

NO. 42616-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of:

CHARLES URLACHER,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

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II. STATEMENT OF THE CASE

A. Procedural History

On September 21, 2010, shortly before Charles Urlacher's scheduled release from the Department of Corrections, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of Mr. Urlacher pursuant to RCW 71.09. CP 1-2, 4. On October 11, 2010, the trial court entered an order determining that probable cause existed to believe Mr. Urlacher was an SVP. CP at 107-108. Pursuant to this order, Mr. Urlacher was transported to the Special Commitment Center (SCC) on McNeil Island. CP 107.

Mr. Urlacher's initial commitment trial took place in Pierce County Superior Court from August 22 through September 2, 2011. RP 1-

1102. On September 2, 2011, the jury returned a verdict finding that Mr. Urlacher was an SVP. CP 283, RP 1085. On the same day, the trial court entered an Order of Commitment. CP 284. On September 23, 2011, Mr. Urlacher filed a Notice of Appeal. CP 285, Ex. 1.

B. Sexually Violent Predator Trial

1. Mr. Urlacher's Offense History

Respondent, Charles Urlacher has a pervasive sexual interest in children, particularly young boys. RP 519, 531, 535. Despite having nearly 1000 sexual partners, a wife with an open marriage, and an adult paramour, his sexual desires for children persisted. RP 175, Ex 72 at 36:22-39:21. Mr. Urlacher's offending behavior against minors included groping, performing oral sex, sodomizing, and photographing children engaged in sexual behavior. RP 160, 204, 211, 222. He also had an extensive collection of child pornography on his computer. RP 174, 413.

Mr. Urlacher's sex offending was first detected in late 1994, when he was charged with Child Molestation in the Second Degree. RP 152. A 12 year-old girl, M.J., reported to law enforcement that Mr. Urlacher had forced her to touch his penis while she was attending a sleepover at the Urlacher household with her brother. RP 153, 154, 196. On October 31, 1995, Mr. Urlacher pleaded guilty to Assault in the Fourth Degree for this offense and received a 2-year suspended sentence. RP 156, Ex. 3, 4.

On June 11, 1999, Mr. Urlacher was charged with two counts of Rape of a Child in the First Degree, one count of Rape of a Child in the Second Degree, and one count of Child Molestation in the First Degree. RP 153, Ex. 8. The victims of these offenses were an 11 year-old boy, J.S., and Mr. Urlacher's older son, C.U. *Id.* Mr. Urlacher was able to take advantage of another plea offer, and pleaded guilty to only one count of Rape of a Child in the First Degree and one count of Rape of a Child in the Second Degree on October 25, 1999. RP 153, Ex. 10. Mr. Urlacher was sentenced to 240 months incarceration for these convictions. Ex. 11.

J.S. was a friend of Mr. Urlacher's younger son, N.U. RP 159. On an occasion when J.S. was visiting N.U. at the Urlacher home, Mr. Urlacher groped, masturbated, and performed oral sex on J.S. RP 160. Mr. Urlacher testified that the sole driving factor behind these offenses was J.S.'s curiosity upon discovering Mr. Urlacher nude sunbathing immediately before the offenses occurred. RP 159-161.

While Mr. Urlacher was only charged with three offenses regarding his son C.U., he testified that the molestations of his son were "numerous and often." RP 166. Mr. Urlacher began sexually assaulting his son at age 8 and continued until he was 15 years old. RP 195, 198. The abuse stopped after C.U. moved out of the home to live with an aunt and uncle following a physical assault by Mr. Urlacher. RP 204-205.

Mr. Urlacher's sexual abuse of C.U. included showing him pornography, groping, masturbating, and performing oral sex on him. RP 198. Mr. Urlacher also took photographs and recorded video of C.U. engaged in sexual behavior, such as masturbation. RP 200.

In between his 1995 and 1999 convictions, Mr. Urlacher sexually assaulted several other young boys. RP 170, 202, 243-245. He was on probation for his 1995 offense while committing some of these offenses. RP 462, Ex. 74 at 46:8-9. After his arrest, Mr. Urlacher confessed to offending against a 14 year-old neighborhood boy named Nicholas, a 13 year-old boy named Chris, and a 12 year-old boy named Brandon. RP 244-245. He engaged in mutual masturbation with each boy in addition to orally copulating them. *Id.*

A friend of C.U.'s named A.K. testified that Mr. Urlacher molested him as many as 200 times, starting at age 13. RP 222. A.K. described grooming behavior by Mr. Urlacher which led to mutual masturbation, oral sex, and Mr. Urlacher sodomizing him. RP 221-222. Mr. Urlacher also took pictures and made video of A.K. masturbating. RP 223. A.K. described Mr. Urlacher's "masturbation parties," where Mr. Urlacher would show boys pornography and encourage them to masturbate to ejaculation in front of him. RP 226.

Mr. Urlacher's younger son, N.U., also testified to repeated molestations by Mr. Urlacher starting when he was six years old. RP 210-211. The offenses included Mr. Urlacher showing N.U. pornography, then groping and masturbating him. RP 211. Along with other witnesses, N.U. described a home environment fostered by Mr. Urlacher where sexual discussions were encouraged. RP 210, 195, 224-225.

When Mr. Urlacher was arrested in 1999, law enforcement discovered over 160 images of children engaged in sexually explicit conduct. RP 413. Most images were found on hard drives in the master bedroom upstairs. RP 380. Mr. Urlacher admitted to downloading pictures of children in sexually explicit situations on his home computer upstairs. RP 174-175, 201. Mr. Urlacher testified that he saved this material because he liked it. Ex. 77 at 73:20-22.

Mr. Urlacher joined the Sex Offender Treatment Program (SOTP) while incarcerated in 2007. Ex. 78 at 77:17-20. Mr. Urlacher was terminated from the 12-month program after seven months. RP 259, 263. In treatment, Mr. Urlacher struggled with managing his emotions. RP 295. He also had difficulty being receptive to feedback. RP 294. When he left treatment, Mr. Urlacher, "still had the bulk of the work to do." RP 300. He has not participated in any sex offense-specific treatment since leaving SOTP. Ex. 78 at 103:22-24.

2. Dr. Goldberg's Testimony at Trial

The State presented expert testimony from licensed psychologist Dr. Harry Goldberg at trial. RP 491-667. Dr. Goldberg specializes in forensic psychology and has conducted approximately 700 SVP evaluations in his career. RP 491, 498.

Dr. Goldberg was retained by DOC to evaluate whether Mr. Urlacher met the statutory criteria for civil commitment as an SVP. RP 500. Dr. Goldberg reviewed extensive records related to Mr. Urlacher. RP 501-506. They included criminal history, institutional, and psychological records, all of which are of the type commonly relied upon by experts who evaluate SVPs. RP 501-503. Though Mr. Urlacher initially refused to be interviewed, Dr. Goldberg did interview him in 2011 as part of an updated evaluation. RP 504-506.

Dr. Goldberg opined, to a reasonable degree of psychological certainty, that Mr. Urlacher suffers from pedophilia and that, in Urlacher's case, it qualifies as a mental abnormality under RCW 71.09. RP 528, 541-546. Pedophilia involves intense, sexually arousing urges or fantasies towards prepubescent children that a person has acted upon or that causes the person interpersonal difficulty. RP 528-530, Ex. 16. He also opined that Urlacher's mental abnormality causes him to have serious difficulty

controlling his sexually violent behavior. RP 546. He held this opinion to a reasonable degree of psychological certainty as well. *Id.*

Finally, Dr. Goldberg testified that Mr. Urlacher's mental abnormality makes him likely to commit sexually violent acts in the future. RP 547-548. This opinion was also held to a reasonable degree of psychological certainty. RP 548. His opinion was based on a risk assessment utilizing an "adjusted actuarial" approach, which is the generally accepted risk assessment method in his field. RP 549. This approach includes consideration of actuarial information, dynamic risk factors, and protective factors. RP 550-551.

Actuarial instruments are tools that combine factors associated with sexual reoffense to provide a statistical risk level for the person being assessed compared to other offenders. RP 553-554. Dr. Goldberg employed four such instruments: the Static 99R, the Static 2002R, the Minnesota Sex Offender Screening Tool Revised (MnSOST-R), and the Sex Offender Risk Appraisal Guide (SORAG). RP 556. These actuarial tools are commonly used in Dr. Goldberg's field and studied the most. *Id.* The actuarial information Dr. Goldberg acquired from these instruments indicated that Mr. Urlacher is a moderate to moderate-high risk when compared to other sex offenders. RP 572.

Actuarials underestimate risk because they only track new charges or convictions. RP 570-572. A high percentage of sex crimes are never reported to law enforcement and would not be detected by actuarials. *Id.* Because many of Mr. Urlacher's victims are unadjudicated, his risk of reoffense is higher than what the actuarial information suggests. RP 572.

Dynamic risk factors take into account characteristics of a person that change and may elevate or reduce risk. RP 550-551. Dr. Goldberg used the SRA-FV instrument to measure these factors in his assessment of Mr. Urlacher. RP 573. Mr. Urlacher's score in this instrument places him "within an extremely high level of sexual recidivism." RP 582. Assessment of Mr. Urlacher's dynamic risk factors indicates that his risk is higher than what the actuarial information suggests. *Id.*

Protective factors reduce an offender's risk for reoffense. RP 551. Such factors include remaining sex offense free in the community for a long period of time, advancing age, completion of sex offender treatment, and a release environment conducive to non-offending. RP 584-591. Dr. Goldberg opined that no protective factors applied to Mr. Urlacher and that Mr. Urlacher could not be safely released into the community. RP 591.

3. Dr. Wollert's Testimony at Trial

Mr. Urlacher presented testimony from his expert, Dr. Richard Wollert. RP 691-723, 749-792. Dr. Wollert has been an expert retained for SVP respondents, like Mr. Urlacher, for 13 years. RP 795. He has never been retained by a prosecuting authority in an SVP case. *Id.*

Dr. Wollert disagreed with Dr. Goldberg's pedophilia diagnosis for Mr. Urlacher. RP 762-763. One stated reason for his disagreement was that Mr. Urlacher's sexual urges for children were not strong, recurrent, or pervasive enough to be diagnosable. RP 762, 767. Dr. Wollert also denied that the pornographic images of children found on Mr. Urlacher's computer were evidence of pedophilia. RP 822.

Dr. Wollert disagreed that Mr. Urlacher was likely to reoffend in a sexually violent manner. RP 785. He testified that no risk assessment exists that can determine a person is likely to reoffend. RP 866. Because actuarial instruments can't determine if a person is likely to reoffend, Dr. Wollert opined that having a "robust" mental abnormality makes a person likely to recidivate. RP 866-868. Based on an offender's mental abnormality, Dr. Wollert uses his "operationalized judgment" to determine risk. RP 868.

C. Mr. Urlacher's Offer of Proof

The trial court gave Mr. Urlacher an opportunity to make an offer of proof regarding the MATS-1, an untested test Dr. Wollert created. RP 723. The State moved in limine to preclude reference to the MATS-1. CP 143. After the offer of proof, the trial court granted the State's motion because the MATS-1 was not commonly used, nor "generally relied on by the relevant scientific community." RP 748-749.

For the offer of proof, Dr. Wollert detailed the development of the MATS-1. RP 724-728. He testified that the MATS-1 was "as accurate as the Static-99" actuarial instrument. RP 728. When asked if he preferred the MATS-1 over other instruments in Mr. Urlacher's case, Dr. Wollert equivocated. RP 732. At no point during the offer of proof did Dr. Wollert testify about the application of the MATS-1 to Mr. Urlacher's case. There was no testimony about what Mr. Urlacher's score on the instrument was, or what role, if any, it played in his risk assessment.

Mr. Urlacher submitted ten declarations from eight individuals claiming to have used the MATS-1 in SVP evaluations. RP 64, Supp. CP. Dr. Wollert testified that he knew of six individuals using his new instrument. RP 739. Dr. Wollert admitted seeking input about the use of the MATS-1 from colleagues at a defense-oriented group known as the Sex Offender Criminal Defense Association (SOCDA). RP 733. The

only people using the MATS-1 that Dr. Wollert was aware of were members of this organization. RP 734.

Two weeks prior to the offer of proof, Dr. Wollert testified about the use and acceptance of the MATS-1 in an unrelated SVP matter. RP 732-733. Dr. Wollert acknowledged testifying at that hearing that the MATS-1 was becoming commonly used. RP 732. He admitted that within the last two weeks the MATS-1 had not evolved into a commonly used test from a test that was becoming used more frequently. RP 733. Dr. Wollert also conceded that he could understand why others might not see his test as generally accepted within his field. RP 734-735.

In considering the State's motion, the trial court also had before it various court orders from other trial courts relating to Dr. Wollert and his "history of unreasonably relying on his own novel methods." CP 145. The State presented evidence that courts across Washington State had entered specific findings rejecting his methods and opinions because they are not commonly accepted. The Hon. Michael E. Schwab of the Yakima County Superior Court, for example, had entered findings stating that "Dr. Wollert's methods of assessing the impact of age on recidivism are not generally accepted in the community of experts who conduct SVP evaluations" and that his "advocacy of" a particular statistical formula to the various risk assessment tools regarding the assessment of older, high

risk offenders “is not generally accepted by the scientific community.” CP 145, 154.

Four years later, the Honorable T.W. Small of the Chelan County Superior Court found that Dr. Wollert’s opinions were “biased and not credible,” and enumerated 16 bases for that finding, including a finding that Dr. Wollert “disregarded methods of evaluation that are generally accepted in the psychological community.” CP 145, 156-157, No. 26(p). The findings state that Dr. Wollert’s criticism of the State’s psychologists was “disingenuous” in light of his “income testifying exclusively for Respondents,” (CP 156, No. 26(e)) and that his opinions “lacked objectivity due to his close association with the defense association and defense bar.” CP 156, No. 26(f).

Not long after entry of Judge Small’s findings in 2009, the Honorable Linda C.J. Lee of the Pierce County Superior Court entered findings characterizing Dr. Wollert’s opinion as “suspect” (CP 146, 159, No. 35) and noting that, while the court “found Dr. Wollert to be a very passionate person about his own theories and opinions...” his opinions and testimony “were inconsistent, contradictory, generalized and conclusory.” CP 159, No. 36. Judge Lee went on to make 14 specific findings illustrating that determination, closing with the observation that, “based on the testimony presented to this Court, Dr. Wollert’s crusade to convince

others to adopt his theories should be best fought with his colleagues in their professional forums first, and not openly in the courts, which, in this Court's opinion, damages his credibility." CP 159-161, Nos. 36 through 48.

III. ARGUMENT

Mr. Urlacher argues that his civil commitment should be reversed because the trial court erred when it precluded testimony regarding the MATS-1 test and admitted images from Mr. Urlacher's child pornography collection. These arguments are without merit. First, the trial court acted within its discretion when it precluded Dr. Wollert from testifying about the tool he created to assess sex offender risk. Mr. Urlacher failed to meet the basic requirements of admissibility pursuant to ER 702 and 703, thus the court did not err in excluding it. Even if there was trial court error, Mr. Urlacher has not shown prejudice. There is no indication from his offer of proof that Mr. Urlacher's assessed risk would have been any lower based on the MATS-1, and as such it is impossible to assess how this ruling affected Dr. Wollert's testimony. There is also no indication that exclusion of the MATS-1 testimony affected the verdict.

Second, the trial court was also acting well within its discretion when it admitted highly probative evidence of Mr. Urlacher's sexual urges

towards prepubescent children. Mr. Urlacher failed to prove that admitting a small selection of his child pornography collection was unfairly prejudicial in an SVP proceeding. Mr. Urlacher's civil commitment must be affirmed.

A. The Trial Court Properly Excluded Dr. Wollert's MATS-1 Test

Mr. Urlacher argues that the trial court abused its discretion by excluding testimony of his expert, Dr. Wollert, related to the MATS-1. App. Br. at 21. This argument lacks merit. Actuarial risk assessment "evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense[.]" *In re Detention of Thorell*, 149 Wn.2d 724, 753, 756, 72 P.3d 708 (2003). Evidence about actuarial risk assessment is admissible in Washington SVP cases and elsewhere because the methods and procedures used to construct such instruments are well accepted in the scientific community. *Id.*, 149 Wn.2d at 753. The admissibility of such instruments is assessed under ER 702¹ and 703.² *Id.* at 756. Mr. Urlacher

¹ ER 702 provides as follows:

If 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.

was unable to demonstrate that the MATS-1 met basic threshold requirements for admissible evidence under evidentiary rules.

1. The Court Exercised Proper Discretion in Excluding MATS-1 Testimony.

Expert testimony is admissible if the witness's expertise is supported by the evidence, his opinion is based on material reasonably relied on in his professional community, and his testimony is helpful to the trier of fact. *Deep Water Brewing, LLC v. Fairway Resources Ltd.* 152 Wn. App. 229, 215 P.3d 990 (2009), *review den.* 168 Wn.2d 1024, 230 P.3d 1038 (2010), *citing Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995); ER 702; 703. The trial court's decision to admit expert testimony under applicable rules of evidence is reviewed for abuse of discretion. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000); *See also Moore v. Harley-Davidson Motor Co. Group, Inc.* 158 Wn. App. 407, 417, 241 P.3d 808 (2010). A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court decision may be affirmed on any basis regardless of whether

² ER 703 provides as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

that basis was considered or relied on by the trial court. RAP 2.5(a); *State v. Cervantes*, ___ Wn. App. ___, 273 P.3d 484, 487, (2012).

Here, the trial court based its ruling on ER 703. The trial court's ruling was proper because it followed established precedent, and Mr. Urlacher could neither demonstrate that MATS-1 was relied upon by other experts in the field generally, or that it was used for purposes other than litigation. Although the trial court did not rely on ER 702 for its decision, exclusion on that basis would have been proper as well, in that consideration of the MATS-1 would not have been helpful to the trier of fact.

a. The MATS-1 is Inadmissible Under ER 703.

Pursuant to ER 703, the “facts or data” upon which an expert bases an opinion need not be admissible in evidence, if they are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” In *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002), Division III adopted the framework for admitting expert testimony under ER 703 set forth by this Court in *State v. Ecklund*, 30 Wn. App. 313, 318-19, 633 P.2d 933 (1981).

First, the judge should find the underlying data are of a kind reasonably relied upon by experts in the particular field in reaching conclusions. And second, since the rule is concerned with trustworthiness of the resulting opinion, the judge should not allow the opinion if (1) the expert can show only that he customarily relies upon such material,

and (2) the data are relied upon only in preparing for litigation. Thus, as stated in the Comment to ER 703, “The expert must establish that he as well as others would act upon the information for purposes other than testifying in a lawsuit.

Nation, 110 Wn. App. at 662-663, *citing Ecklund*, 30 Wn. App. at 318 [internal citations omitted]. The reliance of the expert must be customary and reasonable. Commenting on the court’s decision in *Nation*, Tegland notes, “[I]t is not sufficient to show that the particular expert in question customarily relies upon such material. The proponent of the testimony must show that *experts in the witness’s field, in general, reasonably rely upon such material in their own work*; i.e. for purposes other than litigation.” Karl B. Tegland, *Courtroom Handbook on Washington Evidence*, 2011-2012 Edition (emphasis added). Urlacher failed to make this showing.

Experts in the field of sex offender risk assessment generally do not rely upon the MATS-1. Dr. Wollert testified that he knew of only six people other than himself who used his test. RP 739. He also stated that these individuals were members of the defense-oriented SOCDA. RP 733-734. He spoke to them about the MATS-1 at a SOCDA conference held a few weeks before trial. *Id.* Declarations submitted by Mr. Urlacher increased the grand total of individuals who have used the MATS-1 to eight. RP 64, Supp. CP. There was no evidence that the

MATS-1 was used by experts in the field of SVP risk assessment generally. It was largely this failure to have gained acceptance in the applicable professional community that led the court to conclude that MATS-1 was not “of a type of test reasonably relied upon by experts in the field” and as such did not meet the standards of Rule 703. RP 748-749.

Mr. Urlacher also failed to present any evidence whatsoever that anyone, even Dr. Wollert, used the MATS-1 for any purpose other than litigation. *See Nation*, 110 Wn. App. at 662-663. (The trial court abused discretion by allowing an expert to convey a basis of his opinion without testimony that other experts customarily rely on such material for non-litigation purposes). Dr. Wollert testified that the MATS-1 has been used in five other states and the “federal court system.” RP 728. Each of the five states Dr. Wollert listed has SVP laws and proceedings similar to those in Washington State.³ When asked by the court if another evaluator “used” his test, Dr. Wollert answered the question in the context of litigation. RP 736. While Dr. Wollert did testify that others had requested copies of his article on the MATS-1, asked him questions about the test,

³ *See*, Massachusetts – Mass. Gen. Laws ch 123A (Care, Treatment and Rehabilitation of Sexually Dangerous Persons); Illinois – 725 ILCS 205 (Sexually Dangerous Persons Act); Wisconsin – Wis. Stat. §980. (Sexually Violent Person Commitments); Iowa – Iowa Code §229A (Commitment of Sexually Violent Predators); California – Cal. Welf. & Inst. Code §6600-6609.3 (Sexually Violent Predator Law), Federal Law - 18 USC §4248 (Civil Commitment of a Sexually Dangerous Person).

this hardly constitutes use in the field generally for non-litigation purposes. RP 739.⁴

Case law cited by Mr. Urlacher is also distinguishable under ER 703.⁵ Both *Strauss* and *Taylor* involved actuarial instruments widely used in the SVP risk assessment field, including the MnSOST-R and SORAG used in Mr. Urlacher's trial. *Strauss* at 7; *Taylor* at 833. In these cases, the expert for the opposing side also conceded that these instruments were commonly used. *Strauss* at 8; *Taylor* at 833. In Mr. Urlacher's case, Dr. Goldberg, the State's expert, was prepared to testify that nobody he knew of in his field used the MATS-1. RP 741. Even Dr. Wollert could not say his MATS-1 test was commonly used. RP 732.

b. The MATS-1 is Inadmissible Under ER 702.

Although the trial court's ruling was based on ER 703, ER 702 provides an alternate basis for exclusion. Expert testimony in the form of an opinion is admissible under ER 702 if "(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally

⁴ Dr. Wollert also made an unsupported claim that the Department of Corrections in New Zealand was "making plans to adopt" the MATS-1, under another name. RP 731. Even if true, "making plans" to use the MATS-1 falls short of actually using the test.

⁵ The cases cited by Mr. Urlacher are *In re Robinson*, 135 Wn. App. 772, 146 P.3d 451 (2006); *In re Strauss*, 106 Wn. App. 1, 20 P.3d 1022 (2001); *In re Halgren*, 124 Wn. App. 206, 98 P.3d 1206 (2004); and *In re Taylor*, 132 Wn. App. 827, 134 P.3d 254 (2006).

accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.” *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990) (quoting *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984)). Even if generally accepted in principle, proffered scientific evidence is inadmissible under ER 702 unless it is helpful to the trier of fact under the particular facts of the specific case in which the evidence is sought to be admitted. *State v. Greene*, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999).

Admissibility of expert testimony under ER 702 is also within the trial court’s discretion. *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). In making its determination, the court’s conclusions will depend on (1) the court’s evaluation of the state of knowledge presently existing about the subject of the proposed testimony and (2) on the court’s appraisal of the facts of the case. *State v. Riker*, 123 Wn.2d 351, 364, 869 P.2d 43 (1994) (quoting *State v. Reynolds*, 235 Neb. 662, 683, 457 N.W.2d 405, 419 (1990)).

Here, exclusion of testimony related to MATS-1 was proper under ER 702. Under the facts in Mr. Urlacher’s case, Dr. Wollert’s testimony about the MATS-1 would not have been helpful to the jury. First, Dr. Goldberg did not testify about or rely upon Dr. Wollert’s test in

forming his opinions. Therefore, testimony on the MATS-1 would not have rebutted the State's evidence.

More importantly, testimony regarding the MATS-1 would not have assisted the jury in understanding Dr. Wollert's own opinions on Mr. Urlacher's risk. Dr. Wollert testified that Mr. Urlacher was not likely to reoffend for two reasons: (1) Mr. Urlacher's scores on actuarials estimated only an 11% chance of reoffense, and (2) He did not believe Mr. Urlacher suffered from a mental abnormality. RP 785. Dr. Wollert also testified that actuarial information was incapable of finding a person was likely to reoffend. RP 866-867. Because in his opinion, "actuarials are not going to get you over the bar as far as the SVP statute...you have to have a robust mental abnormality there." RP 867-868. Adding information based on the MATS-1 to Dr. Wollert's opinion that actuarials are useless in an SVP context does nothing to assist the jury to understand his opinion on Mr. Urlacher's risk.

Cases Mr. Urlacher cites where expert actuarial testimony met ER 702 requirements are distinguishable. Unlike Dr. Wollert's testimony that actuarial information is incapable of determining whether a person is likely to reoffend, experts in *Robinson*, *Strauss*, *Halgren*, and *Taylor* used actuarial information to support their opinions that the respective respondents were likely to reoffend. For example, in *Robinson*, Dr. Lund

used the SSPI actuarial instrument to form his opinion on Mr. Robinson's dangerousness. *Robinson* at 789. Arguments regarding the sample size used in the instrument's development and the lack of a formula to assign a percentage of reoffense risk went to the weight of the evidence. *Id.* at 787, 789-790. In these cases, the actuarial information assisted the trier of fact in understanding the expert's opinion.

In considering the admissibility of MATS-1, the court was required to consider "the facts of the case," which included the fact that 1) the instrument had been developed by an expert exclusively associated with the defense; 2) the only other persons known to have used this instrument, besides Dr. Wollert, were 8 psychologists also known to be associated with the defense in SVP cases; and 3) the instrument's author had a history of bias in SVP cases so egregious that three different trial courts over a period of 4 years had entered specific and lengthy findings commenting on his lack of credibility. As noted by this Court,

It is the court's duty to act as a gatekeeper, to admit techniques accepted in the relevant scientific community even when they are novel to the court, but to exclude techniques that are novel both to the court and the relevant scientific community. The courtroom is not the appropriate venue for scientists with reasonable differences of opinion to resolve their professional disputes.

Moore, 158 Wn. App. at 418 (internal citations omitted). Dr. Wollert was not rebutting State evidence or furthering his own opinion concerning

Mr. Urlacher's risk to reoffend. The only purpose testimony on the MATS-1 could serve is to perpetuate Dr. Wollert's ongoing professional dispute with the vast majority of his field.⁶ Under these circumstances, the trial court properly exercised its discretion in excluding any testimony related to the MATS-1.

c. The *Thorell* and *Campbell* Cases Support Exclusion of the MATS-1 Under ER 702 and 703.

Mr. Urlacher cites *Thorell* and *Campbell* to support his contention that "any opposition to the evidence of actuarial instruments goes to the weight of this evidence, not its admissibility."⁷ App. Br. at 17, 20. He is incorrect. Neither of these cases requires a trial court to blindly admit testimony into evidence and leave all arguments against it to be weighed by the fact-finder.

In *Thorell*, SVP detainees argued that use of actuarial instruments in civil commitment cases was novel scientific evidence. *Thorell*, 149

⁶ Mr. Urlacher also claims that "it is uncontroverted in this case that Dr. Wollert used accepted scientific methods to develop the test." App. Br. at 20. This is not true. Dr. Wollert's bias and frequent failure to use accepted methodology in his risk assessments was before the court. CP 145-146, 154, 156-157, 159-161. Further, Dr. Wollert failed to describe what his methods were, let alone testify that they were accepted methods. He testified that he "combined" three separate sets of data and "developed" the MATS-1. RP 727. Without any explanation as to what "combining" and "developing" entails, it is impossible to determine that these methods are "accepted scientific methods." In fact, the lack of use of the MATS-1 in the field generally combined with Dr. Wollert's history strongly suggests that his methodology is lacking.

⁷ *In re Thorell*, 149 Wn.2d 724, 730 P.3d 708 (2003) and *In re Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999).

Wn.2d at 754. The Supreme Court held that such instruments were not novel, and thus, not subject to a *Frye* analysis for admissibility.⁸ *Id.* at 756. Instead arguments regarding the reliability of actuarial instruments are to be assessed under ER 702 and ER 703. *Id.*

In *Campbell*, an SVP challenged the use of a clinical judgment approach to assess his risk instead of actuarial assessment. *Campbell*, 139 Wn.2d at 356-357, *See also*, *Thorell* at 757 (citing *Campbell* and briefs submitted to the Court). He argued that such evidence was inadmissible under *Frye* and ER 702. *Id.* The Supreme Court rejected these arguments, holding that the differences in opinion between his expert and the State's concerning risk assessment methods went to the weight of the evidence, not its admissibility. *Id.* at 358.

Neither *Thorell* nor *Campbell* is applicable in Mr. Urlacher's case. The State is not, and never has, suggested that actuarial assessment is novel science subject to a *Frye* analysis in the SVP context. In terms of risk assessment, both Drs. Goldberg and Wollert were cross examined on their approaches and methods. The jury was left to determine which expert's approach was more credible. In line with the holdings from *Thorell* and *Campbell*, the MATS-1 was properly held to admissibility

⁸ *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

standards under ER 702 and 703. The trial court properly held that Dr. Wollert's test failed to meet these standards.

Mr. Urlacher cites to other cases to support his contention that disagreements with actuarial information must go to the weight of the evidence, and not its admissibility. App. Br. at 20. These cases are either inapplicable or distinguishable from Mr. Urlacher's case. All of these cases involve demands for a *Frye* hearing regarding actuarial testimony that were rejected under *Thorell*.⁹ In each of these cases, the actuarial testimony also cleared the requisite evidentiary thresholds under ER 702 and ER 703. Mr. Urlacher failed to meet these requirements.

2. Mr. Urlacher Failed to Show Prejudice Due to an Insufficient Offer of Proof.

Mr. Urlacher never established, through an offer of proof or any other means, what Dr. Wollert's testimony regarding his risk assessment of Mr. Urlacher using the MATS-1 would have been. By failing to make an offer of proof, Mr. Urlacher failed to show any prejudice from the exclusion of the testimony.

Pursuant to ER 103(a)(2), error may not be predicated upon a ruling which excludes evidence unless the substance of the evidence was "made known to the court by offer or was apparent from the context

⁹ See *Robinson*, 135 Wn. App. at 787; *Strauss*, 106 Wn. App. at 9; *Halgren*, 124 Wn. App. at 219; *Taylor*, 132 Wn. App. At 836-837.

within which questions were asked.” “An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.” *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). In the absence of a sufficient offer of proof, an appellate court may decline to review a ruling excluding evidence. *See Estate of Bordon ex rel. Anderson v. State Dept. of Corrections*, 122 Wn. App. 227, 95 P.3d 764 (2004) (Appellate court declined to determine admissibility of expert testimony where proponent made no offer of proof of what expert would say if allowed to testify; alternate basis for holding).

Here, the State moved in limine for an order “precluding Dr. Wollert from relying on or testifying about the MATS-1.” CP at 144. The substance of the evidence—Mr. Urlacher’s score on an alternative test created by Dr. Wollert—was never made known to the trial court, nor is it “apparent from the context.” Although it is clear that the trial court conceptualized the voir dire testimony of Dr. Wollert as intended as an offer of proof (RP 72, 723), the entirety of the testimony related to Dr. Wollert’s opinion as to why his test was superior to other well-established actuarial instruments, the development of the MATS-1, and the development of another risk assessment instrument.

Dr. Wollert did testify that the MATS-1 is “very simple to use and very easy to explain.” RP 729. However, he failed to describe how it was used in Mr. Urlacher’s case and explain how the information applies to his risk assessment. No testimony was ever offered as to what Mr. Urlacher’s score would have been on the MATS-1 or how that score affected Dr. Wollert’s overall assessment of Mr. Urlacher’s risk. RP 723-748. As such, there is no way to know whether the risk assessment based on the MATS-1 was in fact any different than that assigned based on other well-established instruments to which Dr. Wollert ultimately testified at trial. It is impossible to assess prejudice without this information. Due to this insufficient offer of proof, this Court should affirm the exclusion of the MATS-1 testimony.

3. Exclusion of the MATS-1 Did Not Affect the Verdict.

The trial court did not abuse its discretion in precluding Dr. Wollert from testifying regarding the results of the MATS-1. Even if it did, there was no prejudice. An error in the admission or exclusion of evidence that is harmless, i.e., an error that poses no substantial likelihood that it affected the verdict, is not grounds for reversal. *Carnation Co. v. Hill*, 115 Wn.2d 184, 186, 796 P.2d 416 (1990). Here, there is no evidence that exclusion of testimony relating to the MATS-1 affected the verdict in any way. Mr. Urlacher cannot demonstrate that he was

prejudiced by the court's decision precluding testimony based on the MATS-1.¹⁰

Mr. Urlacher cannot demonstrate prejudice because he cannot demonstrate how testimony based on the MATS-1 would have been any different than the testimony that actually came in at trial. Indeed, it is difficult to imagine what difference testimony regarding the MATS-1 could have made. Dr. Wollert was able to testify, using well-established actuarial instruments such as the Static-99R and Static-2002R, that Mr. Urlacher's scores were "low compared to the standard of more likely than not." RP 775-779. Dr. Wollert demonstrated for the jury how Mr. Urlacher's scores on these instruments placed his recidivism rate lower than the rate of average sex offenders. RP 784. He opined that Mr. Urlacher risk of reoffense was between 10.6% and 12.7% over the next five years, well below the "likely" standard.¹¹ RP 785.

Adding testimony regarding the MATS-1 would not have substantially changed the effect of Dr. Wollert's testimony. In fact, given Dr. Wollert's testimony that using multiple actuarial instruments "doesn't

¹⁰ Mr. Urlacher argues that preclusion of the MATS-1 testimony "prejudiced [Dr. Wollert's] ability to fully testify to the basis of his opinion." App. Br. at 22. As noted above, this is not the standard for showing prejudice. Additionally, when given the opportunity to present evidence of how the MATS-1 supported Dr. Wollert's opinion via offer of proof, Mr. Urlacher failed to do so.

¹¹ Dr. Wollert also explained why he did not employ the MnSOST-R instrument used by Dr. Goldberg. RP 779-782.

make any difference” in terms of risk assessment, adding MATS-1 testimony would have probably damaged his credibility. RP 785.

In closing, Mr. Urlacher described the Static-99R as the best and most widely accepted actuarial instrument. RP 1072, 1075. When reviewing the testimony related to the actuarial instruments, Mr. Urlacher argued that Dr. Goldberg and Dr. Wollert “agreed pretty much” on the scoring of the Static-99R and Static-2002R. RP 1072. He argued his risk was not more than 11% according to each instrument. *Id.* Referring to the MnSOST-R, Mr. Urlacher argued in closing that the MnSOST-R has poor predictive validity and that Dr. Goldberg scored the instrument improperly. RP 1073. Mr. Urlacher concluded that “the two most widely used actuarials show that Mr. Urlacher’s risk of reoffense is not great.” RP 1075. Thus even without reference to the MATS-1, Urlacher was able to argue that his actuarial risk fell well below the “more likely than not” threshold required by law.

Mr. Urlacher argues that the MATS-1 was the basis of Dr. Wollert’s opinion that “[Mr.] Urlacher’s chance of recidivism declines with age.” App. Br. at 21. This point was not contested at trial. Dr. Goldberg testified that advancing age can be a protective factor in risk assessments. RP 585-586. Mr. Urlacher’s advancing age was taken into account in his scores on the Static-99R, Static-2002R, and MnSOST-R

actuarial instruments. RP 586, 986. Dr. Wollert also acknowledged that these three actuarial instruments take the decrease of risk with age into account. RP 738. Exclusion of evidence supporting a non-contested issue is not prejudicial.¹²

Mr. Urlacher has not demonstrated that the fact that Dr. Wollert was precluded from offering (unknown proposed) testimony regarding the (unknown) score on an additional instrument known to be used by only 8 people in the sex predator universe prejudiced his case in any way. The trial court's ruling must be affirmed.

B. The Trial Court Properly Admitted Images of Prepubescent Children Found on Mr. Urlacher's Computer

Mr. Urlacher argues that the trial court abused its discretion by admitting 11 images from Mr. Urlacher's child pornography collection. App. Br. at 22. Specifically, he argues that admitting the images was unnecessary, cumulative, and unduly prejudicial. App. Br. at 22, 25. This argument is without merit. The selected images from Mr. Urlacher's large child pornography collection were highly probative of his mental abnormality and high risk to reoffend against children. The decidedly

¹² Mr. Urlacher also contends that the MATS-1 is "the most accurate test to use for this type of proceeding." App. Br. at 21. The only evidence supporting this contention was Dr. Wollert's self-serving testimony during the offer of proof. RP 723-732. When asked if he preferred the MATS-1 over other instruments in Mr. Urlacher's case, even Dr. Wollert equivocated. RP 732.

probative nature of this evidence substantially outweighs any unfair prejudice to Mr. Urlacher.

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Even relevant evidence will be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403.

The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent manifest abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991). An abuse of discretion exists when the trial court’s exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Mr. Urlacher’s claim of abuse of discretion fails to meet this standard.

1. The Images From Mr. Urlacher’s Computer Are Relevant to His Status as an SVP.

Mr. Urlacher concedes that the 11 images from his child pornography collection had “limited probative value.” App. Br. at 25.

This is a profound understatement. These images reveal a strong and pervasive sexual attraction to prepubescent boys and girls. Mr. Urlacher's child pornography collecting also increases his reoffense risk. The probative value of this evidence is unique and sheds an incomparable light onto the deviance that drives Mr. Urlacher's predatory sexual offending.

At an SVP trial, the State must prove that an offender meets civil commitment criteria¹³ beyond a reasonable doubt. RCW 71.09.060(1). This includes proving that the respondent suffers from a mental abnormality¹⁴ or personality disorder that makes him likely to commit future predatory acts of sexual violence.¹⁵ In assessing whether an individual is an SVP, prior sexual history is highly probative of his propensity for future violence. *In re Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993). Prior sexual history also helps the jury assess the mental state of the alleged SVP, the nature of his or her sexual deviancy, and the likelihood that he or she will commit a crime involving sexual violence in

¹³ "Sexually violent predator" means 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).

¹⁴ "Mental abnormality" means 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)

¹⁵ "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. RCW 71.09.020(7).

the future. *See In re Turay*, 139 Wn.2d 379, 401, 986 P.2d 790 (1999). The selection of images from Mr. Urlacher's child pornography collection admitted at trial helped the State meet its high burden in this case as to all of these considerations.

a. The Images Establish that Mr. Urlacher Suffers from a Profound Mental Abnormality.

The pervasiveness and depth of Mr. Urlacher's mental abnormality is demonstrated by his child pornography collection. The selection of images admitted at trial provides unrivaled evidence of a deep and pervasive sexual attraction to children.

Dr. Goldberg diagnosed Mr. Urlacher with pedophilia. RP 527. Pedophilia involves recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with prepubescent children.¹⁶ RP 528-530, Ex. 16. Mr. Urlacher's pedophilia constitutes a mental abnormality. RP 528, 541-546. In Dr. Goldberg's opinion, Mr. Urlacher's pedophilia is "quite pervasive." RP 531. Research indicates that child pornography collection is a more reliable indicator of pedophilia than hands-on offending behavior. RP 536.

Both experts at trial testified that respondents such as Mr. Urlacher are not typically forthcoming about any deviant fantasies or urges they

¹⁶ For diagnostic purposes, pre-pubescent are generally aged 13 years or younger. RP 529-530.

have. RP 510, 822-823. Mr. Urlacher's child pornography collection was replete with images of prepubescent children. RP 413, 520. Much of the non-expert testimony at trial concerned Mr. Urlacher's sexual offending *behaviors* against children. RP 198-202; 210-211; 219-223; 243-246. However, only the images from Mr. Urlacher's child pornography collection provided evidence of his sexual *fantasies and urges* supporting his pedophilia diagnosis. RP 532. The content of these images demonstrate, with unparalleled specificity, Mr. Urlacher's deviant sexual interest in children.

The content of the images also reveal the motivations behind Mr. Urlacher's offending behavior. Mr. Urlacher's sexual interests with children included copulation, oral sex, and ejaculation. RP 198, 221-226, Ex. 77 at 72:3-12. The content of the images from Mr. Urlacher's computer collection mirrored his offending behavior in the community. RP 520-521. These images demonstrate a process of Mr. Urlacher's sexual urges and fantasies leading to hands-on sexual offending against children.

The images admitted at trial also demonstrate that Mr. Urlacher is sexually attracted to girls as well as boys. Dr. Goldberg's diagnosis of pedophilia included a modifier that Mr. Urlacher was sexually attracted to boys and girls. RP 535. Most non-expert testimony at trial involved

offenses against boys. Two-thirds of the images from Mr. Urlacher's collection contained a girl engaged in sexual activity. RP 399-400, 413, 535, 830.

Dr. Wollert did not diagnose Mr. Urlacher with pedophilia. RP 813-814. He instead describes Mr. Urlacher's sexual offenses against children as a "bad habit." *Id.* Dr. Wollert opined that there was insufficient evidence of strong and pervasive sexual urges involving children in Mr. Urlacher's case. RP 762. He also did not regard Mr. Urlacher's child pornography collection as evidence of pedophilia. RP 822. By admitting a representative sample of these images, the jury was able to fully consider the credibility of each expert's opinion. The content of the images indicates that Dr. Wollert was incorrect and that Mr. Urlacher suffers from a profound pedophilic condition.¹⁷

b. The Images Demonstrate Mr. Urlacher's High Risk for Reoffense.

Mr. Urlacher acknowledges that the images from his computer were "arguably relevant" to prove his risk of reoffense. App. Br. at 23. However, evidence at trial clearly links Mr. Urlacher's child pornography collection to an increased risk for recidivism. Dr. Goldberg cited research

¹⁷ Dr. Wollert also testified that Mr. Urlacher's primary interest from his pornography images was focused on males. RP 829. The content of this representative sample of the collection admitted a trial contradicts this assertion.

finding offenders who committed contact sex offenses had even higher risk for reoffense if they used child pornography. RP 592.

Dr. Goldberg also found Mr. Urlacher's online child pornography collecting aggravated his risk to reoffend. RP 592-593. Dr. Goldberg described how Mr. Urlacher's attraction to child pornography could be a part of the cycle that leads to him to committing more hands-on sexual offenses against children. RP 593. Specifically, accessing child pornography online would increase Mr. Urlacher's sexual drive and lead him to gratify those urges by committing a contact offense against a child. *Id.*

Finally, Dr. Goldberg testified that if not confined in a secure facility, Mr. Urlacher was likely to commit crimes of sexual violence against children. RP 597. For example, Mr. Urlacher would develop a relationship with a man or woman with grandchildren and begin grooming that child for sexual activity. RP 597. The content of the images admitted at trial from Mr. Urlacher's collection show the jury exactly what type of child his untreated pedophilia will be propelling him to offend against.

2. The Images Are Not Unfairly Prejudicial

Any prejudice to Mr. Urlacher from the images admitted at trial does not outweigh the highly probative value of such evidence. Detective Voce discovered 160-170 images of minors engaged in sexually explicit

conduct on Mr. Urlacher's computers. RP 413. From these images, the State submitted only 11 exhibits that constituted a representative sample of Mr. Urlacher's collection. RP 413. Instead of projecting the images onto a large screen at trial, the exhibits were published to the jury in notebooks passed from juror to juror. RP 397. The contents of Mr. Urlacher's child pornography collection were presented to the jury in an appropriate fashion without any unfair prejudice, repetition, or delay.

Mr. Urlacher cites *Sargent* to support his argument that the images from his child pornography collection were unfairly prejudicial. App. Br. at 24. However, that case is clearly distinguishable. In *Sargent*, victim photographs were submitted by the State in a prosecution for murder and arson. *State v. Sargent*, 40 Wn. App. 340, 347, 698 P.2d 598 (1985). The appellate court held that these images had either "marginal" or "no discernable" relevance. *Id.* at 349. Accordingly, the court found "under the circumstances of this case the prejudicial effect of the photographs outweighed any probative value." *Id.* As discussed above, the images admitted in Mr. Urlacher's case were highly probative of his mental abnormality and dangerousness. Unlike the photographs in *Sargent*, the images from Mr. Urlacher's child pornography collection provided unique and compelling evidence supporting the State's case.

Unless it is clear that the primary reason to admit the photographs is to inflame the jury's passion, appellate courts will uphold the decision of the trial court. *State v. Whitaker*, 133 Wn. App. 199, 228, 135 P.3d 923 (2006) (13 "gruesome and disturbing" autopsy photographs admitted at a murder trial were not unfairly prejudicial despite availability of diagrams). As long as the probative value of the photographs outweighs their prejudicial effect, even "repulsive" photographs will be admitted. *Sargent*, 40 Wn. App. at 347. The primary reason in admitting the images from Mr. Urlacher's computer was to support a finding that he suffers from a profound mental abnormality that makes him likely to reoffend, not to inflame the jury's passion. The jury was already aware of Mr. Urlacher's multiple sex offenses against children. While unpleasant to look at, the images admitted at trial served multiple purposes. They reflected the very disturbing nature of Mr. Urlacher's mental disorder and the vulnerability of the victims he fantasizes about. The images also gave the jury a better sense of the expert's opinion regarding Urlacher's pedophilia and his risk for reoffense.

An analogous case from Kansas illuminates how the highly probative nature of these images outweighs any prejudice to

Mr. Urlacher.¹⁸ In *Palmer*, an SVP argued that a limited number of child pornography images from his computer admitted at trial were unduly prejudicial. *In re Palmer*, 46 Kan.App.2d 805, 817, 265 P.3d 565 (2011). In holding that the images were not unduly prejudicial in an SVP case, the court held that, “the nature of the [SVP] inquiry virtually guarantees the wide-ranging admissibility of evidence concerning the defendant’s past crimes and transgressions.” *Id.* at 818. Despite other testimony that Mr. Palmer possessed child pornography, the court held that the images “were relevant to a pattern of behavior and appropriate in aiding the jury to make its determination whether [the individual] would commit a similar offense again.” *Id.* at 819. The court also found that the images were relevant to Mr. Palmer’s pedophilia diagnosis. *Id.* The appellate court concurred with the trial court’s finding that the evidence, while prejudicial, was probative, appropriate to show the jury, and admissible. *Id.* Likewise, the images from Mr. Urlacher’s child pornography collection were highly probative in an “SVP inquiry” and not substantially outweighed by any unfair prejudice. The trial court’s decision admitting the images must be affirmed.

¹⁸ The Kansas SVP law is based on Washington State’s RCW 71.09. *See Thorell* at 149 Wn.2d at 732, 767 (Kansas SVP definition of mental illness is substantially the same as Washington’s).

I. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Mr. Urlacher's civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 23 day of June, 2012.



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NO. 42616-1 II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

CHARLES URLACHER,

Appellant.

DECLARATION OF
SERVICE

I, Allison Cleveland, declare as follows:

On June 25, 2012, I caused to be sent via agreed electronic service, true and correct copies of Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

Stephanie Cunningham
SCCAAttorney@yahoo.com
4616 25th Avenue NE, #552
Seattle, WA 98105

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

DATED this 25th day of June, 2012, at Seattle, Washington.


ALLISON CLEVELAND

WASHINGTON STATE ATTORNEY GENERAL

June 25, 2012 - 2:28 PM

Transmittal Letter

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Case Name: In re the Detention of Charles Urlacher

Court of Appeals Case Number: 42616-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Comments:

No Comments were entered.

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