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COA NO. 69032-9-I

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

IN RE DETENTION OF ZACHARY NELSON:

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY NELSON,

Appellant.

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King County Prosecutor's Attorney's Office
Criminal Division
Civil Liberties Unit

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

The Honorable Chris Washington, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct violated appellant's due process right to a fair jury trial.

Issue Pertaining to Assignment Of Error

Whether the prosecutor improperly aligned herself with the jury, expressed a personal opinion that appellant met the commitment criteria, and vouched for the credibility of the State's expert witnesses and her case, resulting in prejudice incurable by court instruction?

B. STATEMENT OF THE CASE

Shortly before Zachary Nelson finished his juvenile sentence, the State sought his involuntary commitment pursuant to chapter 71.09 RCW. CP 1-2. At the commitment trial, the jury learned Nelson was born in 1992, making him 20 years old at the time of trial. 8RP¹ 150. As a child, Nelson had a history of sexual contact with other children, beginning when he was four years old. 4RP 48-53, 59-62, 66-69; 5RP 112-17; 7RP 13-21, 36-43. Nelson pled guilty to first degree child molestation based on an act committed in 2006 against J.S., a five-year old neighbor. Ex. 25. Nelson also pled guilty to first degree child molestation and first degree

¹ The verbatim report of proceedings is referenced as follows: 1RP - 5/10/12; 2RP - 5/14/12, 5/15/12, 5/16/12, 6/1/12 & 6/5/12; 3RP - 5/17/12; 4RP - 5/21/12; 5RP - 5/22/12; 6RP - 5/23/12; 7RP - 5/24/12; 8RP - 5/29/12; 9RP - 5/30/12; 10RP - 5/31/12.

burglary with sexual motivation based on the act of entering a neighbor's house in 2007 and sexually assaulting J.W., a four-year-old neighbor, while he was asleep. Ex. 1, 24; 4RP 10-15. As a child, Nelson also had sexual contacts with children that were not adjudicated. 4RP 48-53, 59-62, 66-69; 7RP 62-64; 9RP 28-30, 32-33.

Following his 2008 guilty pleas, Nelson was confined as a juvenile in the Maple Lane School. Ex. 15, 16; 8RP 158; 9RP 10. A Maple Lane treatment therapist and a supervisor both testified that Nelson resisted sex offender treatment and made poor progress. 7RP 9, 11, 13, 47, 49.

Nelson testified that treatment began to "click" for him about a year before his release from Maple Lane. 8RP 154-56, 158. If released from confinement, he planned to live with his grandparents, go to school and get work. 8RP 150-51; 9RP 15-16. His grandparents were supportive. 9RP 14. They testified that Nelson could live with them. 9RP 64, 66, 94, 98.

Nelson believed he had sufficient control of himself to not reoffend and would use the assistance of a sex offender therapist if he lived in the community. 9RP 12-13. He denied sexual attraction to children, explaining that he had just wanted sexual contact and had previously thought it was okay to have contact with children because he had been offended against and nothing was done about it. 9RP 18. He now knew it

was not okay. 9RP 19. He denied the need for sex offender treatment, believing he did not have a sexual deviancy problem at this point in time. 9RP 23. Nelson nevertheless planned to work with a treatment provider because he was tired of bucking the system. 8RP 151-52; 9RP 13, 24-25.

Dr. Hoberman, a forensic psychologist testifying for the State, diagnosed Nelson with pedophilia and anti-social personality disorder. 4RP 20, 80-81, 93-94. Hoberman relied on the Diagnostic and Statistical Manual IV-TR (DSM) as a guideline for reaching his diagnosis. 4RP 79. In the DSM, pedophilia refers to a condition where a person has either intense recurrent sexual fantasies or urges or sexual behaviors involving prepubescent children, generally ages 13 or younger. 4RP 81. One of the DSM requirements for a pedophilia diagnosis is that the person is at least 16 years of age and at least five years older than the child. 4RP 81. Hoberman interpreted this to mean 16 years of age at the time of diagnosis rather than the time of offense, acknowledging that some in the profession would disagree with that interpretation. 4RP 82, 178-79.

According to Hoberman, Nelson had not learned much from previous treatment at Maple Lane and elsewhere. 4RP 75. Nelson told Hoberman he was no longer aroused by sexual behavior with children and that he suppressed such feelings that still existed. 4RP 76-77. Hoberman believed Nelson was still sexually attracted to children. 4RP 88-91.

Dr. Richards, another forensic psychologist testifying for the State, diagnosed Nelson with pedophilia, antisocial personality disorder and narcissistic personality disorder. 8RP 9, 30-31, 64-65. Richards scored Nelson very high on the psychopathy scale. 8RP 58-59. He theorized the cause of Nelson's condition stemmed from being sexually abused in a savage manner at a young age. 8RP 122-23.

Dr. Richards and Dr. Hoberman opined that Nelson would more likely than not commit future acts of sexual violence if not confined. 4RP 112, 138-39; 8RP 65-66, 79-80. Both relied on actuarial instruments and clinical judgment in reaching their conclusion on risk of reoffense. 4RP 114-16; 8RP 67-68, 72-73. Dr. Hoberman concluded that Nelson's pedophilia and personality disorder created serious difficulties in controlling his behavior. 4RP 110.

Dr. Lytton, a forensic psychologist testifying for the defense, sharply disagreed with their opinions. 5RP 81, 143. Lytton opined that Nelson did not suffer from a mental abnormality or personality disorder that fit the commitment criteria. 5RP 92-93, 105, 139. Nelson might have attention deficit hyperactivity disorder but that did not make him a sex predator. 5RP 139.

Dr. Lytton was a specialist in the field of adolescent psychology and in the area of evaluating sexual offenders. 5RP 83-86, 122-23. She

disagreed with the diagnoses proffered by Dr. Hoberman and Dr. Richards because those diagnoses were confounded with the developmental aspect of Nelson's adolescence. 5RP 140, 143. According to Lytton, applying a diagnosis of pedophilia to those who were adolescents when they offended against children is extremely difficult and problematic. 5RP 95-96. Adolescent brains are still in the process of development. 5RP 97. Nelson's last sex offense occurred when he had just turned 15 years of age. 5RP 109-10. Nelson was immature at the time. 5RP 118. His developmental age when his offenses occurred needed to be considered. 5RP 117. He had matured since and was still in the process of maturing. 5RP 138-39. Nelson denied current sexual fantasies or urges towards children. 5RP 102-03. The DSM did not authorize a pedophilia diagnosis because Nelson did not show a pattern of behavior after he turned 16 years old. 5RP 103-04, 117-18.

Similarly, a diagnosis of personality disorder cannot be applied based strictly on past juvenile behavior and there were no current symptoms of a personality disorder. 5RP 105, 108. Adolescent behavior can look like manifestations of personality disorder when they are in fact not. 5RP 136-38; 6RP 45-46. Dr. Lytton did not find current traits of a dysfunctional personality. 5RP 138.

Dr. Lytton disagreed with the methods used by the State's experts to assess risk of reoffense in a juvenile-only offender like Nelson. 5RP 123-32; 6RP 40-41, 47-48. Lytton believed there was no proven way of accurately assessing risk for someone who only offended as a juvenile. 5RP 119-20. None of Hoberman's methods had adequate predictive accuracy. 5RP 124-32. Lytton believed that Hoberman harbored a gross misconception about the base rate of reoffense, which tainted his conclusion regarding risk. 5RP 140-41.

Dr. Lytton further opined that Nelson did not have serious difficulty controlling his behavior. 5RP 132-33. Nelson demonstrated knowledge of risk-management techniques and made substantial treatment progress at Maple Lane. 5RP 133-35; 6RP 30.

Dr. Lytton also opined that Nelson was not more than likely to reoffend if unconfined. 5RP 136; 6RP 46. The developmental aspects of offending as a child and teenager needed to be taken into consideration. 5RP 136. The base rate for juveniles shows a very low risk to reoffend as adults. 5RP 136.

A jury found Nelson met the commitment criteria. CP 118. The court ordered Nelson's indefinite confinement in the Special Commitment Center. CP 113-14. This appeal follows. CP 400-02.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DEPRIVED NELSON OF HIS DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Prosecutorial misconduct may violate the due process right to a fair trial. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A defendant's right to a fair trial and the right to be tried by an impartial jury are denied when there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict. Charlton, 90 Wn.2d at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, §§ 3, 22.

The prosecutor here committed misconduct in conducting cross examination and closing argument in a manner that improperly aligned the prosecutor with the jury, placed the prestige of the prosecutor's office on the line, expressed a personal opinion on whether Nelson should be committed as an SVP, and vouched for the strength of her own case and her expert witnesses. Reversal is required, despite the lack of objection, due to the incurability of the misconduct through instruction and a substantial likelihood that it affected the verdict.

- a. The Prosecutor Expressed Her Personal Opinion That Nelson Was An SVP, Vouched For Her Case And The Credibility Of The State's Expert Witnesses, And Unfairly Aligned Herself With The Jury Against Nelson.

It is well established that a prosecutor cannot use his or her position of power and prestige to sway the jury. In re Pers. Restraint of Glasmann, __ Wn.2d __, 286 P.3d 673, 679 (2012). The average jury has confidence that the prosecutor will faithfully observe her obligation to refrain from using methods calculated to produce a wrongful result while using every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). "Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger, 295 U.S. at 88. What the prosecutor says, and how it is said, is likely to have significant persuasive force with the jury. Glasmann, 286 P.3d at 679.

A prosecutor therefore commits misconduct in vouching for a witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016, 245 P.3d 772 (2011). Improper vouching generally occurs if (1) the prosecutor places the prestige of the government behind the witness or expresses a personal belief as to the veracity of the witness or (2) the prosecutor indicates evidence not

presented at trial supports the witness's testimony. Coleman, 155 Wn. App. at 957 (citing United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980); State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (citing United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir.2007))).

"Akin to the rule against vouching is the advocate-witness rule, under which attorneys are generally prohibited from taking the witness stand to testify in a case they are litigating." United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998). Both rules are "designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the 'fundamental distinctions' between advocates and witnesses." Edwards, 154 F.3d at 922 (citing United States v. Prantil, 764 F.2d 548, 554 (9th Cir. 1985)).

The prosecutor is also forbidden from vouching for the State's case by invoking the prestige of his or her office. A fair trial "certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused." State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)). Such conduct is inappropriate because it invites the

jury to assume that the State's witnesses bear a special seal of trustworthiness.

In a criminal case, the prosecutor is forbidden from expressing a personal opinion on a defendant's guilt. Glasmann, 286 P.3d at 679. In an SVP case, the analogue is the prosecutor's expression of a personal opinion that the respondent is an SVP.

It is also misconduct for the prosecutor to make comments "calculated to align the jury with the prosecutor and against the [accused]." Reed, 102 Wn.2d at 147. This alignment may occur in an obvious manner. See id. at 147 (prosecutor argued defendant's counsel and expert witnesses were outsiders, and that they drove expensive cars).

Or it may occur by subtler but no less effective means. For example, it is improper for a prosecutor to align herself with jurors by making continuous references to "we" and "us" as though jurors and the prosecutor were one and the same or on the same side. State v. Mayhorn, 720 N.W.2d 776, 790 (Minn. 2006); State v. Spencer, 81 Conn. App. 320, 329, 329 n.6, 840 A.2d 7 (Conn. Ct. App. 2004), reversed in part on other grounds, 275 Conn. 171, 881 A.2d 209 (Conn. 2005); People v. Johnson, 149 Ill. App. 3d 465, 468, 102 Ill. Dec. 835, 500 N.E.2d 728 (1986) (prosecutor unfairly aligned himself with jury by referring to "our job" to find the facts).

The presence of misconduct and its prejudicial effect are determined in the context of the record and the circumstances of the trial as a whole. Glasmann, 286 P.3d at 678. During cross-examination of Nelson, the prosecutor committed misconduct in repeatedly using the personal pronoun "we" and "us" during cross-examination in a manner that amounted to improper expressions of vouching, personal opinion and alignment. Two of many instances are as follows:

- After Nelson testified that he had taken steps to prevent himself from re-offending against children and that he wanted to show others he had changed, the prosecutor asked "Mr. Nelson, one thing I just want to communicate to you is *we all understand* that's what you want. You don't want to offend against children anymore, right?" 9RP 41. The prosecutor elicited Nelson's agreement that he would use all of his willpower and everything he had learned to prevent himself from doing that. 9RP 41. The prosecutor then asked "*The miscommunication perhaps between you and I is the fact that we believe you suffer from a mental abnormality or personality disorder which may prevent you from being able to do exactly that. Do you understand that's our perspective?*" 9RP 41. Nelson answered, "That can be your perspective, yes." 9RP 41.
- The prosecutor next asked "You disagree with that?" 9RP 41. Nelson answered, "I respectfully disagree, as I said in my deposition." 9RP 41. The prosecutor continued "And that *we, based on the knowledge that we have dealing with these offenses for years, believe that you have to honestly confront your behavior, your offenses, and your deviancy in order to get where you want to be; do you understand that?*" 9RP 41-42.

Who is the "we" in these questions? The prosecutor is obviously referring to herself. Who else is she including by her use of the word "we?" When the prosecutor says "we all understand" that "[y]ou don't want to offend against children anymore," the context is clear that by "we" she at least means herself and her expert witnesses. 9RP 40-41. The jury already heard both Dr. Hoberman and Dr. Richards testify that Nelson suffered from a mental abnormality and personality disorder that made him likely to reoffend if not confined in a secure facility. 4RP 80-81, 93-94, 112, 138-39; 8RP 9, 30-31, 64-66, 79-80. When the prosecutor says "we believe you suffer from a mental abnormality or personality disorder" that prevents Nelson from avoiding further offenses against children, the message is clear that the prosecutor, in league with the State's expert witnesses, holds that opinion. 9RP 41. The prosecutor's prefatory statement — "The miscommunication perhaps between you and I" — and her final question — "Do you understand that's our perspective?" — leave no doubt on that point. 9RP 41.

The prosecutor's follow up question, framed in terms of "we, based on the knowledge that we have dealing with these offenses for years, believe . . . ," drives the point home further. 9RP 41-42. Any juror knows the prosecutor's office is in the business of "dealing" with these kinds of cases. The jury had already heard Dr. Hoberman and Dr. Richards testify

to their years of experience in evaluating people for commitment as SVP's. 4RP 25-27, 31; 8RP 14-18. In context, the prosecutor is vouching for her own expert witnesses and her case by placing the prestige of her office behind them. She is also expressing her personal opinion that Nelson meets the commitment criteria. In effect, she is testifying through the skillful use of speaking questions, blurring the line between advocate and witness. This is misconduct. Coleman, 155 Wn. App. at 957 (vouching for witness); Edwards, 154 F.3d at 921-22 (vouching and witness-advocate rule); Monday, 171 Wn.2d at 677 (personal opinion and prestige of office); Reed, 102 Wn.2d at 147 (alignment); Mayhorn, 720 N.W.2d at 790 (alignment through "we" and "us").

The prosecutor made continued remarks in the guise of examination that not only invoked the prosecutor's opinion and personal perspective on the credibility of her expert witnesses, but also blurred and erased the lines between the distinct roles of the prosecutor and the jury.

Here are some examples:

- After Nelson testified that he did not believe he had a sexual deviancy problem, the prosecutor asked "Mr. Nelson, *can you understand why we may not be comfortable leaving that diagnosis up to you?*" 9RP 23. After Nelson said he understood, the prosecutor then followed up with "do you think that's correct, that maybe you're not in the best position to diagnose yourself, even as smart as you are, that maybe you should listen to what the experts tell you?" 9RP 23.

- The prosecutor asked Nelson "And you understand why considering your high psychopath scores that any person who knows anything about you is going to be extremely reluctant to let you engage in treatment one-on-one with anyone? I mean you picture, you're going to be released and you're just going to have this individual relationship with the counselor of your choosing that you like, someone that you get along with, that you're not going to have to engage in group, but you realize, that's not reality, right, that nobody's going to let you form that one-on-one relationship with a counselor based on concerns about your ability to manipulate, about how smart you are, Zach, *we recognize that?* Do you understand that?" 9RP 27-28.

- After eliciting Nelson's affirmation that he could understand why that may be the case, the prosecutor continued "*Can you understand why we may all sit here and be extremely concerned* about the fact that you still don't believe you need sex offender treatment, that you appear to be in denial about your problem?" 9RP 28.

- Referring back to the sexual contact with J.S., the prosecutor asked "*and you understand that we may not believe* that that little girl pulled down her own underwear so you could touch her?" 9RP 34.

- Referring to incident reports of Nelson harming other residents at Maple Lane and Nelson's aggression towards staff, the prosecutor asked "*And you could understand why it's concerning that we now see that continuing* at the SCC, correct, the aggression, the verbal aggression at staff?" 9RP 38.

- "You plead to just one count involving [J.S.], even though *we now know* there's been more than that, correct? 9RP 31.

- "So when you were interviewed by detective Schneider about the [W.] boys, you never admitted any

molestations or rapes of them other than what occurred at the shed in your yard, correct?" 9RP 32. Nelson answered "I believe at that time, no." 9RP 32. The prosecutor continued "*We now know* that wasn't true?" 9RP 32.

- Following up on the topic, the prosecutor obtained agreement from Nelson that Detective Schneider repeatedly asked Nelson if there was anyone else and Nelson repeatedly denied there was. 9RP 33. The prosecutor then asked "*We now know* that isn't true, correct?" 9RP 33.

- Referring to a Maple Lane psych intern: "Mr. Nelson, so she described first the thought that there are more incidents than -- *that we know*. Do you think that's a fair description or assessment by her?" 9RP 57. When Nelson asked for clarification, the prosecutor asked "I mean you've never admitted to *anything that we don't already know* in your records, correct?" 9RP 57.

The prosecutor's choice of language goes further than an identification of herself with the State's experts. The prosecutor's language includes jurors within its fold, in addition to herself and the State's experts. The prosecutor in this manner appealed to the jury to identify with the State's case. Nowhere is this more obvious than when she says things like "*Can you understand why we may all sit here and be extremely concerned* about the fact that you still don't believe you need sex offender treatment, that you appear to be in denial about your problem?" 9RP 28. The prosecutor is sitting there. The jury is sitting there. The prosecutor has united her perspective with the juror perspective through that "we." This is skillful advocacy. It is also entirely

inappropriate. A prosecutor cannot describe herself and the jury as a group of which the accused is not a part. Reed, 102 Wn.2d at 147; Mayhorn, 720 N.W.2d at 790. Because a prosecutor is not a member of the jury, a prosecutor's use of pronouns like "we" and "us" is inappropriate and may be an effort to appeal to the jury's passions. Mayhorn, 720 N.W.2d at 790; Spencer, 81 Conn. App. at 329, 329 n.6. Such phrasing is also inappropriate because the prosecutor makes an issue of her own credibility and belief in the State's witnesses.

During Nelson's videotaped deposition, which was played for the jury, the prosecutor elicited that Nelson denied the need for sex offender treatment. Ex. 14 at 1:00:13-26; 6RP 62-63. The prosecutor confirmed, with reference to Nelson's recent meeting with a doctor, that he wanted to go to trial, would not accept any stipulation, and deserved to go home with no strings attached. Ex. 14 at 1:00:27-1:01:09. The prosecutor then asked, "*You believe we should just let you go?*" Ex. 14 1:01:10. Nelson answered "Yeah." Ex. 14 at 1:01:15. The prosecutor asked "Untreated?" Ex. 14 1:01:16. Nelson responded affirmatively, that he wanted to work with a counselor or doctor but did not need sex offender treatment because he was sure he would not reoffend. Ex. 14 at 1:01:22-1:03:15.

Who is the "we" in the "*You believe we should just let you go?*" Again, the prosecutor is clearly referring to herself and her office as

aligned with the Special Commitment Center, where Nelson was in custody at the time of the deposition. At the same time, the intended audience for that deposition was the jury. And it was the jury that was deciding Nelson's fate, i.e., whether he should be let go into the community or confined in a secure facility. Once again there is a queasy intermingling of roles here, with the prosecutor placing herself in the role of a 13th juror.

There can be no mistake that her use of "we" is something more than an innocuous rhetorical device. She is referring to herself and her office, in addition to the treatment providers who agree with her and even law enforcement that investigated the crimes. With reference to offending against J.W., the prosecutor asked one question by stating "*We noticed when we examined the sweats* that you had on, the sweats that were removed from you, they were pajama bottom type sweats, that you had, that you had made a hole in the crotch area, in there where your penis would be, did you do that intentionally so that you could have your penis out but not have to pull your pants down?" Ex. 14 at 31:32-32:00. In another part of the deposition, the prosecutor asked, "If I understand your position on the assault that occurred in juvie, *that we say occurred* in juvie, is your position that you deny any type of wrongdoing?" Ex. 14 at 33:47-34:03.

A prosecutor functions as the representative of the people in a quasi-judicial capacity in a search for justice. Monday, 171 Wn.2d at 676. "Defendants are among the people the prosecutor represents." Id. No one sitting through Nelson's trial and listening to the prosecutor would know that. By repeatedly placing herself, her expert witnesses and the jury on one side and Nelson on the other, the prosecutor poisoned the atmosphere of the trial against Nelson. In many instances the prosecutor's choice of language, considered in isolation, does not amount to much. But considered as a whole, the repeated use of such language takes on a thematic significance with inflammatory effect. It creates a noxious environment in which the prosecutor not only injects her personal beliefs and the prestige of her office into the trial, but also sets up the jurors against Nelson through aligning herself and her expert witnesses with the jurors before deliberations even begin.

During cross examination of Nelson, the prosecutor used the word "us" in a confrontational manner on a number of occasions that in context further conveyed a sense of alignment of the prosecutor, the State's witnesses, and the jury against Nelson:

- "Zach, *you tell us* that you -- your goal is you want to prove yourself, correct?" 9RP 20.

- "You assure us about your sincerity of wanting to engage in treatment once you're released, correct?" 9RP 21.
- "Mr. Nelson, you're now going to say that the reason you didn't engage in treatment is because your attorney told you not to; *is that what you're telling us?*" 9RP 22.
- "*You tell us that if we just release you*, you go out in the community, you'll do treatment, but if I understand you, it's treatment of your own choosing with whom you want, and the type that you think you need; is that correct?" 9RP 24.
- When Nelson testified he would do treatment if released and that he was done with bucking the system, the prosecutor asked "*So you can show us now that you mean that and you could engage in treatment even at the SCC?*" 9RP 25.
- The prosecutor asked if Nelson pled guilty to one count of child molestation and then followed up with this: "And the reason I ask you that is *you tell us* that you came forward and that you did everything you could to take responsibility by pleading guilty. And I would ask you, what choice did you have at that time? You were busted, weren't you?" 9RP 29-30.
- Referring to another incident involving J.S. at her house, the prosecutor asked "*and you claim or tell us that you were invited into their home, correct?*" 9RP 35. The prosecutor also asked "*and you tell us that that mother then left you in charge of her daughter in her house, correct?*" 9RP 35.

The prosecutor used the "us" tactic in cross-examining Dr. Lytton as well:

- When asked about an aspect of a study relied upon by Dr. Lytton, the prosecutor asked, "Don't you believe that's something you should know *before you throw that statistic out to us* repeatedly?" 5RP 149-50.
- Again referring to the study, the prosecutor asked "But shouldn't you know that when you're relying on this study and *you're telling us* this reoffense rate and you're spelling out as the all important number that we should attach to, shouldn't you yourself as an expert know what percentage of those individuals were in a security facility at the time they were being studied?" 5RP 152-52. The court overruled defense counsel's badgering objection." 5RP 152.
- "And you described the sexual abuse that Zach suffered, and then yesterday *you told us* about the physical abuse that he suffered." 6RP 8.
- "On page 51 of your deposition, and consistent with your testimony yesterday, *you tell us* that one of the reasons you believed Zach is that you found him to be very revealing about the disclosures of his sexual offenses; is that correct?" 6RP 11.
- "And isn't it true, although *you tell us* that you were compelled by how revealing Mr. Nelson was during your interview, that Mr. Nelson never revealed anything to you that we didn't already know from the records?" 6RP 12.
- "And more I want to focus on though when *you tell us* that there would be no reason to believe that there were other sexual offenses, there really would be, wouldn't there? 6RP 14.
- "My question is *when you say to us*, well, I would have no reason not to believe him, I would have no reason to think that there would be other sexual offenses, that's not accurate, is it?" 6RP 15.

- "All I'm asking you is you could have examined what he told you with a critical eye *instead of repeatedly telling us*, and we'll go through your deposition, that you have no reason not to believe him, that's how you -- that's how I assessed his credibility is you had no reason not to believe him." 6RP 16.

- "*But you tell us* that the reason that you believed Mr. Nelson when he says that he no longer has sexual fantasies about children, it's because you believe him when he tells you that, and you have no reason to not believe him; you don't even view it with a critical eye?" 6RP 17-18.

- "And when I asked you in the deposition, quote, he then told you that a hundred percent of his sexual fantasies are of adults, your response is yes. I asked you, and do you believe that? And again your response is, I don't have any reason not to believe it. *That's what you told us?*" 6RP 23.

Not even Nelson's grandmother was spared. The prosecutor continued her "us" rhetoric with her as well. At one point, the prosecutor asked Nelson's grandmother what she knew about Nelson's response to treatment, to which she replied that she did not know much because she could not get information from the treatment providers. 9RP 106. The prosecutor then asked, "Well, you could ask his attorney. I mean *you're coming to us* in essence and saying you're going to take complete responsibility for someone who's a know sex offender?" 9RP 106. The grandmother answered "Yes, ma'am." 9RP 106. The prosecutor continued, "*That's what you're telling us. But you're telling us* that in so taking that responsibility, you don't really know what you're taking on?"

9RP 106. The prosecutor followed up on the grandmother's answer that she had a clue about what she was taking on by asking, "Can you contain it, can you supervise it, which is what you're in essence taking on, *you're telling us?*" 9RP 107.

Who is the "us" in these questions? The witnesses are answering the prosecutor's questions, telling her something. The jury is sitting there listening to the witnesses. The prosecutor, by using the word "us," is unmistakably referring to herself and the jury, lining herself and the jury up on one side of the case and the defense witnesses on the other. In doing so, the prosecutor has improperly aligned herself with the jury, pitting that collective unit against Nelson and his witnesses. Mayhorn, 720 N.W.2d at 790; Spencer, 81 Conn. App. at 329, 329 n.6.

In questioning Nelson's grandmother, the prosecutor asked "if *we couldn't treat or make him do treatment while he was within custody, within confines, how do you expect him to do that while he's out?*" 9RP 109. Through use of the word "we," the prosecutor's is aligning her office with the treatment providers available to Nelson prior to the commitment trial that were unable to get him to do the treatment. The jury had already heard from several State's witnesses regarding Nelson's treatment failings. The prosecutor's "we" signals an identification of those witnesses with her

office, as if they were all involved in a collective effort to help Nelson before it came to a commitment trial.

In questioning Nelson's grandfather, the prosecutor asked "I think you said that you think that they'll be what you're calling parole for two years. Do you understand that *we lose all jurisdiction over him* once he turns 21; there will be no supervision; it will be all on you; there will be no turning in, there will just be a new victim? Do you understand that?" 9RP 86.

Who is the prosecutor referring to when she says, "we lose all jurisdiction?" The prosecutor's office has jurisdiction to prosecute. Courts have jurisdiction over people and cases as well. The prosecutor, by stating "we lost all jurisdiction over him," has aligned her office with the court. And the prosecutor is making this case personal. Her language suggests Nelson is about to escape from the prosecutor's oversight and ability to supervise him in a manner that will prevent a future offense in the community.

The prosecutor's improper opinion, vouching and alignment language continued into closing argument. At one point, the prosecutor told the jury "*We're labeling the respondent a sexually violent predator because that's what the law calls it when you look at the elements. I'm not here though to say he's a monster, that he's worthless, that we give up on*

him." 10RP 21. The prosecutor, through the use of "we," is again conveying to the jury that her office has personally determined Nelson is an SVP, in agreement with the State's expert witnesses on the issue. It is an improper expression of personal opinion. Glasmann, 286 P.3d at 679, 680. It is analogous to a prosecutor in a criminal trial telling the jury that "we're labeling the defendant guilty." Her use of "we" then immediately bleeds over to the sense of alignment, of the prosecutor and the jury merging as one in their collective perspective on Nelson. She is saying that "we" should not "give up on him." 10RP 21. The State is included in that "we." So is the jury. Nelson most definitely is not.

This intermingling of prosecutor and juror identities continues throughout the course of closing argument. At the close of her initial argument, the prosecutor maintained "the one thing I do want to address up front, before defense stands, is *from the State's perspective*, throughout this case, from the opening words of he's just a kid to the continued theme throughout this trial, the defense has repeatedly attempted to assure you that this is just a juvenile like other juvenile sex offenders. That's a disservice to Mr. Nelson, who hears that, as he sits here. *It's a disservice to us*, and it's simply not accurate." 10RP 33.

Again, the prosecutor uses "us" in the collective sense of referring to herself and the jury as though they were one or on the same side. That

rhetorical strategy is preceded by referring to "the State's perspective," emphasizing that the State's perspective and the jury's perspective are really one and the same. 10RP 33.

Referring to the definition of "predatory" in court instruction, the prosecutor tells the jury: "And *what we see* through the respondent's offense history is that all of his victims to date have met that, have met that definition. *We're not talking about* he's not preying on family members or its not a situation where someone may be married or in a dating relationship, not to say those crimes aren't concerning, but that's not the type of crime that this statute address. *These crimes and the future crimes that we're concerned about are crimes that we're worried he will commit* against acquaintance, a neighbor, a stranger, or someone that de develops a relationship with for the purpose of victimization." 10RP 28. " 10RP 28.

Who is worried here? The prosecutor? The State's expert witnesses? The jury? The answer, of course, is all three, as conveyed through the prosecutor's skillful use of the inclusive "we."

Closing argument is also replete with examples of the prosecutor using the language of what "we" know, learned or saw and what Nelson and his defense witnesses told "us." In this manner, the alignment of prosecutor and jury against Nelson and the defense was further cemented. Examples are as follows:

- "It's said that life is sometimes about opportunities, and what *we've learned* about the respondent in this case is that he's very good at creating his own opportunities." 10RP 12.
- "Looking at his history, *we learned* that *we see* a child by the age of 4 who's been victimized, who's already acting out, showing signs of sexual preoccupation, inappropriate sexual activity with other children." 10RP 12.
- "*We see* by age 5, *we have* an admission from him of a time that he performed oral sex on another child while they were in bed together, and *we see* by 8 he's learning to create his own opportunities to molest." 10RP 12-13.
- "*We know* from that evaluation that there's a finding that he's at moderate to high risk to reoffend. And it's correct. He does, despite the efforts of the system, and *we all know* the system failed him here, maybe his mother failed him in life, *I understand that. We all recognize that.*" 10RP 13.
- "But *what we know* is there were attempts to provide service to Mr. Nelson, and *we recall* that he went to Ryther, to Epic Center, to Ruth Dykeman, and what *we see* already is the first evidence of his strong personality disorders, the fact that you can't give treatment to this individual because he can't get himself to where he needs to be behaviorally and accept that treatment. Instead he's running away from these facilities, he's rejecting efforts, and then importantly *what we have* is by the time he's 14, what *we know* is he's offending again." 10RP 14.
- "*We know* by the age of 14 he's molesting a 5-year-old neighbor girl." 10RP 14.
- "*We know* he then turns his thoughts and desires to the two neighbor boys on the other side, and again he's developing a means or a method to create his opportunity. And *we know* from him yesterday and the deposition that he's in denial about this." 10RP 15.

- "But what *we know* is he's creating his own opportunity." 10RP 15.
- "So *we know* that by 14 and 15, he's developing the ability to create the means and the method to attract children to him, to create his opportunity. And *we know* that the level of activity that he is engaging in isn't touching, isn't exposing; it's full on oral intercourse, and we know now with thoughts of anal intercourse, with thoughts of penetration, when *we finally get to* some of his admissions about what he wanted or intended to do when he entered that home." 10RP 16.
- "*We know* that at some point the molesting behind the shed, the touching of the kids in his yard and in his home aren't enough for him." 10RP 16.
- "You get a better glimpse of what his thoughts were when you look at State's 17 and 18, the behavioral chain analysis where you have a better description from him and not the current regression that *we see* when he's clearly describing the arousal he feels when he thinks about [J.S.], when he makes the decision to offend[.]" 10RP 17.
- "*We know* that at this point his volitional control is low." 10RP 17.
- "And *we know* that when he crawls into this home . . . it's not the sleeping adult woman that he's attracted to or that he reaches for or that he wants or desires; it's the child, and he takes the one that's closest to him and he sexually offends that child." 10RP 18.
- "Whether *we know* if that was the first time Mr. Nelson entered that home, crept into that home in the middle of the night and offended against that family, *we don't. We don't know* that." 10RP 18
- "*We know* that we likely aren't even aware of his full offending history. These are just the things *we know* about[.]" 10RP 18.

- "Considering in light of the defendant's offense history, which really is the evidence of what he did and what he may be capable of, it was then that *we turned to* the evaluations by the experts in this case. And you're instructed, and I wholeheartedly embrace this, that you don't sit there as a juror and have to wholeheartedly accept an expert's opinion just because they have a Ph.D. after their name or a doctor before, and just because they take the stand, because collectively you're smarter than they are. Collectively as a group, when it comes to common sense and certain issues, you may be smarter than they are. And *we all recognize* that." 10RP 19.

- "By the time he's 15, that we are in the system, this many offenses, that *we're aware* of the early onset of his sexual acting out, and then once he gets to juvenile hall, well, the purpose of his sentence was to force him into treatment." 10RP 21.

- "It's finally by instruction number 6 that we hit the heart of this case, and this is the instruction that will guide your deliberations. It's the instruction that we've had before you from the beginning of this case, and it sets forth the three elements that the State has to prove to you beyond a reasonable doubt before you can find that the respondent is a sexually violent predator, meets that definition. After that instruction, all of the other instructions relate definitionally to certain terms that we'll talk about that are contained in those elements. So starting with the easiest element that we have here, we have element number 1, and it is has the respondent been convicted of a crime of sexual violence? *We know* that he has convictions." 10RP 23.

- "And regarding element number 3, that's where *we spent* some time during the trial talking about the risk assessment of Mr. Nelson." 10RP 30.

A prosecutor's use of "we know" statements in closing argument are not condoned because such statements readily blur the line between

improper vouching and legitimate summary. United States v. Younger, 398 F.3d 1179, 1191 (9th Cir. 2005). "The question for the jury is not what a prosecutor believes to be true or what 'we know,' rather, the jury must decide what may be inferred from the evidence." Younger, 398 F.3d at 1191. The prosecutor is free to marshal evidence actually admitted at trial and draw reasonable inferences from that evidence in closing argument. But the use of "we know" is improper "when it suggests that the government has special knowledge of evidence not presented to the jury, carries an implied guarantee of truthfulness, or expresses a personal opinion about credibility." United States v. Bentley, 561 F.3d 803, 812 (8th Cir. 2009).

If what happened during the prosecutor's cross-examination were ignored, a case could be made that the prosecutor's repeated references to "we" and "us" during closing argument amounted to nothing more than summarizing the evidence against Nelson and drawing inferences from it. But when looked at in the context of the larger trial, the prosecutor's argument to the jury were a continuation of the themes of alignment, vouching and personal opinion already established during the course of the State's examination of defense witnesses.

The prosecutor continued to advance the "us versus them" alignment theme in her rebuttal argument through the further intermingling of herself and the jury. Examples are as follows:

- "Let's start with Dr. Lytton. You're told that she took a risk and that she demonstrated courage, and *I'm not going to apologize for the vigorous way in which I cross-examined her, and I want to explain the reason why that occurred.* You start first with someone who calls herself an expert on this topic, who *demonstrates to us* right from the start a red flag about a bias that she may have, and she describes to you the fact that she's fostered 20 juvenile boys. You get the feeling that this is somebody who maybe wants to save those at risk. *I appreciate that as a human emotion, but do I want that in my expert?* No. And *we start with* the just the way Dr. Lytton, this reliable, courageous opinion came to light. *We know* that she evaluated Mr. Nelson and that she herself concluded she was on the fence but leaning towards the diagnosis of pedophilia. She sat on that diagnosis for months in that position, and it wasn't until she was contacted by defense that she flips her opinion and then *gives us* a series of explanations why she did that that simply don't hold weight." 10RP 48.
- "When you have an expert who sits down and she's read Hoberman's report at this point, who sits down with an individual, who has a chronic history of lying, if she had read the records, and *I don't say that lightly to you, I don't call him a liar just because he's sitting here charged,* I call him -- that he has a history of lying because look at the statement he gave to detective Schneider, the first statement, look at the second statement he gave, compare that to the deposition, *and I don't have an IQ of 120, but I'll tell you what, I can spot lies, and I would hope they can too,* and not to say you're a bad individual, but if you're an expert and you're sitting down with somebody that you see that pattern of lying, you better be on guard." 10RP 50.
- "You also are dealing with an individual that doesn't just test as a psychopath, he's in the top one percent, *yet she*

tells us she sits down with him, interviews him, she appreciates that he's not fakey, she finds him highly disclosing, even though he doesn't disclose a single thing other than what we already know, and *she repeatedly tells us* what she lobs on his claims, his denials, well, I had no reason not to believe him." 10RP 50-51.

- "It's easy to sit and criticize others and to *not offer any meaningful information for us to deal with*. I had no reason not to believe him, *she tells us*, but yet she then bases her entire opinion on his word, and then when asked about it during cross-examination, retreats to the position of well, that's not my role when I'm an expert, it's not my role to assess his credibility; that's not what I'm doing as an evaluator. *I can understand* someone's grandfather testifying and *telling us*, I love him and I take him at his word, but that's not the role of an expert, who calls themselves [sic] a forensic psychologist." 10RP 51-52.

- "*Defense tells us* that there are indications that at the end of respondent's stay at Maple Lane, that something started to click, that something started to click, and he started to make progress. The extent of that progress isn't sufficient." 10RP 52.

- "Now *what we have* is an individual who completely denies." 10RP 52.

- "Maybe towards the end of his JRA stay, when he realized that he was being looked at for civil commitment, something clicked and he started to engage in treatment. But it didn't continue when he got to the SCC and instead *now we hear him state*, I don't need it." 10RP 53.

- "*We also hear defense say* that well, he does say he wants specialized treatment. He'll admit that. And you know, *really to me what that implies* is Mr. Nelson is in charge of his treatment, and *when we hear his testimony* from yesterday, *we get the impression* that Mr. Nelson believes that he should diagnose himself, he should decide who provides him treatment, he should decide what kind of

treatment it is, and he'll *describe to us* the progress that he's making in that treatment." 10RP 53

- "I mean *most of us sitting here recognize* the fact that you've dealt with juveniles, that their brains work differently, if at all, at times. I *mean we have all probably encountered* and come into contact with juveniles who are impulsive, who can't explain why they did what they did, and there is always a hope that someone is going to mature and develop." 10RP 54.

- "You're told that your job here is to find out whether or not *we have proved* our case beyond a reasonable doubt." 10RP 55.

- "Mr. *Nelson told us yesterday* in his direct examination, quote, unquote, I have complete control. No, he doesn't. At this point, twelve of you will have that control. And I hope you exercise it wisely." 10RP 57-58.

Defense counsel did not object to any of the argument cited above.

Counsel did lodge one objection on the ground that the prosecutor was vouching for Dr. Hoberman, her expert witness. 10RP 20. That objection was overruled. 10RP 20. The relevant portion of the record is as follows:

[Prosecutor]: We give you expert testimony with the hope that it helps you assess the information and put meaning to it. And *from my perspective*, when you assess an expert's credibility, there are certain things that you look for. You look for, number one, are they thorough? *Do we have experts* who have taken the time to thoroughly review the materials, to become familiar with the topic on which they're giving us an opinion about? And *when I think of thoroughness, I think of Dr. Hoberman, and I think of* even though it annoys me when he was on the stand how long it sometimes took him to answer questions, that he didn't want to answer questions without flipping through that 120-page report, he takes measures to be exact, to document them, and to be accurate, and to be thorough. And *that's the kind of*

expert that we're looking for and that we want to put before you.

[Defense counsel]: Objection. She's vouching for her witnesses, for her witness at this point.

The Court: Overruled:

[Prosecutor]: Regarding an expert, *we also want* someone who can assess where this individual fits as an offender.

10RP 19-20.

The prosecutor then followed up with "*We* also at this time *want an expert* who keeps an open mind about treatment, alternatives, and outcomes." 10RP 21.

Given the prosecutor's vouching and alignment comments during the course of cross-examination and her continued use of such comments during the course of her closing argument, it is clear that the prosecutor was indeed vouching for Dr. Hoberman when she made the above argument and that defense counsel's objection should have been sustained. "It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940, cert. denied, 554 U.S. 922, 128 S. Ct. 2964, 171 L. Ed. 2d 893 (2008). The prosecutor's continued use of "we" terminology furthered the inflammatory alignment theme as well.

- b. The Misconduct Is Preserved As An Issue For Appeal And There Is A Substantial Likelihood That It Affected The Outcome.

With one exception,² defense counsel did not make an appropriate objection to the repeated instances of misconduct set forth above.³ In the absence of objection, appellate review of prosecutorial misconduct is not precluded if the misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The focus is "less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The touchstone of due process analysis is the fairness of the trial: regardless of whether the prosecutor deliberately committed misconduct, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? Davenport, 100 Wn.2d at 762 (citing Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)); accord State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983).

"The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant]

² 10RP 20.

³ As earlier noted, counsel also objected to a prosecutor's question posed to Dr. Lytton on grounds of "badgering." 5RP 152.

from having a fair trial?" Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)). Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal). The cumulative effect of misconduct can overwhelm the power of instruction to cure. Glasmann, 286 P.3d at 679; Case, 49 Wn.2d at 73; State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Looking at each individual comment in isolation, a case could be made that instruction could have cured any prejudice. But that is not how repetitive misconduct is reviewed on appeal. Repeated instances of misconduct and their cumulative effect must be considered as a whole. See Walker, 164 Wn. App. at 738 (improper comments used to develop theme in closing argument impervious to curative instruction).

The prosecutor here made the improper comments not just once or twice, but frequently. She used them to develop a theme while examining the defense witnesses that amounted to telling the jury, through improper suggestion and insinuation, that the prosecutor and the experts she

presented were one on the same side and that the jury should believe them because the prosecutor believed them.

The prosecutor, through her speaking questions, offered testimony in the guise of examination. The prosecutor's repeated use of "we" and "us" during the course of examining Nelson and his witnesses and during closing argument combined to create a prejudicial effect beyond the reach of curative instruction. The use of this language comprised a theme of vouching for the State's witnesses, expressing a personal opinion that Nelson should be committed, and aligning the prosecutor and her office with the State's witnesses and the jury against Nelson.

The standard for showing prejudice is a substantial likelihood that the misconduct affected the verdict. Fisher, 165 Wn.2d at 747. "The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks." State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting State v. Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939) (internal quotation marks omitted)). If this Court is unable to conclude from the record whether the jury would or would not have reached its verdict but for

the misconduct, then it may not deem it harmless. Charlton, 90 Wn.2d at 664. To determine whether misconduct warrants reversal, the courts consider its cumulative effect on the jury. Case, 49 Wn.2d at 73.

In SVP trials, unfair prejudice to the defense is always near the surface. Jurors are naturally reluctant to release anyone with prior sex offenses against children. The instinctive inclination is to both hate and fear such offenders. The prosecutor's improper expressions of opinion, vouching for her case and expert witnesses, and alignment of herself and her witnesses with the jury, may have tipped the scales in favor of convincing a jury to conclude Nelson met the commitment criteria.

The evidence against Nelson was not overwhelming. The experts strongly disagreed as to whether Nelson was an SVP. Dr. Hoberman and Dr. Richards testified Nelson had a mental abnormality or personality disorder that made him likely to commit predatory acts of sexual violence in the future. 4RP 80-81, 93-94, 112, 138-39; 8RP 30-31, 64-66, 79-80. Dr. Lytton reached the opposite conclusion. 5RP 92-93, 105, 108, 132-33, 136, 139, 143; 6RP 46.

The complicated science of human psychology is beyond the ken of the average juror. In re Detention of Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006). In SVP proceedings, psychiatric testimony is therefore central to the ultimate question of whether a person suffers from a mental abnormality or personality disorder that makes him likely to engage

in predatory acts of sexual violence. In re Pers. Restraint of Young, 122 Wn.2d 1, 58, 857 P.2d 989 (1993).

Dr. Lytton and the State's expert witnesses held opposite opinions on whether Nelson met the SVP criteria. This case involved "a classic battle of the experts, a battle in which the jury must decide the victor." Intalco Aluminum v. Dep't of Labor & Indus., 66 Wn. App. 644, 662, 833 P.2d 390 (1992) (wherein one party's medical expert challenged the theories on which the opposing party's experts based their conclusions) (quoting Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1535 (D.C. Cir. 1984)). This is not a case where the State had the overwhelmingly one-sided advantage of presenting unrebutted expert testimony that the respondent met the SVP definition.

Under these circumstances, there is a substantial likelihood that the misconduct unduly influenced the jury as it weighed the strength of dueling expert opinions and whether the State had proven its case beyond a reasonable doubt. Reversal is required.

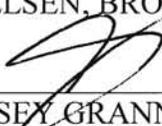
D. CONCLUSION

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

DATED this 29th day of November 2012.

Respectfully submitted

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 69032-9-I
)	
ZACHARY NELSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 29TH DAY OF NOVEMBER, 2012, 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 AND/OR VIA EMAIL.

[X] ZACHARY NELSON
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF NOVEMBER, 2012.

x. 
