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June 29, 2015
Court of Appeals
Division III
State of Washington

S. Ct. No. 91956-9
COA No. 31107-4-III

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

ALBERT BROOKS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Albert Brooks asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished decision of the Court of Appeals, filed on June 2, 2015. A copy of the decision is in the Appendix at pages A-1 through A-8.

C. ISSUES PRESENTED FOR REVIEW

1. Did the court err by admitting evidence of bad acts under ER 404(b) when its probative value was far outweighed by its prejudicial effect?

2. Did the State prove beyond a reasonable doubt that Mr. Brooks suffers from a mental abnormality as that term is defined in RCW 71.09.020(8)?

3. Did the State prove beyond a reasonable doubt that Mr. Brooks' alleged mental abnormality causes him to have serious difficulty controlling his dangerous behavior and make him likely to engage in predatory acts of sexual violence unless confined to a secure facility?

4. Did the State prove beyond a reasonable doubt that Mr. Brooks is a sexually violent predator under RCW 71.09?

D. STATEMENT OF THE CASE

For purposes of this petition for review, Mr. Brooks incorporates by reference the statement of facts in his brief of appellant.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case should be accepted for review under RAP 13.4(b)(4) because it presents issues of substantial public interest that should be determined by this court.

Finding the trial court committed no error in admitting prior, unadjudicated offenses, the Court of Appeals determined “[t]he trial court necessarily had to consider the State’s burden of proof when determining the admissibility of evidence.” (A-4). It then went on to say evidence tending to prove or disprove is by definition probative. (*Id.*). That is no justification for admitting evidence not only far more prejudicial than probative, but also was probative as to only one sexually violent predator element, *i.e.*, he had committed a crime of sexual violence. ER 403; ER 404(b). But that element was not contested by Mr. Brooks so the prior unadjudicated

offenses had no probative value at all for the two remaining elements.

Rather, what the trial court did was make the State's case for it by improperly admitting bad acts evidence, never proved, with the sole purpose of putting Mr. Brooks in a bad light. The prior, unadjudicated offenses were improperly admitted to prove what ER 404(b) prohibits – that Mr. Brooks' acted in conformity with his purported character.

The trial court's consideration of the necessary elements the State had to prove to show Mr. Brooks is a sexually violent predator is not a tenable ground or reason for admitting evidence of these three prior, unadjudicated offenses. *In re Detention of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). They were relevant to prove he had committed a sexual offense in the past, but not to prove the other elements dealing with his having a current mental abnormality or personality disorder and a likelihood of engaging in predatory acts of sexual violence if not confined. RCW 71.09.020(18); RCW 71.09.060(1). Having no other probative value, the evidence of prior, unadjudicated offenses was clearly far more prejudicial than probative and should not have been admitted. ER 403; ER 404(b).

Review is warranted under RAP 13.4(b)(4) because the Court of Appeals' decision approving the trial judge's consideration of the State's burden of proof as justification for allowing prejudicial ER 404(b) evidence that had no probative value is an issue of substantial public interest that should be determined by the Supreme Court.

As to the sufficiency of the evidence, Mr. Brooks argued State failed to prove he currently suffers from a mental abnormality that would make him likely to reoffend. The standard for commitment as a sexually violent predator calls for the State to prove the person (1) has committed a crime of sexual violence and (2) suffers from a mental abnormality or personality disorder which (3) makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18); RCW 71.09.060(1). Mr. Brooks did not dispute he had committed a crime of sexual violence. He did challenge the sufficiency of the evidence that he had a mental abnormality or was likely to engage in more predatory acts of sexual violence.

The Court of Appeals made short-change of Mr. Brooks' contentions by essentially refusing to consider the evidence

because the jury had spoken and its credibility determination was not to be disturbed. (Op. at 7-8).

Although Dr. Judd's diagnosis was pedophilia and paraphilia, he testified Mr. Brooks had not displayed any deviant sexual behavior during his incarceration from 1988 on. (8/23/12 RP 417). Nothing had changed with Mr. Brooks' mental health or behavior. Yet, in 2003, when he interviewed him for eight hours, Dr. Judd did not diagnose Mr. Brooks with pedophilia, much less with paraphilia not otherwise specified, nonconsent. (8/23/12 RP 410). If Mr. Brooks did not suffer from those mental abnormalities then, there is nothing to support a contrary diagnosis now. Dr. Judd cited what he considered evidence to support his diagnosis, but the evidence was the same as when he made no such diagnosis. There is no credibility determination to make. See *State v. Kipp*, 179 Wn.2d 718, 727-78, 317 P.3d 1029 (2014); *In re Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003).

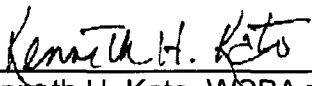
It is also undisputed that Dr. Judd would not have predicted any kind of future re-offense if he had seen Mr. Brooks in October 1985. (8/22/12 RP 385). He did not explain why his opinion had

changed when the factors scored in the Static-99R had not changed. Again, there was no credibility determination to be made. *Kipp, supra*. Review is appropriate as Mr. Brooks' challenge to the sufficiency of the evidence was not meaningfully considered by the Court of Appeals and instead relegated to the "credibility determination" graveyard. When a petitioner challenges what may be a civil commitment for life without proof of a current offense as in a criminal case, the appellate court should take the appeal seriously and not simply rubber-stamp the result as it did here. This issue of substantial public interest warrants review under RAP 13.4(b)(4).

F. CONCLUSION

Based on the foregoing, Mr. Brooks respectfully urges this Court to grant his petition and reverse his commitment.

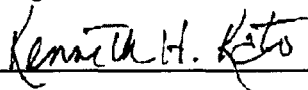
DATED this 29th day of June, 2015.



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CERTIFICATE OF SERVICE

I certify that on June 29, 2015, I served a copy of the petition for review by first class mail, postage prepaid, on Albert Brooks, Special Commitment Center, PO Box 88600, Steilacoom, WA 98388; and by email, as agreed by counsel, on Malcolm Ross and James Buder at CRJSVPEF@atg.wa.gov.



APPENDIX

FILED
June 2, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In re the Detention of:)	
)	No. 31107-4-III
ALBERT BROOKS,)	
)	
Appellant.)	UNPUBLISHED OPINION

KORSMO, J. — Albert Brooks challenges his commitment as a sexually violent predator, contending that the court erred in allowing evidence of uncharged actions and that the evidence does not establish a current mental abnormality. We affirm.

FACTS

In September of 1978, Mr. Brooks attempted to kidnap a 17-year-old Spokane girl, T.N., by approaching her from behind and holding a knife to her throat. However, T.N. resisted and escaped. Four months later he attempted to kidnap 15-year-old S.N. in Post Falls, Idaho, but she also escaped. That same night he kidnapped and raped 15-year-old D.W. elsewhere in Post Falls. Charges in Spokane County relating to T.N. were dropped following Mr. Brooks' indictment in Idaho. He then pleaded guilty to raping D.W. in exchange for dismissal of the charges relating to S.N. Following his conviction, evidence emerged that he also had molested a neighbor, 11-year-old Da.L.

Following his stint in prison, he resumed kidnapping and raping young girls. Although living in Idaho, during visits to Spokane he kidnapped and raped 12-year-old

De.L. in 1986 and 10-year-old K.G. in 1988. He again reached an agreement and pleaded guilty to charges relating to K.G. in exchange for dismissal of charges relating to De.L. While he was still incarcerated on that conviction, the State brought this action in 2008 to have Mr. Brooks committed as a sexually violent predator.

The trial court conducted a pre-trial hearing to address the six noted prior incidents. The evidence relating to the two convictions was admitted without objection, but the parties contested the evidence relating to the four unadjudicated offenses. Ultimately, the trial court struck evidence relating to Da.L., reasoning that the incident was substantially different from the other acts and that the prejudicial effect outweighed the probative value. The trial court admitted the evidence relating to T.N., S.N., and De.L. The court reasoned that while the evidence was prejudicial, the prejudicial effect did not substantially outweigh the compelling probative value of the evidence in light of the State's heavy burden of proof.

At trial, the State presented testimony from each of the five victims, along with corroborating evidence from the respective police investigations into those incidents. The State then presented testimony from Dr. Brian Judd, who diagnosed Mr. Brooks with pedophilia and a rape paraphilia.¹ He based the diagnoses on the evidence from the past crimes, his interviews with Mr. Brooks, and Mr. Brooks' treatment record while

¹ The technical term used was "paraphilia, not otherwise specified, nonconsent." Report of Proceedings at 359.

incarcerated. Dr. Junn then testified about predictive actuarial and diagnostic instruments² that supported his conclusion that Mr. Brooks was likely to reoffend. The defense presented expert testimony from Dr. Theodore Donaldson, who questioned the validity of Dr. Judd's diagnoses and the accuracy of the predictive actuarial instruments used.

The jury found that Mr. Brooks was a sexually violent predator. He then timely appealed to this court.

ANALYSIS

Mr. Brooks contends the trial court erred in admitting evidence of the prior, unadjudicated offenses and that the evidence was insufficient to support the jury's verdict. We address the claims in that order.

Admissibility of Prior, Unadjudicated Offenses

Mr. Brooks first argues that the trial court erred in admitting evidence concerning the three unadjudicated incidents, claiming that the trial court improperly considered the State's need to prove the elements of its case. He contends that without that consideration, the trial court's decision to admit this evidence is untenable because it

² The actuarial instruments employed were the Sex Offender Risk Appraisal Guide (SORAG), and the Static-99R, while the primary diagnostic instrument employed was the Structured Risk Assessment-Forensic Version (SRA-FV).

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struck the equally prejudicial evidence relating to Da.L, and therefore should have struck this evidence.

Well-settled standards govern this appeal. Rulings admitting or excluding evidence are reviewed for an abuse of discretion. *In re Det. of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Evidence of other crimes, wrongs, or acts are inadmissible to prove character or to show an action in conformity therewith, but may be admitted for other purposes. ER 404(b). In a proceeding to commit an individual as a sexually violent predator, evidence of past sexual violence is highly probative of mental state and the propensity for future sexual violence. *In re Det. of Turay*, 139 Wn.2d 379, 400-02, 986 P.2d 790 (1999); *In re Pers. Restraint of Young*, 122 Wn.2d 1, 54-55, 857 P.2d 989 (1993). However, otherwise admissible evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Evidence is unfairly prejudicial where it creates an undue tendency to suggest a decision on an improper basis. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000); *State v. Cameron*, 100 Wn.2d 520, 529, 674 P.2d 650 (1983).

With these standards in mind, the outcome is clear. The trial court necessarily had to consider the State's burden of proof when determining the admissibility of evidence. Evidence "tending to prove or disprove" is by definition probative. BLACK'S LAW

DICTIONARY, 1397 (10th ed. 2014). Since evidence is only inadmissible under ER 403 where the danger of prejudice substantially outweighs its *probative* value, it was proper for the trial court to consider whether the evidence tends to prove the necessary elements of the State's case.

Mr. Brooks is correct in contending that the trial court did not distinguish the prejudicial impact of the admitted evidence from the stricken evidence. However, the evidence relating to T.N., S.N., and De.L. was admitted not because it was less prejudicial, but because it was more probative. The trial court noted that the incident involving Da.L. was different in nature from the other incidents, and therefore was less probative to establish the petitioner's case,³ while the admitted evidence carried a "strong, compelling probative value." The decision to admit or strike evidence under ER 403 involves balancing the potential for prejudice against the probative value of the evidence. The trial court properly weighed those values against each other in making its decision to admit the evidence at issue. Mr. Brooks has failed to point to any facts or law that would render the trial court's grounds or reasoning untenable. There was no abuse of discretion.

³ The record readily supports that conclusion. Da.L. was the only victim of molestation, the only victim who was not kidnapped, and the only victim who knew Mr. Brooks prior to the actual or attempted sexual assault. It also was the only incident not subject to a police investigation and not corroborated by other evidence.

Sufficiency of the Evidence

Mr. Brooks contends that the State failed to prove that he currently suffers from a mental abnormality that would make him likely to reoffend. He contends that Dr. Judd's diagnoses were unfounded because he made no diagnosis in 2003 and there was no subsequent evidence of sexual deviancy during his incarceration. He also points to the testimony from the defense expert questioning Dr. Judd's diagnoses and the actuarial instruments used to demonstrate that he was likely to reoffend.

In order to commit an individual as a sexually violent predator, the petitioner must show that the individual has (1) committed a crime of sexual violence and (2) suffers from a mental abnormality or personality disorder, which (3) makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.060(1); RCW 71.09.020(18). Here, Mr. Brooks contends that the evidence was insufficient to establish that he suffers from a mental abnormality or that he is likely to engage in further predatory acts of sexual violence.

Although an action to commit an individual as a sexually violent predator is a civil proceeding, the criminal standard of review applies to appeals challenging the sufficiency of the evidence. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). Thus, evidence is sufficient where, when viewed in the light most favorable to the State, a rational trier of fact could find each essential element beyond a reasonable doubt. *Id.*

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Deference is given to the trier of fact on issues of credibility and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The State relied primarily upon the testimony of Dr. Judd to establish that Mr. Brooks suffers from a mental abnormality that makes him likely to commit further acts of sexual violence. Dr. Judd diagnosed Mr. Brooks with pedophilia and a rape paraphilia based on Mr. Brooks' past offenses and treatment record, as well as direct observation. His testimony was supported by several actuarial and diagnostic instruments suggesting Mr. Brooks was likely to reoffend. This evidence, taken together with the evidence of his previous sexual violence and recidivism, was more than sufficient to sustain the jury's determination that Mr. Brooks currently suffered from a mental abnormality and that he was likely to engage in further predatory acts of sexual violence.

Much of the argument presented by Mr. Brooks on appeal is merely a reiteration of the defense expert's testimony challenging Dr. Judd's diagnoses and the predictive accuracy of the actuarial instruments. These are solely issues of credibility and persuasiveness that the trier of fact, not a reviewing court, must weigh. His argument that Dr. Judd's diagnosis is factually without basis due to the fact that no diagnosis was made in 2003 is unpersuasive. The record clearly indicates that Dr. Judd refrained from making an initial diagnosis in order to further observe Mr. Brooks. He then diagnosed Mr. Brooks only once he had sufficient information, based in part on those additional

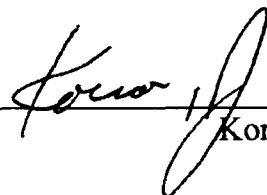
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observations. These facts do not undercut Dr. Judd's diagnoses, but rather demonstrate prudence in ascertaining all the pertinent facts prior to diagnosing a malady.

There was sufficient evidence to support the conviction.

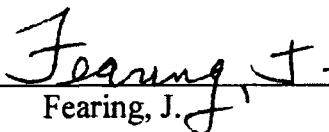
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

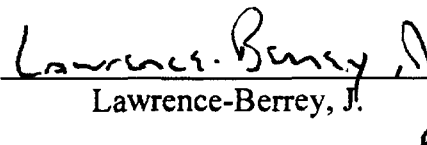


Korsmo, J.

WE CONCUR:



Fearing, J.



Lawrence-Berrey, J.

KATO LAW OFFICE

June 29, 2015 - 3:22 PM

Transmittal Letter

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Comments:

No Comments were entered.

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