Supreme Court No. 99946-5
(Court of Appeals No. 80857-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

Ricky Lewis.

PETITION FOR REVIEW

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A. INTRODUCTION

When the State seeks a person's indefinite confinement under RCW ch. 71.09, such confinement is constitutional only if it is based on the person's mental illness and future dangerousness. Because the proceeding is civil and not criminal, it may not be used to punish a person for past conduct. Yet here, over Ricky Lewis's objections, the commitment trial focused on past alleged offenses of which Mr. Lewis was acquitted or never charged. And the prosecution opened the trial by urging the jury to punish Mr. Lewis for these alleged offenses, stating, "We're here today because for the last four decades, Ricky Lee Lewis has been sexually assaulting and abusing young women and girls in our community." RP (10/28/19) 582.

The Court of Appeals affirmed, but this Court should grant review. Using acquitted conduct to incarcerate a person indefinitely makes a mockery of the Constitution and other laws. The admission of the alleged prior offenses violated due process and ER 403, and the prosecution committed misconduct by using this civil proceeding to urge the jury to punish Mr. Lewis for past alleged crimes.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Ricky Lewis, petitioner here and appellant below, asks this Court to review the opinion of the Court of Appeals in *In re Detention of Lewis* (No. 80857-5-I, filed June 7, 2021), attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals has held that using a civil commitment trial to punish a person for past conduct raises due process issues. This Court has held it violates due process to admit evidence of prior alleged crimes that did not result in convictions in capital proceedings because such evidence is unreliable. In this civil commitment proceeding, did the trial court violate Mr. Lewis's right to due process by admitting evidence of prior alleged crimes of which Mr. Lewis was acquitted or not charged?

2. ER 403 prohibits the admission of evidence which is substantially more prejudicial than probative. In this civil commitment trial, where the question for the jury is whether the person is mentally ill and likely to commit future crimes of sexual violence, did the trial court abuse its discretion under ER 403 by admitting evidence of prior alleged sex crimes of which Mr. Lewis was acquitted or not charged?

3. A prosecutor commits misconduct by urging the jury in a civil commitment trial to punish a person for past conduct. In this case, several State's witnesses accused Mr. Lewis of committing crimes of which he

was already acquitted or not charged, and the prosecutor told the jury such witnesses are unseen, unheard victims. The prosecutor also told the jury, "We're here today because for the last four decades, Ricky Lee Lewis has been sexually assaulting and abusing young women and girls in our community." Did prosecutorial misconduct deprive Mr. Lewis of a fair trial?

4. This Court has held, "Evidence that a respondent in an SVP proceeding who is subsequently released could be subject to another SVP proceeding if he commits a recent overt act is relevant[.]" *In re Det. of Post*, 170 Wn.2d 302, 316, 241 P.3d 1234 (2010). Did the trial court abuse its discretion by excluding such evidence on the basis that it would be confusing to explain the meaning of "recent overt act" to a jury, and was the trial court's ruling contrary to *Post*?

D. STATEMENT OF THE CASE

Ricky Lewis is the son of a black mother and white father who divorced when he was four or five years old. CP 23, 135. Mr. Lewis lived alternately with each parent, but his mother had mental health challenges that hindered her ability to care for her son. CP 23-24, 135; RP (11/12/19) 1444. She abused him, including beating him with a coat hanger. CP 24, 75. As he grew up, Mr. Lewis was a target of bullying because of his perceived race. CP 75, 135.

In his adult life, Mr. Lewis's primary passion was music, but he also had jobs at a newspaper, lumberyard, shipyard, grocery store, fitness center, senior center, and other businesses. CP 26, 135-36; RP (11/12/19) 1456. He also engaged in criminal activity, and has been convicted of one sexually violent offense and one non-violent sex offense, as well as assault, theft, marijuana possession, driving offenses, and other non-sex offenses. CP 1-12, 51.

Mr. Lewis's two sex offenses occurred in 1985 and 1992. CP 4, 11-12, 31. Yet, in 2018, the State sought Mr. Lewis's commitment as a "sexually violent predator." CP 1-12. The State averred that although these sex offenses were decades old, Mr. Lewis actually committed numerous other sex offenses that justified his indefinite incarceration. CP 30-50. It claimed Mr. Lewis raped two other women even though juries *acquitted* Mr. Lewis of those crimes. CP 38-46. It asserted that Mr. Lewis committed sexual assault against multiple people in 1989 and 1990, even though the State itself declined to file charges after contemporaneously reviewing the evidence. CP 35-38; RP (10/28/19) 589-91; RP (11/4/19) 1180-82. And it insisted Mr. Lewis had committed other sex crimes even though it had dismissed charges when witness statements proved false, or failed to investigate allegations in the first place. CP 30, 34, 46-50.

Prior to trial, Mr. Lewis moved to prohibit the State "from mentioning or presenting evidence that Mr. Lewis was charged with crimes which differ from his actual convictions or where he was found not guilty by a jury." CP 516; RP (4/10/19) 70-72. Mr. Lewis argued the admission of such evidence would be substantially more prejudicial than probative in violation of ER 403. CP 516-17. And he argued "it violates due process now for the State to try and get another 'bite at the apple'" when juries already acquitted Mr. Lewis of crimes the prosecution sought to resurrect. CP 517.

Mr. Lewis further noted it would be prosecutorial misconduct to "appeal[] for greater punishment or disparag[e] earlier punishment as too lenient[.]" CP 516. "[A]ny argument for further punishment raises substantive due process … issues." CP 516 (quoting *State v. Gaff*, 90 Wn. App. 834, 842, 954 P.2d 943 (1998)). Counsel stated, "my point, I think, in making this motion was to refer to *Gaff* as a cautionary request so that the State doesn't get up there and essentially ask the jury to, okay, he's finally here to be punished now for all these things that he wasn't punished for in the past." RP (4/10/19) 71.

The court denied the motion to exclude the evidence, stating that in "cases of this nature, references to past sentences, past charges, are inevitable." RP (4/10/19) 72. But the court ruled, "the State may not argue

that this proceeding should be used to punish Mr. Lewis for past offenses that were not filed, charged, or acquitted." CP 265.

The court also denied Mr. Lewis's motion to admit evidence that the State could file another commitment petition if he committed a "recent overt act." RP (4/10/19) 63-67; CP 511-14. Although this Court has held such evidence is relevant, the trial judge credited the State's argument that admitting such evidence would "open up a pretty large and murky area in terms of marshaling that evidence in a manner that doesn't lead to a mini-trial and doesn't confuse the jury." RP (4/10/19) 67; CP 264.

The case proceeded to trial, but after hearing all of the evidence and arguments, the jury could not agree on a verdict. The court ordered a mistrial, and later presided over a second trial with a new jury. CP 393. The court's rulings on motions in limine from the first trial remained in place and governed the second trial. RP (10/21/19) 3.

The trial was dominated by testimony and argument regarding alleged sex offenses for which Mr. Lewis was acquitted or never charged. The prosecutor opened the trial by stating, "We're here today because for the last four decades, Ricky Lee Lewis has been sexually assaulting and abusing young women and girls in our community." RP (10/28/19) 582. She went on to describe several of these supposed sexual assaults, including allegations of which juries acquitted Mr. Lewis and instances

where the prosecution decided the evidence did not support charges. RP (10/28/19) 585-99. After describing one of the cases for which Mr. Lewis was acquitted, the prosecutor stated, "That's what happens when you pick people as victims who aren't likely to be seen and not to be heard." RP (10/28/19) 593.

The theme continued as the first two witnesses accused Mr. Lewis of sexually assaulting them decades ago even though in one case the State chose not to file charges and in the other a jury acquitted Mr. Lewis. RP (10/28/19) 606-66. Notwithstanding the dispositions in these criminal cases, the witnesses testified in detail about what Mr. Lewis allegedly did to them. RP (10/28/19) 606-66. Later, Detective Cloyd Steiger testified about two cases he investigated involving Mr. Lewis, even though both of these cases resulted in acquittals.[1] RP (10/30/19 AM) 894-942.

Only one person who testified was a victim of a sex offense for which Mr. Lewis had been convicted. RP (10/28/19) 667-706.

The State also introduced testimony from employees of the Department of Corrections and Special Commitment Center, as well as

[1] Detective Steiger was recently fired for racist behavior. Mike Carter, *Washington state AG fires chief investigator over his alleged behavior toward restaurant waiter wearing a BLM button*, Seattle Times (Oct. 9, 2020), https://www.seattletimes.com/seattle-news/ag-fires-chief-investigator-over-ruckus-at-restaurant-involving-waiter-wearing-a-blm-button/

testimony from a psychologist who opined that Mr. Lewis met the criteria for confinement under RCW ch. 71.09. RP (10/31/19) 949-1076; RP (11/4/19) 1080-1221; RP (11/5/19) 1227-87. Mr. Lewis presented testimony from an expert who opined he did not meet the criteria for indefinite incarceration under RCW ch. 71.09. RP (12/2/19) 1543-1675; RP (12/3/19) 1679-1738.

The second jury found Mr. Lewis met the criteria for confinement, and the court ordered him committed. CP 475, 494-95.

On appeal, Mr. Lewis argued his "civil" commitment trial was improperly used to criminally punish him for alleged past conduct. Specifically, he argued the trial court violated due process and ER 403 by admitting evidence of alleged past crimes of which Mr. Lewis was acquitted or not charged, and the prosecutor committed misconduct by urging the jury to punish him for this acquitted and uncharged conduct. He also argued the trial court wrongly excluded evidence that the State could file another commitment petition in the future if Mr. Lewis committed an "overt act" signaling potential sexual violence, and that the trial court's ruling was contrary to *Post*, supra.

The Court of Appeals rejected the State's argument that Mr. Lewis waived these arguments, noting his trial court motion "directly references"

the relevant issues. Slip Op. at 8. However, the court affirmed the commitment order on the merits.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review because this civil commitment proceeding was improperly used to criminally punish Mr. Lewis for alleged conduct of which he was acquitted or not charged.

In a civil commitment trial, the question for the jury is whether the person has a mental abnormality or personality disorder that makes him more likely than not to offend if not confined. RCW 71.09.020(18). It is not a criminal trial, and must not be used to punish a person for past conduct. Here, over Mr. Lewis's objections, the trial court admitted evidence of alleged past sex crimes for which Mr. Lewis had been acquitted or not charged. And the prosecutor in opening statements focused on Mr. Lewis's alleged past conduct instead of his future dangerousness.

This Court should grant review. Mr. Lewis does not contest the experts' use of alleged prior conduct to support their opinions, and the court gave a limiting instruction during expert testimony. But the court violated due process and ER 403 by admitting other testimony about these unproven allegations, and the prosecutor committed misconduct by

signaling that the jury should punish Mr. Lewis for these alleged past offenses.

a. The trial court violated Mr. Lewis's right to due process by admitting evidence of alleged past crimes of which Mr. Lewis was acquitted or not charged.

Because civil commitment is a "massive curtailment of liberty," commitment proceedings must comport with due process. *In re Harris*, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L.Ed.2d 394 (1972)); U.S. Const. amend. XIV; Const. art. I, § 3. They may not be used to punish individuals for past alleged conduct, because doing so would render the proceedings criminal rather than civil. *See In re Young*, 122 Wn.2d 1, 18-23, 857 P.2d 989 (1993). "Any argument for further punishment raises substantive due process … issues." *Gaff*, 90 Wn. App. at 842 (citing, inter alia, *Young*, 122 Wn.2d at 18-26).

Here, in violation of substantive due process, the trial court admitted evidence of alleged past crimes of which Mr. Lewis was acquitted or not charged. CP 265, 516-17; RP (4/10/19) 70-72. The first two witnesses accused Mr. Lewis of sexually assaulting them decades ago even though in one case the State chose not to file charges and in the other a jury acquitted Mr. Lewis. RP (10/28/19) 606-66. Notwithstanding the

dispositions in these criminal cases, the witnesses testified in detail about what Mr. Lewis allegedly did to them. *Id.* Later, Detective Cloyd Steiger testified about two cases he investigated involving Mr. Lewis even though both cases resulted in acquittals. RP (10/30/19 AM) 894-942.

This evidence did not demonstrate that Mr. Lewis is currently mentally ill and dangerous, which is the question in a civil commitment proceeding. *See* RCW 71.09.020(18); CP 480-81. Instead, the testimony sent a clear message to the jury that Mr. Lewis "got away with" criminal behavior decades ago and should be punished for it now. The admission of the evidence violated substantive due process.

Its admission also violated procedural due process. A court violates procedural due process by admitting evidence which lacks reliability. *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984); Const. art. I, § 3. In *Bartholomew*, this Court reversed a death sentence because the trial court had admitted evidence of the defendant's alleged prior criminal activity "regardless of whether [the] defendant was charged or convicted as a result of such activity." *Id.* Such evidence is not reliable, and the Court "deem[s] particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." *Id.*

Similarly here, the court admitted unreliable evidence of alleged prior sex crimes regardless of whether Mr. Lewis was charged or

convicted. Indeed, juries acquitted Mr. Lewis of two of the alleged crimes, and the State declined to file charges for other reported acts. The admission of evidence of these alleged crimes was "offensive to the concept of fairness[.]" *Bartholomew*, 101 Wn.2d at 640.

Because this is a significant question of constitutional law, this Court should grant review. RAP 13.4(b)(3).

b. The trial court abused its discretion under ER 403 by admitting evidence of alleged past crimes of which Mr. Lewis was acquitted or not charged.

In addition to violating due process, the admission of this evidence violated ER 403. That rule provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The evidence of alleged crimes of which Mr. Lewis was acquitted or not charged was substantially more prejudicial than probative, and the court should have excluded it.

In *Bartholomew*, this Court recognized not only that such evidence was unreliable in violation of due process, but also that "it is usually highly prejudicial and of questionable relevance." *Bartholomew*, 101 Wn.2d at 641 (citing ER 403). The Court held that non-conviction evidence must be excluded from death penalty proceedings, *id.*, even

though in those cases, like civil commitment cases, "future dangerousness" is "a relevant factor for a jury's consideration." *In re the Pers. Restraint of Davis*, 152 Wn.2d 647, 704, 101 P.3d 1 (2004).

This case is different from those in which individuals challenged the admission of prior *convictions* under ER 403. *See, e.g.*, *Young*, 122 Wn.2d at 53-54; *In re Det. of Turay*, 139 Wn.2d 379, 400, 986 P.2d 790 (1999). In those cases, the Court "upheld the practice of admitting testimony from prior victims of the respondent's sex crimes—rather than admitting only the fact of the Judgment." *Turay*, 139 Wn.2d at 400 (describing and reaffirming *Young*). But here, the court admitted testimony about *alleged* sex crimes for which juries had acquitted Mr. Lewis, prosecutors declined to charge Mr. Lewis, or the State reduced charges due to credibility problems with complaining witnesses. *See* RP (4/10/19) 71-72 (counsel notes the "unusual history of dismissed cases, uncharged [cases] and acquittals" in Mr. Lewis's case). *Young* and *Turay* are therefore inapposite. Unlike prior conviction evidence, this evidence was of questionable relevance in addition to being highly prejudicial. *See Bartholomew*, 101 Wn.2d at 641.

The prosecution relied on *Stout*, but that case is also not on point. *See* RP (4/10/19) 71; Slip Op. at 10 (mentioning *In re Det. of Stout*, 159 Wn.2d 357, 150 P.3d 86 (2007)). There, the committed individual had one

prior acquittal, and his appellate attorney argued trial counsel was ineffective for failing to object to the admission of testimony regarding that allegation. *Stout*, 159 Wn.2d at 377. But the argument was not based on the rules of evidence or due process; Stout argued trial counsel should have objected on collateral estoppel grounds. *Id.* The Court rejected the argument because Stout failed to satisfy all four prongs of the collateral estoppel doctrine. *Id.* at 378. Here, Mr. Lewis raises the issue under ER 403 and due process. CP 516. Because the non-conviction evidence was unreliable and substantially more prejudicial than probative, the trial court erred in admitting it. *Bartholomew*, 101 Wn.2d at 640-41; Const. art. I, § 3; ER 403. For this reason, too, this Court should grant review.

c. The prosecution committed misconduct by urging the jury to punish Mr. Lewis for alleged past conduct, where the issues in a civil commitment proceeding are mental illness and future dangerousness.

In its order denying the motion to exclude allegations that were different from actual charges and convictions, the court ruled, "the State may not argue that this proceeding should be used to punish Mr. Lewis for past offenses that were not filed, charged, or acquitted." CP 265. The State immediately violated this order.

The prosecutor opened the trial by telling the jury, "We're here today because for the last four decades, Ricky Lee Lewis has been

sexually assaulting and abusing young women and girls in our community." RP (10/28/19) 582. She went on to describe several of these supposed sexual assaults, most of which did not result in convictions for sex offenses. RP (10/28/19) 585-99. After describing one of the cases for which Mr. Lewis was acquitted, the prosecutor stated, "That's what happens when you pick people as victims who aren't likely to be seen and not to be heard." RP (10/28/19) 593.

After the opening statement established the impermissible theme of Mr. Lewis escaping punishment for a lifetime of sex crimes, the prosecution immediately called two witnesses who accused Mr. Lewis of sexually assaulting them decades ago even though in one case the State chose not to file charges and in the other a jury acquitted Mr. Lewis. RP (10/28/19) 606-66. The message was clear: Mr. Lewis wrongly avoided convictions in the past, and must be punished now. And while the State's closing argument was more careful, the damage was already done. For weeks, jurors viewed the evidence through the lens of opening statements which implored the jury to right past wrongs. *Cf. State v. Loughbom*, 196 Wn.2d 64, 76, 470 P.3d 499 (2020) (reversing for prosecutorial misconduct where prosecutor established improper "war on drugs" theme and stating, "[r]emarks that are made at the beginning of the prosecutor's opening statement … must be understood as 'a prism through which the

jury should view the evidence.' ") (quoting *State v. Ramos*, 164 Wn. App. 327, 340, 263 P.3d 1268 (2011)).

In *Gaff*, the court held a prosecutor committed misconduct in a civil commitment trial by making comments "critical of leniency in prior criminal sentences[.]" *Gaff*, 90 Wn. App. at 843. The prosecutor acknowledged "there is nothing we can do about it," and clearly stated that the question for the jury was future dangerousness. *Id.* (Prosecutor states, "But there is one tool. You are asked to say there is something about Mr. Gaff that makes it more likely—likely that he is going to do this again[.]"). But because the prosecutor connected that question to his condemnation of the criminal system, his "argument was entirely improper" and raised due process concerns. *Id.*

Here, the vast majority of the State's opening statement recounted past alleged sex crimes for which Mr. Lewis was acquitted or not charged, combined with an emotional appeal to right these wrongs for victims who were not "seen" or "heard." RP (10/28/19) 582-602. Although the prosecutor mentioned the civil commitment standards toward the end of the presentation, it was a small portion of the jurors' introduction to the case. *Id.*

The prosecutor's focus on punishing Mr. Lewis for past alleged crimes was not just improper under *Gaff* and due process; it was also a

violation of the order in limine. CP 265; *see State v. Gregory*, 158 Wn.2d 759, 864-67, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). In *Gregory*, the trial court in a death penalty case granted a State's motion to exclude evidence of prison conditions for those sentenced to life without parole. *Gregory*, 158 Wn.2d at 864. But in closing argument, the prosecutor asked the jury to consider all of the amenities that would be afforded to the defendant in prison if he were sentenced to life instead of death. *Id.* This Court held the prosecutor committed misconduct and reversed the death sentence. *Id.* at 865-67. The Court noted, "It is clear that the prosecutor's argument at the very least violates the trial court's order excluding 'any reference to the conditions that exist in prison.'" *Id.* at 865-66; *see also State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (reversing for prosecutorial misconduct where prosecutor argued facts not in evidence "in spite of a direct court order on a motion in limine to exclude" the evidence at issue).

Here, the court ordered the State not to argue that this proceeding should be used to punish Mr. Lewis for past offenses that were not charged or of which Mr. Lewis was acquitted. In violating the order, the State committed misconduct. This Court should grant review.

2. This Court should grant review because the trial court's ruling excluding evidence that the State could file another commitment petition was contrary to *Post*.

This Court should also grant review because the trial court wrongly excluded evidence that the State could file another commitment petition in the future if Mr. Lewis committed an "overt act" signaling potential sexual violence. CP 264; RP (4/10/19) 63-67; CP 511-14. The court credited the State's argument that admitting such evidence would "open up a pretty large and murky area in terms of marshaling that evidence in a manner that doesn't lead to a mini-trial and doesn't confuse the jury." RP (4/10/19) 67. The court stated:

> I'm going to deny [Mr. Lewis's] motion. It seems to me that although relevant in the strictest of terms, the possibility of jury confusion, inordinate time spent exploring what is meant by "overt act" and what would need to be invoked if an overt act was alleged and what it actually means, is distracting, confusing and highly speculative in the context of this case. We are talking about potential future acts and potential future punishment for potential future acts. It just seems like we are getting very near the head of a pin there, and I'm going to deny the motion.

RP (4/10/19) 67. Because this logic would apply to *any* civil commitment case, it is contrary to this Court's decision in *Post*, 170 Wn.2d at 316-17.

In *Post*, like in this case, the trial court prohibited the respondent from introducing evidence that, "if released into the community, he could be subject to a new SVP commitment petition if he were to commit a

recent overt act." *Id.* at 307. The Court of Appeals affirmed the exclusion on the basis the evidence was not relevant, but this Court reversed. *Id.* at 316. The Court explained, "Evidence that a respondent in an SVP proceeding who is subsequently released could be subject to another SVP proceeding if he commits a recent overt act is relevant and is a condition that would exist upon placement in the community." *Id.*

In its analysis, the Court quoted RCW 71.09.030(1)(e) for the proposition that the State could file a petition to commit "a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act." *Id.* Moreover, a person's "knowledge of the consequences for engaging in such conduct may well serve as a deterrent to such conduct and, therefore, has some tendency to diminish the likelihood of his committing another predatory act of sexual violence." *Id.* at 316-17. Because the likelihood of a future sex offense is one of the questions the jury must answer, the possibility of a future petition is relevant. *Post*, 170 Wn.2d at 317.

The Court did not decide whether the trial court on remand could exclude the evidence on other grounds like ER 403. *Id.* In Mr. Lewis's case, the State seized on this dictum to convince the trial court to exclude the evidence because of "the possibility of jury confusion, inordinate time

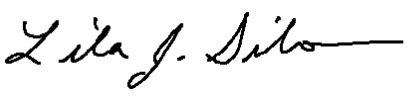
spent exploring what is meant by 'overt act' and what would need to be invoked if an overt act was alleged and what it actually means." RP (4/10/19) 67. But while the court couched its ruling as rooted in "the context of this case," *id.*, the logic it invoked would apply to *any* civil commitment case, and would render *Post* a nullity.

The Court in *Post* quoted the statute discussing the "recent overt act" predicate to a petition and held that in light of the statute, evidence of a possible future petition was relevant. *Post,* 170 Wn.2d at 316-17 (quoting RCW 71.09.030(1)(e)). Thus, "what is meant by 'overt act' and what would need to be invoked if an overt act was alleged and what it actually means" would be at issue in *any* case in which such evidence was introduced. RP (4/10/19) 67. The trial court's reason for exclusion amounts to a *per se* rule that such evidence is never admissible. Because this ruling is contrary to *Post,* this Court should grant review. RAP 13.4(b)(1).

F. CONCLUSION

For the above reasons Mr. Lewis asks this Court to grant review.

DATED this 30th day of June, 2021.



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of	)	No. 80857-5-I
	)	
RICKY LEE LEWIS,	)	DIVISION ONE
	)	
Appellant.	)	UNPUBLISHED OPINION
	)	

MANN, C.J. — Ricky Lewis appeals a jury finding that he was a sexually violent predator (SVP) who was likely to reoffend if not placed in a secure setting. Lewis argues that (1) the trial court abused its discretion by admitting evidence about prior alleged crimes where he was never charged, acquitted, or where the charges were reduced; (2) that the trial court abused its discretion in not admitting evidence that the State could file a future SVP petition were Lewis freed from custody, and (3) that prosecutorial misconduct during opening statement requires reversal. We affirm.

FACTS

A. Background

Lewis was scheduled to be released from prison in June 2018 after serving an 84-month sentence for assault in the second degree and two counts of unlawful imprisonment. The crime was originally charged as rape in the first degree and

kidnapping in the first degree. Lewis entered an Alford[1] plea to the reduced charges. Based on previous rape convictions, on June 25, 2018, the State filed a petition alleging Lewis was an SVP[2] in accordance with chapter 71.09 RCW. The State supported its petition with a forensic psychological evaluation prepared by Harry Hoberman, Ph.D., L.P. The psychological evaluation documented an extensive history of Lewis sexually assaulting both underage girls and young adult women over the course of several decades. Many of the incidents resulted in reports to the police and arrests, but only a few resulted in criminal charges. Four incidents resulted in convictions—three pursuant to plea bargains involving reduced charges, and one conviction by a jury as charged for rape in the second degree. Other evidence documented other sexual assaults that were never reported to the police. Lewis was acquitted twice at trial—once for second degree rape, and once for second degree assault with sexual motivation. Dr. Hoberman's evaluation identified Lewis's "mental abnormalities"[3] as defined by the SVP statute. At the time, Lewis was serving his most recent sentence for the crimes involving B.P. and C.S.

B. Trial

Before trial, Lewis moved in limine to prohibit the State from mentioning or presenting evidence that Lewis was charged with crimes which differ from his actual conviction(s) or where he was found not guilty by a jury. Lewis argued that introduction

[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] A "sexually violent predator" is "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

[3] A "mental abnormality" is "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." RCW 71.09.020(8).

of this evidence would allow the State to use the civil commitment as a substitute for criminal convictions that did not occur.

Lewis also moved in limine to present evidence that, were he released, the State could file another SVP petition in the future if he committed a "recent overt act"[4] in the community. Lewis argued that the evidence would demonstrate a deterrent to engage in further sexual misconduct.

At oral argument, Lewis's attorney acknowledged the admissibility of the evidence regarding crimes that did not result in convictions, but clarified that her motion was focused on precluding improper arguments by the State. The trial court confirmed that the State would not be arguing that Lewis should be punished now for crimes that he was not sufficiently punished for in the past, stating:

> THE COURT: . . . It does seem and I think acknowledges that cases of this nature, references to past sentences, past charges, are inevitable. The State has acknowledged that it would be improper for it to argue that this case should be used to punish for other cases.
>
> I see [Lewis's attorney] acknowledge that now. The court is not going to grant that kind of argument if it is offered. But I'm not going to preclude evidence through experts regarding past sentences, past charges, past acts. That seems to be the nature of this type of proceeding, and I can't exclude that evidence.

The court denied Lewis's motion.

The trial court also denied Lewis's motion to introduce evidence that the State could file an SVP petition in the future because of "the possibility of jury confusion" and

[4] 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).

"time spent exploring what is meant by an 'overt act'" would be "distracting, confusing, and highly speculative in the context of this case."

Lewis's first trial ended in a mistrial when the jury could not agree on a verdict. A second trial began in November 2019. Evidence at trial included the following details about Lewis's history of sexual assaults.

In 1980, when Lewis was 22, he impregnated 12-year-old L.R., sexually assaulted her, isolated her in his room, and photographed her nude. The incident was never reported to law enforcement. Dr. Hoberman explained that the incident was relevant because it demonstrated Lewis's nearly lifelong fixation on nonconsensual sex.

Approximately three years later, Lewis had a relationship with C.G., then 16 years old. Hoberman explained that C.G. reported to the police that when she attempted to end the relationship, Lewis smeared dog feces onto her face. While not sexual, Dr. Hoberman explained that it was relevant as an example of Lewis's sadistic behavior. Lewis admitted having an argument with C.G. during which "[s]ome feces accidentally got on her shirt," but denied he smeared any on her face.

In 1985, Lewis was convicted of his first sex offense for the statutory rape of 15-year-old A.A. Lewis drugged A.A. at a party, took her home, struck her in the face, forced her to perform oral sex, and had forcible intercourse with her. Lewis was originally charged with forcible second degree rape, but the charge was dropped as part of a plea agreement. Lewis claimed that A.A. had sex with him willingly and that she lied to him about her age. Lewis served six months for his conviction.

In 1988, when Lewis was 30 years old, he met 14-year-old J.Sm. through mutual acquaintances. J.Sm. testified at the SVP trial that they were eating Jack-in-the-Box on

the backseat of his van, where he then forcibly kissed her, pulled her shirt open, rubbed his penis between her breasts, ejaculated on her neck, and then handed her some napkins and told her to clean herself up. Lewis explained that he and J.Sm. had only engaged in "heavy petting," but that she did not resist. After J.Sm. reported the incident, no charges were filed.

In 1990, Lewis was arrested for sexual assaults against 12-year-old B.W. and 14-year-old M.H. Dr. Hoberman described B.W.'s report that Lewis bound her hands with her underwear, placed her into a closet, and raped her at knifepoint. Dr. Hoberman described M.H.'s report that Lewis forced her to perform oral sex at gunpoint. Lewis denied the interactions because he was not attracted to B.W. due to her bad complexion, and that M.H. had intercourse with his friend, but not him. This incident was reported to the police, Lewis was arrested, but the case was not referred to the prosecutor's office for criminal charges.

In 1992, 20-year-old T.T. reported to police that she had been raped by a man later identified as Lewis. T.T. testified at the SVP trial. She explained that after she initially rebuffed a pass by Lewis, he agreed to drive her from the house he was staying at back to Pioneer Square. Lewis was driving T.T. on the highway when he demanded she give him oral sex. T.T. attempted to open the door while the vehicle was moving, but Lewis pulled her back into the car by her hair. T.T. did what Lewis asked. T.T. reported the incident to the police.

Detective Cloyd Steiger investigated the incident involving T.T. In an interview with Steiger, Lewis claimed that he was using drugs to trick the cocaine-addicted T.T.

into sex, and because he had scammed her, she reported the sex as rape. The case resulted in acquittal.

Two months following Lewis's acquittal in the T.T. case, R.M. reported to the police that Lewis raped her. R.M. testified at the SVP trial. Lewis provided R.M. with heroin and asked for a massage in return. Lewis then grabbed R.M.'s arm, twisted it behind her back, and demanded she masturbate him and perform oral sex.

Four days following the occurrence with R.M., Lewis assaulted J.Su. by putting her in a choke hold and demanding that she give him oral sex in exchange for cocaine; she managed to run away. Steiger investigated both R.M. and J.Su.'s cases. When he questioned Lewis, Lewis stated that the women were "cokeheads" and "he was just trying to help them."

R.M. and J.Su.'s cases were charged and tried together. Lewis was acquitted of second degree assault with sexual motivation in J.Su.'s case; he was convicted of forcible second degree rape as charged in R.M.'s case. Dr. Hoberman relied on both cases in forming his opinion, because both incidents fit Lewis's pattern of coerced sexual behavior and the infliction of physical and psychological suffering on his victims.

In March 2013, police arrested Lewis for assaulting 19-year-old C.S. and refusing to allow her to leave his trailer. Lewis provided police with a camcorder containing a video of C.S. performing oral sex on him. On the same camcorder, police found a video with B.P. B.P. became upset with Lewis when he tried to pay for intercourse in coins instead of bills. In response, Lewis slapped her, berated her, and shoved his genitals in her face, after which she acquiesced to having intercourse with him.

Lewis entered an Alford plea to assault in the second degree and unlawful imprisonment for his conduct with B.P., and unlawful imprisonment for his conduct with C.S. He denied unlawfully imprisoning C.S., stating that he refused to pay for his services because he failed to climax. Lewis claimed that the videos were part of a documentary about women working on Aurora Avenue called "The Girls on 99," which he had planned to submit to the Seattle International Film Festival.

Based on Lewis's history of sexual assault towards young women and minors, as well as other behaviors, pieces of evidence, and psychological evaluations, Dr. Hoberman diagnosed Lewis with a paraphilic disorder that he described as: 1) other specified paraphilic disorder focused on nonconsent, coercion, and rape; or 2) sexual sadism disorder. Dr. Hoberman also diagnosed Lewis with two overlapping personality disorders: 1) antisocial personality disorder and 2) narcissistic personality disorder.

Dr. Hoberman noted that coerced sexual activity "is an area of a particular sexual interest or source of particular sexual arousal for Mr. Lewis such that he has regularly or persistently engaged—appeared to engage in that behavior over time." Dr. Hoberman also identified that Lewis has a "victim type"—specifically girls who were runaways or estranged from their families, girls and women with drug issues, and prostitutes, all whom are marginalized and unlikely to reach out to law enforcement. Dr. Hoberman concluded that "what seems extremely clear . . . is that there is a pattern of behavior of engaging in isolating, vulnerable or marginalized females," and subjecting them to coerced, nonconsensual, and sadistic behavior.

The jury ultimately found Lewis to be an SVP. The trial court ordered Lewis to be civilly committed and placed him in the custody of the Washington State Department of Social and Health Services. Lewis appeals.

ANALYSIS

A. Evidentiary Rulings

1. Admission of Evidence of Prior Alleged Crimes

Lewis first argues that the trial court erred in admitting evidence about prior alleged crimes of which he was acquitted, where the charges were reduced, and where the State did not file charges.[5] In particular, Lewis challenges the admission of testimony from J.Sm. (no charges) and T.T. (acquittal), as well as Detective Steiger's testimony about two cases he investigated that resulted in acquittals (T.T. and J.Su.). Lewis does not contest Dr. Hoberman's use of the alleged prior conduct in preparing his analysis, and agrees that the trial court gave proper limiting instructions during Dr. Hoberman's testimony. Instead, he alleges that the trial court violated his right to due process and abused its discretion under ER 403 in allowing the direct testimony. We disagree.

Due Process

A challenge to denial of due process is a legal question that we review de novo. State ex rel. Washington State Public Disclosure Com'n v. Permanent Offense, 136 Wn. App. 277, 293, 150 P.3d 568 (2006).

[5] As a preliminary matter, the State argues that Lewis waived any evidentiary objection because his trial counsel's motion in limine concerned the characterization of the State's arguments, not the admission of evidence. Because Lewis's motion at trial directly references the admission of evidence, we recognize his objection and address his argument on appeal.

We first note that SVP proceedings are "resolutely civil in nature." In re Detention of Reyes, 184 Wn.2d 340, 347-48, 358 P.3d 394 (2015). Accordingly, constitutional trial rights expressly afforded to criminal defendants by the Fifth and Sixth Amendments do not apply in SVP cases. Reyes, 184 Wn.2d at 347-48 (citing multiple cases).[6] While individuals facing SVP commitment are entitled to due process of law, due process is a "flexible concept." In re Detention of Stout, 159 Wn.2d 357, 369-70, 150 P.2d 86 (2007). "At its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context." Stout, 159 Wn.2d at 370 (citing Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

Here, there is no dispute that Lewis was in any way denied the right to be heard. He was represented by counsel throughout the proceedings. His counsel was afforded the right to cross examine each witness. And Lewis testified on his own behalf and was able to dispute the witnesses' allegations.[7] Lewis was not denied due process.

ER 403

"We review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court." State v. Clark, 187 Wn.2d 641, 648, 389 P.3d 462 (2017). Relevance of evidence under ER 403 is soundly within the trial court's discretion. State v. Rice, 48

[6] Lewis cites to State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984) in support of his claim that misconduct that did not result in a conviction should not be admitted because it is "unreliable." Bartholomew, however, is a death penalty case and not applicable to an SVP proceeding. Moreover, the issue in Bartholomew was the constitutionality of a statute that allowed evidence of prior misconduct to be admitted during the penalty phase "regardless of its admissibility under the rules of evidence," which the court found to be in violation of the due process and cruel punishment clauses of the state constitution. Bartholomew, 101 Wn.2d at 638-39. We agree with the State that Bartholomew is not on point.

[7] For example, during his testimony at the SVP trial, Lewis admitted having sex with T.T. in his car, but claimed T.T. willingly offered sex in exchange for a ride back to Pioneer Square. Lewis also admitted he had engaged in what he called "heavy petting" with J.Sm., but he claimed that she did not resist. He also claimed that she lied about her age.

Wn. App. 7, 11, 737 P.2d 726 (1987). "The trial judge has broad discretion in balancing the probative value of the evidence against its possible prejudicial impact." Rice, 48 Wn. App. at 11. Thus, this court will only reverse a trial court's decision on the relevance and prejudicial effect of the evidence upon a manifest abuse of discretion. State v. Lee, 188 Wn.2d 473, 486, 396 P.3d 316 (2017). Abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Rice, 48 Wn. App. at 11.

The trial court did not abuse its discretion in allowing the testimony from J.Sm., T.T., and Detective Steiger regarding Lewis's prior sexual misconduct that did not result in a conviction. It is well established that testimony from an offender's prior victims is admissible in SVP proceedings. "The manner in which the previous crimes were committed has some bearing on the motivations and mental states of [the offenders], and is pertinent to the ultimate question . . . of whether they are sexually violent predators under the terms of the [s]tatute." In re Det. of Young, 122 Wn.2d 1, 53, 857 P.2d 989 (1993). This includes evidence of past criminal sexual behavior that did not result in a conviction. Stout, 159 Wn.2d at 378.[8]

The probative value of victim testimony outweighs its potential for unfair prejudice under ER 403 because the evidence bears directly on "the mental state of the alleged SVP, the nature of [their] sexual deviancy, and the likelihood that [they] will commit a

[8] Lewis asserts that Stout is not controlling because it addressed the issue in terms of collateral estoppel rather than ER 403. While this may be true, it is a distinction without import. The Stout court clearly distinguished the difference in admissible evidence in a criminal proceeding as opposed to an SVP proceeding and concluded that evidence of prior acts where the defendant was acquitted are admissible in an SVP proceeding in contrast to a criminal proceeding. Stout, 159 Wn.2d at 378.

crime involving sexual violence in the future." In re Det. of Turay, 139 Wn.2d 379, 400-02, 986 P.2d 790 (1999).

The State had the burden of demonstrating that Lewis "suffers from a mental abnormality or personality disorder which makes [him] likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). Evidence of Lewis's prior misconduct, regardless of conviction, is probative in the determination of Lewis's behavior, abnormalities or disorders, and his likelihood to reoffend if not confined for treatment. The trial court did not abuse its discretion in allowing testimony regarding such misconduct.

2. Future SVP Petition

Lewis argues that the trial court abused its discretion under ER 403 by excluding evidence that if he were released the State could bring another SVP proceeding if he commits a more "recent overt act." We disagree.

Lewis relies on In re Det. of Post, 170 Wn.2d 302, 241 P.3d 1234 (2010), to support his claim that a future SVP petition is relevant. But Post does not stand for the proposition that evidence of a potential future SVP petition is always admissible. Instead, the Post court held that the possibility of a "recent overt act" petition is a condition that "would exist" upon an offender's release, and evidence of that possibility may be relevant in an SVP trial. Post, 170 Wn.2d at 316-17. The court explained that the evidence may be relevant because the offender's knowledge that a future petition could be filed "may well serve as a deterrent" and may "diminish the likelihood of [their] committing another predatory act of sexual violence" in the community. Post, 170

Wn.2d at 316-17. But, while possibly relevant, the court expressly stated that it was not deciding that such evidence is always admissible:

> We do not decide whether the evidence was admissible, we merely correct the Court of Appeals' misapprehension and hold that the evidence is relevant and does not violate RCW 71.09.060(1). ER 403 issues of unfair prejudice and confusion of the issues are best addressed in the first instance by the trial court, subject to review for abuse of discretion.

Post, 170 Wn.2d at 317.

In this case, the trial court considered the impact of introducing the evidence at trial and determined that it was more likely to confuse the jury:

> I'm going to deny [Lewis's] motion. It seems to me that although relevant in the strictest of terms, the possibility of jury confusion, inordinate time spent exploring what is meant by "overt act" and what would need to be invoked if an overt act was alleged and what it actually means, is distracting, confusing and highly speculative in the context of this case. We are talking about potential future acts and potential future punishment for potential future acts. It just seems like we are getting very near the head of a pin there, and I'm going to deny the motion.

We cannot say that the trial court's decision was manifestly unreasonable or an abuse of discretion.

3. Harmless Error

The State asserts that, were any evidentiary errors to have occurred, such errors are harmless. The State is correct. Evidentiary error is harmless if, within reasonable probability, it did not materially affect the verdict. In re Det. of West, 171 Wn.2d 383, 410, 256 P.3d 302 (2011). Here, even if the trial court excluded the testimonies of J.Sm., T.T., and Detective Steiger, and if the trial court included the possibility of a future SVP petition, the errors would be harmless.

The evidence of Lewis's ongoing pattern of sexually violent behavior was overwhelming. The evidence included R.M.'s testimony; certified court records establishing Lewis's criminal sexual conduct with L.R., B.P., and C.S.; a videotape of Lewis slapping, berating, sexually abusing, and humiliating B.P.; thousands of pages of describing Lewis's sexual abuse of girls and women that Dr. Hoberman used to form his expert opinion; as well as Lewis's own testimony. Taking the evidence as a whole, there is no reasonable probability that the outcome of the case would have been different had J.Sm., T.T., and Steiger not testified, or if the jury had been informed that a future SVP petition were possible.

B. Prosecutorial Misconduct

During its opening statement, the State made the following comment:

> We're here today because for the last four decades, Ricky Lee Lewis has been sexually assaulting and abusing young women and girls in our community. He has sought out and chosen victims that people might not believe, might not hear, or might not see.

Lewis did not object to these remarks. Lewis argues that this statement constituted prosecutorial misconduct because it sought to punish Lewis for past actions. We disagree.

In order to establish prosecutorial misconduct, the defendant bears the burden of proving the conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). We evaluate improper arguments in context of the total argument, the issues addressed in the case, and the evidence addressed in the argument. State v. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

Once impropriety is established, we determine whether the defendant was prejudiced under one of two standards of review. If the defendant objected at trial, he must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. Emery, 174 Wn.2d at 760. If the defendant did not object at trial, he is deemed to have waived any error, "unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61. Under the second, heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

Here, the prosecutor's statement was not improper. The opening statement that the reason for being in court was Lewis's decades of assaulting and abusing young women was accurate. Taken in context, this single statement does not imply the need to punish Lewis for past actions, but rather that his habitual behaviors have culminated in the State filing an SVP petition, the topic the jury was to consider.

Even were the prosecutor's statement improper, Lewis does not meet his burden of establishing that it rises to misconduct. Because Lewis did not object at trial, he is subject to the heightened misconduct standard. First, a limiting instruction could have cured the prosecutor's statement; it would have taken little effort to inform the jury that they were not punishing Lewis for past actions.[9] Second, given the backdrop of the trial

[9] Additionally, the trial court specifically instructed the prospective jurors that their role was "not to punish or hold Lewis accountable; rather [their] role would be to decide based solely on the evidence presented during the trial whether Lewis currently meets the definition of [an SVP]."

and evidence presented, it is unlikely that a single statement had a substantial likelihood of affecting the jury verdict.

Affirmed.

Mann, C.J.

WE CONCUR:

Chun, J.

Dwyer, J.

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 **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80857-5-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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