Supreme Court No.: _____
Court of Appeals No.: 74248-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES TURNER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mr. Turner requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *In re Detention of James Turner*, No. 74248-5-I, filed June 5, 2017. A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. The State claimed Mr. Turner committed a recent overt act when he exchanged text messages with a 15-year-old, fantasized about engaging in sexual acts with children as young as ten, violated the rules of community supervision, and engaged in role play with a consenting adult partner. However, the evidence demonstrated Mr. Turner had not acted upon any of his fantasies and his interaction with the 15-year-old did not, alone, constitute a recent overt act. Should this Court grant review in the substantial public interest because the State presented insufficient evidence of a recent overt act? RAP 13.4(b)(4).

2. The State alleged Mr. Turner suffered from pedophilic disorder because he had acted on sexual urges involving a prepubescent child. However, where the State's expert conceded that Mr. Turner's only act against a prepubescent child occurred over a decade before the State petitioned to commit him, when he was still a teenager, should

this Court grant review because the State failed to present sufficient evidence of the alleged mental abnormality? RAP 13.4(b)(4).

3. In order to show that Mr. Turner was more likely than not to reoffend, the State asked the jury to rely on an actuarial tool that only provided an estimate of Mr. Turner's risk of committing a violent offense. Should this court grant review because such evidence was insufficient where the law requires the State to prove Mr. Turner was more likely than not to commit a *sexually* violent offense? RAP 13.4(b)(4).

4. In order to be admissible, expert testimony must be relevant and helpful to the trier of fact. It must also not be unfairly prejudicial or risk misleading the jury. Should this Court grant review where the State's expert testified the Static 99-R underestimated Mr. Turner's risk of reoffending, based on nothing more than an entirely speculative claim that there may exist unreported sexual offenses not accounted for by the Static 99-R analysis? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

1. James Turner's background

James Turner had a troubled childhood. By the time he reached kindergarten, he had attempted to slice his own wrists with blunt

scissors. 10/19/15 RP 427. When he was eight years old, his doctor discovered he had Klinefelter syndrome.[1] 10/19/15 RP 439. Relieved that this might explain Mr. Turner's behavioral concerns, his mother pushed his pediatric endocrinologist to begin injecting him with testosterone at age twelve. 10/19/15 RP 456. The endocrinologist recommended she wait until Mr. Turner got past puberty, but eventually relented after Mr. Turner's mother insisted they begin the shots earlier. 10/19/15 RP 456.

Mr. Turner's mother initially raised him alone, but remarried when he was young, introducing two stepsisters into his life. 10/19/15 RP 434. Both girls had serious behavioral issues and had been abandoned by their own mother. 10/19/15 RP 434. Mr. Turner appeared depressed and he struggled to adjust to life with this new, blended family. 10/19/15 RP 435. Mr. Turner continued to act out, and got into physical altercations with his mother when she attempted to discipline him. 10/19/15 RP 448. However, Mr. Turner responded

[1] Klinefelter syndrome is a condition resulting from the presence of an extra X chromosome in the cells, causing Mr. Turner's sex chromosomes to be XXY rather than XY. https://ghr.nlm.nih.gov/condition/klinefelter-syndrome#genes (last accessed July 5, 2017).

well to positive attention and his mother was advised to express greater emotional support for her son. 10/19/15 RP 488.

Mr. Turner was enrolled in special education services throughout his schooling and was often the target of bullying as a result. 10/19/15 RP 451-52. He was immature for his age and struggled with social and emotional functioning. 11/2/15 RP 1330. Because Mr. Turner had difficulty making friends, his new stepsisters became his only companions. 10/19/15 RP 434. One of his stepsisters, who was approximately one year older than Mr. Turner, initiated sexual contact with him when he was 10 years old. 11/2/15 RP 1336. Mr. Turner fell in love with this stepsister, and grieved deeply when she died a few years later. 11/3/15 RP 1562; Ex 69 at 128.

Mr. Turner's mother had a second child, S.H., with her husband. 10/19/15 RP 435. However, Mr. Turner's mother determined her husband was not a good father to any of the children, and they later divorced. 10/19/15 RP 435. When S.H. was seven and Mr. Turner was 15, Mr. Turner's mother remarried again. 10/19/15 RP 463.

Mr. Turner did not finish high school and after his eighteenth birthday, his mother told him to find a job or get out of her house.

10/19/16 RP 474. Mr. Turner began sleeping on the streets. 10/19/15 RP 474.

2. The underlying offense and Mr. Turner's subsequent disclosure of molesting his younger half-sister

When Mr. Turner was 20 years old, he met S.P., who was 13 years old at the time. 10/20/15 RP 534. Mr. Turner told S.P.'s mother that he was 15 years old, and she granted S.P.'s request to spend a few hours hanging out with Mr. Turner. 10/201/15 RP 535. S.P.'s mother later observed Mr. Turner and S.P. kiss. 10/20/15 RP 537.

Later that same evening, Mr. Turner told S.P.'s mother that he had lost his keys and could not get into the place where he had been living. 10/20/15 RP 540. S.P.'s mother allowed Mr. Turner and his friend to stay at her house for five days while she attempted to get them assistance, surmising they were homeless. 10/20/15 RP 550. While contacting service providers, she learned Mr. Turner's true age. 10/20/15 RP 552. S.P. told her mother they had sex, and S.P.'s mother viewed a video in which Mr. Turner was sucking on S.P.'s naked breasts. 10/20/15 RP 553-54. Mr. Turner pled guilty to two counts of child molestation in the second degree and two counts of Communication with a Minor for Immoral Purposes. CP 17, 46. He

was sentenced to 31 months of incarceration with 36 to 48 months of community supervision. CP 46.

Mr. Turner later disclosed he had molested his half-sister, S.H., for two years. 10/28/15 RP 901. He was age 15 or 16 and she was age 6 or 7 at the time the abuse began. 10/28/15 RP 901. Mr. Turner pled guilty to the charge of Communication with a Minor for Immoral Purposes and was sentenced to an additional 12 months incarceration with 24 months of community custody. CP 47-48.

3. Mr. Turner's actions while on community custody

Once released on community custody, Mr. Turner visited his community corrections officer, Andrea Holmes, on an almost daily basis. 10/20/16 RP 64. He also faithfully attended sessions with his sexual offender treatment provider, Sara Straus-King. 10/21/15 RP 674-75.

While on community supervision, Mr. Turner pursued a relationship with an adult, Cheyenne James. 10/21/15 RP 628. However, CCO Holmes and Ms. Straus-King refused to approve this relationship because Mr. Turner did not request approval before starting the relationship and they believed Ms. James was a negative influence on him. 10/21/15 RP 628-29.

Mr. Turner also engaged in a relationship with an adult woman named Johanna Calderon. 10/21/15 RP 632. The two met over the Internet but were unable to meet in person because Ms. Calderon lived in California. 10/22/15 RP 81, 84-85. Instead, they communicated by phone, and often engaged in phone sex. 10/22/15 RP 90, 93. During phone sex, Mr. Turner and Ms. Calderon engaged in role play in which she pretended to be a teenager ages 13 or 16. 10/22/15 RP 93.

In two instances, Mr. Turner engaged in brief interactions with minors. 10/22/15 RP 46. On the first occasion, a 14-year-old waved at him and he approached her a bus stop. 10/22/15 RP 48. He rode the bus with her and discussed mutual interests. 10/22/15 RP 48-49. After she purchased a pack of cigarettes, the two kissed and she promptly announced that she was only 14. 10/22/15 RP 50. Upon learning her age, Mr. Turner broke off contact and told CCO Holmes what had happened. 10/22/15 RP 51.

The State filed the petition for indefinite civil commitment in response to the second incident, in which Mr. Turner met a 15-year-old, T.A., and began exchanging text messages with her. 10/21/15 RP 638. The two engaged in no physical contact, but Mr. Turner sent T.A. messages inviting her to lunch and asking if she would like a neck

massage to relieve a headache. 10/21/15 RP 638. When CCO Holmes discovered the exchange and notified T.A. that Mr. Turner was a sex offender, T.A. informed Mr. Turner she no longer wished to speak with him. 10/22/15 RP 20-21; Ex. 69 at 345. Mr. Turner immediately stopped communicating with her. Ex. 69 at 345; 10/29/15 RP 6.

4. Mr. Turner's trial

At Mr. Turner's trial, the State alleged Mr. Turner suffered from a pedophilic disorder and that, in light of his history, he had committed a recent overt act when he exchanged text messages with T.A. 10/28/15 RP 898; 10/21/15 RP 638.

In an attempt to prove that Mr. Turner was more likely than not to reoffend, the State's expert used the VRAG-R, an actuarial tool that estimates the risk that an individual is likely to commit a violent offense, but provides no information as to whether the individual is likely to commit a *sexually* violent offense. 10/29/15 RP 30. Over the defense's objection, the State's expert was permitted to testify that the Static 99-R, another actuarial tool that indicated Mr. Turner's likelihood of committing a sexually violent offense was well below fifty percent, underestimated Mr. Turner's risk of re-offense. 10/28/15 RP 1045-46. The State's expert opined this was because the Static 99-

R relied on criminal history, and many sex offenses go unreported. 10/28/15 RP 1046.

The jury found the State had proven, beyond a reasonable doubt, that Mr. Turner was a "sexually violent predator." CP 1208. The Court of Appeals affirmed. Op. at 18.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. This Court should grant review in the substantial public interest because the State failed to prove Mr. Turner committed a recent overt act.

The quantum of the evidence required in RCW 71.09 commitment trials is examined under a criminal standard. *In re Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). In criminal proceedings, Due Process requires the State prove "beyond a reasonable doubt… every fact necessary to constitute the crime with which [a defendant] is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV; Const. art. I, § 3.

In RCW 71.09 proceedings, the State must prove:

> (1) that the respondent "has been convicted of or charged with a crime of sexual violence," (2) that the respondent "suffers from a mental abnormality or personality disorder," and (3) that such abnormality or disorder "makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility."

Post, 170 Wn.2d at 309-10; RCW 71.09.020(18). When the individual has been released from total confinement, the State must also demonstrate a substantial risk of physical harm through the proof of a recent overt act. *In re Detention of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

A "recent overt act" is "any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors." RCW 71.09.020(12). Only when the State has proved the individual committed such an act is Due Process satisfied. *In re Detention of Lewis*, 163 Wn.2d 188, 193, 177 P.3d 708 (2008).

The State alleged Mr. Turner committed a recent overt act when he met fifteen-year-old T.A. and began exchanging text messages with her. 10/21/15 RP 638. He asked her if he was a "bad boy" for talking with her, offered to massage her neck to alleviate a headache, and invited her to lunch at his expense. 10/21/15 RP 638. CCO Holmes learned about the interaction after she observed him composing a poem to T.A. on his phone. 10/22/15 RP 18.

CCO Holmes notified T.A. that Mr. Turner was a sex offender and T.A. informed Mr. Turner she no longer wished to talk to him. 10/22/15 RP 20-21; Ex. 69 at 345. Mr. Turner respected her wishes and did not attempt to contact her again. Ex. 69 at 345; 10/29/15 RP 6.

Dr. Judd opined that this incident alone did not qualify as a recent overt act. 10/28/15 RP 1072; 10/29/15 RP 69. Instead, Dr. Judd believed Mr. Turner's interaction with T.A. created a reasonable apprehension of fear based on Mr. Turner's role play with Ms. Calderon, reported fantasies of engaging in sexual acts with minors as young as ten, seeking materials out that depict student/teacher interactions or incest, and his failure to comply with community supervision. 10/29/15 RP 70-71.

This evidence was not sufficient to find Mr. Turner committed a recent overt act. First, Due Process does not permit the State to rely on proof of a community custody violation to satisfy its burden of proving a recent overt act. *In re Detention of Davis*, 109 Wn. App. 734, 745, 37 P.3d 325 (2002); U.S. Const. amend. XIV; Const. art. I, § 3. And the only remaining evidence upon which Dr. Judd relied, Mr. Turner's self-report of his fantasies, did not provide sufficient evidence for a finding that Mr. Turner had committed a recent overt act. Dr. Judd testified his

fear was that, given Mr. Turner's fantasies of engaging in sexual acts with minors younger than T.A., Mr. Turner would have been equally likely to engage with T.A. if she had been twelve, rather than fifteen. 10/28/15 RP 1073.

The Court of Appeals mistakenly relied on this Court's decision in *In re Detention of Anderson*, 166 Wn.2d 543, 547, 211 P.3d 994 (2009), to find this was sufficient evidence for a recent overt act. Op. at 12. The court wrongly suggests that a sexual relationship between consenting adults satisfies this standard when it is a substitute for a relationship with the individual's "preferred victims." Op. at 12-13. This was not the conclusion reached in *Anderson*.

In fact, in *Anderson*, this Court took care to point out that several of Mr. Anderson's relationships involved patients with intellectual disabilities. 166 Wn.2d at 547. The court explained:

> Anderson himself described these relationships as "deviant" and he admitted that he took sexual advantage of at least two patients because they were disabled. Anderson's treatment professional at WSH testified that at least three of the patients with whom Anderson had sex were incapable of consensual sex.

Id.

The State's expert testified that Mr. Anderson, who was confined to Western State Hospital at the time of the sexual acts,

"substituted vulnerable patients for his preferred child victims," and this Court relied on this testimony to affirm. *Id*. at 548, 550. This result was unsurprising, given that the expert's testimony was clearly supported by the facts of that case.

In contrast, here the State's expert offered nothing more than his own speculation that Mr. Turner would have pursued a relationship with T.A. regardless of her age. 10/28/15 RP 1073-74. The evidence presented at trial did not support Dr. Judd's opinion. Unlike in *Anderson*, Mr. Turner was not confined and therefore had the ability to pursue a relationship with a younger teenager. Instead, he chose to exchange text messages with T.A. In addition, the evidence showed Mr. Turner terminated his interaction with another teenager after he learned she was 14 years old and that he notified his CCO of the encounter. 10/22/15 RP 51. Dr. Judd's speculative opinion that Mr. Turner would pursue a relationship with a teenager younger than T.A., when the actual evidence demonstrated the opposite, was insufficient for a jury to find beyond a reasonable doubt that Mr. Turner had committed a recent over act. This Court should accept review because the State failed to prove Mr. Turner committed a recent overt act. RAP 13.4(b)(4).

2. The State failed to prove Mr. Turner suffered from a mental abnormality and this Court should grant review in the substantial public interest.

The definition of "mental abnormality" is directly tied to present dangerousness. *Henrickson v. State*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000). Two experts testified at trial as to whether Mr. Turner suffered from a mental abnormality. Brian Judd, Ph.D., testified for the State, and Paul Spizman, Psy.D., testified for the defense. 10/27/15 RP 840; 11/2/15 RP 1314. The experts' opinions diverged regarding whether Mr. Turner suffered from pedophilic disorder. Dr. Judd concluded that he did, and Dr. Spizman concluded he did not. 10/28/15 RP 898; 11/2/15 RP 1322. However, Dr. Judd's own testimony at trial revealed his conclusion was unsupported by the evidence.

Dr. Judd acknowledged that a diagnosis of pedophilic disorder requires: (1) the individual has had "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger)" over a period of at least six months; (2) "[t]he individual has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty; and (3) "[t]he individual is at least age 16 years and at least 5 years older than the child or

children" at issue. 10/28/15 RP 899-900 (discussing the criteria in the DSM-V); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 99 at 697 (5th ed. 2013).

Dr. Judd suggested that one of Mr. Turner's relationships – the relationship with S.P. – might satisfy the criteria for pedophilic disorder. 11/2/15 RP 1208-09. However, he had to admit that S.P. was not prepubescent. 11/2/15 RP 1262. Dr. Judd testified:

> At the end of the day, I would say there is some question, but it's clear that she is at some level of pubescence.
>
> So I believe that from my standpoint, given that, this qualifies as being an individual likely to meet the criteria for pedophilia.

11/2/15 RP 1208-09.

Dr. Judd's statements are contradictory. He claims there is "some question" about whether S.P. was prepubescent but then admits "it's clear" that S.P. was at "some level of pubescence." By definition, S.P. was therefore not *pre*pubescent. His conclusion that somehow the relationship satisfies the criteria for pedophilic disorder, despite having acknowledged it does not satisfy the criteria based on the facts, is not sufficient evidence for a jury to find beyond a reasonable doubt that Mr. Turner suffered from pedophilic disorder.

Dr. Judd was also forced to admit S.P. was not prepubescent when he engaged in the following exchange with defense counsel:

> [Defense counsel]: So let's be clear because there has been a lot of talk about S.P. today.
>
> S.P. is only evidence of pedophilia if she is prepubescent, correct?
>
> [Dr. Judd]: Yes, I would agree with that.
>
> [Defense counsel]: Now, you claim that, since your prior testimony, that you learned some new information about [S.P.], right, about her physical maturity?
>
> [Dr. Judd]: No, I don't believe that I indicated that.
>
> [Defense counsel]: This story you went through about how her breasts were small, right?
>
> [Dr. Judd]: Yes, but that was in the Michelle Diggins deposition. I was aware of that.
>
> [Defense counsel]: But, of course, what you also have learned most significantly since your prior testimony is that [S.P.] was menstruating, right?
>
> [Dr. Judd]: No. I knew that at the time.
>
> [Defense counsel] It's still your contention that a menstruating teenager is prepubescent.
>
> Is that what you are saying?
>
> [Dr. Judd]: No.

11/02/15 RP 1261-62.

Thus, Dr. Judd's testimony was that S.P. had begun menstruating by the time she was involved with Mr. Turner, and that a menstruating teenager was no longer prepubescent. Once again, Dr. Judd concedes that the facts do not actually support his conclusion.

"The opinion of an expert must be based on facts." *Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984). In *Theonnes*, the court affirmed the summary judgment after finding the appellant's expert opinion was unsupported by evidence. *Id*. at 648. In doing so, it held that "[a]n opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury." *Id*.; *see also Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 578, 719 P.2d 569 (1986) (reversing based on the erroneous admission of expert testimony because the jury could have improperly based its finding on the expert's opinion which was unsupported by the facts); *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 766, 265 P.3d 207 (2011) ("An expert's unsupported conclusions do not create an issue of fact on summary judgment.").

Without evidence that Mr. Turner had acted on his sexual urges with a prepubescent child after S.H., the State could not meet its burden to show Mr. Turner suffered from a mental abnormality. The Court of

Appeals adopted the State's suggestion that challenges to Dr. Judd's testimony brought out conflicting evidence at trial, and the jury could have been persuaded by any number of factors. Op. at 10. But the State never explained what evidence supported Dr. Judd's conclusion that Mr. Turner satisfied the criteria for pedophilic disorder.

For example, Dr. Judd relied on Mr. Turner's reported fantasies, but the evidence did not show that Mr. Turner's sexual urges or fantasies were causing him "marked distress or interpersonal difficulty." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 99 at 697 (5th ed. 2013); *See also* Op. Br. at 16-18. Instead, the evidence showed Mr. Turner was acting out his fantasies with a consenting adult. 10/22/15 RP 93. Dr. Judd's opinion that Mr. Turner suffered from pedophilic disorder was not supported by sufficient evidence and this Court should accept review in the substantial public interest. RAP 13.4(b)(4).

3. This Court should grant review in the substantial public interest because the State failed to prove Mr. Turner was more likely than not to commit a sexually violent offense if released from total confinement.

Indefinite commitment requires a finding a person is likely to "engage in predatory acts of *sexual* violence if not confined in a secure facility." RCW 71.09.020(18) (emphasis added); *Post*, 170 Wn.2d at

309-10. This Court should accept review because the State relied on an actuarial tool that only provided an estimate of Mr. Turner's risk of committing a violent offense, thereby providing insufficient evidence of his risk of committing a sexually violent offense. RAP 13.4(b)(4).

4. Review should be granted because the trial court erred when it permitted Dr. Judd to testify that the Static 99-R underestimated Mr. Turner's risk of reoffending.

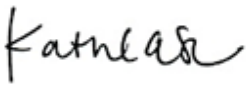
The trial court should not have permitted the State to elicit Dr. Judd's opinion that the Static 99-R underestimated Mr. Turner's risk of offending over Mr. Turner's objection. CP 160, 393; 10/13/15 RP 63-64. This evidence was both speculative, irrelevant, and unfairly prejudicial. *Stedman v. Cooper*, 172 Wn. App. 9, 16, 292 P.3d 764 (2012); *In re Detention of West*, 171 Wn.2d 383, 400, 256 P.3d 302 (2011); ER 403. This Court should accept review. RAP 13.4(b)(4).

E. CONCLUSION

On each of these bases, the Court should grant review of the Court of Appeals opinion affirming Mr. Turner's civil commitment.

DATED this 5th day of July, 2017.

Respectfully submitted,



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APPENDIX

COURT OF APPEALS, DIVISION I OPINION

June 5, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of JAMES TAYLOR TURNER, Appellant.	No. 74248-5-I DIVISION ONE UNPUBLISHED OPINION FILED: June 5, 2017

APPELWICK, J. — A jury found Turner to be a sexually violent predator. Turner argues that the evidence was insufficient to show that he suffered from a mental abnormality, that he committed a recent overt act, or that he is more likely than not to reoffend. He also argues that the State's expert should not have been permitted to testify that an actuarial formula underestimated Turner's likelihood of reoffending. We affirm.

FACTS

In 2007, James Turner pleaded guilty to two counts of second degree child molestation and two counts of communication with a minor for immoral purposes. The charges arose from Turner having sexual contact with S.P., who was 13 at the time. Turner was 20 at the time, but he had told S.P.'s mother that he was 15 so that S.P.'s mother would allow S.P. to be around Turner.

After pleading guilty to the crimes involving S.P., Turner also disclosed that he had molested his half sister, S.H. The abuse began when S.H. was six or

seven. Turner was about eight years older than S.H. Turner abused S.H. until Turner moved out of his mother's house at 18.

When he was released from prison, Turner was placed in the Department of Corrections' Offender Community Reentry Safety Program. Turner's community corrections officer (CCO) testified that Turner committed a number of community custody violations after his release. He used the internet to try to contact S.P. Another violation involved Turner meeting a 14 year old at a bus stop and eventually kissing her in a park.

Turner also was pursuing a relationship with an adult woman named Joanna Calderon online and by telephone. The two met over the internet. They engaged in phone sex involving role play. Calderon sometimes pretended to be a teenager as young as 13. The role play involved sexual relationships between brother-sister, uncle-niece, grandfather-granddaughter, and teacher-student.

On another occasion, Turner began exchanging text messages with 15 year old T.A. His CCO discovered the relationship after she noticed Turner texting T.A. a poem that stated "Roses are red like a sweet, tender kiss engulfs the soul and fuels the heart. There is only one word for this: DESIRE." Turner invited T.A. to lunch and had asked her if she would like a massage. He asked T.A. if he was a "bad boy" for talking to her.

In August 2014, the State petitioned to have Turner committed as a sexually violent predator (SVP). At trial, the State presented expert testimony from Dr. Brian Judd. Dr. Judd testified that Turner suffered from pedophilic disorder, nonexclusive. And, Dr. Judd testified that Turner's communication with

T.A. amounted to a recent overt act that justified commitment. Turner presented testimony from Dr. Paul Spizman, who testified that Turner did not suffer from pedophilic disorder.

The jury found beyond a reasonable doubt that Turner qualified as an SVP. The trial court entered an order of commitment. Turner appeals.

DISCUSSION

Turner argues that the trial court erred in allowing the State's expert to testify that an actuarial tool underestimated his likelihood of reoffending. Turner also argues that the evidence was insufficient to show that he is a sexually violent predator.

I. Expert testimony

Turner contends that the trial court violated both ER 702 and ER 403 when it allowed Dr. Judd to testify that an actuarial formula underestimated Turner's likelihood of reoffending.

Dr. Judd testified that one actuarial tool, Static 99-R, put Turner's likelihood of reoffending at 21.2 percent within five years, and 32.1 percent within 10 years. But, he stated that this tool underestimates the actual risk of reoffending for two reasons.

First, it accounts for only "rap sheet sexual recidivism." That is, the tool uses data about only crimes that are explicitly sexual offenses. But, it does not account for crimes that are not explicitly sexual, but are sexually motivated. For example, Dr. Judd noted that a crime such as kidnapping may be sexually motivated, but not accounted for in the Static 99-R, because it is not an explicitly

sexual offense. According to Dr. Judd, many crimes can be sexually motivated even if they are not explicitly sexual.

Second, Dr. Judd also opined that the Static 99-R tool underestimated risk of reoffending, because research shows that the majority of sexually motivated crimes go unreported. For these two reasons, he concluded that the Static 99-R tool underestimated the risk of reoffending "at multiple levels."

ER 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Admissibility of expert testimony under ER 702 is within the trial court's discretion. In re Det. of Coe, 160 Wn. App. 809, 818, 250 P.3d 1056 (2011), aff'd, 175 Wn.2d 482, 283 P.3d 29 (2012). ER 702 requires that expert testimony be based on sufficient foundational facts to support the expert's opinion. State v. Pittman, 88 Wn. App. 188, 198, 943 P.2d 713 (1997).

Actuarial instruments are often used in SVP trials to aid in the prediction of an offender's future dangerousness. See, e.g., In re Det. of Thorell, 149 Wn.2d 724, 753, 72 P.3d 708 (2003). Our Supreme Court has held that actuarial tools satisfy the Frye[1] standard and are admissible evidence. See id. at 755-56.

In Thorell, the court held that conflicting conclusions on likelihood of reoffending between clinical and actuarial assessments go to the weight of the evidence, rather than admissibility. Id. at 753-54, 756. Thus, when an expert's

[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)

clinical opinion conflicts with an actuarial tool, both are admissible and the jury may weigh each source of evidence. See id. at 756.

Turner claims that Dr. Judd's comments on the Static 99-R's shortcomings were impermissibly speculative. But, Dr. Judd cited scientific sources for his claim that most sexual offenses go unreported. Specifically, he cited a study showing that, for every 30 sex offenses, offenders are arrested for only one actual offense. He also cited a study showing that only 33 percent to 45 percent of sexual assaults are reported. And, he gave an example of one of Turner's acts that was not prosecuted, and therefore did not factor into the Static 99-R assessment. Therefore, he testified that the Static 99-R's input variables are imperfect, and the results were accordingly imperfect. In Thorell, the court noted that actuarial tools "may be adjusted (or not) by expert evaluators considering potentially important factors not included in the actuarial measure." Id. at 753. The trial court did not abuse its discretion in determining that Dr. Judd's comments on the reliability of the Static 99-R tool were relevant and not overly speculative.

Second, Turner claims that the probative value of Dr. Judd's comments on the Static 99-R test was substantially outweighed by the danger of unfair prejudice.

Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In Thorell, the court noted that testimony regarding future dangerousness of SVPs is inherently prejudicial. Id. at 758. But, it nevertheless observed that the probative value of

such testimony is high, and it is directly relevant to whether the SVP elements are satisfied. Id.

Like the tool itself, an expert's comments on "important factors not considered in the actuarial measures" are relevant. See id. at 753. And, although Dr. Judd's comments were inherently prejudicial given that he believed Turner's chances of reoffending were higher, that prejudice was not especially unfair. Given that our Supreme Court has deemed similar testimony highly probative and directly relevant, the trial court did not abuse its discretion in allowing Dr. Judd's testimony about the likelihood of reoffending.

II. Sufficiency of Evidence

Turner next contends that the State's evidence at trial was insufficient. In a sufficiency challenge, the evidence is viewed in the light most favorable to the State. In re Det. of Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006). A claim of insufficiency admits the truth of the State's evidence. In re Det. of Broten, 130 Wn. App. 326, 334-35, 122 P.3d 942 (2005). We draw all reasonable inferences in favor of the State, and interpret them most strongly against the respondent. Audett, 158 Wn.2d at 727. The appellate court defers to the trier of fact regarding a witness' credibility, conflicting testimony, and the persuasiveness of the evidence. Broten, 130 Wn. App. at 335. The commitment will be upheld if any rational trier of fact could have found the essential elements beyond a reasonable doubt. Audett, 158 Wn.2d at 727-28.

In order to uphold an SVP commitment, a court must find that the jury had sufficient evidence to find (1) that the respondent had been convicted of or

charged with a crime of sexual violence; and (2) that the respondent suffers from a mental abnormality or personality disorder; and (3) that such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility. Id. at 727. If, as here, the respondent is living in the community after release from custody, the State must also prove beyond a reasonable doubt that the person has committed a "recent overt act." RCW 71.09.060(1).

A. Mental Abnormality

Turner contends that the evidence was insufficient to show that he suffers from a mental abnormality. Specifically, he contends that the Dr. Judd's diagnosis of pedophilic disorder was not supported by sufficient facts.

RCW 71.09.020(8) defines "mental abnormality" as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." No technical diagnosis of a particular mental abnormality definitively renders an individual either an SVP or not. Thorell, 149 Wn.2d at 761-62.

At trial, the State's expert, Dr. Brian Judd, testified that Turner suffers from pedophilic disorder. Dr. Judd relied on the Diagnostic and Statistical Manual of Mental Disorders (DSM-5). AM. PSYCHIATRIC ASS'N, DIAGNOSTICS AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th Ed. 2013). Citing the DSM-5, Dr. Judd's psychosexual evaluation listed three criteria for pedophilic disorder are: (1) that the individual has recurrent, intense, sexually arousing fantasies, urges, or

behaviors involving sexual activity with a prepubescent child, generally age 13 or younger, over a period of at least six months, (2) that the individual has acted on these urges, or the urges and fantasies cause marked distress or interpersonal difficulty, and (3) that the individual is at least 16 years of age and at least five years older than the child or children at issue.

Dr. Judd's diagnosis relied primarily on Turner's sexual acts with S.H. and S.P. in making his diagnosis of pedophilic disorder. And he testified that Turner's ongoing sexual fantasies of minors, often 12 years old, were also relevant to that diagnosis. Turner argues that this evidence were insufficient to lead to the pedophilic disorder diagnosis. He notes that, while he abused six year old S.H., that occurred over a decade prior to trial. And, although Turner had sex with 13 year old S.P., Turner contends that Dr. Judd's testimony acknowledged that S.P. was pubescent when Turner was attracted to her.

Dr. Judd clearly identified why the acts against S.H. and S.P. nevertheless supported his diagnosis of pedophilic disorder. Dr. Judd testified that Turner was between the ages of 15 and 17 or 16 and 18 when Turner abused S.H. S.H. also indicated that the abuse occurred until Turner moved out of his parents' house at age 18. There was an approximately eight year age gap between Turner and S.H. Turner engaged in sexual activity with S.H. for a period of greater than 6 months, was over 16 when the abuse occurred, and S.H. was under 13 and over 5 years younger than Turner. For these reasons, Dr. Judd testified that Turner's acts against S.H. fit the criteria for a pedophilic disorder diagnosis.

Turner does not argue that the abuse of S.H. did not occur when he was over 16. Rather, he argues that it should not be sufficient to meet the requirement because it occurred many years earlier, and does not suggest present dangerousness.[2] But, Turner cites no authority suggesting that the pedophilic acts supporting the diagnosis must have occurred in the recent past. The diagnostic criteria also does not set forth any such requirement. Nor did Turner's expert Dr. Spizman testify that any such requirement exists. And, even if the lapse of time since the abuse of S.H. was relevant to the weight of the evidence, Dr. Judd testified that Turner's recent masturbatory fantasies, including his acts with S.H. and masturbating to erotic stories involving 8 and 9 year olds, made the acts against S.H. more significant.

Turner correctly points out that Dr. Judd acknowledged that Turner's sexual partners and victims other than S.H. were postpubescent, and therefore not indicative of pedophilic disorder. On cross-examination, Dr. Judd testified that Turner's contact with S.P. is evidence of pedophilic disorder only if she was prepubescent. He acknowledged that S.P. had begun menstruating, and testified that S.P. was "at some level of pubescence." Turner asserts that this contradicts and undermines a conclusion that his interactions with S.P. indicate pedophilia.

But, with respect to S.P., Dr. Judd testified that menstruation does not necessarily take a child out of the prepubescent category for diagnostic purposes. Rather, the child's physical characteristics, such as breasts and pubic

[2] "Mental abnormality" is tied directly to present dangerousness. In re Det. of Henrickson, 140 Wn.2d 686, 692, 2 P.3d 473 (2000).

hair, are most significant. And, Dr. Judd noted earlier that the fact that S.P. had some breast development at the time of Turner's physical attraction to her does not necessarily take her out of the prepubescent category. On this point, he testified as follows:

> Q. Even if [S.P.] is on the line, so to speak, with regard to being another hands-on victim for the actual diagnosis part of the pedophilic disorder, is what occurred with her still relevant to your diagnosis?
>
> A. It is.
>
> Q. How so?
>
> A. Just from the fact that this is [an]individual that is at some level of pubescence or growth and that he is continuing to focus on individuals such as this.

Although isolated portions of Dr. Judd's testimony may have appeared contradictory, he made the relevant facts and his conclusion clear:

> Again, as I said in my prior testimony, not only do we have these individuals between ages of 6 and . . . age 13, but we also have the consistent reports throughout the records of him having fantasies and enacting fantasies of school girl/teacher, father/daughter, grandfather/granddaughter. We have reports of him in 2009 masturbating to individuals from age -- down to age 12. We again have the same report in 2012 of the same sort of pattern, that his primary fantasy or most significant is a preteen female and her mother.
>
> So we have these various data points throughout the records which would support a pedophilic diagnosis.

Turner's acts against S.P. were probative of Dr. Judd's diagnosis of pedophilia.

And, Dr. Judd testified that Turner admitted to fantasies of girls as young as 10. He would read erotic stories involving girls as young as 8. Turner's community custody officer read notes she had taken on Turner that stated the

" '[m]ajority of his sexual fantasies are 13-year-old females. He knows it is not okay but can't stop himself. Ultimate fantasy is sex with a preteen girl and her mother while he is in a military group that is not part of the U.S. military.' "

In a sufficiency challenge, this court views the evidence in the light most favorable to the State. Audett, 158 Wn.2d at 727. When viewed in that light, Dr. Judd's testimony satisfied the DSM-5's pedophilic disorder criteria. The apparent inconsistencies in Dr. Judd's testimony were for the jury to weigh in comparing Dr. Judd's credibility against Dr. Spizman's credibility. Broten, 130 Wn. App. at 335 ("We defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence."). The jury heard sufficient evidence to support Dr. Judd's pedophilic disorder diagnosis.

B. Recent Overt Act

Turner also argues that evidence was insufficient to show that he committed a "recent overt act." Involuntary civil commitment is a substantial curtailment of individual liberty and therefore requires a showing that the offender is presently dangerous to justify commitment. In re Det. of Lewis, 163 Wn.2d 188, 193-94, 177 P.3d 708 (2008). To satisfy this requirement, the State must prove beyond a reasonable doubt that the offender has committed a "recent overt act." Id. at 194.

" 'Recent overt act' means any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the

history and mental condition of the person engaging in the act or behaviors." RCW 71.09.020(12).

Whether an act is a recent overt act is a mixed question of law and fact. In re Det. of Brown, 154 Wn. App. 116, 121, 225 P.3d 1028 (2010). To resolve questions of mixed law and fact, we apply legal precepts to factual circumstances. Id. Unchallenged factual findings are verities on appeal, and the application of law to those facts is a question of law reviewed de novo. Id.

Our analysis is guided by our Supreme Court's decision in In re Detention of Anderson, 166 Wn.2d 543, 211 P.3d 994 (2009). Anderson had a history of sexually violent crime and was diagnosed with pedophilia. See id. at 547. He was voluntarily committed at Western State Hospital (WSH). Id. at 546-47. There, he had sex with developmentally disabled patients, some of whom were unable to consent. Id. at 547. These victims were not prepubescent. See id. at 550. Anderson sought to leave WSH. Id. at 547. The State filed an SVP petition. Id.

The court held that the acts with the other patients at WSH qualified as a recent overt act based on Anderson's history of similar sexual behavior. Id. at 548. And, expert testimony suggested that Anderson was merely using the developmentally disabled individuals as substitutes for his preferred victims, prepubescent children. Id. The court also cited Anderson's ongoing sexual

fantasies of prepubescent children as relevant to its conclusion that Anderson committed a recent overt act.[3] Id.

The key inquiry is a reasonable person's apprehension of sexually violent harm based on the individual's past. For example, in Broten, this court found that an offender committed a recent overt act when he visited a park playground. 130 Wn. App. at 335-36. The court's conclusion relied on Broten's "mental history, numerous release violations, admission of fantasizing about molesting and raping young girls, and pattern of placing himself in high risk situations in anticipation of causing sexually violent harm." Id.

In re Detention of Albrecht, 129 Wn. App. 243, 118 P.3d 909 (2005) reached a similar conclusion. Albrecht offered a 13 year old boy who was "smaller than other children his age" some change to follow Albrecht, and at one point attempted to grab the boy's hand. Id. at 249-50. The Albrecht court held

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[3] Moreover, the Anderson expert noted that the lack of available prepubescent children led Anderson to seek out developmentally disabled adults as an alternative. 166 Wn.2d at 550. And, here, Dr. Judd provided testimony that the lack of available prepubescent children was a factor in Turner engaging 15 year old T.A.:

> Q. How does the access to kids who were -- access issues to kids younger to 13 factor into your analysis?
>
> A. I think it's a matter that accessing children that are younger than 13 would be more challenging because they are typically -- in the community, they are going to be with parents or they will be with some authority figure as opposed to simply being released into the community, use public transit, or to do other activities independent of that kind of supervision.

Thus, the jury heard evidence that, like Anderson, Turner pursued T.A. in part as a form of substitution, because she was easier to access than prepubescent children.

that this was sufficient evidence to show a recent overt act. Id. at 257. The court relied on the offender's pedophilia diagnosis and history of offering candy or money to small children in order to lure them. Id. Albrecht's act was not explicitly violent or sexual, but rather highly suggestive that it would lead to a violent or sexual act with the boy. See id.

Here, Dr. Judd testified that Turner's acts involving T.A. amounted to a "recent overt act."[4] T.A. was 15. Turner was 28. Turner knew she was a high school freshman. Turner introduced himself to T.A. while she was on her way to school. They rode the bus together. He began texting her. His CCO saw Turner "immersed" in composing a message to T.A. that stated "Roses are red like a sweet, tender kiss engulfs the soul and fuels the heart. There is only one word for this: DESIRE." He texted her that he wanted to buy her lunch. He told her he wanted to give her a massage. He had saved her bus schedule on his phone. And, the conduct towards T.A. aligned closely with Turner's prior conduct, such as when he met a 14 year old on a bus and eventually kissed her in a park. Dr. Judd testified that, based on his observation of Turner, he believed that Turner would have pursued T.A. even if she was as young as 12. Turner's conduct towards T.A. could create a reasonable apprehension of sexually violent harm when considering Turner's history and mental condition.

[4] Turner cites no authority to suggest that the recent overt act must be an act that itself would support a diagnosis of the alleged mental abnormality. Rather, the text of statute states that the act must cause a reasonable apprehension of sexually violent harm. RCW 71.09.020(12). Thus, the fact that T.A. was 15 is not dispositive on the recent overt act issue.

Turner cites In re Detention of Davis, 109 Wn. App. 734, 745, 37 P.3d 325 (2002), in arguing that proof of a community custody violation is insufficient to prove a recent overt act. The Davis trial court determined that, in the SVP proceeding, the State need not prove that Davis committed a recent overt act because he was incarcerated for a community custody violation. Id. at 737. On appeal, this court held that, while the State need not prove a recent overt act if the individual is incarcerated for a sexually violent offense conviction, it must prove a recent overt act if the individual is incarcerated for a community custody violation.[5] Id. at 745-46, 748. This is because the community custody violation required only a preponderance standard, whereas the SVP elements must be proven beyond a reasonable doubt. Id. Thus, the Davis jury never heard any arguments or evidence on whether Davis committed a recent overt act. See id. at 737-38. The State put forth no evidence on the recent overt act elements besides its original statement of probable cause, because the trial court originally held that it was not required to. Id. at 747.

But, the record on Turner's appeal is different. The State did not argue that the community custody violations were per se sufficient to show a recent overt act. Rather, it presented the jury with evidence of multiple contacts with minors, fantasies, role play, and expert opinion on the significance of these actions in light of the diagnosis.

[5] Washington law does not require the State to prove a recent overt act if the offender is incarcerated when the SVP petition is filed. Davis, 109 Wn. App. at 739.

Dr. Judd's opinion, based on the evidence taken in the context of Turner's past sexual behavior and reported fantasies, was that a person with full knowledge of Turner's history would have a reasonable apprehension of harm of a sexually violent nature. The evidence was sufficient to support the finding that Turner committed a recent overt act.

C. Likely to Reoffend

Turner next contends that the evidence was insufficient to show that he was more likely than not to reoffend. Turner makes two arguments on this point. First, he argues that the actuarial tools were flawed and therefore insufficient. Second, he argues that Dr. Judd's clinical judgment was insufficient, because his clinical judgment is less reliable than the actuarial tools themselves.

To prove this element, the State is required to show that the person more probably than not will engage in predatory acts of sexual violence if released unconditionally from detention. RCW 71.09.020(7). Actuarial tools may be used to prove this element, but experts' opinions are not limited to the results of actuarial tools. In re Det. of Meirhofer, 182 Wn.2d 632, 645, 343 P.3d 731 (2015).

First, Turner contends that the actuarial tools at issue were insufficient to prove this element. He contends this is so, because one actuarial tool, the Static 99-R, put Turner's reoffending risk below 50 percent. And, the actuarial tool that estimated Turner's risk of reoffending above 50 percent, the Violent Risk Appraisal Guide Revised (VRAG-R), included violent recidivism as well as sexual

reoffenses. But, Turner cites no authority suggesting that the expert opinions are confined to the precise results of actuarial tools.

Dr. Judd gave his expert opinion that the VRAG-R was the more reliable of the tools, and it put Turner's risk of reoffending at 76 percent within five years, and 87 percent within 12 years. He acknowledged that the VRAG-R had some shortcomings might overestimate sexual reoffense. But, he nevertheless concluded that Turner's risk of reoffending was higher than 50 percent. Dr. Judd's acknowledgement of the VRAG-R's imperfections is not grounds to reject his conclusions.

Second, Turner argues that Dr. Judd's clinical judgment was insufficient, because, he contends, it was less reliable than an actuarial tool that showed Turner had a low risk of reoffending. Dr. Judd believed that one actuarial tool, the Static 99-R, underestimated Turner's risk of reoffending, while another tool, the VRAG-R, overestimated that risk. Using his own judgment and knowledge of the tools' shortcomings, he concluded that Turner's risk was somewhere between the two, but over 50 percent.

The crux of Turner's argument is that Dr. Judd's deviation from the actuarial results is inherently less reliable than the actuarial results themselves, and therefore insufficient. Our Supreme Court has endorsed the use of actuarial tools in making such determinations. See Meirhofer, 182 Wn.2d at 645. But, it has also rejected insufficiency arguments that expert judgments must bow to actuarial tools. See id. at 645-46. In Mierhofer, the court noted that it has never found that actuarial tools are inherently better evidence than clinical judgment.

Id. And, here Dr. Judd testified that, based on both the actuarial tools and Turner's pattern of conduct, his expert judgment was that Turner was more likely than not to reoffend.

The evidence was sufficient to show that Turner was more likely than not to engage in sexually violent acts if released.

We affirm.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Motion for Discretionary Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74248-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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