NO. 31107-4

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of Albert Brooks:

STATE OF WASHINGTON,

Respondent,

v.

ALBERT BROOKS,

Appellant.

BRIEF OF RESPONDENT

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A. Whether the trial court properly admitted evidence about Brooks' unadjudicated sexual crimes, where the State proved he committed them by a preponderance of evidence and they were highly probative of Brooks' mental state and risk of committing future sexually violent acts.

B. Whether the jury's verdict that Brooks is a sexually violent predator was supported by sufficient evidence.

II. STATEMENT OF THE CASE

A. Procedural History

On October 30, 2008, the State filed a sexually violent predator (SVP) petition in Spokane County, seeking the involuntary civil commitment of Albert Brooks, pursuant to RCW 71.09. CP at 1-2. Prior to trial, the State moved under ER 404(b) for admission of evidence about four unadjudicated crimes. CP at 1349-1467. Brooks responded, opposing admission of that evidence. CP at 1487-1545. The State replied. CP at 1609-1642. The trial court heard oral argument and ruled that evidence of three of the four crimes was substantively admissible. (8/10/12 RP 13-53). A jury trial was then held on August 20-23 and 27-28, 2012. On January 17, 2012, the jury returned a verdict finding Brooks to be an SVP. CP at 2072. The trial court then entered an order civilly committing Brooks, which he timely appealed. CP at 2073.

B. Substantive Facts

The State adopts Brooks' Statement of the Case in the Brief of Appellant at 2-27, supplemented by additional facts presented in the arguments below.

III. ARGUMENT

A. The Trial Court Properly Admitted Evidence Of Brooks' Unadjudicated Sexual Criminal History

In a pretrial ER 404(b) motion, the State linked several unadjudicated sexual crimes to Brooks by a preponderance of evidence. Brooks argues that the trial court abused its discretion by admitting evidence about those crimes because the probative value was substantially outweighed by the danger of unfair prejudice. ER 403. In an SVP proceeding, however, a person's prior sexual history is considered highly probative of his mental state and propensity for future violence, and is admissible despite the danger of prejudice. The trial court did not abuse its discretion when it admitted evidence of Brooks' violent attacks on children and young women.

1. Standard of Review

A trial court's decision to admit ER 404(b) evidence is reviewed for an abuse of discretion. *In re Detention of Coe*, 175 Wn.2d 482, 492,

286 P.3d 29 (2012). A trial court abuses its discretion when it exercises that discretion on untenable grounds or for untenable reasons. *Id*.

2. Brooks' Sexual History Was Probative Of His Mental State And Future Risk And Was Not Unfairly Prejudicial

To prove that Brooks is an SVP the State had to produce evidence beyond a reasonable doubt that: (1) he had been convicted of a sexually violent offense; (2) he suffers from a mental abnormality or personality disorder; and (3) his mental state makes him likely to commit predatory acts of sexual violence if he is not confined to a secure facility. RCW 71.09.020(18). Brooks argues that any probative value of his past criminal sexual acts was substantially outweighed by the danger of unfair prejudice. ER 403. But it is well-settled that such evidence is highly probative of the second and third elements – mental state and future risk – and is not unfairly prejudicial.

Evidence of past sexual crimes and the manner in which they were committed is probative of the "motivations and mental states" of persons alleged to be SVPs, as well as their "propensity for future violence." *In re Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993). In *Young*, evidence of prior sexual crimes was admitted at the appellant's 1991 trial, including evidence of rapes he committed in 1962, and his victims testified. 122 Wn.2d at 14-16. The evidence was found to be properly admitted,

was not unfairly prejudicial, and any prejudice did not substantially outweigh the probative value. *Id*. at 53.

The Washington Supreme Court reaffirmed this holding in *In re Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999). The Court again noted that the manner of committing past crimes was relevant to establish mental state and any prejudicial effect did not outweigh the probative value. 139 Wn.2d at 400-402. Since *Young* and *Turay*, Washington courts have routinely admitted evidence of a Respondent's full criminal history.[1] The trial court here, therefore, did not abuse its discretion, because Brooks' sexual history passes muster under ER 403.

The State moved under ER 404(b) for the admission of Brooks' unadjudicated sexual history, because that rule provides the standard for

[1] *See, e.g.*, *In re Detention of Coe*, 175 Wn.2d 482, 286 P.3d 289 (2012) (evidence of 17 unadjudicated rapes and other sexual crimes admissible under ER 404(b)); *In re Detention of Mines*, 165 Wn. App. 112, 118, 266 P.3d 242 (2011) (evidence of 1969 sexually motivated assault admitted at trial); *In re Detention of Berry*, 160 Wn. App. 374, 376, 248 P.3d 592 (2011) (evidence of crimes from 1975, 1979 and 1988 admitted at trial); *In re Detention of Danforth*, 173 Wn.2d 59, 61-62, 264 P.3d 783 (2011) (evidence of crimes from 1971 and 1987 admitted at trial); *In re Turay*, 153 Wn.2d 44, 46, 101 P.3d 854 (2004) (evidence of crimes from 1977, 1979, 1985 and 1990 admitted at trial); *In re Albrecht*, 147 Wn.2d 1, 4, 51 P.3d 73 (2002) (evidence of crimes from 1976 and 1992 admitted at trial); *State v. Dudgeon*, 146 Wn. App. 216, 225, 189 P.3d 240 (2008) (evidence of offenses from the "early 1970s through the late 1990s" admitted at trial); *Matter of Paschke*, 80 Wn. App. 439, 442, 909 P.2d 1328 (1996) (evidence of crimes from 1972 and 1979 admitted at trial).

admitting other crimes, wrongs or acts.[2] When the State offers such evidence, the trial court must:

(1) Find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence;
(2) identify the purpose for which the evidence will be admitted;
(3) find the evidence materially relevant to that purpose; and
(4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.

State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Based on a fair reading of Washington SVP case law, a person's criminal sexual history presumptively meets ER 404(b) admissibility criteria two, three and four. *Young*, 122 Wn.2d at 53 (prior crimes highly probative of propensity for future violence and its prejudicial effect does not outweigh probative value); *In re Detention of Turay*, 139 Wn.2d 379, 401, 986 P.2d 790 (1999) (manner of committing past crimes relevant to establish mental state, prejudicial effect does not outweigh probative value). Consequently, in order to introduce a Respondent's unadjudicated sexual crimes, the State need only meet the first criterion – it must prove by a preponderance of evidence that the uncharged acts probably occurred. The State can make its showing by an offer of proof and an evidentiary

[2] ER 404(b) provides: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

hearing is not required. *Kilgore*, 147 Wn.2d at 290-91, 294-95. The trial court is not bound by the rules of evidence. ER 104(a).

a. The Trial Court Properly Admitted Evidence About T.N.

The State moved to admit evidence about Brooks' kidnapping of T.N. CP at 1350-51, 1611-12, 1613-15. The State's motion was supported by T.N.'s deposition, the deposition of an eyewitness, a police report, the Information charging Brooks with Kidnapping First Degree and an order dismissing the charge. CP at 1350-51 n.2. The trial court carefully considered the State's motion, Brooks' response, and the State's reply, and found the evidence admissible. 8/10/12 RP at 34-37.

Brooks argues that there was insufficient evidence that this crime was a sexual offense. The trial court considered that argument and rejected it:

> It's urged as well that this was not a sexual offense in motivation in that there wasn't typical things accompanying a sexual assault in this brief encounter. Circumstantial evidence, however, is of equal value as direct evidence. And, again, I recall back to the use of the tape and grabbing Tiah and trying to put her in the car and so forth. There's a clear circumstantial inference that arises that that is a sexual offense. And there's really nothing apart from that to indicate that there was any other sort of motivation such as theft or a motivation for ransom or any of that sort of thing. So there is a definite probative linkage.

8/10/12 RP at 36-37.

The trial court also considered Brooks' argument that the evidence should be excluded under ER 403, and ruled as follows:

> And so finally, does the probative value outweigh the potential prejudice to the defendant. Admittedly there's a powerful prejudicial effect to the respondent here. Nonetheless, again recalling the elements that are part of the petitioner's proof that must be met, there is strong, compelling probative value to this evidence as well. And so the Court would find that the prejudicial impact does not substantially outweigh the probative value.

8/10/12 RP at 37.

The trial court had "broad discretion" to decide the admissibility of the evidence, and its decision is not disturbed unless a "manifest abuse" of that discretion is shown. *Young*, 122 Wn.2d at 53. The evidence was properly admitted.

b. The Trial Court Properly Admitted Evidence About S.N.

The State moved to admit evidence about Brooks' attempted kidnapping of S.N. CP at 1351, 1612, 1615-16. The State's motion was supported by S.N.'s deposition, a police report, the Information charging Brooks with attempted kidnapping and other court documents. CP at 1351 n.3. The trial court carefully considered the State's motion, Brooks' response, and the State's reply, and found the evidence admissible. 8/10/12 RP at 44-47. The court again considered Brooks' argument that the offense was not sexual and rejected it. 8/10/14 at 45.

Lastly, the trial court considered Brooks' argument that the evidence should be excluded under ER 403, and rejected it. 8/10/12 RP at 46.

c. The Trial Court Properly Admitted Evidence About De.L.

The State moved to admit evidence about Brooks' attempted kidnapping of De.L. CP at 1352, 1616-17. The State's motion was supported by the deposition of De.L. and Sheriff's reports. CP at 1352 n.4. The trial court considered the State's motion, Brooks' response, and the State's reply, and found the evidence admissible. 8/10/12 RP at 44-47. The court again considered Brooks' argument that the offense was not sexual and rejected it. 8/10/14 at 51-53. Lastly, the trial court considered Brooks' argument that the evidence should be excluded under ER 403, and rejected it. 8/10/12 RP at 52-53.

d. The Trial Court Should Not Have Excluded Evidence About Da.L. But That Decision Does Not Undermine Its Correct Decisions about Other Evidence

The State moved to admit evidence about Brooks' molestation and attempted rape of Da.L. CP at 1350, 1612-13. The State's motion was supported by the deposition of Da.L., her interview by police, and the deposition of Brooks. CP at 1350 n.1. Da.L. testified that in the late 1970s, when she was ten or eleven years old, Brooks had been her neighbor. CP at 1361. Luring her into his home, he played a game with

her that he called the "elephant game." CP at 1362. He would wrap her in a blanket and try to insert his penis into her. CP at 1362. Da.L. recalled that Brooks had built a toy spaceship in his basement for his children, and used it to lure her into the home. CP at 1365. In his deposition, Brooks confirmed that there had been a toy spaceship in his home. CP at 1374-75. A police report from that time proved that Da.L. had reported to police that Brooks had tried to kiss her and had rubbed his penis against her. CP at 1370.

Given Da.L.'s identification of Brooks as the person who had molested and attempted to rape her, and corroborating evidence, the trial court found that the sexual crime probably occurred. 8/10/12 RP at 21-22. But the trial court excluded the evidence based on ER 403, holding that:

> I do see somewhat of a difference between this event and the other uncharged events and the charged events which led to convictions. And based on that, Counsel, I am finding that the prejudicial effect does outweigh the probative value as to victim -- alleged victim [Da.L.]. So I would grant the motion, or deny the motion, rather, to introduce -- permit introduction of that particular alleged and uncharged act.

8/10/12 RP at 24.

Brooks argues that there was no meaningful difference between the evidence related to Da.L. and the other victims. Because the trial court did not sufficiently differentiate between the crime against Da.L. and those it

admitted under ER 404(b), Brooks argues, the trial court must have abused its discretion when admitting the evidence of the other crimes.

Brooks' argument is not valid. The fact that the trial court failed to articulate a clear delineation between the crimes it admitted and the one it excluded does not compel the conclusion that it erred by admitting evidence of the other crimes. The State, of course, believes that the evidence about Da.L. should have been admitted, given the well-established rule that an SVP's sexual history is probative of his mental state and future risk and not unfairly prejudicial. Indeed, the State argued, and continues to assert, that crimes such as those against Da.L. are presumptively admissible at SVP trials when proven by a preponderance of evidence. CP at 1354. The trial court should have admitted the evidence. Its decision to exclude it, however, does not render its other decisions erroneous.

B. Substantial Evidence Supported The Jury's Verdict That Brooks Is An SVP

Brooks argues that the State failed to prove, beyond a reasonable doubt, that he is an SVP. The evidence at trial was sufficient, however, to prove all the elements the State was required to prove. Brooks' arguments to the contrary go to the weight of the evidence, and this Court does re-weigh the evidence or second-guess the fact-finder.

1. Standard of Review

In reviewing the sufficiency of the evidence under the SVP statute, a reviewing court applies the criminal standard. *In re Detention of Thorell,* 149 Wn.2d 724, 744, 72 P.3d 708 (2003). "Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* The court upholds the commitment if any rational trier of fact could have found the essential elements beyond a reasonable doubt. *In re Detention of Audett,* 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006). All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the appellant. *Id*. at 727. Appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Detention of Broten,* 130 Wn. App. 326, 335, 122 P.3d 942 (2005).

2. Sufficient Evidence Supported The Jury's Finding That Brooks Suffers From A Mental Abnormality

The State was required to prove that Brooks "suffers from a mental abnormality or personality disorder[.]" RCW 71.09.020(18). The State's Expert, Dr. Brian Judd, testified at length about his diagnoses and the bases for them.

Dr. Judd diagnosed Brooks with two paraphilias. Paraphilias involve recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors which generally involve nonhuman objects, the suffering or humiliation of oneself or one's partner, or children, or other nonconsenting persons. 8/22/12 RP at 329. They must last at least six months and cause clinically significant impairment in social, occupational, or other important areas of functioning. *Id*. at 330.

Dr. Judd diagnosed Brooks with the paraphilia known as pedophilia. *Id*. at 331. He based that diagnosis, first, on Brooks' criminal sexual activity with children. *Id*. at 334. He relied on the disclosure by Da.L. that Brooks had molested and attempted to rape her, from her police statement and her deposition in the SVP case. *Id*. He relied on the attempted kidnapping of S.N., who had told Brooks she was only eleven years old, thinking that would stop him from attacking her. *Id*. at 334-35.

In addition to considering Brooks' crimes against young children, Dr. Judd reviewed information about Brooks' participation in sex offender treatment at the Washington Department of Corrections. *Id*. at 335-36. Test responses by Brooks indicated he was experiencing "fantasies of forcible sexual contact with girls age 9 to 11[.]" *Id*. at 336. By end of the program, Brooks continued to experience arousal to minors or coerced sex. *Id*. at 337. Interviewed by Dr. Judd in 2008, Brooks admitted that he

still experienced some arousal to minors and rape or coercion, and had been masturbating to those themes even after treatment ended. *Id*. at 337-38. Dr. Judd opined that Brooks continued to suffer from pedophilia, given the long duration of his fantasies and behaviors and the fact that pedophilia is incurable. *Id*. at 346. Dr. Judd also testified that Brooks' pedophilia met the definition of a "mental abnormality." *Id*. at 359-65.

In addition to the expert testimony, the State presented the testimony of two of Brooks' child victims to support Dr. Judd's opinions. *See* testimony of De.L, and K.G., 8/22/12 RP at 260-75, 282-96.

Viewing these facts in a light most favorable to the State, it is clear that the State's evidence was sufficient to support the jury's finding that Brooks suffers from pedophilia, and that it constitutes for him, a mental abnormality.

Dr. Judd also diagnosed Brooks with paraphilia not otherwise specified, nonconsent. 8/22/12 RP at 346. A person with this disorder has sexually arousing fantasies or urges to have sex with nonconsenting persons. *Id*. at 347. Dr. Judd found support for this diagnosis in Brooks' crimes against D.W. and T.N., who were older, and therefore not accounted for by pedophilia. *Id*. at 349. But he also considered the force Brooks used against the young children he molested and raped.

Id. at 349-50. Additionally, Brooks' initial treatment assessment disclosed his "moderate to high arousal to a number of verbal depictions of forcible sexual contact with adult women[.]" *Id*. at 350. Also supporting this diagnosis was Brooks' admission that he had stalked victims while in the community and that he "found it exciting to cruise for someone to rape[.]" *Id*. at 351. Treatment records indicated that Brooks experienced an adrenaline rush while stalking and had masturbated while doing it. *Id*. Dr. Judd opined that Brooks' paraphilia not otherwise specified, nonconsent, constituted a mental abnormality. *Id*. at 359-65.

As with the diagnosis of pedophilia, the State corroborated the expert testimony with substantive evidence from Brooks' victims. *See* testimony of T.N. and D.W., 8/22/12 RP at 218-233, 248-59.

When this evidence is viewed in a light most favorable to the State, it sufficiently supports the jury's finding that Brooks suffers from paraphilia not otherwise specified, nonconsent, and that it constitutes a mental abnormality.

3. Sufficient Evidence Supported The Jury's Finding That Brooks Is Likely To Commit A Predatory Act Of Sexual Violence If Released Unconditionally

The State was also required to prove that Brooks is "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). A person is "likely" to commit such

offenses if they will do so "more probably than not[.]" RCW 71.09.020(7). Dr. Judd testified that, in his opinion, Brooks was likely to engage in predatory acts of sexual violence if not confined in a secure facility. 8/22/12 RP at 366.

Brooks argues that Dr. Judd's opinion was unsupported by the actuarial instruments he used because Brooks' scores on those instruments were associated with group recidivism rates that were under 50 percent; *i.e.*, they did not indicate Brooks "more probably than not" would reoffend. His argument does not establish a lack of sufficient evidence because it addresses only the weight to be given to Judd's opinion, and this Court does not reweigh the evidence. *Keene Valley Ventures, Inc. v. City of Richland*, 174 Wn. App. 219, 223-24, 298 P.3d 121 (2013).

Dr. Judd utilized two actuarial instruments, the Static-99R and the Sex Offender Risk Appraisal Guide (SORAG). 8/22/12 RP at 370. He did so because research shows that deviant sexual interest and antisocial orientation are two factors associated with sexual recidivism, and the Static-99R and SORAG are each sensitive to one of these factors, respectively. *Id*. at 370-71. Dr. Judd also scored Brooks on the Hare Psychopathy Checklist – Revised (PCL-R), which also examines elements associated with recidivism, and which is incorporated into the SORAG. Id. at 378-79.

Dr. Judd explained that actuarial estimates are considered underestimates of a person's true risk. 8/12/12 RP at 376; *See In re Detention of Lewis,* 134 Wn. App. 896, 906, 143 P.3d 833 (2006) (Static-99 "measures reconvictions, which underestimates risk of reoffense."). The data on which the instruments are based represent only detected offenses, and "a large number of rapes are never reported." *Id*. Brooks is a perfect example of this phenomenon because of the number of crimes he committed for which he was never convicted. *Id*. Furthermore, the data underrepresents the true sexual crime rate because some sexually motivated offenses are "pled down to being nonsexual offenses through the judicial process." *Id*. at 376-77. Actuarial instruments only consider static or historical factors. *Id*. at 369-70. They have limited applicability in SVP cases because of their small sample sizes and a variety of predictive shortcomings. *Thorell,* 149 Wn.2d at 753. Consequently, they are only "moderately predictive" and other, dynamic factors must be taken into account. 8/22/12 RP at 369-70.

Dr. Judd therefore relied on an instrument more specific to the individual, known as the Structured Risk Assessment – Forensic Version (SRA-FV). 8/23/12 RP at 388-89. It is a common practice to consult factors outside the actuarials. *See In re Detention of Thorell,* 149 Wn.2d 724, 753, 72 P.3d 708 (2003) (actuarial results "may be

adjusted (or not) by expert evaluators considering potentially important factors not included in the actuarial measure."); *In re Jacobson*, 120 Wn. App. 770, 783-84, 86 P.3d 1202 (2004) (expert's conclusion that person continued to meet SVP criteria supported by consideration of dynamic factors). The SRA-FV examines three areas: Sexual interest, including sexual interest in children, interest in sexual violence, and level of sexual preoccupation; how the individual manages their interpersonal relationships; and self-management. 8/23/12 RP at 389-90. Dr. Judd used the SRA-FV to closely examine these areas in Brooks' life. *Id*. at 390-96. Brooks' overall score exceeded the range of scores in a data set known as the "high-risk, high-needs group." *Id*. at 395.

Judd also considered "protective factors" which, if present, could have lowered Brooks' risk. *Id*. at 396. Brooks' age was a consideration. *Id*. at 396-97. But Brooks had already received a deduction of three points for his age on the Static-99R, and he was extraordinarily healthy for a 67 year old man – he continued to perform 125 push-ups and sit-ups every weekday. *Id*. at 397. He is also "quite healthy." *Id*. Dr. Judd also took into account Brooks' treatment participation. *Id*. But Brooks was still admitting that he masturbated to deviant fantasies, of children and rape, after having completed treatment in 2008, at the age of 63. *Id*. at 398-99.

Summarizing his risk assessment for the jury, Dr. Judd explained that Brooks' long pattern of predatory sexual violence, his rapid recidivism after being released, the actuarials and other factors, and his relative health and vigor, caused Dr. Judd to come to the opinion that Brooks was likely to engage in further predatory acts if he was released. *Id*. at 401-403. This ultimate opinion by Dr. Judd, which was well-supported by a range of components, constituted substantial evidence that Brooks is likely to sexually recidivate if released unconditionally to the community.

In addition to Dr. Judd's opinion, the jury learned about Brooks' long history of sexual violence, from his victims. A person's sexual history is admissible in SVP proceedings because it is highly probative of that person's recidivism risk. *Young*, 122 Wn.2d at 53. Looking at all of this evidence in a light most favorable to the State, and drawing all reasonable inferences in the State's favor, a rational jury could have found, beyond a reasonable doubt, that Brooks was likely to commit future sexually violent crimes if not confined. *Audett*, 158 Wn.2d at 727-28. This Court should therefore affirm Brooks' commitment order.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Brooks' commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 29th day of July, 2014.

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NO. 31107-4

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of: ALBERT BROOKS, Appellant.	DECLARATION OF SERVICE

I, Joslyn Wallenborn, declare as follows:

On July 29, 2014, I sent via electronic mail and United States mail a true and correct copy of Brief Of Respondent and Declaration of Service, postage affixed, addressed as follows:

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

DATED this 29th day of July, 2014, at Seattle, Washington.

JOSLYN WALLENBORN