

NO. 43404-1

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

In re the Detention of Tremayne Francis:

STATE OF WASHINGTON,

Respondent,

v.

TREMAYNE FRANCIS,

Appellant.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

MALCOLM ROSS
Senior Counsel
WSBA #22883
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-6430

TABLE OF CONTENTS

- I. ISSUES PRESENTED1
 - A. Where evidence about Washington’s Persistent Offender Act was potentially prejudicial or confusing, did the trial court abuse its discretion by sustaining an objection to Francis’ testimony about that law?1
 - B. Where the jury found, beyond a reasonable doubt, that Francis had a mental disorder that caused him serious difficulty controlling his sexually violent behavior, would evidence about the Persistent Offender Act likely have changed the jury’s decision that Francis’ disorder made him likely to commit a future sexually violent offense?.....1
- II. STATEMENT OF THE CASE1
- III. ARGUMENT1
 - A. Francis has not Raised a Constitutional Issue.....2
 - B. The Standard of Review is Abuse of Discretion.....3
 - C. The Trial Court Did Not Abuse Its Discretion by Excluding the Evidence Under ER 4033
 - 1. The evidence had marginal relevance4
 - a. Required elements for civil commitment and the *Post* decision4
 - b. The Persistent Offender Act evidence that was excluded by the trial court.....6
 - c. The trial court had tenable reasons for excluding the evidence under ER 403, because its marginal relevance was substantially outweighed by the danger of unfair prejudice, or by confusing or misleading the jury7

D. If the Trial Court Erred, its Error was Clearly Harmless10

IV. CONCLUSION11

TABLE OF AUTHORITIES

Cases

<i>In re Detention of Post</i> , 170 Wn.2d 302, 241 P.3d 1234 (2010).....	4, 5, 6, 7
<i>In re Detention of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	4
<i>In re Detention of West</i> , 171 Wn.2d 383, 256 P.3d 302 (2011).....	3
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	10
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	7
<i>State v. Harris</i> 141 Wn. App. 673, 174 P.3d 1171 (2007).....	5
<i>State v. Olmedo</i> , 112 Wn. App. 525, 49 P.3d 960 (2002).....	2
<i>State v. Turnipseed</i> , 162 Wn. App. 60, 255 P.3d 843 (2011) (Sweeney, J., concurring).....	2
<i>United States v. Waters</i> , 627 F.3d 345 (9th Cir. 2010)	2, 3

Statutes

RCW 71.09	4
RCW 71.09.020(7).....	4
RCW 71.09.020(12).....	5
RCW 71.09.020(18).....	4, 8

RCW 71.09.030(1)(e)	5
RCW 71.09.060(1).....	4
RCW 9.94A.030(37).....	1
RCW 9.94A.030(37)(b)(ii)	6
RCW 9.94A.570.....	6

Rules

ER 403	3, 7, 9
Fed. R. Civ. P. 403.....	2

I. ISSUES PRESENTED

- A. **Where evidence about Washington's Persistent Offender Act was potentially prejudicial or confusing, did the trial court abuse its discretion by sustaining an objection to Francis' testimony about that law?**
- B. **Where the jury found, beyond a reasonable doubt, that Francis had a mental disorder that caused him serious difficulty controlling his sexually violent behavior, would evidence about the Persistent Offender Act likely have changed the jury's decision that Francis' disorder made him likely to commit a future sexually violent offense?**

II. STATEMENT OF THE CASE

The State adopts Francis' Statement of the Case in his Brief of Appellant at 1-7, supplemented by a few additional facts presented in the argument below.

III. ARGUMENT

Francis asserts that the trial court violated his right to due process when it sustained the State's objection to his testimony about Washington's Persistent Offender Accountability Act, RCW 9.94A.030(37) (Persistent Offender Act). His argument has no merit. The trial court's exclusion of that evidence did not infringe on Francis' constitutional rights because the alleged error implicates only the rules of evidence and the trial court's substantial discretion to admit or exclude evidence under those rules. The trial court properly exercised its

discretion to exclude the testimony as unfairly prejudicial, confusing or misleading to the jury, under ER 403. Assuming there was error, it was clearly harmless. This Court should affirm Francis' commitment as a sexually violent predator.

A. Francis has not Raised a Constitutional Issue

Francis attempts to portray alleged evidentiary error as a constitutional violation. He argues that the trial court's decision to sustain the State's objection violated his right to due process. His attempt to recast the issue as a constitutional question should be rejected as consistent with a "trend that is troublesome—the 'constitutionalization' of most assignments of error in criminal cases." *State v. Turnipseed*, 162 Wn. App. 60, 72, 255 P.3d 843 (2011) (Sweeney, J., concurring).

"Trial courts are afforded broad discretion in deciding whether to admit evidence, including testimony." *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002). Here, the decision to sustain an objection fell squarely within the trial court's discretionary authority. Francis' argument is identical to one rejected in *United States v. Waters*, 627 F.3d 345 (9th Cir. 2010). In *Waters*, a Washington case, the district court excluded the defendant's proposed evidence that she was a victim of government misconduct, under Fed. R. Civ. P. 403. The defendant appealed her conviction, arguing that the trial court's exclusion of her

evidence violated her due process rights. *Id.* The 9th Circuit rejected the same argument made here by Francis – that a discretionary decision excluding evidence implicated a due process right to present a defense. *Id.* at 353-54 (“Given that the district court’s evidentiary ruling was well within its discretion, we reject Waters’ attempts to “constitutionalize” her claims.”). *Waters* is directly on point and Francis’ attempt to constitutionalize his assignment of error should be rejected.

B. The Standard of Review is Abuse of Discretion

This Court reviews a trial court’s decision to exclude evidence under the abuse of discretion standard. *In re Detention of West*, 171 Wn.2d 383, 396-97, 256 P.3d 302 (2011). Under that standard, a trial court has abused its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

C. The Trial Court Did Not Abuse Its Discretion by Excluding the Evidence Under ER 403

The trial court did not abuse its discretion by excluding evidence about the Persistent Offender Act. The court explained its concern that the jury could be unfairly prejudiced, confused or misled by the evidence and its reasoning constitutes a tenable basis for affirming the court’s decision.

1. The evidence had marginal relevance

a. Required elements for civil commitment and the *Post* decision

To civilly commit a person under Washington's Sexually Violent Predator Act, RCW 71.09, the State must prove, beyond a reasonable doubt, that the person (1) has been convicted of a crime of sexual violence, and (2) suffers from a mental abnormality or personality disorder that (3) makes the person likely to engage in predatory acts of sexual violent if not confined in a secure facility. RCW 71.09.020(18), .060(1). Additionally, the State must present evidence that the person's mental condition causes him to have serious difficulty controlling his sexually violent behavior. *In re Detention of Thorell*, 149 Wn.2d 724, 735-36, 72 P.3d 708 (2003).

A person is "likely" to reoffend if they more probably than not will do so. RCW 71.09.020(7) (definition of "likely to engage in predatory acts of sexual violent if not confined in a secure facility"). The jury is permitted to consider all evidence that bears on the person's likelihood of reoffending. *See* CP at 93.

A legal consequence of future sexual behavior has been found to be relevant to the jury's consideration of a person's likelihood of reoffending, though not necessarily admissible. *In re Detention of Post*,

170 Wn.2d 302, 316-317, 241 P.3d 1234 (2010). In *Post*, the trial court had excluded evidence about the State’s ability to file a future SVP petition where the person is released but commits a “recent overt act.”¹ 170 Wn.2d at 316; RCW 71.09.030(1)(e) (authorizing petition where recent over act is committed). *Post* reasoned that a person’s knowledge of possible legal consequences could inhibit future dangerous behavior:

Post’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.

170 Wn.2d at 316-17. *Post* abrogated a prior Court of Appeals opinion finding such evidence irrelevant. *Id* at 316; *see State v. Harris* 141 Wn. App. 673, 679-80, 174 P.3d 1171 (2007).

Importantly for this case, while *Post* held such evidence to be relevant, it did not hold that it was *per se* admissible. Instead, *Post* acknowledged and deferred to the trial court’s broad discretion to exclude relevant evidence that is unfairly prejudicial, confusing or misleading:

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

¹ 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).

instance by the trial court, subject to review for abuse of discretion.

170 Wn.2d at 317.

b. The Persistent Offender Act evidence that was excluded by the trial court

When Francis was 26 years old he raped two different 17 year old males and was convicted of two counts of Rape Second Degree by forcible compulsion. RP at 142; Exs. 1-4. Those convictions count as strike offenses under the Persistent Offender Act. RCW 9.94A.030(37)(b)(ii). A future felony sexual offense would therefore make Francis eligible for a lifetime sentence. RCW 9.94A.570.

During Francis' testimony, his counsel asked him, "Mr. Francis, are you aware of the Washington two strikes law for sex offenses?" RP at 501-502. The trial court sustained the state's objection to that question and Francis' counsel moved on to another topic. RP at 502. During the next break, Francis' counsel asked the court about its ruling:

Even before we address the sidebars, maybe I can learn something again from Your Honor. You sustained the State's objection when I asked him about Washington two strikes law, and I don't have a clue why, and I need to learn why.

RP at 512. The court explained that it believed the evidence would prejudice or confuse the jury because Francis already had two convictions for serious sexual offenses but had not been sentenced to life

imprisonment. RP at 512. Additionally, the court was concerned that the jury would speculate that Francis had proceeded to trial on another crime to avoid sentencing under the Persistent Offender Act. *Id.* The court also believed there was insufficient foundation for the evidence. *Id.* Francis' counsel indicated he would have provided more foundation, but said nothing further. RP at 513. He did not ask the court to reconsider its ruling and did not mention the *Post* decision.

- c. **The trial court had tenable reasons for excluding the evidence under ER 403, because its marginal relevance was substantially outweighed by the danger of unfair prejudice, or by confusing or misleading the jury**

The State does not dispute that the proposed evidence was of the same general type as that found relevant in *Post*. Though it addressed recent overt act petitions, a fair reading of *Post* indicates its reasoning would apply to other potential legal consequences known to the person on trial, such as the Persistent Offender Act. 170 Wn.2d at 316-17.

Relevant evidence, however, can be excluded under ER 403 if its probative value is substantially outweighed by the danger of unfair prejudice, or if it could confuse or mislead the jury. And the trial court has "wide discretion" to exclude evidence under that rule. *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984) (trial judge "has wide discretion

in balancing the probative value of evidence against its potential prejudicial impact.”).

Here, the trial court had tenable reasons for excluding the evidence. The danger of unfair prejudice and confusion substantially outweighed the marginal relevance of the evidence, which must be considered in its proper context. It was potentially relevant only to the third civil commitment element – whether Francis is “likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18); CP at 89 (jury instruction No. 5 – the “to commit” instruction). In order to reach that element, the jury first had to be convinced beyond a reasonable doubt of the prerequisite second element – that Francis “suffers from a mental abnormality which causes serious difficulty in controlling his sexually violent behavior[.]” CP at 89.

Francis was diagnosed with a chronic rape disorder that caused him to be sexually aroused to forcible sexual contact with nonconsenting people. RP at 197-99. The disorder caused him to have serious difficulty controlling his sexually violent behavior. CP at 89. Therefore, had the evidence been admitted, the jury would have considered whether Francis’ knowledge of a criminal penalty would have inhibited his “recurrent, intense, sexually arousing fantasies, sexual urges or behaviors” involving nonconsenting individuals. RP at 198. It is highly implausible that

Francis' knowledge of the Persistent Offender Act would have had any effect on his risk of violently recidivating. Certainly the existence of other criminal penalties had failed to inhibit his past violent sexual behavior. Thus, the evidence had little probative value.

Given that the jury knew Francis had already pled guilty to, and been convicted of, two violent sex offenses, the trial court believed the jury likely would have been confused about why he had not already received a life sentence. RP at 512; Exs. 1-4. Indeed, the excluded evidence could have been quite unfairly prejudicial to Francis, should any juror have concluded that he should have received a life sentence for his two prior convictions. Unfair prejudice and confusion of the issues are valid bases to exclude evidence under ER 403. The trial court also noted that the next time Francis had been charged with rape (against victim Grey), he had contested the charge at trial. RP at 484-85, 512. The court was concerned that the excluded evidence would mislead the jury into speculating that Francis had contested the later charge in order to avoid a life sentence. RP at 512. Evidence that can mislead the jury is also properly excluded under ER 403.

The trial court's concerns were reasonable and constitute tenable bases supporting its decision. The trial court did not abuse its discretion by excluding evidence of the Persistent Offender Act.

D. If the Trial Court Erred, its Error was Clearly Harmless

Assuming for the sake of argument that the trial court abused its discretion, any such error was harmless. Evidentiary error is harmless if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Bourgeois*, 133 Wn.2d 389, 404, 945 P.2d 1120 (1997).

There is no reasonable probability that exclusion of evidence about the Persistent Offender Act could have affected the outcome of the trial. It was a minor point of little probative value in a trial with extensive evidence about Francis’ violent sexual proclivities. As previously noted, the jury would not have considered the evidence unless and until it determined that Francis had a mental disorder that (1) caused him to have recurrent, intense, sexually arousing fantasies, urges or behaviors for sex with nonconsenting individuals (RP at 197-99) and (2) caused him to have serious difficulty controlling his sexually violent behavior. CP at 89. The jury did so determine. CP at 144. Therefore, the error could only have been harmful if the jury could reasonably have found that Francis’ knowledge of the Persistent Offender Act was so inhibitive that it would override his mental disorder that caused him serious difficulty controlling his sexually violent behavior. The notion is too implausible to support reversal of the jury’s verdict.

It is all the more implausible given that Francis' diagnosis was supported by evidence that, after incarceration for his sexually violent offenses, he continued his sexual assaults. *See* RP at 143-74. This evidence arose during a period that Francis would have been subject to a lifetime sentence under the Persistent Offender Act. Clearly, Francis' knowledge of potential legal consequences did not disinhibit him or override his serious mental disorder. There is no reasonable probability that admission of the evidence would have altered the outcome of the trial. Any error was therefore harmless.

IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 15th day of July, 2013.

ROBERT W. FERGUSON
Attorney General



MALCOLM ROSS, WSBA #22883
Senior Counsel
Attorneys for Respondent

NO. 43404-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of Tremayne
Francis:

STATE OF WASHINGTON,

Respondent,

v.

TREMAYNE FRANCIS,

Appellant.

DECLARATION OF
SERVICE

I, Elizabeth Jackson, declare as follows:

On July 15, 2013, I deposited in the United States mail true and correct copies of Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

Rebecca Bouchey
Nielsen, Broman & Koch
1908 East Madison Street
Seattle, WA 98122-2842

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

DATED this 15th day of July, 2013, at Seattle, Washington.


ELIZABETH JACKSON

WASHINGTON STATE ATTORNEY GENERAL

July 15, 2013 - 3:17 PM

Transmittal Letter

Document Uploaded: 434041-Respondent's Brief.pdf

Case Name: In re the Detention of Tremayne Francis

Court of Appeals Case Number: 43404-1

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

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Liz Jackson - Email: elizabethj@atg.wa.gov

A copy of this document has been emailed to the following addresses:

BoucheyR@nwattorney.net