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No. 52814-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

In re the Detention of:

Darren Perkins.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT DARREN PERKINS

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A. INTRODUCTION

Darren Perkins was the victim of repeated sexual molestation and rape when he was a child. Due to his parents' lack of resources, he did not receive the counseling he needed following these and other traumatic events. He eventually committed a sexually violent offense himself, along with some other crimes. While he was serving his sentence for his last crime, committed in 2004, the State petitioned for his indefinite incarceration, alleging he was a "sexually violent predator" under RCW ch. 71.09.

Because civil commitment is a massive curtailment of liberty and the people subject to commitment petitions have already served sentences for their crimes, the State may not continue to confine a person unless it proves he has a mental abnormality or personality disorder that makes him *more likely than not* to reoffend if not confined.

The actuarial instruments for sex offenses indicate that most sex offenders are less than 50% likely to reoffend and that Mr. Perkins fell into a category that was less than 50% likely to reoffend. But over Mr. Perkins's objections, the State introduced testimony and argument that Mr. Perkins's was in the 98th or 99th percentile of risk *relative to other sex offenders*. This Court should reverse for the improper admission of this irrelevant and highly prejudicial evidence.

B. ASSIGNMENT OF ERROR

The trial court abused its discretion and erred under ER 402 and 403 by admitting testimony and argument regarding Mr. Perkins's risk of reoffending relative to other sex offenders. CP 250; RP (9/17/18) 75-103; RP (9/25/18) 850-97.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Irrelevant evidence is not admissible and even evidence that is relevant is not admissible if it is substantially more prejudicial than probative. ER 402, 403. In an "SVP" commitment proceeding under RCW ch. 71.09, the jury must determine whether an individual is more likely than not to reoffend if not confined. In other words, the question is whether the person is more than 50% likely to reoffend – *not* whether he is more likely to reoffend than other sex offenders. Did the trial court abuse its discretion and violate ER 402 and 403 by denying Mr. Perkins's motion to exclude evidence of his risk relative to other sex offenders? And was this error prejudicial, requiring a new trial, where the actuarial instruments showed a 35-44% risk of reoffense for people in Mr. Perkins's category, but the State repeatedly emphasized that Mr. Perkins was in the 98th or 99th percentile *relative to other sex offenders*, and that he was "one of the riskiest people there is?"

D. STATEMENT OF THE CASE

Darren Perkins is a child sex abuse victim. RP (9/24/18) 640-46, 717; CP 33. State's expert Dr. Harry Goldberg reported that "at age 5, Darren was a repeated victim of child molestation and rape." CP 33. In addition to being directly raped, he "was forced to perform oral sex on an individual's female cousin, age 14, who was tied up in a tent." CP 46. This trauma was exacerbated by the deaths of two of his three sisters at a very young age. CP 30-31; RP (9/24/18) 717.

Counseling was recommended, but young Darren received very little counseling because his family could not afford it. CP 31, 40; RP (9/24/18) 645-46. He started acting out, and was eventually convicted of one sexually violent offense himself, as well as two sex offenses and some non-sex offenses. CP 3-7. His actions mirrored what was done to him as a child. CP 46.

Mr. Perkins's last sex offense occurred in 2004. CP 12. While he was still incarcerated for that offense, the State filed a petition to commit him as a "sexually violent predator" ("SVP") pursuant to RCW ch. 71.09. CP 1-2. In order for Mr. Perkins to be incarcerated under this statute, the State had to prove to a jury beyond a reasonable doubt that Mr. Perkins had a mental abnormality or personality disorder that rendered him more likely than not to engage in predatory acts of sexual violence if not

confined. RCW 71.09.060; RCW 71.09.020(18). State's expert Dr. Goldberg evaluated Mr. Perkins and concluded he met the criteria, while Mr. Perkins's expert Dr. Paul Spizman evaluated Mr. Perkins and concluded he did not. Exs. 50, 53.

Prior to trial, Mr. Perkins moved to exclude any testimony about Mr. Perkins's risk relative to other sex offenders, because such evidence was irrelevant and substantially more prejudicial than probative. CP 250; RP (9/17/18) 75-103; RP (9/25/18) 850-97. The court denied the motion, and the State repeatedly emphasized that the actuarial instruments showed Mr. Perkins was in the 98th or 99th percentile of risk relative to other sex offenders. RP (9/25/18) 892-97; RP (9/26/18) 910-13, 934; RP (10/2/18) 1550-51; RP (10/3/18) 1741.

Those same instruments showed that most sex offenders were less than 50% likely to reoffend and Mr. Perkins fell into a category that was less than 50% likely to reoffend. Ex. 50 at 22; RP (9/26/18) 911, 915. The question for the jury in a commitment case is whether the individual is more than 50% likely to reoffend. *In re Detention of Brooks*, 145 Wn.2d 275, 298, 36 P.3d 1034 (2001). But having heard that Mr. Perkins was in the 98th or 99th percentile of risk relative to other sex offenders, the jury found Mr. Perkins met the criteria for commitment. CP 796-98.

Mr. Perkins appeals. CP 809.

E. ARGUMENT

The trial court abused its discretion and violated ER 402 and 403 by admitting testimony regarding Mr. Perkins's risk of reoffending relative to other sex offenders.

The trial court abused its discretion in admitting testimony and argument regarding Mr. Perkins's level of risk relative to other sex offenders. This evidence was irrelevant and, even if relevant, substantially more prejudicial than probative. The question in commitment trials is whether the person is more likely than not to reoffend – not whether he is more likely to reoffend than other sex offenders. The State's expert misunderstood the law, repeatedly claiming relative risk was relevant because his "understanding of the law was that the intent was to segregate those offenders who are the most risky. That's what the percentile rank does." Because this view is legally wrong, the trial court erred in deferring to the expert and admitting this irrelevant, highly prejudicial evidence. This Court should reverse and remand for a new trial.

1. Mr. Perkins moved to exclude evidence of relative risk because it is irrelevant and prejudicial.

In his evaluations, Dr. Goldberg opined that Mr. Perkins was more likely than not to reoffend if not confined to a secure facility. RP (9/26/18) 936; CP 50, 74; ex. 50 at 21. The actuarial instruments did not so indicate – they resulted in predictions of less than a 50% likelihood of sexual

reoffense within five years. Ex. 50 at 22; RP (9/26/18) 911, 915 (In his report and testimony Dr. Goldberg states that Static-99R shows 35.1% likelihood of reoffense in five years and Static-2002R predicts 43.7% likelihood of reoffense in five years); *see also* RP (10/1/18) 1355-58 (Dr. Spizman testifies he obtained same Static-99R score as Dr. Goldberg).¹ And Dr. Goldberg acknowledged that once a person “stays in the community for five years without reoffending,” that person’s risk “actually drops” even further. RP (9/26/18) 1066.

But Dr. Goldberg insisted that in his clinical judgment, after assessing “protective factors” and “dynamic risk factors,” Mr. Perkins met the criteria for indefinite confinement. RP (9/26/18) 926-36; CP 55; ex. 50 at 22-28. Although Mr. Perkins’s expert, Dr. Spizman, disagreed with this assessment, Mr. Perkins did not move to exclude Dr. Goldberg’s testimony about these factors.

However, he did move to exclude testimony about another portion of Dr. Goldberg’s report: Mr. Perkins’s “relative risk” of reoffense. CP 250. Dr. Goldberg indicated that with a Static-99 score of 8, Mr. Perkins was “within the high range for sexual reoffense when compared to other

¹ According to Dr. Goldberg, the two other instruments whose scores he reported, the SORAG and VRAG-R, “were somewhat higher since this is predicting both sexual and non-sexual violence.” Ex. 50 at 22.

sexual offenders.” CP 51. Specifically, “[r]ecidivism rates for sex offenders with the same score as Mr. Perkins are expected to be 4.96 times higher than the recidivism rates of the typical sex offender[.]” CP 51.

Mr. Perkins’ Static-99-R score of 8 falls within the 97.8 to 99.1 percentile. This means that 97.8 to 99.1% of sex offenders in that sample scored at or below Mr. Perkins’ score. Conversely, 0.9 to 2.2% scored higher.

CP 51.

Mr. Perkins moved to exclude testimony regarding his risk relative to other sex offenders because it was irrelevant and unduly prejudicial. CP

250. He explained:

The RCW 71.09 statutory scheme is concerned with absolute risk, i.e., whether the risk exceeds 50% that an individual will commit “predatory acts of sexual violence if not confined to a secure facility.” RCW 71.09.020(18). In contrast, relative risks looks at the ranking among sex offenders, i.e., whether one sex offender’s risk is greater than other sex offenders and if so, how much greater.

This case is about absolute risk. The SVP law seeks to incarcerate only those who are *likely* to commit acts of sexual violence. It does not, for example, seek to incarcerate the upper ten percent of offenders at any given time. As a result, relative risk estimates and considerations are not relevant, and should be excluded pursuant to ER 402 and ER 403.

CP 250 (Motion in Limine B).

The court heard arguments on the motion at a pretrial hearing. RP (9/17/18) 76-103. The State argued that because the “variance across the

samples was so large,” the absolute risk numbers were less stable, while “[t]his variance problem . . . does not exist in the relative ranges.” RP (9/17/18) 76-77, 79 (discussing ex. 1 on offer of proof). The State emphasized that “the ten questions related to the Static-99R, the ten questions that make up the risk factors of the Static-99R are essentially historical. There is a whole notion of risk called dynamic risk which deals with psychological constructs and change. That is not folded into that.” RP (9/17/18) 81.

But Mr. Perkins did not move to exclude discussion of dynamic risk factors; he moved to exclude discussion of *relative* risk, because it is irrelevant. Thus, the prosecutor’s argument regarding the importance of dynamic risk factors was a red herring. Mr. Perkins pointed this out: “Let me just say that I think that Mr. Howe is actually responding to a motion that I haven't yet made. For example, I'm not moving to exclude any sort of clinical judgment. I understand that they are using dynamic risk factors. I'm not moving to exclude that.” RP (9/17/18) 82.

Mr. Perkins emphasized he was merely asking to exclude the irrelevant and prejudicial relative risk rankings, because the only question for the jury was whether Mr. Perkins was more likely than not to reoffend – not whether he was more likely to reoffend than other sex offenders. “Legally, what this ‘more likely than not’ has been interpreted as is, does

the person have more than a 50 percent chance to reoffend in a sexually predatory way?” RP (9/17/18) 83. Counsel explained:

The problem with relative ranking is this: What relative ranking says is, well, somebody who scores as much as -- he is in the top ten percent most dangerous among the sex offenders. For example, he is like 95th percentile in the dangerousness among the sex offenders.

The problem doing that is that the jurors have a preconceived notion that sex offenders are dangerous. Absolutely dangerous regardless of what the science and the research says. On top of that, we add fuel to that fire by saying, well, he is in the 99th percentile of dangerous sex offenders without providing the context.

RP (9/17/18) 84-85.

Mr. Perkins explained by analogy that if the question for the jury were whether someone was a certain minimum height, then a person's height relative to others in a group would be meaningless. RP (9/17/18) 85. For instance, if a person were the tallest among a group of five, he would be in the top 20 percentile, but that information “does not add any value whatsoever” if the question is whether he is six-foot, seven inches. *Id.* Thus, Mr. Perkins argued, relative risk “is not relevant” and should be excluded under ER 402 and ER 403. RP (9/17/18) 85-86.

THE COURT: He's in the top 20 or even five percentile of the sample, but he still isn't over six-foot, seven.

MR. CHANG: Correct.

RP (9/17/18) 89.

Although the court understood the point, it believed relative risk should still be admissible if the experts relied on it. RP (9/17/18) 89. But Mr. Perkins explained that the reason practitioners report relative risk numbers is simply because they are more stable, not because they are relevant to the question at issue in civil commitment trials. RP (9/17/18) 90. He explained that the purpose of the instrument and the reason for reporting relative risk was not for use in this context but for use in determining resource allocation. *Id.* The exhibit the State submitted as an offer of proof supported this statement: “Given the instability of absolute recidivism rates, evaluators should also consider whether it is necessary to report absolute recidivism rates at all. For many decisions, relative risk ranking is sufficient (e.g., provide high intensity supervision to the top 20% of sex offenders).” Ex. 1 on offer of proof at 30.

The State again discussed the limitations of the Static-99R and the importance of incorporating dynamic risk factors, which was not what Mr. Perkins moved to exclude. RP (9/17/18) 92. The court asked how relative risk was relevant to Dr. Goldberg’s opinion. RP (9/17/18) 93. The prosecutor ultimately stated that the relative risk ratio was one data point contributing to the clinical judgment about a person’s risk. RP (9/17/18) 94. The court indicated that if Dr. Goldberg “is going to testify that this was relevant and this is part of what made his opinion, then it seems to me

that makes it relevant.” RP (9/17/18) 97. Mr. Perkins again argued it was not relevant, and again clarified that he was not objecting to testimony about dynamic risk factors or other tools that “add something” to the analysis. RP (9/17/18) 98. But the relative risk numbers added nothing relevant to the analysis and are extremely prejudicial. RP (9/17/18) 99-102.

2. The court denied the motion to exclude evidence of relative risk even though the State and its expert failed to explain its relevance; thus, the jury heard this irrelevant and highly prejudicial testimony.

The court denied the motion on the basis that it was within “the realm of the expert,” but noted it would reconsider if the expert himself said “it doesn’t really play into his opinion[.]” RP (9/17/18) 102-03.

During trial, before Dr. Goldberg testified about relative risk, the parties and the court again discussed the issue outside the presence of the jury. RP (9/25/18) 850-97. Dr. Goldberg explained that the absolute risk number derived from a person’s Static-99R score is not necessarily that individual’s likelihood of reoffense; rather, it is the percentage of people within a group who will likely reoffend within the time period. RP (9/25/18) 854. For instance, 35% of people who score an 8 on the Static-99R are likely to reoffend within five years. *See id.*; ex. 50 at 22 (“One must also keep in mind that these percentages represent group rates. In

other words, Mr. Perkins falls within a group that has these levels of recidivism risk.”). The corollary is that 65% of the group will not reoffend. *See id.*

But Dr. Goldberg explained he does not look only at the Static-99R recidivism risk levels. He also looks at “dynamic factors, protective factors, and ... the idiosyncratic aspects of each case.” RP (9/25/18) 855; *see also* RP (9/25/18) 863 (acknowledging he performs a “structured clinical judgment” and considers both static and dynamic risk factors). Dr. Goldberg also claimed that in looking at “all of the numbers” he reviews not just the “absolute risk numbers” but also the “relative risk numbers.” RP (9/25/18) 855. He again emphasized the stability of the latter relative to the former, without explaining why this stability rendered the number relevant to the civil commitment context. RP (9/25/18) 856-59; *see also* ex. 1 on offer of proof.

Dr. Goldberg admitted that a person’s percentile ranking gives no information about absolute value. RP (9/25/18) 868, 870.

[Q:] Among a group of 100 men, if I were to tell that you the person has 85th percentile rank in their height, that means that 85 men of the group are shorter than that person? A. Actually, it is 84. Q. 84, right. A. That's fine, yes. Q. Sure. Given that information, ... Doctor, can you tell me whether you are taller than five-foot, six? A. No, I cannot. Q. Not at all, correct? A. No.

RP (9/25/18) 868.

Later, when pressed, he again failed to explain the relevance of the percentile rank, simply stating “I do think it is informative”:

Q. This is the million-dollar question: What does this percentile, which is associated with a particular number of the score add to your opinion regarding his individual risk level? A. I do think it is informative in that -- the way that I see, as evaluators, as long as we explain it to the jury, 99.1 percent -- it doesn't mean that he has 99 percent chance of reoffending. That is not what the jury should understand, but I think it is informative.

RP (9/25/18) 876. Dr. Goldberg then admitted, “*As I see it, as evaluators, we are asking to segregate those individuals amongst the group of sex offenders who are the riskiest types.*” RP (9/25/18) 876 (emphasis added).

Mr. Perkins correctly explained that although Dr. Goldberg may “see it” as his job to segregate sex offenders who are riskier than other sex offenders, this viewpoint is wrong as a matter of law and misrepresents the question the jury decides. A person may be indefinitely confined only if he is more likely than not to reoffend – not if he is more likely to reoffend than other sex offenders. RP (9/25/18) 882-83. Dr. Goldberg could not explain the relevance of the percentile to the question the statute requires the jury to consider. *See also* RP (9/25/18) 877 (“[T]he percentile tells me that he is so much higher risk than other sex offenders in general. That’s what it tells me.”).

Throughout the offer of proof, Dr. Goldberg failed to elucidate the relevance of the relative risk percentile to the question at issue in civil commitment proceedings. He simply repeated his mantra that this number was “consistent” and “informative” and persisted in mischaracterizing the issue before the jury in RCW 71.09 trials: “It informs me that – my understanding of the law was that the intent was to segregate those offenders who are the most risky. That’s what the percentile rank does.” RP (9/25/18) 883-84.

The court nevertheless permitted the testimony on the basis that Dr. Goldberg stated the relative risk number was something experts consider. RP (9/25/18) 892-97.

Thus, Dr. Goldberg told the jury that on the Static-99R, Mr. Perkins was in the “well above average risk” category and that “compare[d] with other sexual offenders” Mr. Perkins’s “relative risk number” was “99.1 percent.” RP (9/26/18) 910, 912. “Compared to other sex offenders, he is in the 99 percentile. In other words, he is more risky in a 99 percentile compared to other sex offenders.” RP (9/26/18) 913; *see also* RP (9/26/18) 916 (on Static-2002R, “Compared to other offenders, he is in the 98th percentile with his score”). He even misled the jury when talking about the only relevant number, which was absolute risk: “As far

as the absolute risk, they all give him some fairly *relatively high* numbers.” RP (9/26/18) 934.

The prosecutor was also permitted to imply that relative risk was relevant when cross-examining Dr. Spizman, and to wrongly imply that Dr. Spizman was a shill for Mr. Perkins who was ignoring the science. Presumably understanding the overwhelming impact these misleading numbers would have on the jury, the prosecutor saved this discussion for the end of cross-examination:

Q. And a score of 98 percentile doesn't meet the risk prong.

A. Let's not say 98 percentile. That's misleading. 35 percent risk of reoffense.

Q. 35 percent recidivism rate, right? You are right. It is misleading. I'm going to return your attention to Exhibit 71. That is the prior identified “Evaluator's Handbook”? The score of eight is the 99th percentile, not the 98, right?

A. Well, again, what you are talking about is a completely different situation here than what we are addressing.

Q. It is data point, is it not?

A. It is noise.

Q. It is a data point that you ignore despite the admonitions of the developers of the instrument in that 2016 paper that we spent so much time on?

A. I don't ignore it. I don't believe it is appropriate to report in this instance.

Q. You called it noise, right?

A. In this particular proceeding where it is not relevant to the question at hand and can be confusing and misleading, yes.

Q. Okay. That means in every case like this, it is noise?

A. I believe it is potentially misleading and could be more misleading than valuable. Absolutely.

Q. All right.

MR. HOWE: That's all I have.

RP (10/2/18) 1550-51.

In closing argument, while purporting to acknowledge that the percentile ranking “is not the question that you are asked to answer[,]” the prosecutor told the jury that this percentile ranking “does suggest that ... he is one of the riskiest people there is.” RP (10/3/18) 1741.

3. The court abused its discretion and erred under ER 402 and 403; the question for the jury is one of absolute risk, not relative risk, and the latter number merely served as a scare tactic.

This Court should reverse. The trial court abused its discretion and violated ER 402 and ER 403 by admitting this irrelevant, highly prejudicial evidence.

“It is a fundamental rule of evidence that ‘[e]vidence which is not relevant is not admissible.’” *In re Detention of Post*, 170 Wn.2d 302, 311, 241 P.3d 1234 (2010) (quoting ER 402). Moreover, even if relevant,

evidence should be excluded if it is substantially more prejudicial than probative. ER 403; *In re Detention of Thorell*, 149 Wn.2d 724, 757, 72 P.3d 708 (2003).

As trial counsel aptly explained, the admission of “relative risk” evidence violated both of these rules. “At the SVP determination trial, there is but one question for the finder of fact: Has the State proved, beyond a reasonable doubt, that the respondent is an SVP?” *Post*, 170 Wn.2d at 309. SVP 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) (emphasis added). Thus, the “risk” question is one of absolute risk, not relative risk. The jury must determine “whether the probability of the defendant’s reoffending exceeds 50 percent.” *In re Detention of Brooks*, 145 Wn.2d 275, 298, 36 P.3d 1034 (2001).

The Court in *Brooks* explained the relevant statistics, quoting a passage “from a leading work on SVPs”: “When a physician states, ‘You have an 80% chance of survival,’ it actually means, ‘Of all the people like you who get this disease, 80% survive.’” *Id.* at 296 (quoting Vernon L. Quinsey et al., *Violent Offenders: Appraising and Managing Risk* 180 (1998)). Thus, “when an expert testifies that a person has a likelihood of

reoffending,” it means that “[o]f 100 similarly afflicted offenders, more than 50 would reoffend if not so confined.” *Brooks*, 145 Wn.2d at 296-97. Mr. Perkins did not object to this type of absolute risk evidence, because it is relevant.

However, relative risk evidence is not relevant. The question for the jury was not whether Mr. Perkins was more likely to reoffend than other sex offenders; the question was whether he was more likely to reoffend than to not reoffend.

Post is instructive. There, over Mr. Post’s objection, the trial court admitted evidence of the treatment that would be available to him at the Special Commitment Center (“SCC”) if he were committed, which would not be available to him if he were not. *Post*, 170 Wn.2d at 306-07. The State emphasized this evidence in opening statements and closing arguments, “going so far as to directly compare recidivism rates of those who completed treatment in a secure facility and those who did not.” *Id.* at 307.

Post appealed and argued the court abused its discretion in admitting the evidence. In response the State claimed, among other things, that such evidence was relevant to the determination of dangerousness. *Id.* at 313. The Supreme Court disagreed, explaining that the *relative* degree of risk associated with the two scenarios was irrelevant – even if Post

would be less dangerous after a course of treatment in SCC than he would be if treated in the community, that was beside the point: “With respect to dangerousness, the question for the finder of fact is whether Post is likely to engage in a predatory act of sexual violence if released immediately; it is not whether Post would be more likely to commit such an act if immediately released than if he were confined and subsequently released.” *Id.* The Court allowed, “It may be that commitment is more likely to prevent Post from committing another predatory act of sexual violence than is Post’s voluntary treatment program, but this is entirely irrelevant to the likelihood that Post will reoffend if unconditionally released.” *Id.* at 314.

Similarly here, with respect to dangerousness, the question for the finder of fact is whether Mr. Perkins is likely to engage in a predatory act of sexual violence if released immediately; it is not whether he is more likely to commit such acts than other sex offenders. And though it may be that Mr. Perkins is more likely to commit a predatory act of sexual violence than other sex offenders, this is entirely irrelevant to the likelihood that Mr. Perkins will reoffend if unconditionally released. *See id.* The State’s expert completely misunderstood the statute when he repeatedly stated that the law’s purpose is “to segregate those individuals amongst the group of sex offenders who are the riskiest types.” RP

(9/25/18) 876; *see also* RP (9/25/18) 883-84. Thus, the fact that the State's expert relied on relative risk does not matter – he misunderstood the statute, and under the statute, this number is irrelevant. As in *Post*, the admission of this evidence violated ER 402. *See Post*, 170 Wn.2d at 314.

Its admission also violated ER 403. Even if the evidence were marginally relevant, which it is not, it is substantially more prejudicial than probative. The State repeatedly emphasized that Mr. Perkins was more dangerous than 98-99% of sex offenders. Though this is completely irrelevant to the question before the jury, any juror hearing this information would do nothing other than vote to commit. As Mr. Perkins explained, even though the jury heard that the absolute numbers showed only a 35-44% risk of sexual reoffense, people wrongly believe that sex offenders as a group are likely to recommit sex offenses. RP (9/17/18) 84-85 (“The problem with doing that is that the jurors have a preconceived notion that sex offenders are dangerous ... regardless of what the science and the research says. On top of that, we add fuel to that fire by saying, well, he is in the 99th percentile of dangerous sex offenders”).²

² In addition to the much lower recidivism rates reported in the updated actuarial instruments, other research indicates that sex offenders as a group are unlikely to recommit sex offenses. *See, e.g., Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) (discussing “the significant doubt cast by recent empirical studies” on the belief that “the risk of recidivism posed by sex offenders is frightening and high” and research

This Court reversed for a similar violation of ER 403 in *State v. Maule*, 35 Wn. App. 287, 667 P.2d 96 (1983). See also *Thorell*, 149 Wn.2d at 757-58 (citing *Maule* with approval). There, the defendant was charged with two counts of statutory rape for allegedly raping his daughter and stepdaughter. *Maule*, 35 Wn. App. at 288-89. Over the defendant's objections, the State's expert was permitted to testify that "a majority of child abuse cases involved a male parent figure, with biological parents in the majority." *Id.* at 292. This Court held the admission of this testimony was improper. Even though the evidence was introduced through an expert, "[i]ts admissibility must be determined pursuant to ER 403 the same as any other evidence which is relevant but involves a danger of unfair prejudice." *Id.* at 293. This Court concluded, "The relevancy of this evidence is not discernible" and "the prejudice to Maule was great." *Id.*

We consider ... prejudicial the admission of "expert" testimony that the majority of child sexual abuse cases involve "a male parent-figure, and of those cases that would involve a father-figure, biological parents are in the majority" in a prosecution of a defendant who is the father figure of one of the alleged victims and the father of the other. Such evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child sexual abuse, it is more likely the defendant committed the crime.

showing sex offenders "are actually *less* likely to recidivate than other sorts of criminals") (internal citation omitted).

Id. “Admission of this testimony was reversible error.” *Id.*

Similarly here, the admission of “expert” testimony that Mr. Perkins was more likely to reoffend than most sex offenders had indiscernible relevance and great prejudice. “Such evidence invites a jury to conclude that because [Mr. Perkins] has been identified by an expert with experience in [sex] abuse cases as a member of a group having a higher incidence of ... sex abuse, it is more likely” than not Mr. Perkins will reoffend. *See id.* As in *Maule*, admission of this testimony violated ER 403, and is reversible error. *Id.*

4. The remedy is reversal of the commitment order and remand for a new trial.

As in *Maule* and *Post*, this error was not harmless, and a new trial should be granted. “An evidentiary error is not harmless if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Post*, 170 Wn.2d at 314.

Here, within reasonable probabilities, the highly prejudicial evidence of relative risk affected the outcome. As noted, the sex offense actuarial instruments indicated Mr. Perkins was less than 50% likely to reoffend, but the State’s expert emphasized that Mr. Perkins was in the 98th or 99th percentile of risk relative to other sex offenders, and the prosecutor chastised the defense expert for claiming this number was not

relevant. Then, in closing argument, while purporting to acknowledge the limited relevance of relative risk, the prosecutor told the jury, “It does suggest that ... he is *one of the riskiest people there is.*” RP (10/3/180 1741 (emphasis added). The jury could not help but succumb to this scare tactic. A new trial should be granted. *See Post*, 170 Wn.2d at 314-15 (reversing SVP commitment because evidentiary error not harmless); *Maule*, 35 Wn. App. at 297 (reversing child rape convictions because evidentiary error not harmless, and stating that although court was “naturally reluctant to require a retrial” in a child rape case, all persons “are entitled to a fair trial, and this means the rules of evidence must be applied evenhandedly in all cases”).

F. CONCLUSION

Mr. Perkins asks this Court to reverse the commitment order and remand for a new trial because the court abused its discretion in admitting irrelevant, highly prejudicial testimony about Mr. Perkins’s dangerousness relative to other sex offenders.

Respectfully submitted this 22nd day of August, 2019.



Lila J. Silverstein – WSBA 38394
Washington Appellate Project – 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

IN RE THE DETENTION OF)	
)	
)	
DARREN PERKINS,)	NO. 52814-2-II
)	
)	
APPELLANT.)	

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