapter 71.09 RCW. CP 1-2. In an effort to link Coe to other offenses at trial, State expert Dr. Keppel claimed to find a signature for the Harmia offense and 17 unadjudicated rape offenses. CP 4444, 4448. The Attorney General's Office also searched its Homicide Investigation Tracking System (HITS) database containing information on 8100 reported rape offenses and obtained results purporting to show Coe committed 20 unadjudicated rapes. CP 3868-3873. The trial court admitted Keppel's signature analysis and HITS results over defense objection. CP 892, 898, 3992-4001.

Dr. Phenix, testifying for the State, opined Coe had three "mental abnormalities" and a "personality disorder" that in combination made Coe more than likely to reoffend. 1RP 3118-19, 3142, 1RP 3159, 3174-75, 3194, 3212. In arriving at this opinion, 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. Coe did not have the opportunity to cross examine the victims of some of those offenses. CP 905-07. Dr. Donaldson, testifying for Coe, opined Coe did not suffer from a mental abnormality or personality disorder that made him likely to reoffend. 1RP 3490, 3513-14. A jury rendered a verdict in favor of the State. CP 3503-04, 6746-47. The Court of Appeals affirmed. In re Det. of Coe, 160 Wn. App. 809, 815, 250 P.3d 1056 (2011). This Court accepted review.

C. ARGUMENT

This supplemental brief does not cover all of the issues on review, argument on which is set forth in appellant's opening brief, reply brief, and petition for review. This supplemental brief offers additional argument and reemphasizes certain points on some issues.

1. COE HAD THE CONSTITUTIONAL DUE PROCESS RIGHT TO CONFRONT THROUGH CROSS EXAMINATION VICTIMS OF OFFENSES THAT HE DID NOT HAVE THE OPPORTUNITY TO PREVIOUSLY EXAMINE.

Cross-examination has been characterized as "the 'greatest legal engine ever invented for the discovery of truth.'" California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (quoting 5 John Henry Wigmore, Evidence § 1367 (3d ed. 1940)). Yet Coe was never given the opportunity, in any forum at any time, to examine the five victims at issue here whose accounts were used by the State to secure Coe's involuntary commitment. CP 457, 612-28, 905-07, 4015, 6750.

Those facing indefinite involuntary commitment are entitled to cross examine their accusers at some point in time as a matter of constitutional due process. 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 offenses to the jury even though Coe *never* had the opportunity to examine the five victims of those offenses before trial. U.S. Const. amend. V and XIV, Wash. Const. art. I, § 3.

In concluding otherwise, the Court of Appeals misconstrued this Court's decision in In re Det. of Stout, 159 Wn.2d 357, 150 P.3d 86 (2007). 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." Stout, 159 Wn.2d at 374. This Court distinguished the right to cross-examine witnesses from the right to confront witnesses after having previously been allowed examination. Id. at 368-69. Its holding 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.

Unlike Stout, Coe never had the opportunity to examine any of the alleged victims at issue here. The Court of Appeals erroneously equated the lack of right to be *present* at a deposition in which a victim was examined under Stout with a purported lack of right to have no examination at all at any time. Coe, 160 Wn. App. at 833-34. This Court in Stout carefully limited its holding to the situation where the accused was allowed examination prior to trial under oath and the jury was allowed to observe that examination via videotape. Stout, 159 Wn.2d at 368-69, 369 n.9, 371, 374. Procedural due process did not require redundant examination at trial under those circumstances. Id. at 371-72.

The Mathews¹ due process balancing test leads to a different result in Coe's case because he never had the opportunity to examine the victims at

¹ Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

issue and the jury was altogether deprived of the ability to observe any form of sworn testimony.

The private interests at stake here are the significant limitations on Coe's liberty through indefinite confinement, the stigma of being classified as a sexually violent predator, and subjection to unwanted treatment as the means to escape confinement. Coe is possibly confined for the rest of his life. The possible length of the deprivation of the interest is an important factor in the Mathews balancing test. Gourley v. Gourley, 158 Wn.2d 460, 468, 145 P.3d 1185 (2006) (J. Johnson, J., lead opinion) (citing Mathews, 424 U.S. at 341).

Unlike in Stout, the risk of erroneous deprivation is also in Coe's favor. Recognition of the right to cross examine at the commitment trial where there has never been an opportunity to examine a witness before adds more than "marginal protection" against erroneous liberty deprivation. The reliability of the unadjudicated victims' accounts remains to be tested through examination, as Coe has never admitted their accuracy. Cf. Gourley, 158 Wn.2d at 470 (in case involving protection order entered against father accused of sexually assaulting daughter, no due process need to cross-examine daughter because father confirmed accuracy of daughter's hearsay declaration); see also In re MH-2008-000867, 225 Ariz. 178, 182, 236 P.3d 405 (Ariz. 2010) (under Mathews

balancing test, no due process violation in presenting telephonic testimony where person subject to involuntary commitment had opportunity to fully cross examine the witness) (citing Goldberg v. Kelly, 397 U.S. 254, 269, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (due process requires opportunity to cross-examine adverse witnesses "[i]n almost every setting where important decisions turn on questions of fact"))).

In Stout, the witness at issue was in fact examined at a pre-trial, videotaped deposition that was played for the jury. Stout, 159 Wn.2d at 371. In this manner, the purposes of confrontation were satisfied by ensuring the veracity of witness testimony, allowing the accused to alert counsel to inconsistencies in the testimony of an adverse witness, and allowing the fact finder to judge the witness's demeanor. Id.

Those things are missing in Coe's case. The interest of the accused in not being inaccurately classified as mentally ill and indefinitely confined is a powerful one. The risk of an inaccurate determination increases in the total absence of witness examination.

In Stout, the Court determined the "significant protections" surrounding SVP commitments, most importantly the proof beyond a reasonable doubt standard, made it unlikely "an SVP detainee will be erroneously committed if he is not also able to confront a live witness at commitment or be *present* at a deposition." Id. at 370-71 (emphasis

added). Again, the witness in Stout was examined at deposition, which rendered additional examination at trial redundant. And because that examination took place, Stout could have reviewed the deposition with his attorney, allowing him to point out inconsistencies that could have been used to impeach the witness in any subsequent deposition regardless of whether Stout was actually present at the deposition. Id.

Coe's case presents a different scenario. Examination would not be redundant because it has never taken place for the five witnesses at issue here. Coe had no opportunity to point out inconsistencies through examination because there was no examination whatsoever. And the jury was never given an opportunity to judge the demeanor of those witnesses because they were never presented to the jury in any form. The ability to examine a witness at some point in time through a means that allows the jury to perform its traditional role of fact finder by judging a witness's veracity retains importance here. The proof beyond a reasonable doubt standard is an appropriate protection given the dire stakes at issue. But whether the State has proven someone meets the criteria for involuntary commitment beyond a reasonable doubt should be tested by examination to ensure the jury reaches an *accurate* determination that the standard has been met.

In Stout, the additional procedures of redundant examination at trial or the right to be present at the pre-trial examination did not outweigh the State's interests because they did not meaningfully enhance the accuracy of the SVP determination. Stout, 159 Wn.2d at 371-72. The Court noted "where Stout's argument that he should have been present at the deposition is concerned, the limited argument presented to us *tips* the third factor of the Mathews test in favor of the State." Id. at 372 n.11 (emphasis added).

But where examination has never been achieved, the risk of error in making the SVP determination is substantial enough to warrant the appropriate due process safeguard against error. If the circumstances in Stout merely tipped the balance in favor of the State, then the circumstances here tilt decidedly in favor of the due process right to cross examine witnesses.

The State claims there is no due process right to examine witnesses when an expert relies on those sources as the basis for expert opinion. The Court of Appeals advanced the same type of claim 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 confrontation. State v. Mason, 127 Wn. App. 554, 566, 126 P.3d 34 (2005), affd, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035, 128 S. Ct.

2430, 171 L. Ed. 2d 235 (2008). This Court disapproved of that formalistic approach, recognizing "courts ought to guard against any 'backdoor' admission of inadmissible hearsay statements" that would otherwise violate the right to confrontation. Mason, 160 Wn.2d at 921.²

The right to cross examination cannot be circumvented by declaring the bases for expert opinion are not being offered for their truth. People v. Goldstein, 6 N.Y.3d 119, 122, 810 N.Y.S.2d 100, 843 N.E.2d 727 (N.Y. 2005); Wood v. State, 299 S.W.3d 200, 213 (Tex. Crim. App. 2009); Vann v. State, 229 P.3d 197, 208-09 (Alaska Ct. App. 2010). In arguing otherwise, the State refuses to come to grips with the unrealistic premise of its argument. An expert's testimony about the factors underlying their opinion is formally not introduced for the truth of the matters asserted under the rules of evidence, "[b]ut, as a practical matter, there are times when the expert's opinion has essentially no probative value unless the jury assumes the truth of some or all of this underlying information or data." Vann, 229 P.3d at 209. The real probative force of the expert's testimony hinges on the accuracy of bases for that opinion: if those bases are false or mistaken, then the expert's opinion has essentially no value. Id.

² The issue is pending before this Court in State v. Lui, 153 Wn. App. 304, 221 P.3d 948 (2009), review granted, 168 Wn.2d 1018, 228 P.3d 17 (2010). This Court has stayed its decision in Lui pending the outcome of the United States Supreme Court's decision in Williams v. Illinois (No. 10-8505).

The Goldstein court similarly recognized the jury could not use the out-of-court statements of interviewees to evaluate the in-court expert's opinion without accepting as a premise either that the statements were true or that they were false. Goldstein, 6 N.Y.3d at 127. The jury in Coe's case likewise could not meaningfully and fairly assess the value of Dr. Phenix's opinion without first assessing the truth of the bases for her opinion. Indeed, the jury was instructed to consider "the source's of the witness's information" in determining the weight and credibility of expert opinion. CP 3478. It was logically impossible for the jury to fully evaluate Dr. Phenix's opinion without treating the unadjudicated offenses for their truth. Legal fictions should not be allowed to trump the realities of human experience.

It does not comport with fundamental fairness to have the accusations of non-testifying victims bootstrapped into evidence through the testimony of a testifying experts without an opportunity for cross-examination of the underlying accusations made by those accusers. Jurors are unable to fairly evaluate the basis of in-court opinions that rely upon out-of-court statements made by those who are effectively shielded not just from meaningful cross-examination but from any cross-examination whatsoever.

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.

The stringent test for admitting signature (modus operandi) evidence should not be diluted to the point where there is no meaningful difference between the signature test and the lesser test of common scheme or plan under ER 404(b). Dr. Keppel's expert testimony should not have been admitted to demonstrate Coe's identity as the perpetrator of various offenses because the offense features identified by Keppel did not establish a unique signature as required by law.

The Court of Appeals claimed "[d]issimilarities go to weight, not admissibility." Coe, 160 Wn. App. at 825 (citing State v. Foxhoven, 161 Wn.2d 168, 178-79, 163 P.3d 786 (2007)). That formulation of the issue eviscerates the legal test governing the admissibility of signature evidence. Proper application of the signature rule requires dissimilarities in offenses be taken into account. State v. Thang, 145 Wn.2d 630, 643, 645, 41 P.3d 1159 (2002). Only in this manner may a fair determination of whether prior acts bear such a unique and high degree of similarity as to mark it as the handiwork of the accused. Thang, 145 Wn.2d at 643; State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984).

The Court of Appeals misconstrued Foxhoven in applying its legal analysis to Coe's case. Foxhoven involved comparison of actual signatures in the form of graffiti tags. Foxhoven, 161 Wn.2d at 178-79. This Court determined "[t]he fact that there were differences in font, style, medium, and canvas used for the graffiti go to the weight that the jury should attach to the evidence of the prior acts; they do not render the evidence inadmissible." Foxhoven, 161 Wn.2d at 178-79. But a greater degree of similarity is required to establish a signature in cases that do not involve an actual signature. Id. at 179. The Court of Appeals analyzed the issue as if there was an actual signature in Coe's case instead of appropriately recognizing a greater degree of similarity is required.

Dr. Keppel identified this signature for 18 rapes: (1) intimidation; (2) co-opting victim compliance; (3) perpetrator taking off his own clothes; (4) necessity for intercourse and/or ejaculation; and (5) questioning or engaging victim in conversation. CP 4413-14, 4425-31, 4444-48; 1RP 2899, 2935. "Co-opting victim compliance" meant telling victims to be quiet and not scream or telling the victims to take off their clothing. CP 4426, 4428, 4445.

To establish signature-like similarity, distinctive features must be shared between the crimes. Thang, 145 Wn.2d at 643. Keppel admitted a number of the offenses were missing some element of the signature he had created. 1RP 2913-14, 2976. Moreover, in looking at these 18 rapes,

Keppel determined some modus operandi characteristics remained the same but that others changed from one rape to the next. CP 4424.

Keppel described the modus operandi 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 modus operandi did not need to be unique. 1RP 2974. He agreed there was nothing particularly striking or unique about the modus operandi he described for the offenses at issue in Coe's case. 1RP 2975. Yet "when 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." State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). (emphasis added).

Here, the Court of Appeals and the trial court recited the rule for admitting *signature/modus operandi* evidence, but in practice applied the less onerous test for admission under *common scheme or plan*. A common scheme or plan may be established by evidence that the defendant "committed markedly similar acts of misconduct against similar

victims under similar circumstances." State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Admission of evidence of a common scheme or plan, which is relevant only when the existence of the crime as opposed to identity is at issue, requires "substantial similarity" between the prior bad acts and the charged crime. DeVincentis, 150 Wn.2d at 21. The common scheme or plan test, however, does not require evidence of "a unique method of committing the crime." Id. at 20-21.

The approach employed by the Court of Appeals and the trial court conflates the lesser standard needed to show common scheme or plan and the demanding standard needed to show identity, where "the degree of similarity must be at the highest level." Id. at 21. The conduct exhibited in the various offenses identified by Keppel as forming a signature cannot fairly be construed as either distinctive or remarkable in the universe of sexual offenses against women. They are not sufficiently idiosyncratic. Any doubt about the admissibility of evidence to show identity must be resolved in favor of Coe. Thang, 145 Wn.2d at 642.

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

The HITS results were inadmissible hearsay because they derived from out of court victim statements offered for their truth. ER 801(c); People v. Hernandez, 55 Cal. App. 4th 225, 240-41, 63 Cal. Rptr. 2d 769 (Cal. Ct. App. 1997), review denied (Aug. 27, 1997); State v. Fortin, 189 N.J. 579, 604-05, 917 A.2d 746 (N.J. 2007). Out of court statements contained in police reports are not exempt from the hearsay rule. ER 805 (hearsay within hearsay); State v. Hines, 87 Wn. App. 98, 101-02, 941 P.2d 9 (1997); State v. Monson, 53 Wn. App. 854, 862-63, 771 P.2d 359, affd., 113 Wn.2d 833, 784 P.2d 485 (1989).

The Court of Appeals concluded the HITS evidence, even if it constituted hearsay, was properly admissible as the basis for Dr. Phenix's expert opinion. Coe, 160 Wn. App. at 829-30. Assuming that conclusion remains viable notwithstanding Coe's arguments to the contrary, the problem here is that the trial court admitted the HITS results as substantive evidence as well. CP 892, 898. A fact underlying an expert's opinion admitted for the limited purpose of explaining the basis for an expert's opinion is not substantive evidence. Group Health Co-op. of Puget Sound, Inc. v. Dep't of Revenue, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986).

The admission of the HITS evidence as substantive evidence is unequivocal error on hearsay grounds. That error allowed the jury, in determining Coe's fate, to treat the HITS results as true. That error taints the outcome because the HITS evidence, although it never should have been admitted substantively, was powerful evidence that Coe committed these other offenses as a simple matter of mathematical calculation. It is one thing for the jury to hear an expert witness such as Dr. Keppel reach a conclusion that the same signature is present in a number of offenses. Jurors are aware of human fallibility. But math presents itself as infallible. Indeed, Dr. Phenix described the HITS analysis as "scientific." 1RP 3098-99.

The HITS evidence, admitted for its truth, bolstered the credibility and strength of the expert opinion offered by Dr. Phenix in a case where the jury's assessment of her opinion was crucial. The substantively admitted HITS evidence also bolstered Dr. Keppel expert opinion by backing that opinion up with the illusion of mathematical certainty. The State used the HITS evidence to show a 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. There is a reasonable probability that the improperly admitted HITS evidence impacted the verdict.

By citing Hernandez and applying it to the facts of Coe's case, counsel sufficiently raised a hearsay objection before the trial court definitively ruled the HITS evidence was substantively admissible. CP 3995-96, 3999. The Court of Appeals acknowledged counsel lodged a hearsay objection at the trial level. Coe, 160 Wn. App. at 829.

The State nevertheless continues to argue the hearsay objection was not preserved and therefore needs to be addressed as ineffective assistance of counsel. Based on its motion to supplement the record, it apparently wants to argue the record show defense counsel was competent in not objecting on hearsay grounds because counsel included HITS investigator Tamara Matheny on his revised witness list. CP 6944.

The revised witness list provides no basis for concluding defense counsel did not lodge a hearsay objection because he wanted to examine Matheny at trial. As recognized by the Court of Appeals, counsel moved to exclude Matheny's HITS testimony. CP 3988-4007; Coe, 160 Wn. App. at 816, 826-27. Counsel lost that argument. CP 891-92, 898. Counsel filed his revised witness list that included Matheny *after* the trial court entered its order admitting Matheny's testimony and the HITS evidence. CP 891-92, 898, 6944. Under these circumstances, it is implausible to argue the inclusion of Matheny on the defense witness list

shows counsel had a legitimate reason for not lodging a hearsay objection against the HITS evidence.

Having lost the battle to keep the HITS evidence out, counsel may have wanted to ensure she was available for examination for the purpose of doing damage control. But counsel unequivocally sought to have that evidence excluded. CP 3988-4007. Assuming the trial court followed the law, a hearsay objection would have accomplished that purpose. Any failure to lodge a hearsay objection is not legitimate tactic where the record shows counsel's goal was to keep the HITS evidence out.³ See State v. Kyllö, 166 Wn.2d 856, 869, 215 P.3d 177 (2009) (only legitimate trial strategy or tactics constitute reasonable performance).

Even if the HITS evidence was admissible for the non-substantive purpose of supporting Dr. Phenix's expert opinion, no legitimate tactic excuses the failure to prevent the jury from considering that evidence as substantively true. As set forth above, prejudice results from allowing the jury to consider that evidence for its truth as opposed to treating it as mere hypothesis.

That being said, Coe stands by his additional arguments regarding why the HITS evidence was inadmissible on other grounds, including that the evidence was irrelevant because it did not meet the test for establishing

³ The State's witness lists include Matheny as well. CP 6929, 6935.

identity through a unique modus operandi. Opening Brief of Appellant at 40-43, 50-57; Petition for Review at 14-16. Dr. Phenix should not have been allowed to rely on the HITS evidence as a basis for her expert opinion or allowed to divulge that basis to the jury because the HITS evidence was irrelevant to show Coe's identity as the perpetrator. See Thang, 145 Wn.2d at 643 (evidence of other bad acts introduced to show identity is relevant only where a unique modus operandi is established).

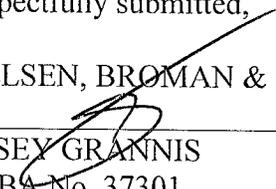
D. CONCLUSION

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

DATED this 28th day of October 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Kevin Coe:)
STATE OF WASHINGTON,)
Respondent,)
v.)
KEVIN COE,)
Petitioner.)

SUPREME COURT NO. 85965-5

CLERK

BY MALCOLM ROSS, ATTORNEY GENERAL

2011 OCT 31 AM 8:12

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF OCTOBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER KEVIN COE** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] MALCOLM ROSS
ATTORNEY GENERAL'S OFFICE
800 5TH AVENUE
SUITE 2000
SEATTLE, WA 98104
- [X] KEVIN COE
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON THE 29TH DAY OF OCTOBER, 2011.

x Patrick Mayovsky