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NO. 63732-1-I

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

In re the Commitment of Randy Town,

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SEP 17 2010

King County Prosecuting Attorney's Office
Criminal Division
Civil Commitment Unit

STATE OF WASHINGTON,

Respondent,

v.

RANDY TOWN,

Appellant.

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COURT OF APPEALS
DIVISION ONE

SEP 17 2010

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COURT OF APPEALS
DIVISION ONE

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

The Honorable Michael J. Trickey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred when it overruled Appellant's objection to bolstering testimony excluded by pretrial ruling.

2. Admission of testimony bolstering the State's decision to seek civil commitment under Chapter 71.09 RCW violated Appellant's due process right to a fair trial.

Issues Pertaining to Assignments of Error

By pretrial ruling, the court excluded evidence tending to bolster the State's decision to seek civil commitment of Appellant under Chapter 71.09 RCW. Over Appellant's objection, however, the State's expert was allowed to testify that the percentage of referrals she finds meets the criteria for civil commitment under sexually violent predator law is substantially higher in Washington (80%), than in other states (50%).

1. Did the State's expert's testimony improperly bolstering the State's case against Appellant because it unfairly injected the prestige of the prosecutor's office into the jury's consideration of whether to find Appellant met the commitment criteria?

2. Where Appellant had successfully completed a treatment program and learned intervention techniques to prevent reoffending, did testimony bolstering the State's decision to petition for civil commitment violate his right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

On October 23, 2007, the King County Prosecutor filed a petition seeking the civil commitment of appellant Randy Town under Chapter 71.09 RCW. CP 1-2, 52-54. Town had been evaluated on November 5, 2006 by Dr. Amy Phenix, who opined he met the criteria for commitment. CP 4-45.

A jury found Town met the commitment criteria beyond a reasonable doubt and he was therefore committed to the Department of Social and Health Services. CP 599; Supp. CP ____ (sub 97, Order of Commitment, 6/19/09). This appeal timely follows. CP 600.

2. Substantive Facts

a. *Town's Offense and Disclosure History*

Randy Town was 55 years old at the time of the commitment trial. CP 4; 10RP 2011. When Town was ten years old, his sixteen-year-old brother performed oral sex on him, and Town reciprocated. 5RP 1073; 8RP 70-71.¹ By Town's own admission, he is a child molester. 8RP 62. The diagnosis of Town's pedophilia, non-exclusive, sexually attracted to

¹ The Verbatim Report of Proceedings is referenced as follows: 1RP – 6/01/09; 2RP – 6/02/09; 3RP – 6/03/09; 4RP – 6/08/09; 5RP – 6/09/09; 6RP – 6/10/09; 7RP – 6/11/09; 8RP – 6/15/09 AM; 9RP – 6/15/09 PM; 10RP – 6/16/09 Start AM & PM; 11RP – 6/16/09 Mid-AM; 12RP – 6/17/09; 13RP – 6/18/09 AM; 14RP – 6/18/09 PM.

males, was recognized by experts for both the State and Town and was not disputed at trial. CP 34; 6RP 1186-87; 12RP 2108; 14RP 2409, 2438. Town is especially attracted to boys, but also has a history of offenses against girls. CP 21-27. His victims ranged in age from three months to ten years old. Id.

On February 6, 1986, pursuant to a guilty plea on one count of first-degree statutory rape, Town received a 31-month sentence. CP 8, 47-51. He was released from prison on November 14, 1987, and discharged from supervision on June 9, 1989. CP 8-9. On September 8, 1989, Town was charged with indecent exposure and received a sentence requiring one year of sexual deviancy treatment. CP 10. While undergoing a treatment evaluation, Town disclosed a number of molestations that had occurred prior to his 1986 statutory rape conviction. CP 11. Following these disclosures, Town entered guilty pleas to two statutory rapes and received an exceptional sentence of 300 months, which he was serving when the State filed the commitment petition. CP 11-13, 52-57, 65.

While incarcerated, Town completed the Sex Offender Treatment Program (SOTP) at Twin Rivers. 5RP 1009. The central issues at the commitment trial were whether Town had made sufficient progress in treatment to be able to control his pedophilia and his current risk.

The evaluation ordered as part of Town's 1989 sentence for indecent exposure was conducted by Marsha Macy. 5RP 1037. Macy's evaluation of Town took approximately three months, beginning November 7, 1989. 5RP 1037, 1068. At the start of the evaluation, Macy informed Town of her mandatory reporting obligations. 5RP 1101. Despite this, Town disclosed numerous instances of child molestations that had occurred prior to his incarceration for the 1986 statutory rape conviction, many of which he had disclosed to police when he was arrested for that offense. CP 9-10. Town said he disclosed because he was tired of keeping secrets. CP 152. Macy reported Town's disclosures to Child Protective Services, the police and the prosecutor's office.² 5RP 1101-02.

Town acknowledged molesting numerous children, starting when he was 19 and ending when he was incarcerated on the 1986 statutory rape. 5RP 1076. Town's victims were typically the children of friends or family members. 5RP 1076, 1078-79. Many of the victims were single contacts, while some were on-going. 5RP 1076-77.

In addition, Town acknowledged a variety of other behaviors including, peeping at young boys in bathrooms and shower stalls,

² These disclosures are what led to Town's 1990 guilty plea to two counts of first-degree statutory rape and the sentence he was serving at the time the State filed the commitment petition. CP 11-13, 52-57, 65.

exhibitionism, fantasizing about young boys, and using magazine and catalog photographs and television images as stimuli to masturbate. 5RP 1089-99. Town said his fantasies always involved consenting children, and he denied using force to have sex with anyone. 5RP 1091, 1104.

Town also acknowledged alcohol and substance abuse issues to Macy. 5RP 1058-61. Town said he drank heavily and used a variety of illegal drugs from an early age. 5RP 1058-59. He acknowledged failed attempts to quit, but eventually succeeded, having his last drink prior to his incarceration in 1986. 5RP 1061. Town also quit using drugs in 1986, when he went to jail, and denied using them after he was released in November 1987. 5RP 1059.

Macy said Town participated in treatment during the evaluation, including written assignments, and he did a good job on them. 5RP 1069. Macy also said Town's reports of his sexual behaviors during the evaluation period was "a very good sign of self disclosure." 5RP 1125. Town was arrested for the 1990 statutory rapes as Macy was completing her evaluation. 5RP 1068.

b. *Incarceration And Treatment History*

On January 30, 1987, Dr. Savio Chan conducted an evaluation of Town, including an interview, in preparation for his release from

incarceration on the 1986 statutory rape conviction. 4RP 799. Chan found Town was open about his offending, but showed little remorse and little insight into his problem. 4RP 802. At that time, Town did not feel he needed sex offender treatment because he had disclosed his wrongdoing. 4RP 803, 809.

As discussed above, Town made some progress during the three months he worked with Macy. 5RP 1069, 1125. Once Town entered prison on the 1990 convictions, he signed up for the voluntary Sex Offender Treatment Program (SOTP), first in 1990 and again in 1994. CP 6-7; 4RP 828; 5RP 957.

When Chan evaluated Town again, on February 4, 1994, Town said he was interested in the prison treatment program. 4RP 803, 806, 809. Due to the length of his sentence and limited resources, however, Town could not immediately enter that treatment. 4RP 809, 846-47; 5RP 955. While waiting for the SOTP, he took a variety of treatment and educational courses, including a course in informational technology. CP 18; 10RP 1987-88. Town did so well in the computer course that he acted as a teaching assistant for a number of years after he completed the course.³ 10RP 1988-90.

³ The video deposition of Edwin Anderson, the informational technology instruction was played for the jury. 10RP 2007.

Town began SOTP in November 2005 and remained in the program for 12 months. CP 152; 5RP 1007. Arkame Curry, a sex offender therapist, conducted Town's intake and oversaw his in-custody treatment. 4RP 820, 826. Curry said Town's initial assessment of his acts exhibited cognitive distortions because he felt he was being nice to his victims and it was difficult for him to see his behavior as harmful because there was not brute force. 4RP 838-39.

Curry said Town had initial difficulties with the group treatment, especially in disclosing some of his conduct and the ages of his victims. 4RP 864-64. In the third month of his treatment, however, Town faced a crisis when he was confronted by the group with his failure to disclose sexual grooming behaviors towards a cell mate. 4RP 873-75. Town's conduct was reported to the group, and he was challenged both in the groups and individual sessions until he eventually took responsibility. 4RP 876-79. This crisis was a turning point, and once Town faced it, he performed well in SOTP. 5RP 973-74, 1007-

Town's treatment addressed his number of victims and his engrained pattern of offense. 4RP 901. Town showed significant changes in his ability to disclose his offenses and to accept, and give, help. 4RP 903. As he progressed in treatment, Town reported decreasing fantasies and masturbation, along with increased appropriate arousal. 4RP 904.

Town also experienced a shift in his attitude towards his victims, with his emotional attitudes shifting from a self-focus to victim empathy. 4RP 904-05. Town successfully completed the in-custody program and his treatment summary stated, "Mr. Town has completed it and appears to have internalized a considerable body of work relative to preventing the relapse." 5RP 1009.

Town also engaged in treatment at the SCC while awaiting his commitment trial, and he seemed to be progressing well there. CP 153-57. The jury heard the duration of Town's treatment was two years, which included treatment at SCC, but did not hear of treatment at SCC. 8RP 69. Town's only reported infractions, both in prison and the SCC, involved consensual sexual relations with adult inmates. CP 44, 156; 9RP 1916-

In preparation for life in the community, Town contacted the community-based SOTP follow up program about post-release treatment. Dr. Gerald Hover, the clinical supervisor of the outpatient phase of SOTP testified that the outpatient program was available without charge to anyone who has completed the in-custody portion of the program. 10RP 1963-64, 1967.

Town also arranged for accommodation on his release with Mercy House, a DOC-approved, church-based ministry shelter that provides structured living for released offenders, including sex offenders. 10RP

2020-22, 2037. Edward Fish, the ministry coordinator of Mercy House, described the structure of life at Mercy House, including rules requiring residents to attend all meetings, remain in the residence unless they have approval of their house leaders, and to obey an 11:00 p.m. curfew. 10RP 2022-23. Alcohol and drugs are strictly prohibited. 10RP 2023. Sex offenders are required to engage in treatment. 10RP 2026-27. Children are not permitted to be on the premises unless supervised. 10RP 2041-43. All program activities are adults only, and the ministry conducts special adults-only church services. 10RP 2033; 12RP 2066.

c. *Town's Trial Testimony*⁴

Town acknowledged he was a child molester and had been one for more than 30 years. 8RP 62. During the State's direct examination, Town went through the sexual autobiography he prepared for Macy, acknowledging the offenses, behaviors and fantasies he disclosed there. 9RP 1852-1916. Town said he disclosed to Macy because, "I just decided that it was time to quit keeping secrets and put it out on the table and let the chips fall where they may." 10RP 1986.

Discussing his offender treatment, Town said he learned about his offense cycle and how it arose from his background. 8RP 70. Town said the most important lesson he learned for treatment was victim empathy.

10RP 1991-92, 2005; 11RP 21. “[I]t was that realization, I think that I really started to breakdown and say, you know, all of this justification that they liked, what it felt like was a bunch of bull, because it really hurts.” 10RP 1992.

Town’s treatment also helped him recognize his triggers and taught him interventions to apply before a situation escalates into an actual offense. 8RP 72-73, 80-81, 87-88; 10RP 1993-4; 11RP 23. Treatment also helped Town developed social skills to foster friendships with adults. 10RP 1994-95.

Town recognized he could not allow himself to be alone with children, and one of the interventions he learned was to look at his environment to make sure children were not present. 10RP 1994; 11RP 19-20. If he came across a child, Town said he would leave the area because he understood the negative impacts of looking at, or thinking about, children. 11RP 20.

When asked what had changed given his prior behavior, Town said he now understood his offending and had learned how to intervene to ensure he did not create additional victims. 10RP 2004. He said treatment had opened his eyes to the impacts he had had on his victims. 10RP 2005. When pressed by the prosecutor to estimate his risk to reoffend, Town

⁴ Town testified both as a witness for the State and on his own behalf.

agreed with the actuarial estimates of less than 50 percent, but said it was greater than zero. 9RP 1947-48. When asked why he did not say zero, Town said he did not want to become complacent. 10RP 2005. Rather, he said he had to be diligent and mindful of his risks and interventions. 10RP 2005.

d. *Expert Testimony*

Dr. Amy Phenix, Ph.D. appeared for the State, and Dr. Brian Abbott, Ph.D., appeared for Town. Both Phenix and Abbott agreed Town did not suffer from a personality disorder. 12RP 2097. Both also agreed he suffered from the mental abnormality of pedophilia, sexually attracted to males and females,⁵ non-exclusive type. CP 34;6RP 1186-87; 12RP 2108.

Phenix, however, also diagnosed three additional paraphilias – voyeurism, exhibitionism, and frotteurism – and alcohol and cannabis dependence. CP 34; 6RP 1186-87. Abbott disagreed and said there were no current symptoms of voyeurism, exhibitionism or frotteurism to support a current diagnosis, and opined Town’s past behaviors were manifestations of his basic pedophilia. 12RP 2123-25, 2247-61.

⁵ Abbott’s diagnosis did not include sexual attraction to females, but he did not dispute this.

The central issue at trial was whether Town's mental abnormality caused him serious difficulty in controlling his sexually violent behavior, and if so, whether he his mental abnormality made him likely to engage in predatory acts of sexual violence if not confined.

Phenix opined her diagnosed abnormalities caused Town serious difficulty in controlling his behavior. 6RP 1182-83. She based her opinion on his history of offending, his inability to control his risky behavior, his continuing to offend despite negative feelings about himself resulting from his acts, his admission to police in 1990 and in his SOTP intake that he only stopped when he thought he would be caught, his statements about the difficulties he experienced trying to maintain control over his behavior, and his masturbation to televised pictures of children in 2006 while in treatment. 6RP 1242, 1296-1306.

Abbott disagreed because Phenix had based her opinion largely on Town's past offending, without reports of current serious difficulty controlling sexually violent behavior. 12RP 2126. Abbott acknowledged that Town continues to suffer from deviant urges or thoughts about prepubescent children, but said he is able to control them to a point where he does not engage in acts indicative of serious difficulty controlling sexually violent predatory behavior. 12RP 2127.

Phenix and Abbott also disagreed about whether Town was likely to commit predatory acts of sexual violence if not confined in a secure facility. Phenix said he was, while Abbott said he was not. 6RP 1312; 12RP 2222. Both Phenix and Abbott used the Static-99 and Static-2002, but disagreed about how the tests should be used and the results interpreted. 6RP 1316-17; 12RP 2156-57.

Phenix said the Static-99 may be limited when applied to Town because very few offenders on the developmental samples had such a long-term history of offending or so many victims. 6RP 1341. Over a standing objection, Phenix said she believed the instrument underestimated Town's risk due to the number of victims he had and the amount of his offending that went undetected. 6RP 1346.

Phenix admitted, however, she did not have data on the numbers of victims attributed to those in the developmental samples and based her assessment on her experience which indicated very few child molesters have had so many undetected offenses. 6RP 1348. On cross, Phenix acknowledged the Static-99 did not have a category for the number of victims because the meta-analysis, from which the Static-99 factors were derived, did not show a correlation between number of victims and recidivism. 7RP 105-06. Abbott said he had searched the literature and had not been able to find any studies that looked at the number of victims

having any relationship with the future risk for sexual re-offense. 12RP 2236.

Abbott's concerns about the actuarials went to the base rates, or the rates of occurrence of a behavior in a particular population, the accuracy of the instrument, its sensitivity or inclusion of individuals who fit the criteria, and its specificity or exclusion of those who do not. 12RP 2137-40. He demonstrated that the number of false positives for recidivism increases if the local base rate is lower than the sample rates. 12RP 2137-48. Abbott then presented state-by-state base rate data, which showed Washington's five-year sexual recidivism rate to be 2.7 percent. 12RP 2158. Abbott said applying the Static-99 or Static-2002 to populations with a lower base rate presents a danger of overestimating the risk.⁶ 12RP 2160-61.

Another issue was the effect of age on recidivism. Addressing Town's age of 55, Phenix acknowledged studies indicate decreasing recidivism rates as age increases, becoming very low after age 60. 7RP 42. Phenix, however, relied on one study that showed no decline in rates

⁶ Phenix also used the Minnesota Sex Offender Screening Tool, Revised (MnSOST-R) and the Sex Offender Risk Appraisal Guide (SORAG), both of which Abbott said presented the same base rate overestimation problems. 6RP 1316-17; 12RP 2172-74. In addition, Abbott specifically critiqued the MnSOST-R for over-predicting risk and the SORAG because its absolute risk estimates had not been published in peer reviews articles, and because it over-predicts risk. 12RP 2213-17. He also critiqued the SORAG because it included both sexual and non-sexual conduct in its recidivism data. 12RP 2217.

of re-offense during the middle years for offenders with high levels of sexual deviance up to age 60. 7RP 42-44. Based on her assessment of Town's sexual preoccupation, Phenix did not expect to see his age-related decline to be as early or as quick as in those without paraphilia. 7RP 39. On cross, however, Phenix acknowledged every study done on sex offender recidivism and age showed a significant decline in recidivism after 60. 8RP 11. She agreed it was fair to expect Town's risk of recidivism to continue to decline as he ages. 8RP 11.

Abbott critiqued the one study Phenix relied upon regarding age and presented a number of others, which established a link between advancing age and declining recidivism. 12RP 2174-93. Almost all of those studies showed a sharp drop-off as age approached 60. 12RP 2178-93.

In the end, Phenix opined Town was more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility. 7RP 47. She said that risk would be above 50 percent. 7RP 47.

Abbott's opinion was that Town did not meet the more likely than not standard. 12RP 2222. Taking into account the local base rates in Washington as well as his advancing age, Abbott said, Town's risk for sexual re-offense was substantially less than 50 percent. 12RP 2223.

As discussed in detail in the argument section below, a pretrial ruling had excluded evidence regarding the nature of Phenix's employment until Town's counsel elicited the percentage of cases in which Abbott agreed with the State's recommendation. CP 78-79; 2RP 115-16, 148-49; 12RP 2080-84, 2100. This opened the door to rebuttal testimony from Phenix regarding the percentage of cases in which she worked for respondents and the percentage of referrals she found met the criteria for civil commitment. 12RP 2117-19, 2165-66; 13RP 2275-77. But as discussed below, Phenix's rebuttal testimony went beyond this. Over objection, Phenix was allowed to testify that compared average overall, she found a significantly higher percentage of referrals from Washington met the criteria for commitment. 13RP 2380-81.

C. ARGUMENT

REBUTTAL TESTIMONY OF THE STATE'S EXPERT
BOLSTERING THE STATE'S FILING DECISIONS IN 71.09
RCW CASES DENIED TOWN A FAIR TRIAL.

Involuntary civil commitment will only be upheld when the confinement takes place pursuant to proper procedures and evidentiary standards. Kansas v. Hendricks, 521 U.S. 346, 357, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); In re Young, 122 Wn.2d 1, 45, 857 P.2d 989 (1993) (individuals involuntarily committed are entitled to procedural and substantive protections). While due process does not guarantee a perfect

trial, it does guarantee a fair trial. Bruton v. United States, 391 U.S. 123, 135, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

An important element of a fair trial is that the jury consider only relevant and competent evidence bearing on the issues presented. Bruton, 391 U.S. at 135 n.6. A “fair trial” implies a trial in which the attorney representing the State does not throw the prestige of his public office, information from its records, and the expression of his own belief into the scales against the accused. State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956) (citing State v. Susan, 152 Wash. 365, 278 P. 149 (1929)).

Here the prosecution was permitted to elicit testimony from Phenix that the percentage of referrals she finds meets the criteria for civil commitment under sexually violent predator law is substantially higher in Washington (80%), than for referrals in general (50%). 13RP 2381. This testimony had the effect of bolstering the State’s case against Town by having its own expert vouch for the prosecutor's decision to seek the civil commitment of Town. This unfairly threw the prestige of the prosecutor's office into the mix of evidence for the jury's consideration.

Three of Town’s motions in limine are relevant to this issue. One asked for exclude Phenix from testifying about the number of times she does or does not recommend commitment. CP 78-79. This motion was granted, but the court cautioned the door may be opened if counsel asked

whether Phenix always appears for the State or asks whether the defense has ever asked her to do an evaluation. 2RP 148-49.

Another of Town's motions asked for exclusion of vouching of the State's filing standards by Phenix. CP 87. This motion arose from Phenix's deposition where she stated her belief that Washington has a higher filing standard than other states. CP 87. That motion was granted in part by agreement. 2RP 115.

Finally, Town moved to preclude Phenix from testifying about Washington's filing standard as a factor in classifying Town's risk. 2RP 115-16. The court eventually granted the motion, but permitted the State to try to lay a foundation for testimony about how she considers the fact of the referral itself in her assessment of risk. 2RP 182-85.

At trial, in the course of establishing Abbott as an expert, Town's counsel opened the door to the information regarding the number of times Phenix does or does not recommend commitment. Counsel elicited from Abbott that he had performed more than 1,400 psychological evaluations in his career, typically for Child Protective Services, the Probation Department and for the courts. 12RP 2080. Abbott's work for the courts and probation includes diagnoses of mental conditions, assessing risk for sexual re-offense or violent behavior, and evaluating parents who abused their children. 12RP 2082.

Abbott also said he was also retained by defense counsel to conduct evaluations. 12RP 2080. In his work for defense counsel, Abbott said his work included competency and insanity issues, risk for re-offense and propensity for violence, and evaluations of treatment progress. 12RP 2081. Abbott estimated 75 to 80 percent of his evaluations involved sex offenders. 12RP 2082. Some of those evaluations addressed sentencing mitigation, risk assessments, diagnoses of mental disorders and treatment recommendations. 12RP 2084.

Abbott also estimated 70 percent of his evaluations were for sex offender civil commitment proceedings. 12RP 2082-83. In regard to civil commitment of sexual offender cases, Abbott said he agreed with the State evaluators in 25 to 30 percent of the cases he reviews, and did not move to a full evaluation in those cases. 12RP 2100.

The State complained that Abbott had testified regarding who he worked for and in what percentage of cases he agreed with the State's evaluators. 12RP 2117. The State said they had been precluded from inquiring about Phenix's work for respondents in civil commitment trials. 12RP 2117.

Town's counsel responded that he was only attempting to head off an attack by the State in cross about Abbott working exclusively for the defense in civil commitment cases. 12RP 2118. The court agreed it had

precluded the State from asking such questions. 12RP 2117. The court also failed to see significant prejudice to the State, and reserved decision on whether Phenix would be allowed to return to testify about her work for defendants. 12RP 2118-19.

The court ultimately ruled, “Respondent had opened the door to Dr. Phenix testimony, that I previously excluded.” 12RP 2165. In response, Town's counsel noted that the State had not made a similar motion in limine, and he expected the State to cross-examine Abbott about only working for the defense. 12RP 2165-66. Counsel said he wished there had been a clear ruling the State was not to inquire into working only for the defense. 12RP 2166. Without setting specific boundaries, the court reiterated, “I think that the door has been opened.” 12RP 2166.

At the start of the last day of trial, counsel attempted to establish the boundaries of Phenix’s testimony to how much of her work was on behalf of the State and how much on behalf of the defense. 13RP 2275. Counsel expressed specific concern about vouching, to which he had not opened the door. 13RP 2275. The State's attorney assured counsel he was aware of the rebuttal rules and would inquire only into matters the door had been opened to. 13RP 2276. The court advised counsel to object if he thought something went beyond the scope of allowable rebuttal. 13RP 2277.

When Phenix testified, however, she went way beyond the limits discussed by counsel and vouched for the State's filing decisions. Over objection, Phenix testified she found a little under 50 percent of her 300 evaluations met the criteria for commitment. 13RP 2380. The State then asked how many of the Washington cases she evaluated met the criteria, and over a standing objection, Phenix said, "I found about 80 percent of those cases would be positive and . . . 20 I did not recommend commitment." 13RP 2381. Finally, the State elicited that Phenix worked for the respondents in about 30 percent of her cases. 13RP 2381.

Thereafter, in the State argued in its closing:

Well, consider Dr. Phenix. She has done about 300 evaluation[s]. She has told you that over all, in about 50 percent of the time, she has found that someone has not met the sexually violent predator criteria.

In terms of Washington cases that number is higher, about 90 percent [sic].

14RP 2434.

Phenix's statement that she found that 80 percent of Washington cases met the commitment criteria compared to only 50 percent overall, constituted unfair bolstering that went beyond proper rebuttal to Abbott's testimony. That the trial erred when it overruled counsel's objection to this testimony and the State exacerbated the prejudice by making specific reference to the improper bolstering evidence in closing argument.

In State v. Susan, 152 Wash. 365, 278 P. 149 (1929), the prosecutor in his opening statement told the jury, “never in the history of the five or six years that I have been Prosecuting Attorney of this County have I ever accused any man or woman of any crime or filed an information against them until I was satisfied that they had committed the crime.” Susan, 152 Wash. at 378. The Court had already decided to reverse on other ground, so it did not decide whether this statement constituted reversible error, but the court expressed its clear disapproval. Id. at 380. What concerned the Court was that the prosecutor’s belief as to the defendant’s guilt came prior to any of the evidence in the case. Id. at 379. Thus, it was not a statement based on the evidence, but rather suggested other facts not disclosed at trial. Id.

Similar to Susan, here, the State went to great lengths to establish Phenix as an expert in sex offender evaluations. 6RP 1159-73. The State then elicited testimony from her to vouch for the State’s civil commitment filing decisions by establishing Washington presented her with a significantly higher percent of meritorious referrals for evaluation than other states. 13RP 2381. The State followed that with argument to the jury reminding them that Phenix found a much higher percentage of Washington referrals meritorious than those of other states. 14RP 2434.

Here as in Susan, the State bolstered its case by vouching for its filing decisions. The difference is that the prosecutor in Susan announced his faith in his filing decisions by himself. Here, the State enlisted the aid of its expert witness to establish the State's track record of filing meritorious cases. Here as in Susan, the State referred to matters outside of the evidence presented to the jury, its filing decisions in other cases. Here, the State was supported by the faith Phenix expressed for those decisions.

Town had demonstrated a clear desire to stop offending and had made significant progress in treatment. He had a structured accommodation available on release and access to free out-patient treatment in the community. At trial, there was a hard fought battle of the experts.

The vouching in this case placed the weight of the State's expert behind its filing decisions. The message to the jury could not be clearer – petitions for civil commitment filed in Washington almost always merit the jury's approval because they tend to have greater merit than the typical case. This vouching denied Town his due process right to a fair trial, and this Court should reverse.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

In re the Commitment of Randy Town,)

STATE OF WASHINGTON,)

Respondent,)

vs.)

RANDY TOWN,)

Appellant.)

COA NO. 63732-1

RECEIVED
COURT OF APPEALS
DIVISION ONE

SEP 17 2010

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 17TH DAY OF SEPTEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RANDY TOWN
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388-0646

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF SEPTEMBER, 2010.

x Patrick Mayovsky

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