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

In re Detention of James Aston, Jr.,

STATE OF WASHINGTON,

Respondent,

v.

JAMES ASTON, JR.,

Appellant.

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

The Honorable William Downing, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to find a “recent overt act.”
2. Appellant’s rights to substantive due process and freedom of speech were violated.
3. The court erred in denying appellant’s request that the jury be instructed it must be unanimous as to the acts constituting a recent overt act.
4. The trial court erred in denying appellant’s motions for a mistrial after repeated references to the results of failed lie detector tests.
5. The trial court erred in permitting mention of the lie detector tests.
6. The trial court erred in imposing unreasonable time restrictions on voir dire.

Issues Pertaining to Assignments of Error

Under chapter 71.09 RCW, a person may be civilly committed as a sexually violent predator only upon proof beyond a reasonable doubt that the person “has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18). If the person was released from confinement at the time the commitment petition was filed, the State must also prove a “recent overt act” defined as

“any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.” RCW 71.09.020(12).

1. Was the evidence insufficient to show a “recent overt act” where appellant made statements acknowledging he could reoffend, wrote down his fantasies about children and masturbated to them, and admitted having deviant arousal to children in the community?

2. Did the trial court err in failing to instruct the jury on unanimity when the State did not elect which act constituted a recent overt act under the statute and argued in closing that the recent overt act was a course of conduct over an entire year?

3. Did the trial court err in failing to declare a mistrial when three different witnesses repeatedly stated or implied the results of appellant’s lie detector test in violation of the court’s ruling in limine that the tests could only be mentioned so long as the results were neither stated nor implied?

4. Was appellant denied his right to a jury trial and due process when the trial court arbitrarily cut short voir dire questioning while appellant’s counsel still had questions likely to reveal juror bias?

B. STATEMENT OF THE CASE

1. Procedural Facts

On July 16, 2007, the King County prosecutor filed a petition alleging James Aston, Jr. is a sexually violent predator (SVP). CP 1-2; RCW 71.09.030(5). Aston has one prior qualifying offense, a 1999 conviction for first-degree rape of a child. CP 1. The State alleged Aston committed recent overt acts. CP 1. The jury found Aston met the criteria for commitment under 71.09 RCW, and on October 6, 2009, the trial court ordered Aston committed to the Special Commitment Center (SCC). CP 943-44. Notice of appeal was timely filed. CP 949

2. Substantive Facts

a. *Community Custody 2006*

Aston was released from prison in January 2006 and was supervised by Community Corrections Officer (CCO) Kevin Jones until September of that year. 6RP¹ 257, 269. When Jones met with Aston to facilitate an organized transition, he found Aston quiet and timid. 6RP 261-62. Aston spoke openly about kissing a six-year-old girl and sexualizing neighborhood girls while he was between the ages of 16 and 20. 6RP 264. During those same adolescent years, Aston said he had orally raped a fifteen-year-old boy

¹ There are ten volumes of Verbatim Report of Proceedings referenced as follows: 1RP – 9/23/09; 2RP – 9/28/09; 3RP – 9/28/09 (cont'd); 4RP – 9/29/09; 5RP - 9/29/09 (cont'd); 6RP – 9/30/09; 7RP – 10/1/09; 8RP – 10/5/09; 9RP – 10/6/09. The tenth volume is a duplicate of portions of 9/28/09 that is not referenced in this brief.

and a six-year-old girl. 6RP 265. Aston told Jones he wished he was a girl and had tried to cut his penis off. 6RP 266. Following this meeting, Aston's risk level was changed from a 2 (potentially high risk) to a 3 (automatically high risk). 6RP 262, 267.

During his release, Aston was subject to numerous community custody conditions including requirements to work and participate in sexual deviancy treatment and prohibitions on alcohol and pornography. 6RP 270-71. He was also required to participate in regular polygraph lie-detector tests. 6RP 272. Initially, Aston was to report to CCO Jones weekly, but this was increased to daily after his first violation. 6RP 276.

During his release, Aston always reported as required and maintained his sex-offender registration. 6RP 329-30. His drug and alcohol testing was always negative. 6RP 331. Although he put in multiple job applications to restaurants such as Shari's and Sizzler, Aston had difficulty finding and keeping work. 6RP 301-03, 340. Aston's parents' trailer was two to three miles from the nearest bus stop, and Aston had no car. 6RP 340. Jones believed Aston tried to avoid day labor jobs because he did not like manual labor or getting dirty. 6RP 305-06. Jones visited Aston unannounced many times, but never found evidence of a violation. 6RP 342.

Aston told Jones more than once he did not want to hurt anyone or create another victim. 6RP 331-34. Therefore, Aston studiously adhered to

the requirement that he avoid parks, malls, schools, and places where children congregate. 6RP 344. Nevertheless, Aston had difficulty abiding by the condition prohibiting possession of pornography. 6RP 298-99. In March, Aston bought two books involving themes of sexual domination. 6RP 307-08. He was arrested for violating the conditions of his release and was sanctioned with 45 days in jail. 6RP 310.

Also in March, Aston admitted he fantasized about a young girl after seeing her in the community with her mother. 6RP 309. The fantasy did not violate the terms of his release; he merely was required to report such fantasies, which he did. 6RP 311. Aston reported continued fantasies involving minors in April. 6RP 313.

In July, after failing a polygraph test, Aston reported several previously unreported fantasies involving minor females and forcible rape. 6RP 314-16. He explained that he would write the fantasies down, masturbate while reading them, and then rip them up and flush them down the toilet. 6RP 316. He admitted he had saved one story and hidden it in his parents' bedroom. 6RP 317. Jones concluded this violated the conditions of Aston's release because once Aston wrote his fantasies down, they became pornography, which he then possessed. 6RP 317. This time, Aston was sanctioned 90 days. 6RP 318.

After this meeting, Aston called his mother and asked her to clean out his room because his CCO would be searching it. 7RP 454. When he learned of the clean-up, Jones instructed Aston's mother to bring him the items she had taken from Aston's room. 6RP 323. Aston's mother admitted she may have cleaned out videos and papers from Aston's room, but brought Jones nothing but a bag of trash. 6RP 324. There was no evidence of additional violations. 6RP 324.

In September, Jones was again released from jail after his 90-day sanction. 6RP 324. Supervision passed to CCO Patrick Austin. 6RP 326. From October through December 2006, Aston continued to have difficulty reporting his fantasies and working. 6RP 357-59. Although CCO Austin required Aston to apply for five jobs per day, Aston never found employment during this period. 6RP 358-59.

On November 6, Aston reported for his polygraph, and after the test, revealed more information. 6RP 360-61. Aston discussed writing stories involving mutilating children, masturbating to them, and then destroying them. 6RP 360, 362. At his CCO's request, Aston brought in a list of all the stories he had written and destroyed. 6RP 363-64. Also at his CCO's request, Aston re-wrote some of the stories he had destroyed. 6RP 386. Although writing these stories was a violation, CCO Austin chose not to charge Aston with a violation at that time. 6RP 401.

When he reported to CCO Austin on November 9, Aston acknowledged that if given the opportunity to reoffend, he would do so. 6RP 364. CCO Austin testified he believed Aston's prediction. 6RP 364. Aston also admitted he was fantasizing about children in the community. 6RP 364. CCO Austin testified that at this point, he was concerned and wanted to arrest Aston, but did not do so. 6RP 365. At trial, CCO Austin testified the only reason he did not arrest Aston was because he did not believe he had grounds to do so. 6RP 365. However, in his deposition pre-trial, CCO Austin stated he believed he had authority to arrest Aston, but did not because he wanted give him a chance. CP 669.

On December 1, Aston admitted to fantasizing about a six-year-old girl again. 6RP 367. A week later, he admitted to possessing pornography and fantasizing about an eight-year-old neighbor in a way similar to his original offense. 6RP 368. The pornographic materials Aston possessed were mainstream books and movies such as the "Harry Potter" series. 6RP 371. However, because Aston used these for masturbation purposes, his CCO concluded they were child pornography. 6RP 372-73. While awaiting the hearing on this violation, which was scheduled for December 27, Aston was involuntarily terminated from sex offender treatment, which constituted another violation of his community custody conditions. 6RP 373-74. Aston was again sanctioned, this time to 300 days in jail. 6RP 373-734. Aston was

moved to the Special Commitment Center (SCC) when the State petitioned to have him civilly committed under chapter 71.09 RCW.

b. *Treatment at the SCC*

Aston voluntarily chose to engage in treatment at the SCC beginning in November, 2007. 7RP 489. He began in the introductory group, and moved on to a “cohort” group. 7RP 489. Initially, his participation was positive. 7RP 501-04. However, in January, he told his group he did not see how anyone could make a “good life plan” when they are “smashed down” and “have to keep their doors closed.” 7RP 505-06. He began missing sessions, making speeches, and leaving early. 7RP 507-08, 510-11, 514-15. His personal hygiene deteriorated as well. 7RP 509. An incident report from May, 2008 related that he left handwritten notes describing himself as a “retarded rapist,” threw his dinner tray on the floor, and ate on his hands and knees. 7RP 524-26. As of June, 2008, Aston was no longer in treatment. 7RP 518. His job performance as a custodian at the SCC was marginal because his attendance was poor and his work needed improvement but he did not respond well to constructive criticism. 7RP 536-37, 539-40.

c. *Assessment of Dr. Judd*

Dr. Brian Judd evaluated Aston in June 2007, and again in August 2009. 8RP 607. He found overwhelming evidence Aston suffers from pedophilia and opined that diagnosis qualifies as a mental abnormality under

the statute because it impacts Aston's volitional control. 8RP 623. He based his opinion on Aston's statements that he felt ashamed of and hated his conduct, as well as the report from CCO Austin that Aston said he would reoffend if given the opportunity. 8RP 626-28. Judd also diagnosed Aston with a personality disorder not otherwise specified with antisocial and borderline traits. 8RP 635-36. Judd opined Aston's pedophilia predisposes him to acts of sexual violence.²

Judd concluded Aston is likely to engage in acts of sexual violence if not confined in a secure facility. 8RP 649. The basis for his opinion included both his assessment of Aston's offense cycle and his assessment of various actuarial instruments. People with scores similar to Aston's on the Sexual Offender Risk Appraisal Guide (SORAG), reoffended at a rate of 58% over seven years and 76% over ten years. 8RP 665-66. Judd also noted Aston's previous pattern of first fantasizing, then targeting a specific individual in the community, and then offending. 8RP 647-48. Based on that pattern, and Aston's 2006 conduct, he concluded the next logical step would have been another offense. 8RP 647-48. Judd also concluded the SORAG underestimated Aston's risk because the SORAG prediction only goes up to ten years. Because Aston was 29 years old at the time of trial,

² Judd concluded the personality disorder had an effect that would not be specific to sexual violence. 8RP 643.

Judd opined, Aston's risk of re-offense over his lifetime was likely higher than the SORAG would predict. 8RP 658, 669-70.

Judd also identified numerous acts that he concluded satisfied the statutory requirement of a "recent overt act" by causing reasonable apprehension of sexually violent harm. 8RP 675. He found Aston's stories alone were a recent overt act. 8RP 676. Also, taken together with the statements that he would re-offend, they were a recent overt act. 8RP 677. He also found Aston's escalating behavior in the community of fantasizing and then visually targeting individual children was a recent overt act. 8RP 678.

Judd also acknowledged Aston had been making some progress. Aston reported his fantasies had recently greatly decreased in frequency. 8RP 682. When he felt urges regarding children in the community, Aston reported using the distraction techniques he had been taught in treatment. 8RP 682-83. Judd also felt it was a positive sign that Aston was willing to speak openly about his fantasies and urges. 8RP 685. He also conceded that Aston explained his statement to his CCO was an acknowledgment of the possibility of re-offense, not a statement he intended to do so. 8RP 689. Since his crime, Aston had not only learned techniques for managing his deviant arousal, but had also begun taking medication known to help reduce sexually compulsive behavior. 8RP 694. Aston has stopped writing the

fantasy stories because he now understands that they escalate his arousal, which he recognizes as wrong. 8RP 696-97. Although Aston reported deviant fantasies as recently as the week before his deposition, Judd acknowledged that even with successful treatment, one would not expect such fantasies to simply stop overnight. 8RP 655-58, 708.

Before trial began, Aston's attorneys expressed concern that the court had not planned sufficient time for jury selection, given the sensitive issues involved in this type of trial. 1RP 14-15. As jury selection went on, the court insisted on moving quickly and ultimately cut off questioning while Aston's attorneys were still attempting to follow up with jurors who had raised their hands in answer to a question indicating bias such that they could not vote to release Aston even if the State failed to meet its burden of proof.³ 5RP 176.

Before trial, Aston moved in limine to exclude any mention of polygraph testing. CP 67. Although that motion was granted because the State agreed, the trial court later stated the ruling was only that the results of testing were excluded, but the fact of the tests could be mentioned. 1RP 70; 4RP 151. During the trial, both CCO's Jones and Austin, as well as Aston's mother made repeated references to the polygraph testing,⁴ including the

³ Additional facts regarding jury selection are discussed in argument section C.4.a., infra.

results, in front of the jury. 6RP 272, 314, 360-61; 7RP 458-59. The court instructed the jury to disregard, but denied Aston's repeated mistrial motions. 6RP 314-15; 7RP 459, 466.

Aston requested the jury be instructed it had to be unanimous as to which act or acts constituted a recent overt act. 7RP 564. The court agreed with the State that no unanimity instruction was required. 8RP 744-45. In closing, the State argued the recent overt act was Aston's continuing course of conduct over the year he spent on community custody. 9RP 810-11.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO SHOW ASTON COMMITTED A RECENT OVERT ACT.

a. Due Process Requires Proof of a Recent Overt Act.

Civil Commitment is a "massive curtailment of liberty." In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)). Laws abridging liberty interests violate due process unless they are narrowly tailored to further a compelling state interest. U.S. Const. amend. XIV; In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). Thus, due process requires proof of both mental illness and current dangerousness before a person may

⁴ Additional facts regarding the evidence of polygraph testing are discussed in argument section C.3.a., infra.

be committed. Albrecht, 147 Wn.2d at 7; In re Pers. Restraint of Young, 122 Wn.2d 1, 37, 857 P.2d 989 (1993).

It is in order to comport with these due process requirements that Washington's civil commitment statutes, chapter 71.09 RCW, require proof of a "recent overt act" if the person to be committed has been living in the community. Young, 122 Wn.2d at 41-42 (reading recent overt act requirement into RCW 71.09.030); Laws of 1995, ch. 216 § 3 (amending commitment statute to incorporate the requirement). In accord with Young, the commitment statute was amended to require proof of "any act that has either caused harm of a sexually violent nature or creates reasonable apprehension of such harm." Laws of 1995, ch. 216 § 1. In 2001, the Legislature amended the statute to include not only acts, but threats as well. Laws of 2001, ch. 286 § 4. In 2009, the Legislature again amended the statute, which now requires proof of an "act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors." RCW 71.09.020(12).

Aston's conduct while released on community custody, whether taken individually or cumulatively, does not constitute a recent overt act. First, his statements to his CCO were not threats under the plain meaning of

that word, nor were they “true threats” as required to comport with the First Amendment protection of freedom of speech. Second, Aston’s fantasies and stories were not overt acts.

b. Aston’s Statement He Would Re-Offend If Given the Opportunity Is Not a Recent Overt Act Because It Is Neither an Act Nor a True Threat.

Despite the substantial protection afforded freedom of speech under the First Amendment, the State may enact laws prohibiting “true threats.” A true threat is “statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another individual.” State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (internal quotes omitted). Statutes proscribing threats must be construed as limited to true threats in order to avoid invalidation for overbreadth under the First Amendment. State v. Johnston, 156 Wn.2d 355, 363-64, 127 P.3d 707 (2006). Whether a true threat has been made is determined under an objective standard that focuses on the speaker, not the listener. Id. at 361.

In In re Detention of Danforth, 153 Wn. App. 833, 223 P.3d 1241 (2009), this Court affirmed that a plea for help out of fear of re-offending could be considered a recent overt act, a “threat,” under the statute. A petition for review is pending with the Washington Supreme Court in that

case. Danforth's case appears to be the first to involve a "threat" as a recent overt act.

Chapter 71.09 RCW does not define the term "threat." RCW 71.09.020(12). When a statute does not define a word, courts derive its meaning from the ordinary dictionary definition. Harry v. Buse Timber & Sales, 166 Wn.2d 1, 21, 201 P.3d 1011 (2009). The dictionary defines threat as "an expression of an intention to inflict loss or harm on another." Webster's Third New International Dictionary 2382 (Philip Babcock Gove et al. eds. 1993).

Aston's various statements and stories were not "threats" under the plain language of the statute. When speaking to his CCO, Aston merely acknowledged the realistic likelihood that he would reoffend if given the opportunity. 6RP 364; 8RP 688-89. He did not express the intent to inflict harm on any individual. On the contrary, he seemed to be expressing fear he would harm someone involuntarily. Construing this statement as a recent overt act violates the narrow tailoring requirement of substantive due process and Aston's first amendment rights to free speech.

Nor do his fantasies, even if written down, constitute threats. See In re Detention of Anderson, 134 Wn. App. 309, 326, 139 P.3d 396 (2006) (Armstrong, J., dissenting) ("standing alone, a fantasy does not comprise a threat of harm to another"). Thoughts are by definition not an "overt" act.

Overt is defined as “open to view; not concealed; publicly observable; manifest.” Webster’s Third New International Dictionary 1611 (Philip Babcock Gove et al. eds. 1993). The statute defines recent overt act as one that either 1) caused harm or 2) creates a reasonable apprehension of harm. RCW 71.09.020. Fantasies, by their nature internal, cannot cause either harm or even incite apprehension of harm unless in some way communicated to another. But Aston’s revelation of those fantasies should not be considered a recent overt act because he was required by his treatment and the terms of his community custody to report them. 6RP 311. He communicated them only because required to do so, not in order to express the intention to harm anyone. Because Aston’s statements and fantasies were neither threats nor true threats, they do not constitute a “recent overt act.”

c. If the Threat Prong of the Recent Overt Act Definition Applies to Aston’s Statement, the Statute Is Unconstitutionally Vague.

Due process under the Fourteenth Amendment of the United States Constitution and article I, section 3 of our state constitution requires statutes give citizens fair warning of prohibited conduct and protect them from arbitrary, ad hoc, or discriminatory law enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A statute is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that

ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Courts are “especially cautious in the interpretation of vague statutes when First Amendment interests are implicated.” City of Bellevue v. Lorang, 140 Wn.2d 19, 31, 992 P.2d 496 (2000). If the definition of recent overt act can include statements such as Aston’s, the statute is unconstitutionally vague. A reasonable person would not be on notice that an acknowledgment of the realistic risk of re-offense by someone diagnosed with pedophilia, in a context such as Community Corrections, where such disclosures are encouraged and even required, would subject a person to indefinite civil commitment.

d. A Combination of Thoughts, Private Conduct, and Protected Speech Cannot Rise to the Level of a Recent Overt Act under the Statute.

Even considering all the other bases the State cited in closing argument in support of a recent overt act, the evidence is insufficient because the so-called “overt acts” were neither overt nor acts. A combination of protected speech, private thoughts, and intimate conduct involving no other person cannot be a “recent overt act” under the statute.

No Washington court has upheld a recent overt act finding solely based on private conduct, thoughts, and/or speech, with the exception of

Danforth, discussed above. Cases have found recent overt acts based on sexual activity with substitute victims. In re Detention of Anderson, 166 Wn.2d 543, 550, 211 P.3d 994 (2009) (sexual activity with vulnerable fellow patients as well as sexually violent fantasies of children); In re Detention of Froats, 134 Wn. App. 420, 438, 140 P.3d 622 (2006) (sexual harassment of developmentally disabled fellow inmate). Conduct designed to place the person in contact with preferred victims has also been found to be a recent overt act. In re Detention of Robinson, 135 Wn. App. 772, 785, 146 P.3d 451 (2006) (found locked in a bedroom with a minor); In re Detention of Hovinga, 132 Wn. App. 16, 24, 130 P.3d 830 (2006) (following girls in the Bon Marche); In re Detention of Broten, 130 Wn. App. 326, 122 P.3d 942 (2005) (going to a children's play area); In re Detention of Albrecht, 129 Wn. App. 243, 118 P.3d 909 (2005) (offering child 50 cents and grabbing his hand). Recent overt acts have been found when the person possessed child pornography. In re Detention of Brown, ____ Wn. App. ____, ____ P.3d ____ (No. 62383-4-I, filed January 11, 2010); Froats, 134 Wn. App. at 438. True threats to re-offend are recent overt acts as well. In re Detention of Paschke, 136 Wn. App. 517, 523, 150 P.3d 586 (2007) (obscene phone calls threatening rape). As are actual new sex offenses. In re Detention of Marshall, 156 Wn.2d 150, 159, 125 P.3d 111 (2005) (third degree rape).

Aston committed no such conduct. He did not commit a sex offense. Nor did he threaten to commit one. Nor did he put himself in positions of opportunity. Nor did he act out with substitute victims. Even the child pornography he was accused of possessing was only deemed to be so by the CCO because Aston used it for masturbation and fantasies. 6RP 372. The films and books cited included one of the Harry Potter movies, and other similarly innocuous media, as well as more troublesome stories he wrote himself. 6RP 371, 373.

No case has held that the type of private conduct and protected speech Aston engaged in constitutes a recent overt act under the statute. The acts the State relied on here are the type the court in Brotten mentions as helping to create reasonable apprehension in combination with a specific, more overt act. 130 Wn. App. at 336. Brotten was arrested at a park, near a children's playground. Id. at 335. The court concluded, "This act, taken together with Brotten's mental history, numerous release violations, admission of fantasizing about molesting and raping young girls, and pattern of placing himself in high risk situations in anticipation of causing sexually violent harm, constituted a recent overt act." Id. at 336.

Brotten's fantasies, taken alone, were not held to be a recent overt act. Instead, they merely contributed to the apprehension caused by Brotten's overt act of going to a children's play area at a park. Similarly, had Aston

committed an overt act, his fantasies could be used to assess the apprehension caused thereby, but they are not, in and of themselves, a recent overt act.

No Washington case has held that fantasies and private masturbation, without more, constitutes a recent overt act qualifying a person for commitment. Even when considered together, Aston's conduct while released on Community Custody is insufficient to support the jury's verdict that he committed a recent overt act. Therefore, Aston requests this Court to reverse his commitment order.

2. ASTON WAS DENIED HIS RIGHT TO A UNANIMOUS JURY VERDICT.

Like a criminal conviction, a civil commitment under chapter 71.09 RCW must rest upon a unanimous jury verdict. Young, 122 Wn.2d at 48; see also In Re Campbell, 139 Wn.2d 341, 354-55, 986 P.2d 771 (1999) (noting chapter 71.09 RCW requires a unanimous jury to find the individual a sexual predator beyond a reasonable doubt, and commitment under chapter 71.09 RCW resembles a criminal proceeding). Criminal cases analyzing the need for a unanimity instruction are applicable to civil commitment cases under chapter 71.09 RCW. In re Detention of Halgren, 156 Wn.2d 795, 809, 132 p.3d 714 (2006).

Specifically, the jury must be unanimous as to the act that forms the basis for a criminal charge. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Additionally, the jury must be unanimous as to each element of the offense. State v. Coleman, 159 Wn.2d 509, 515, 150 P.3d 1126 (2007). When the jury hears evidence of several acts which could form the basis of a charge, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Petrich, 101 Wn.2d at 570; State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911)).

The failure to require jury unanimity is manifest constitutional error that may be considered for the first time on appeal. State v. Bobenhouse, 166 Wn.2d 881, 214 P.3d 907 (2009). Review of such a constitutional challenge is de novo. State v. Jones, 159 Wn.2d 231, 237, 149 P.3d 636 (2006). Reversal is required unless the State affirmatively proves the error was harmless beyond a reasonable doubt. State v. Fisher, 165 Wn.2d 727, 755, 202 P.3d 937 (2009).

Here, the State relied on numerous behaviors over the course of the months Aston was released to establish the requisite “recent overt act.” 9RP 810-14. Aston requested a Petrich instruction that the jury must be unanimous as to the act or acts forming the basis for the recent overt act

finding. 7RP 564; 8RP 741-43. The court declined to give this instruction. 8RP 755-56. Because it is unclear whether the jury unanimously agreed on which act or acts were proved as constituting a recent overt act, the commitment order should be reversed.

In order to commit Aston, the jury had to find as one of the elements in the “to commit” instruction, that he committed a “recent overt act.” CP 940. In this case, several acts were identified as potential recent overt acts under the statute. Dr. Judd testified he found a recent overt act based on Aston’s acquisition of movies and books with children he found arousing, his pedophilic fantasies, and his statement he would re-offend. 8RP 672-75. He testified Aston’s written fantasies constituted a recent overt act in and of themselves. 8RP 676. He also testified that the written fantasies, taken together with the statement that he would re-offend could qualify as a threat constituting a recent overt act. 8RP 676-77. He also testified Aston’s “escalating pattern” of watching pornography, masturbating to fantasies, and visually targeting children in the community was a recent overt act. 8RP 677-78. Different jurors could easily have relied on different acts in voting that this element was satisfied. With this testimony of multiple acts and combinations of acts, a unanimity instruction was required.

The State’s closing argument fails to resolve the concern for jury unanimity. In closing, the prosecutor argued it was Aston’s entire course of

conduct while in the community that constituted the recent overt act. 9RP 811. But the statute does not define a recent overt act as a continuing course of conduct. Instead it is an act or a threat or a combination of an act and a threat. RCW 71.90.020(12). Even if the statute contemplated a continuing course of conduct as a recent overt act, the acts relied on in this case do not meet the standard for a continuing course of conduct that would obviate the need for a unanimity instruction.

When multiple acts are separated by time, place and other circumstances, there is no “continuing course of conduct” for purposes of a unanimity instruction. State v. King, 75 Wn. App. 899, 902, 878 P.2d 466 (1994). King was charged with one count of possession of cocaine after cocaine was found in the car he was riding in. Id. at 901. The State also presented evidence that an inventory search after arrest revealed cocaine in King’s backpack. Id. The State failed to elect which cocaine it relied on to support the possession charge and the jury was not instructed it must be unanimous. Id. at 903. The court rejected the State’s argument that the possession of the two amounts of cocaine was a continuing course of conduct excusing the need for an election or unanimity instruction. Id. at 903. The court reasoned there were two distinct instances of possession occurring at different times, in different places, and involving different containers. Id. at 903.

Similarly, the numerous acts the State points to in this case as a recent overt act occurred in different places, at different times, and involved different people. Some were fantasies Aston engaged in alone and later related to his CCO. Some were statements to his CCO. Some were stories Aston wrote. Some were acts of accessing pornography from the internet. These numerous separate acts occurred over the course of nearly a year. As in King, these acts were not a “continuing course of conduct” and either an election or unanimity instruction was required. 75 Wn. App. at 903.

Given the numerous different acts and possible combinations thereof, it more than possible jurors were not unanimous as to which act or acts satisfied the necessary element of a “recent overt act.” Therefore, the lack of a unanimity instruction or an election undermined the verdict and violated Aston’s right to due process of law. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 571.

3. THE COURT ERRED IN NOT DECLARING A MISTRIAL AFTER THREE DIFFERENT WITNESSES BROUGHT UP ASTON’S FAILED POLYGRAPH TESTS.

The rule is well established: polygraph evidence is inadmissible absent stipulation of the parties because it has not achieved general scientific acceptance. State v. Sutherland, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980); State v. Descoteaux, 94 Wn.2d 31, 38, 614 P.2d 179 (1980), overruled on other grounds, State v. Danforth, 97 Wn.2d 255, 257, 643 P.2d 882 (1982);

State v. Ahlfinger, 50 Wn. App. 466, 468-69, 749 P.2d 190 (1988). In the absence of a stipulation, reference to a polygraph test is reversible error if an inference is raised about the results of the test that is prejudicial to the defendant. State v. Terrovona, 105 Wn.2d 632, 652, 716 P.2d 295 (1986); Descoteaux, 94 Wn. 2d at 38.

Evidence of a polygraph “is liable to be prejudicial and should only be admitted when clearly relevant and unmistakably non-prejudicial.” Sutherland, 94 Wn.2d at 529-30 (quoting Descoteaux, 94 Wn.2d at 38-39). A prejudicial inference makes “mere mention of the polygraph tests impermissible.” Sutherland, 94 Wn.2d at 530. As the court noted in State v. Agren, 28 Wn. App. 1, 7, 622 P.2d 388 (1980), “Quite obviously, except under precisely circumscribed circumstances not present in this case, all trial lawyers should studiously evade references to polygraph tests to avoid any strong implication to a jury that a particular witness is a proven liar.”

It is undisputed there was no stipulation to admit polygraph testimony in this case. The repeated references to Aston’s polygraph test require a new trial because 1) the results of the test were admitted, both explicitly and by implication, 2) the references were repeated throughout the trial, 3) the polygraph was not clearly relevant regardless of the result, and 4) the failure to prevent and redact references to the polygraph amounted

evidence of bad character and also prejudiced Aston's ability to impeach a crucial State's witness.

a. Facts Regarding Polygraph Evidence

Before trial, Aston moved to exclude any mention of polygraph tests. CP 67. The motion was granted as agreed. 1RP 70. Later, the court clarified that only results of polygraph tests were excluded; mere mention would not violate the court's ruling. 4RP 151. The State wanted to (and did) elicit that Aston met with his CCO, failed to disclose fantasies he was required to report, and after taking the test, admitted he had been fantasizing. 6RP 314-15, 360-62. Aston argued mention of the polygraph was both unnecessary and prejudicial; the State could simply elicit that Aston lied when first interviewed and then recanted. 4RP 151.

i. *Testimony of CCO Kevin Jones*

CCO Kevin Jones first testified Aston was required, as a condition of his community custody, to do polygraph testing. 6RP 272. Aston objected to the mention of the polygraph and requested a sidebar. 6RP 272. After the jury left, Aston moved for a mistrial because upcoming testimony about him recanting earlier statements would imply the results of the polygraph. 6RP 278. Counsel argued it was agreed the polygraph would not be mentioned. 6RP 280. The court denied the motion for mistrial, ruling the mention of the polygraph testing was consistent with the ruling on the motion in limine. 6RP 279-80.

At this point, the prosecutor clarified what would be elicited in terms of the polygraph. He explained Jones would testify he brought Aston in for a polygraph, and when he spoke to him after the test, Aston clarified certain things. 6RP 283. Aston again objected, explaining, "There is going to be the inference that he lied. There is no way to escape that." 6RP 283.

Jones later testified he asked Aston if he had anything to report because "he had a polygraph that day." 6RP 314. Counsel immediately objected. 6RP 314. Jones continued to testify, stating that Aston first said he had nothing to report, then took the polygraph, and then spoke with him again later. 6RP 314. Counsel again objected, at which point the court intervened to give a cautionary instruction:

Let me just give you one cautionary instruction on a principle of law. Polygraph evidence is not admissible. Polygraph results are not admissible in evidence in the courts in the State of Washington and that's because polygraph evidence is simply not sufficiently reliable to be admissible. Therefore, not testimony will come in in this case regarding any polygraph testing, either the results, good, bad, or indifferent, either expressed or implied. The testimony that is allowable is the context of the conversation that ensued between Mr. Jones and Mr. Aston. But you should disregard entirely any consideration of any results of any polygraph test that might or might not have been administered.

6RP 314-15. Jones then testified, regarding the fantasies, "It took some time to get the information from him." 6RP 315.

ii. Testimony of CCO Patrick Austin

The next witness for the State was Aston's second CCO, Patrick Austin. 6RP 353. He testified, "At one point [Aston] came into the office in October and informed me that he was concerned about taking a polygraph. 6RP 360. There was no objection at this point. However, seconds later, CCO Austin brought it up again, "He came in November 6, 2006 for a polygraph." 6RP 360. Aston registered a standing objection. 6RP 361.

CCO Austin then repeated essentially the same type of testimony elicited from CCO Jones. CCO Austin testified Aston disclosed some information, "but after he disclosed more." 6RP 361. The prosecutor clarified, "So you interviewed him, he went – he took a test and then he came back and you talked to him?" 6RP 361. Austin responded, "I did." *Id.* Aston again objected that the testimony violated the court's ruling. 6RP 361. The court simply responded, "Let's move on and get into what it was that was said." 6RP 361.

The court also denied the defense's request to edit out mention of the polygraph in CCO Austin's deposition in order to impeach Austin on a crucial point. 6RP 406-408. Aston's counsel wanted to argue that if the CCO had been truly concerned about Aston's statement that he would re-offend, he would have arrested him at that point. 6RP 406. At trial, Austin testified he did not believe he had authority to arrest Aston that day. 6RP

401. By contrast, in his sworn deposition, Austin said he believed he could have arrested Aston that day for failing the polygraph test, but chose to give him a break. CP 669.

The same predicament arose again during Dr. Judd's testimony. Dr. Judd testified he relied on CCO Austin's report of Aston's statement that he would re-offend. 8RP 729-34. Again, counsel argued it was necessary to redact mention of the polygraph so that Judd could be cross-examined about his reliance on CCO Austin's testimony and knowledge of the contrary statements made in Austin's deposition. 8RP 729-34.

iii. Testimony of Mary Aston

The third and final witness to bring up the polygraph was Aston's mother Mary Aston, who testified as part of the State's case in chief. 7RP 411, 458-59. Mary Aston testified she knew her son was having problematic thoughts because, "it came up after he failed one of the polygraph tests." 7RP 458-59. After a defense objection, the court instructed the jury to disregard. 7RP 459. Apparently not understanding the court's ruling, in her answer to the next question, Mary Aston again said, "[H]e had talked about it after he failed the polygraph test." 7RP 459. Aston objected again and the jury was excused. 7RP 359.

The court stated, "I'm not sure where the fault lies for this circumstance. I know each side has had some contact with the witness in

advance of the testimony this morning, but *it's been agreed that we're not supposed to mention the polygraph altogether.*" 7RP 460 (emphasis added). Ms. Aston had not been alerted to the ruling, but the State explained first that Ms. Aston had never mentioned it before, so they were unaware it was an issue and second that Ms. Aston was not particularly interested in cooperating with the State or preparing for her testimony. 7RP 460-62.

The court denied Aston's renewed mistrial motion but instructed the witness not to mention the polygraph again. 7RP 460, 462, 464, 466-67. The court reasoned that the mention of the polygraph was not prejudicial because the results of the test were not being used as evidence of the truth of the matter asserted. 7RP 467 (referring to prosecutor's argument at 7RP 463). Additionally, the court reasoned that the jury had been nodding when instructed to disregard, indicating they could and would do as instructed. 7RP 466.

The polygraph was not mentioned again, and immediately before Dr. Judd's testimony, the court agreed that if Judd needed to refer to the polygraph testimony, he could simply refer to an "interview." 8RP 589.

b. Aston's Right to a Fair Trial was Compromised by Repeated Testimony about the Results of His Lie Detector Test.

Mere mention of polygraph results is impermissible when a prejudicial inference is raised. Sutherland, 94 Wn.2d at 530; Agren, 28 Wn.

App. at 7. Even when not directly stated, testimony which strongly infers failure of a polygraph test is inadmissible. Sutherland, 94 Wn.2d at 530. In Sutherland, the results of the test were not stated directly, but were “strongly implicated.” Id. In Sutherland, the police officer was questioned about his investigation, and testified he administered two lie detector tests to the State’s principal witness. Id. at 528-29. The witness had initially been the prime suspect and became the State’s principal witness. Under these circumstances, the court concluded that, although the officer did not testify as to the results of the polygraph, his testimony “by strong implication” gave the jury the results. Id. at 530.

As in Sutherland, the testimony of CCO’s Kevin Jones and Patrick Austin gave the jury the results of Aston’s lie detector test “by strong implication.” Sutherland, 94 Wn.2d at 530; 4RP 278, 324, 360-62. Each made clear Aston was there for a polygraph, initially gave some information, and after the test, gave more or different information. 5RP 314-15, 361. The “strong implication” is that Aston was caught in a falsehood by the polygraph test. Sutherland, 94 Wn.2d at 530. In addition to the implied results, Aston’s mother’s testimony explicitly stated the results, telling the jury, “It came up after he failed one of the polygraph tests.” 7RP 458-60.

Even isolated references to polygraph tests should be eliminated. State v. Lavaris, 99 Wn.2d 851, 664 P.2d 1234 (1983). Under the

circumstances, the Lavaris court held the isolated reference to a witness's willingness to take a lie detector test was not reversible error, nonetheless the court went out of its way to condemn the error. Id. at 860 (noting the court need not reach the issue). “[T]he better practice would have been to eliminate the reference [to the polygraph test] in light of the inherent difficulties associated with *any* kind of reference to a polygraph test.” Id. at 860-61.

By contrast, the repeated references to Aston's failed polygraph test were reversible error. See Agren, 28 Wn. App. 1. In Agren, the court declined to reverse where there was only an “isolated mention” of a polygraph test. Id. at 8. In that case, the prosecutor asked a defense witness whether he would be willing to take a lie detector test regarding his testimony. Id. at 7. Defense counsel promptly objected and the objection was sustained. Id. This was the only mention of polygraph testing. By contrast, in this case, the fact that Aston failed a polygraph was referenced seven times by three different witnesses, including his mother. 6RP 314-15, 361; 7RP 458-59.

- c. The Polygraph Testimony Prejudiced Aston because it was Intertwined with Other Prior Bad Acts and Portrayed Aston as a Proven Liar, While the Relevance was Minimal.

As in Descoteaux, the polygraph evidence in this case was intertwined with evidence of other bad acts inadmissible to show character under ER 404. 94 Wn.2d at 38-39. In Descoteaux, the defendant was charged with escape from work release. Id. at 32-33. He testified he stayed away because his fiancée was ill. Id. at 33. On cross examination, the prosecutor asked whether upon his return Descoteaux was scheduled to take a lie detector test regarding possible violations and perhaps even criminal activity. Id. at 37. Although the question was relevant to Descoteaux's intent to escape, the court held that mention of the polygraph, combined with the inference of other misconduct unrelated to the crime, was improper because its prejudicial effect outweighed any probative value. Id. at 38-39. Here, there is even less probative value to the failed polygraph test, the jury actually heard about the results, and the testimony similarly implicated Aston in unrelated misconduct, that of lying to his CCO.

Washington courts have only held a polygraph admissible absent stipulation when administration of the test was clearly relevant without regard to the results, for example when the central issue was the thoroughness of an investigation. State v. Justesen, 121 Wn. App. 83, 94-95,

86 P.3d 1269 (2004). That is not the case here. In Justesen, the defendant mother was charged with custodial interference. Id. at 85. Her defense was her good faith belief that the child's father was molesting her. Id. The State presented evidence the father had passed a lie detector test in which he denied any sexual misconduct. Id. On appeal, the court held the trial court had abused its discretion in admitting the polygraph evidence despite a limiting instruction. Id. at 94-95. Like Justesen's case, Aston's was not one in which the central issue was the thoroughness of the investigation. Indeed it is unclear what possible relevance the polygraph had to the elements necessary for commitment under chapter 71.09 RCW. Thus, the polygraph should not have been mentioned.

d. The Court's Decision to Allow Mention of the Polygraph Impacted Aston's Right to Fully Cross-Examine Witnesses.

A crucial aspect of Aston's argument at trial was that he either did not tell CCO Austin he would re-offend or Austin did not take his statement as one of intent, but rather of an indication that Aston had learned in treatment that sex offenders are likely to re-offend and his desire to prevent that in his own case. 8RP 680, 688-89; 9RP 820. To show that CCO Austin did not actually interpret this as a real threat, Aston's counsel wanted to elicit that CCO Austin could have arrested Aston that day, but chose not to. This was what Austin said in his pre-trial sworn deposition. CP 669. However,

on the stand, Austin changed his testimony and testified he wanted to arrest Aston but did not believe he could. 6RP 365, 401.

Counsel wanted to impeach Austin with his prior statement while editing out the reference to the polygraph. 6RP 406. Redacting mention of the polygraph was even more important to avoid increasing the prejudice from the prior mentions. Yet the court declined to permit redaction of the polygraph from the statement. 6RP 407. Thus, counsel was forced into a no-win situation: either re-ring the prejudicial polygraph bell or forego impeaching a crucial state's witness on a matter crucial to Aston's defense.

The prejudice only continued because Dr. Judd also relied on Aston's statement to his CCO Austin in forming his opinion that Aston was likely to re-offend if not confined to a secure facility. 8RP 628. Again, Aston's counsel wished to bring out the inconsistencies in Austin's testimony and deposition in order to undermine the basis for Dr. Judd's damaging opinion. 8RP 729-30. And again, the court declined to permit redaction of the testimony to omit mention of the polygraph. 8RP 732. The court's rulings on the polygraph prejudiced Aston because they forced counsel to choose between unfairly prejudicial evidence and crucial impeachment.

e. The Admission of Polygraph Testimony in this Case Was a Serious Trial Irregularity that Necessitated a Mistrial.

A mistrial is required when a defendant has been so prejudiced by a trial irregularity that only a new trial can ensure that the defendant will be tried fairly. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). On appeal, this Court determines whether a mistrial should have been granted by considering: (1) the seriousness of the trial irregularity; (2) whether the trial irregularity involved cumulative evidence; and (3) whether a proper instruction to disregard cured the prejudice against the defendant. Johnson, 124 Wn.2d at 76; Escalona, 49 Wn. App. at 254.

For the reasons discussed above, admission of the polygraph testimony was a serious irregularity. Since there was no other reason for the polygraph test to come in, the mentions of it were not cumulative evidence. The State may argue the testimony about Aston's failed lie detector tests was not prejudicial because the Court instructed the jury twice to disregard. 6RP 314-15; 7RP 459. Because a prejudicial lie detector bell cannot be unrung, however, particularly when rung seven times by three witnesses, the argument should be rejected. See State v. Easter, 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996) ("A bell once rung cannot be unrung") (citing State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)).

4. THE TRIAL JUDGE DENIED ASTON HIS RIGHT TO DUE PROCESS AND A FAIR JURY TRIAL BY IMPOSING UNREASONABLE TIME LIMITS ON VOIR DIRE.

a. Facts Relating to Voir Dire

Before jury selection even began, defense counsel wanted to ensure sufficient time for individual questioning, and noted the questionnaires and individual questioning alone could take a full day. 1RP 14-15. The court indicated it was not inclined to give that much time and implied counsel's concerns were unreasonable, saying "the goal should not be to bump people off for cause just because it's a satisfying thing to do." 1RP 15. Later that day, defense counsel also requested additional time on voir dire due to recent media coverage of sex offenders. 1RP 147-48. Counsel was concerned discussion of this issue should not take away from each side's time for questioning. 1RP 150. The court replied it assumed the questionnaire would shorten the time needed for questioning, but it would consider permitting more questions if necessary. 1RP 150.

Jury selection began the morning of September 28, 2009, after brief discussion of other matters. 3RP 7. Almost immediately, defense counsel expressed concern with the court's statement the previous day that it would be possible to pick a jury in one day. 3RP 9. Specifically, defense counsel objected to any intent to deny private questioning to any juror who requested it in the jury questionnaire. 3RP 9. The court declined to rule on the

objection “in a vacuum,” but stated that he would not necessarily permit individual private questioning of every juror to request it. 3RP 8-9. The court then announced the schedule. A general explanation of the case, presentation of the witness lists, discussion of the schedule of the trial, and filling out the questionnaire would occur that morning. 3RP 16-17. “If we can get that done by noon, that would be great.” 3RP 17. Although “we are not locked into any schedule,” the court declared questioning in open court on all subjects would begin at 1:30, and peremptory challenges by the end of the day. 3RP 17.

During individual questioning of jurors, the court continued to press for speed. After brief questioning by the court of one juror, the court then asked counsel, “Any quick question? There shouldn’t be.” 3RP 42. Defense counsel took the opportunity to ask questions specific to sexually violent predator cases and rape of a child. 3RP 42-43. After questioning another juror, the court asked, “Any other question? There probably isn’t.” 3RP 47. This time, no other questions ensued.

Aston’s attorney McDonald specifically requested individual questioning for any juror who answered “yes” to question 31 on the jury questionnaire, asking whether anyone who had committed more than one sexual assault was likely to commit another. Because Aston was previously convicted of only one sexual assault, not more than one, McDonald wished

to follow up individually with each juror who answered yes to that question. 3RP 48. The court denied this request and ruled McDonald could ask that question of the entire panel at once. Id.

Aston's other attorney Zorich noted "concern for how quickly this is going." 3RP 49. Although she appreciated the court had given some extra time, she explained counsel could only go over the jury questionnaires very briefly, at lunch while eating. 3RP 49. She specifically requested individual voir dire of anyone who indicated experience with sexual assault, regardless of whether they requested it. 3RP 49. Such experience would imply bias, she argued, that defense counsel needed to explore with these individuals privately. 3RP 49-50. She noted juror 7 was sexually assaulted as a child, but did not request individual questioning. 3RP 49-50.

Each of the four attorneys was then afforded 20 minutes each to question the entire panel of potential jurors. 1RP 151. At the end of that time, the court and defense counsel noted potential concerns about jurors 25, 26, and 21. 3RP 147. But defense counsel agreed everyone in the box seemed fine so far. 3RP 147.

The next morning, the court agreed to give everyone a few more minutes of general questioning of the panel, in case new thoughts arose from the questionnaires overnight. 4RP 150. However, the court did not permit counsel any more time for individual questioning of jurors regarding the

sensitive topics raised in the questionnaire. Specifically, Aston's attorneys wanted to talk to juror 7 who was sexually abused as a child, juror 23 whose sister was abused, juror 44 who seemed to indicate the mentally ill should be hospitalized, 23 whose sister was abused, and juror 28 who said homosexuality is unnatural. 4RP 160-61. Counsel noted for the record they were not afforded time to question these jurors outside the presence of the rest of the panel. 4RP 160, 161.

Attorney Zorich then moved to dismiss for cause all jurors who raised their hands when asked if they would be unable to vote to release Aston if there were only a 5-10% chance of re-offense. 4RP 157. She specifically listed jurors 24, 25, 26, 45, 19, 21, 35, 34, 40, 29, 28, 41, 47, 49, 54. The court believed that only five jurors (24, 25, 26, 21, 45, 54) had actually raised their hands in response to this question and that the question was confusing. 4RP 158. However, when Zorich questioned the jurors, several others spoke up to explain their "yes" answers the previous day including 46, 19, 28, 29, 34, 40. 4RP 164-40.

Counsel then stated she had some more questions, but the court grudgingly permitted, "One more juror, if you feel a need to." 4RP 171. Counsel asked if anyone else had raised a hand regarding these concerns the previous day. 4RP 171. At that point, juror 11 raised a hand and stated, "my

personal bias I believe would greatly influence my decision.” 4RP 172.

Counsel was never able to follow up with the remaining jurors.

The court then excused several jurors for cause and moved on to peremptory challenges. 4RP 173-74. When trial began, attorney Zorich noted for the record that she was still asking questions and had more questions for jurors going to issues of bias when the court called a halt to voir dire. 4RP 176.

The jury chosen for this trial included 11 jurors who answered yes to question 31 asking whether one conviction for a sex crime makes a person “automatically” likely to re-offend. Supp CP ____ (sub no. 87, jury questionnaires, 10/9/09). It also included one (juror 35) who had raised a hand indicating an inability to vote for the defense if the State did not prove its case. Id.

b. Unreasonable Curtailment of Voir Dire Infringes the Right to a Fair Trial by an Impartial Jury.

“A searching voir dire is a necessary incident to the right to an impartial jury.” United States v. Bear Runner, 502 F.2d 908, 911 (8th Cir. 1974). The importance of a truly impartial jury, whether the action is civil or criminal, has never really been questioned in this country. U.S. Const. amend. VI.; see also Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 297, 3 L.

Ed. 348 (1812) (“It is certainly much desired to be desired that jurors should enter upon their duties with minds entirely free from every prejudice.”).

The right to an impartial jury carries with it “the concomitant right to take reasonable steps designed to ensure that the jury is impartial.” Ham v. South Carolina, 409 U.S. 524, 93 S. Ct. 848, 35 L. Ed. 2d 46, (1973) (Marshall, J., concurring). According to Justice Marshall, “perhaps the most important of these is the jury challenge.” Id.; see also Pointer v. United States, 151 U.S. 396, 408, 14 S. Ct. 410, 414, 38 L. Ed. 208 (1894) (right to challenge is “one of the most important of the rights secured to the accused.”). “Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned.” Pointer, 151 U.S. at 408; see also State v. Rivera, 108 Wn. App. 645, 649-50, 32 P.3d 292 (2001) (discussing the venerable history of peremptory challenges).

Thus, voir dire is an essential part of the trial process because the right to challenge is meaningless, “if unaccompanied by the right to ask relevant questions on voir dire.” Ham, 409 U.S. at 532. “[T]he opportunity to prove actual bias is a guarantee of a defendant’s right to an impartial jury.” Dennis v. United States, 339 U.S. 162, 171-172, 70 S. Ct. 519, 523, 94 L. Ed. 734 (1950). The Eighth Circuit has declared:

Unquestionably one of the most effective means of insuring impartiality is the voir dire proceeding during which questioning will expose any latent bias entertained by prospective jurors. Such questioning is necessary if the party is expected to exercise its challenge in an intelligent and informed manner.

Bear Runner, 502 F.2d at 911. Although the scope of voir dire is generally within a trial court's discretion, criminal convictions are reversed when the right to inquire on voir dire has been unreasonably infringed. See, e.g., Aldridge v. United States, 283 U.S. 308, 51 S. Ct. 470, 75 L. Ed. 1054 (1931).

The rights to due process and a fair and impartial jury are also guaranteed under the state Constitution. Article 1, § 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law." The Washington Constitution further provides "[t]he right of trial by jury shall remain inviolate." Const. art. 1, § 21. Article 1, § 22 of the Washington Constitution further provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.] . . .

This right includes the right to an unbiased and unprejudiced jury.

Robinson v. Safeway Stores, 113 Wn.2d 154, 159, 776 P.2d 676 (1989);

Allison v. Department of Labor & Industries, 66 Wn.2d 263, 265, 401 P.2d 982 (1965). To that end, an accused has the right to carefully examine prospective jurors on voir dire to an extent necessary to afford the accused “every reasonable protection.” State v. Davis, 141 Wn.2d 798, 826, 10 P.3d 977 (2000); State v. Laureano, 101 Wn.2d 745, 758, 682 P.2d 889 (1984), overruled on other grounds in State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989), (quoting State v. Tharp, 42 Wn.2d 494, 499, 256 P.2d 482 (1953)).

Attempts to limit voir dire have also been strongly criticized in other jurisdictions. In Pineda v. State, 571 So.2d 105 (Fla. App. 1991), the trial court limited voir dire to 20 minutes per side. The appellate court reversed, holding:

Because the purpose of voir dire is to obtain a fair and impartial jury, time restrictions or limits on numbers of questions can result in the loss of this fundamental right. Although a trial judge has considerable discretion in determining the extent of counsel's examination of the venire, we have held it is unreasonable and an abuse of discretion to limit counsel's voir dire examinations of each potential juror to one-to-three minutes.

Pineda, 571 So.2d at 105 (citations omitted).

In another Florida case, Helton v. State, 719 So.2d 928 (Fla. App. 1998), voir dire was limited to 38 minutes. The appellate court reversed, citing Pineda. Helton, 719 So.2d at 929. In a Minnesota case, State v.

Evans, 352 N.W.2d 824, 827 (Minn. App. 1987), the court reversed an assault conviction, holding limiting the attorney's voir dire to 60 minutes after 50 minutes of general questions was arbitrary.

Although the trial court has broad discretion to determine the scope of voir dire, it cannot unreasonably and arbitrarily impose limitations without regard to the time and information reasonably necessary to accomplish the purposes of voir dire. Limitations in terms of time or content must be reasonable in light of the total circumstances of the case.

Evans, 352 N.W.2d at 827; see also, Clemments v. State, 940 S.W. 2d 207 (Tex. 1996), and Morris v. State, 1 S.W.3d 336 (Tex. App. 1999) (error to impose limit of 60 minutes and 45 minutes per side, respectively); State v. Carver, 129 Idaho 294, 923 P.2d 1001 (Idaho App. 1996) (one hour per side); State v. Williams, 123 Ore. App. 546, 860 P.2d 860 (1993) (defense counsel stopped by court after 44 minutes).

To make a determination whether a juror has any biases or prejudices that would affect the juror's decision making in a particular case a trial court must allow a reasonable and sufficient time for voir dire. Davis, 141 Wn.2d at 827. The pertinent court rule states, "A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges." CrR 6.4(b). In this case, the trial court, in an effort to meet its own goals in selecting a jury quickly, cut voir dire short and

thereby violated Aston's state and federal constitutional rights to a fair and impartial jury.

c. The Trial Court's Concern for Efficiency Did Not Justify the Denial of Necessary Time for Voir Dire.

“[M]ore important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors.” State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969), abrogated on other grounds by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). The trial court in this case essentially insisted voir dire be accomplished in one day. Additional questioning was permitted for less than one hour the second day. 4RP 150; Supp CP ____ (sub no. 71A, Trial minutes, 9/23/09). This was not sufficient time to enable Aston or his counsel to make intelligent decisions regarding the qualifications of 54 potential jurors in a case involving indefinite civil commitment of a person alleged to be a sexually violent predator. 1RP 153. The court abused its discretion by arbitrarily cutting off defense voir dire after such a short period and not allowing further questioning.

The record suggests the judge was primarily concerned with picking the jury quickly within not much more than a day, and was predisposed against permitting careful “searching” voir dire. Bear Runner, 502 F.2d at 911; 1RP 15 (implying counsel would “bump people off for cause just

because it's a satisfying thing to do.”). The court repeatedly announced the schedule and stated that questions should not be asked. After the court called a halt to voir dire, Aston's attorneys made it clear important questions remained regarding possible biases. 5RP 176. Nevertheless, the court denied counsel additional time to finish inquiring as to those sources of bias.

Specifically, counsel was denied sufficient time to question every potential juror who answered “yes” to question 31. That question asked whether the juror believed a person who had committed more than one sexual assault was “automatically likely to reoffend.” A “yes” answer indicated the juror would not have an open mind with regards to the essential issue before the jury: whether Aston would, more likely than not, commit new acts of sexual violence if not confined. Yet 11 jurors were seated who answered yes to this question. Seven of these were not directly questioned about this bias. (1, 3, 17, 18, 35, 39, 14).

Due to insufficient time for voir dire, counsel was also unable to follow up with several jurors, who raised their hands in answer to a question that indicated they could not apply the proper burden of proof. Counsel McDonald discussed media articles saying that sex offenders re-offend at a rate of 90-95%. 3RP 106. He then asked, “how many of you, knowing that, would not be able to let him be released even if the state didn't prove its case?” 3RP 109. Counsel followed up with several jurors, and then after

comments by the court, moved on to another topic, noting “I don’t have that much time left.” 3RP 117.

The next day, counsel moved to dismiss for cause all the jurors who raised their hands in response to this question, and specifically noted which jurors. 4RP 157. The court permitted some additional time for questions, but not enough for counsel to follow up with each juror. 4RP 161; 5RP 176. Counsel was not able to follow up with jurors 35, 41, 47, or 49. 4RP 162-72. Juror 35 was ultimately seated on the jury. Supp. CP ____ (sub no. 87, jury questionnaires, 10/9/09).

The court’s arbitrary decision to refuse further inquiry also precluded counsel from asking potential jurors fundamental questions in private where they would feel more comfortable discussing issues of sexual abuse. The Eighth Circuit has recognized the ineffectiveness of general voir dire questioning by a trial court. See Bear Runner, 502 F.2d at 912 (“The effect was more like a monologue by the court than a probing examination of the jurors.”); see also, Miller v. State, 785 So.2d 662 (Fla. App. 1991) (trial court’s general questions of jurors did not substitute for allowing defense counsel a reasonable time for voir dire). For example, two jurors who were eventually seated (23 and 35)⁵ indicated on their questionnaires that someone close to them had been sexually assaulted. Supp CP ____ (sub no. 87, jury

⁵ Three others (3, 12, 22) also answered that someone close to them had been sexually assaulted and were seated after private questioning. 3RP 55, 64-65, 74-75.

questionnaires, 10/9/09). Yet counsel were not able to explore this potential source of bias with them outside the presence of the rest of the venire.

Not only should there be a fair trial, but there should be no lingering doubt about it. Davis, 141 Wn.2d at 825; Parnell, 77 Wn.2d at 508. Permitting full exploration of juror bias is particularly important in civil commitment cases under chapter 71.09 RCW. Cases such as Aston's bring up topics such as child rape that arouse extremely strong emotions in most people. The court's desire to finish jury selection by the end of the day cannot excuse the infringement of Aston's fundamental right to the effective exercise of his peremptory challenges. This curtailment of voir dire deprived Aston of his state and federal constitutional rights to a fair trial by an impartial jury. The conviction should be reversed.

D. CONCLUSION

Aston requests this Court reverse his commitment order because the evidence was insufficient to show a recent overt act.

DATED this 24th day of March, 2010.

Respectfully submitted,

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No. 64264-2-I

Certificate of Service by Mail

On March 25, 2010, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

James Aston, Jr.
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Containing a copy of the opening brief, re James Aston, Jr.
Cause No. 64264-2-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



John Sloane
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3-25-10

Date
Done in Seattle, Washington