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Court of Appeals

Division III

State of Washington

COA No. 31107-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of:

ALBERT BROOKS, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1, The court erred by admitting evidence of bad acts under ER 404(b) when its probative value was far outweighed by its prejudicial effect.

2. The State did not prove beyond a reasonable doubt that Albert Brooks currently suffers from a mental abnormality as defined in RCW 71.09.020(8).

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1. Did the court err by admitting evidence of bad acts under ER 404(b) when its probative value was far outweighed by its prejudicial effect? (Assignment of Error 1).

2. Did the State prove beyond a reasonable doubt that Mr. Brooks suffers from a mental abnormality as that term is defined in

RCW 71.09.020(8)? (Assignment of Error 2).

3. Did the State prove beyond a reasonable doubt that Mr. Brooks' alleged mental abnormality causes him to have serious difficulty controlling his dangerous behavior and make him likely to engage in predatory acts of sexual violence unless confined to a secure facility? (Assignment of Error 3).

4. Did the State prove beyond a reasonable doubt that Mr. Brooks is a sexually violent predator under RCW 71.09? (Assignment of Error 4).

II. STATEMENT OF THE CASE

On October 30, 2008, the State filed a petition seeking the involuntary civil commitment of Mr. Brooks as a sexually violent predator pursuant to chapter 71.09 RCW. (CP 1). The court held a hearing on January 22, 2009, and found probable cause. (1/22/09 RP 69-70; CP 235). Waivers of time for trial and continuances were entered over the next several years. (See CP 207, 209, 233, 313, 314, 331, 460, 523, 597, 970).

On July 18, 2012, the State filed a motion to admit other crimes' evidence. (CP 1349-1467). The court held a hearing on August 10, 2012. As to an unadjudicated incident in 1979 involving

Darcy L, who was 10-11 years old, the court found its prejudicial effect outweighed the probative value and the evidence thus inadmissible. (8/10/12 RP 14-24).

The court found an incident involving TN that was charged as an attempted kidnapping and later dismissed, was admissible because the probative value outweighed the prejudicial effect. (8/10/12 RP 27-37). The court then determined that an Idaho incident of attempted kidnapping in January 1979 involving SN, occurring the same day as the rape of DW for which Mr. Brooks was convicted, was admissible as well. (*Id.* at 37-47). Finally, the court found an unadjudicated incident of rape involving DL, who was 12 years old in 1986, was admissible. (*Id.* at 47-53).

The case proceeded to trial in August 2012. SN, who was 15 years old and living in Post Falls, Idaho, on January 21, 1979, was done shoveling snow with a friend. (8/21/12 RP 160-61). Having a babysitting job that afternoon, she was walking when a truck pulled up and stopped in the road beside her. (*Id.* at 162). A man got out of the truck and asked her name and age. SN told him she was 11 because he might leave her alone if she was younger. (*Id.* at 163). The man put his left hand over her mouth and grabbed

her shoulder with his right hand. (*Id.* at 164-65). The man told SN he had a knife and pushed her toward his truck. (*Id.* at 165). She resisted and was able to run away. (*Id.* at 166). She never saw the man again. (*Id.* at 167).

Post Falls Police Officer Randy Bohn investigated the attempted abduction of SN. (8/21/12 RP 171). The officer learned that evening of another crime, a similar incident in Coeur d'Alene, involving DW. (*Id.* at 178). Albert Brooks was arrested the next day and a search warrant was executed at his Post Falls home. (*Id.* at 179). Detective Bohn found a boot similar to a boot print he found while investigating the scene of the SN incident. (*Id.* at 181). The SN case was closed with the arrest of Mr. Brooks. (*Id.*). He was charged with rape in Kootenai County and subsequently pleaded guilty. (*Id.* at 190).

In September 1978, TN was 17 years old and worked at the Albertson's deli at the corner of Pines and Sprague in Spokane Valley. (8/21/12 RP 193; 8/22/12 RP 218). She was working late on September 21, 1978, and went to her car to go home. (8/22/12 RP 220). She dropped her keys and leaned over to pick them up when someone had his arms around her neck. (*Id.* at 220-21). TN

started laughing because she thought it was a joke by a box boy. (*Id.* at 222). Then she heard: “You think that’s funny, bitch?” (*Id.*). The man got in her car and told her not to move or he was going to cut her fucking throat. He pulled her hair and flashed a knife at her. (*Id.*). He had the knife at her throat and drew some blood. (*Id.*). TN said she was only 17 and asked him why he was doing this. (*Id.* at 223). He said he neither cared whether she lived or died nor how old she was. (*Id.*). TN saw him very well. (*Id.* at 224). He told her they were going for a ride. (*Id.* at 225). The man was sitting on her hands and put duct tape over her eyes and around her head. (*Id.* at 225). She slid her hand out to push up the duct tape so she could see the door handle as she knew she was going to die if she did not get out of the car. (*Id.* at 226). TN grabbed the door handle. The door swung open and she fell out. (*Id.* at 227). The man tried to pull her back in by grabbing the duct tape attached to her head. (*Id.*). TN ripped off the tape and ran into the store. (*Id.*). She talked to the police. Detectives took her to a Rosauer’s store and she saw the man who attacked her behind the meat counter. (*Id.* at 229). Mr. Brooks was that man. (*Id.* at 229).

LL, then 16 years old on September 21, 1978, was at

Albertson's with her mother when she saw a man grab a young girl. (8/22/12 RP 192-93). LL heard her scream and saw her struggle, break away, and run into the store. (*Id.* at 194). The man got into a vehicle and drove away. LL and her mother followed and wrote down the license plate number. (*Id.* at 10). They circled around, went back to Albertson's, and gave the information to the store manager. (*Id.* at 195).

Spokane County Sheriff's Detective Danny O'Dell investigated the attempted kidnapping of TN. (8/22/12 RP 236). The vehicle registration for the license plate number came back for Albert Brooks, the man behind the meat counter when TN identified him as her attacker. (*Id.* at 240-41).

DW was 15 years old and living in Coeur d'Alene on January 21, 1979. (8/22/12 RP 248). She was walking to her sister's house and was in a church parking lot when she was struck in the back of the head. (*Id.* at 249). Dazed, DW was forced into a vehicle. (*Id.*). A man forced her to the floorboard and threatened her with a knife to cooperate. (*Id.* at 250). He drove off and she had a ski cap over her head and face so she could not see. (*Id.* at 250-51). The man stopped the car when DW said she had to go to the bathroom. (*Id.*

at 252). She got out of the vehicle and the man was in front of her. (*Id.* at 252). Scared, upset, and afraid, DW had her pants down. She could not recall whether she could go to the bathroom. (*Id.* at 253). The man had his pants down and forced DW to perform oral sex on him. (*Id.*). He forced her into the truck and put his penis into her vagina. (*Id.* at 254). He told DW to cooperate or he would cut her with the knife. (*Id.* at 255). The man told her to get out and not to look back as he drove away. (*Id.*). DW was disoriented and went to a stranger's door to get help. (*Id.* at 256). Mr. Brooks pleaded guilty to the rape of DW. (8/21/12 RP 190).

On September 9, 1986, DL was 12 years old and living in Spokane. (8/22/12 RP 260). She went to school and got off the bus. (*Id.* at 261). DL was in the alleyway to her apartment complex behind a grocery store. (*Id.* at 262). A man walked by, said hi, and grabbed her. (*Id.*). He asked where she lived and she pointed it out. (*Id.*). The man told her he had a knife, but she did not see it. (*Id.* at 263). They walked to the front of the grocery store and she was so scared she could not cry out. (*Id.*). The man led her to his truck and DL was on the passenger side floorboard. (*Id.* at 264).

He raped DL orally and vaginally. (*Id.* at 267). A couple of years later, she identified Mr. Brooks as her attacker. (*Id.* at 278-79). The investigating detective forwarded a report to the prosecutor, but Mr. Brooks was not charged in the DL case. (*Id.* at 280).

KG, born August 27, 1978, was living in Spokane in 1988. (8/22/12 RP 282). On December 9, 1988, she was walking to school by herself around 8:30. (*Id.* at 283-84). A little less than two blocks from her home, KG passed a pickup on the same side of the road. (*Id.* at 284). A man put his hand around her mouth, brought her around the front of the truck, and put her on the floorboard. (*Id.*). KG froze. She was covered up with a flannel coat. (*Id.* at 285). The man duct-taped her eyes and had her take off her underwear. (*Id.* at 286). KG was forced to perform oral sex and he then put his penis into her vagina. (*Id.* at 286-87). The man put his fingers in first. (*Id.* at 287). KG noticed he had cocoa butter lotion on his fingers and penis. (*Id.* at 288). She feared he would kill her if she did not take her clothes off. (*Id.*). He told her if she did not cooperate, he would beat her with a flashlight and have his black friends kill her and her family. (*Id.*). DL put her clothes back on and thought she was going to be killed. (*Id.* at 289-90). She was

dropped off on the south hill with the duct tape removed. He told her not to look back. (*Id.* at 290). DL went to a house and told the residents she had been kidnapped and raped. (*Id.* at 291). They called her home; detectives came; and she went to the hospital. (*Id.*). That man was Mr. Brooks. (*Id.* at 293).

Spokane Police Officer Alan Quist stopped Mr. Brooks in his pickup and arrested him shortly after the rape of KG. (8/22/12 RP 297-99). Duct tape was found in the vehicle and cocoa butter lotion. (*Id.* at 301).

Dr. Brian Judd, a licensed psychologist, was the State's expert. (8/22/12 RP 317). His current expertise was the assessment and treatment of sex offenders. (*Id.* at 319). As a member of the Joint Forensic Unit, a panel of community practitioners and independent evaluators assigned to do sexually violent predator cases, he was first asked to evaluate Mr. Brooks in 2003. (*Id.* at 323). Dr. Judd's task was a referral from the End of Sentence Review Committee of DOC. (*Id.*). He performed other evaluations of Mr. Brooks in 2005, 2008, and 2012. (*Id.* at 324). In evaluating him, Dr. Judd reviewed over 3000 pages of records, including victim and witness statements, police statements and

investigative reports, previous psychological and psychiatric evaluations, DOC reports, reports from when Mr. Brooks was incarcerated as well as reports from the Special Commitment Center. (*Id.* at 324-26). Dr. Judd interviewed Mr. Brooks for 8 hours on February 4 and 5, 2003; 3¼ hours on October 20, 2008; and 1½ hours on January 27, 2012. On October 4, 2010, he interviewed Mr. Brooks, but no report was written. (*Id.* at 326). The purpose of the interviews was to assess his current functioning. (*Id.* at 327).

Dr. Judd testified he had enough information to form expert opinions about Mr. Brooks' disorders. (8/22/12 RP 328). The doctor diagnosed him as having pedophilia, a sexual attraction to females generally 13 and under:

The [DSM] indicates . . . that the individual for at least a period of six months experiences recurrent, intense, sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children. and it identifies prepubescent as generally age 13 years of age or younger. Secondly, the person has acted on these sexual urges or the sexual urges or fantasies caused marked distress or interpersonal difficulty and that the person is at least 16 years of age and at least five years older than the child or children referenced in the first criterion. (*Id.* at 333).

Dr. Judd opined, to a reasonable degree of psychological certainty, that Mr. Brooks suffers from recurrent intense, sexually arousing fantasies, urges, or behaviors including sexual activity with prepubescent children. (*Id.*) He noted Mr. Brooks' criminal activity involving Darcy L in January 1979 when she was 11 years old; SN in January 1979 when she was 11 years old; DL in October 1986 when she was 11 years old; and KG in December 1988 when she was 10 years old. (*Id.* at 334-35). The criminal behavior persisted for over six months in light of the acts in 1978-79 and 1988. (*Id.* at 335).

Dr. Judd testified the prison sex offender treatment program in which Mr. Brooks was a participant from August 2004 to June 2005 supported his diagnosis. (8/22/12 RP 335). Mr. Brooks had fantasies of forcible sexual contact with girls 9-11 and high levels of arousal for girls 9-11. (*Id.* at 336). At the end of the program, he was still experiencing 30-40% deviant arousal. (*Id.* at 337). In the October 20, 2008 interview, Mr. Brooks had 20% deviant arousal and reported masturbating to fantasies of minors and rape and coercion. (*Id.* at 338). After the petition was filed, he denied making those statements. (*Id.*).

Dr. Judd mentioned the penile plethysmograph (PPG), a way to assess an individual's patterns of arousal. (8/22/12 RP 338-39). The PPG involves a stress gauge around the penis and exposure to a variety of stimuli, both visual and auditory. (*Id.* at 339). Mr. Brooks took a PPG on July 28, 2011. (*Id.* at 340; CP 1993-2009). He had no significant arousal to anything and the assessment was relatively uninformative. (*Id.*).

Dr. Judd opined Mr. Brooks' sexual urges caused him marked distress and interpersonal difficulty. (8/22/12 RP 344). For example, he knew it was morally wrong to rape, but he did it anyway with knowledge he would lose his family, friends, and fiancé. (*Id.* at 345). With his victims, the age requirement for the diagnosis was also met. (*Id.*). Dr. Judd stated Mr. Brooks currently suffers from pedophilia, given the duration of time he suffered from these urges even after completion of sex offender treatment. (*Id.*). The doctor testified there is no cure for pedophilia. (*Id.* at 346).

Dr. Judd also diagnosed Mr. Brooks with paraphilia not otherwise specified, nonconsent. (8/22/12 RP 346). The doctor summarized what that was:

And so this is indicating an individual who is

not consenting to the sexual contact that is occurring and that if the individual experiences arousing fantasies or urges or engages in these behaviors, again, over a period of six months, then that would meet the overall criteria and definition for a paraphilic disorder. . .

They are sexually aroused to the nonconsenting aspects of the sexual encounter. (*Id.* at 347).

Doctor Judd said this condition was not explicitly diagnosed in the DSM. (*Id.*). There was an ongoing debate about including it. (*Id.* at 348). Not all rapists suffer from the disorder, but Dr. Judd said it was “commonly used and applied in [his] field.” (*Id.*). From Mr. Brooks’ criminal history, the doctor found evidence he has recurrent, intense, sexually arousing fantasies, urges, or behaviors involving nonconsenting persons:

Well, specifically we are looking at the 9/21/78 attempted abduction of [TN]. We’re looking at the 1/21/78 abduction and sexual assault of [DW] who was 15 years of age. And [TN] was, I believe, 17 years of age. So, therefore, they were older than would be typically seen for a pedophilic disorder. (*Id.* at 349).

Dr. Judd also found the treatment document when Mr. Brooks first went into the sex offender treatment program showed “a focus in terms of coercive sexual behavior focused on using

force and that he demonstrated arousal to that.” (*Id.* at 350).

Moreover, to the extent that factor was involved with the abduction and rapes of the minors, Dr. Judd believed “that that would tend to support the diagnosis of paraphilic coercive disorder.” (*Id.*). From the initial assessment conducted in 2004 by Dr. Christmas Covell, Mr. Brooks “also reported moderate to high arousal to a number of verbal depictions of formal sexual contact with adult women.” (*Id.*). Dr. Judd testified the self-report in 2004 was well after the attempted abduction of TN and the sexual assault of DW, thus tending to suggest a persisting pattern of interest. (*Id.*).

There was also an indication from Mr. Brooks that his stalking behavior between 1985 and 1988 was not simply a matter of power and control, but was “actually victim-seeking behavior.” (*Id.* at 351). Treatment records from the sex offender treatment program indicated Mr. Brooks experienced an adrenaline rush when stalking and also masturbated during those periods of time. (*Id.*). Mr. Brooks, however, denied it when he was interviewed by Dr. Judd. (*Id.*). The doctor further determined the paraphilic behavior occurred over at least six months and Mr. Brooks’ deviant

arousal to forced sexual activity with nonconsenting persons cause him clinically significant distress or impairment in social, occupational, or other areas of functioning. (*Id.* at 352.)

Dr. Judd did, however, state that with respect to the attempted abduction of TN, the perpetrator had made no sexual comments. (8/22/12 RP 353). Nonetheless, he concluded the incident supported his opinion of paraphilia:

I believe that the abduction was interrupted before he could fully abduct her and that the consistent pattern that has been implicated in terms of Mr. Brooks's – specifically looking again in 1/21/79 with the attempted abduction of [SN], the abduction of [DW], 12/8/88 abduction of [KG], I mean, the similarities in terms of what he attempted to do in each of those cases and the fact that we have no other real criminal behaviors after 1968 that are in any way sexual leads me to believe that this was a sexual – attempted sexual assault. (*Id.* at 353).

To a reasonable degree of psychological certainty, Dr. Judd further diagnosed Mr. Brooks with antisocial personality disorder. (8/22/12 RP 354, 357). A personality disorder is “an enduring way that an individual understands and relates and interacts with their environment.” (*Id.*). This is not temporary, but rather reflects their patterns for a sustained period of time. (*Id.*). Dr. Judd summarized the symptoms supporting the diagnosis for Mr. Brooks:

In general terms an individual with anitiosocial personality disorder is going to be an individual who demonstrates a pattern of noncompliance with societal, normal behavior, lawful behavior. They may engage in pattern of deceitfulness, lying. They demonstrate irritability and aggressiveness. They may demonstrate a pattern of impulsivity, lack of remorse, lack of empathy for their victims, a variety of things like that. In addition there must be evidence that this behavior started prior to the age of 15, which we call conduct disorder. There must be elements of a conduct disorder prior to age 15 in order to diagnose antisocial personality disorder. (*Id.* at 355).

Dr. Judd saw evidence of that for Mr. Brooks before age 15 through information in the sex offender treatment program and his own writings he began to engage in a pattern of theft, use of alcohol, and stealing of vehicles at 13 or 14. (*Id.* at 355-56). The doctor noted when he initially interviewed him in 2003, Mr. Brooks did not “represent that to me.” (*Id.* at 356). As for adult antisocial activity, Dr. Judd pointed to Mr. Brooks’ pattern of conduct after age 18. (*Id.* at 356-57).

Dr. Judd evaluated Mr. Brooks to form an opinion as to whether he met the elements of the sexually violent predator law under RCW 71.09. (8/22/12 RP 358). The doctor diagnosed Mr.

Brooks with mental disorders. (*Id.*). But the statute “asks whether he suffers from a mental abnormality or personality disorder.” (*Id.*). Dr. Judd testified the term “mental abnormality” is not used in his field, but rather comes from RCW 71.09.020(8). (*Id.*). He nevertheless opined certain of Mr. Brooks’ disorders constituted mental abnormalities – the diagnosis of pedophilia, sexually attracted to females, nonexclusive type, and paraphilia not otherwise specified, nonconsent. (*Id.* at 359). Going through the definition of mental abnormality as defined by statute, Dr. Judd found Mr. Brooks’ pedophilia was a congenital or acquired condition, but did not know which it was. (*Id.* at 360). As for his paraphilia not otherwise specified, the doctor also found it was a congenital or acquired condition and could not say specifically which it was. (*Id.*).

Dr. Judd found evidence that Mr. Brooks’ pedophilia affected his emotional or volitional capacity. (8/22/12 RP 361). Mr. Brooks engaged in the behaviors of stalking, abducting, and raping even though he knew the impact they could potentially have. (*Id.*). Moreover, he was acting out in the context of marital relationships that he described as relatively fulfilling from a sexual standpoint.

(*Id.* at 362). Dr. Judd found the same for paraphilia not otherwise specified as the evidence was no different for this diagnosis than with pedophilia. (*Id.* at 362-63).

As for the last criterion in the definition of mental abnormality, Dr. Judd found Mr. Brooks' pedophilia predisposed him to committing criminal sexual acts to the requisite degree. (8/22/12 RP 364). He pointed to the pattern of criminal behavior in 1978-79 that continued even after his arrest for the TN incident in September 1978 and continuing to 1979 for the incidents involving SN and DW:

And so even when he's come to the attention of the authorities, he's continuing to engage in this behavior. And so we see this pattern of conduct resuming once again when he returns to the community on 10/9/85. (*Id.*)

Dr. Judd also found the same predisposition and the criterion being met regarding the paraphilia not otherwise specified. (*Id.* at 364-65). These two mental abnormalities cause Mr. Brooks "to have serious difficulty controlling his behavior." (*Id.* at 365).

But with respect to the antisocial personality disorder diagnosis, Dr. Judd opined that it was not something that predisposed Mr. Brooks to commit criminal sexual acts and did not

meet the requirement. (8/22/12 RP 365). In and of itself, the personality disorder was not enough to meet the criteria as a mental abnormality. (*Id.* at 365-66).

Dr. Judd opined that Mr. Brooks' mental abnormalities made him likely to engage in predatory acts of sexual violence if not confined in a secure facility. (8/22/12 RP 366). He stated "likely" meant more probably than not or over a 50% likelihood. (*Id.*). Dr. Judd used two actuarial instruments, the Static-99R and SORAG (Sex Offender Risk Appraisal Guide), to assess Mr. Brooks' risk of sexual recidivism. (*Id.* at 367-71). The Static-99R tends to be more sensitive to deviant sexual interest and the SORAG tends to be less sensitive to deviant sexual interest but more so to lifestyle inability and antisocial orientation. (*Id.* at 371). These actuarial instruments, however, are only moderately predictive, which means they are not bad and not great and focus on static factors, *i.e.*, the historical factors of the individual. (*Id.* at 369-70).

The Static-99R is designed to measure the probability that the individual is going to be re-charged or re-convicted for a sexual offense. (8/22/12 RP 372). For the scoring sheet, "you look at the specific time when you're rating the individual and you . . . simply

go through and you look at the information that you have, and you essentially just code it based upon the information in the individual's history." (*Id.*). Since Mr. Brooks was then 67 years old, he got a score of negative three indicating a substantially reduced risk for somebody over 60. (*Id.* at 374). Dr. Judd came up with an overall score of 4 for Mr. Brooks on the Static-99R. (*Id.*). In comparing his score to that of others, the doctor determined Mr. Brooks was in the high-risk and high-need sample. (*Id.* at 375). With individuals similar to Mr. Brooks, about 20 percent "recidivated or re-offended or were re-charged or re-convicted of a sexual offense at five years, and approximately 30 percent were re-charged or re-convicted of a sexual offense at ten years." (*Id.* at 376).

With respect to the SORAG, Dr. Judd noted again that the instrument was more general and looked at violent recidivism as opposed to specifically sexually violent re-offense. (8/22/12 RP 377). It worked in a similar way to the Static-99R because the higher the score for an individual, the higher the risk posed. (*Id.* at 377-78). The SORAG incorporates some outside instruments, the

PPG and the Hare Psychopathy Checklist – Revised, which examines elements very similar in some respects to the diagnostic criteria for antisocial personality disorder. (*Id.* at 378-79). Mr. Brooks’ score on the Hare Psychopathy Checklist – Revised was 19 in a range of zero to 40. (*Id.* at 379). Dr. Judd incorporated that score in the SORAG, but did not use the PPG as it was inconclusive. (*Id.* at 380). Because of his age, Mr. Brooks had a score of negative five on the “age at index offense” factor in the SORAG. (*Id.*). Overall, his score was 14. (*Id.* at 381). Dr. Judd testified 58% of individuals with a score of 14 re-offended at seven years of time of risk and approximately 76% did at ten years at time of risk. (*Id.*). He again acknowledged the instruments were just moderately predictive. (*Id.*).

Dr. Judd went back and looked at how Mr. Brooks would have scored on both of the instruments in October 1985. (8/22/12 RP 382). Using the Static-99R score of five for that time, the doctor said he would not have predicted any kind of future re-offense if he had seen him at the beginning of October 1985 because the associated recidivism rates for a score of five were about 25% and 35%. (*Id.*). Recidivism rates for the SORAG would have

remained essentially the same so he would have said that Mr. Brooks “constituted a more-likely-than-not probability of recidivating.” (*Id.*).

Dr. Judd also used the SRA-FV, Structured Risk Assessment – Forensic Version, in evaluating Mr. Brooks. (8/23/12 RP at 388-90). His overall score on the SRA-FV was 4.13. (*Id.* at 395). Given the score, Dr. Judd decided Mr. Brooks fit in with the high-risk and high-needs sample, but his score exceeded the range associated with that group, generally 3.5 to 3.7. (*Id.*).

Dr. Judd considered two protective factors which reduce the probability that someone is going to offend or re-offend. (8/23/12 RP 396). Those factors were Mr. Brooks’ advancing age as well as his participation in sexual deviancy treatment. (*Id.*). Dr. Judd, however, found age did not significantly or to any degree reduce Mr. Brooks’ risk because he was very healthy. (*Id.* at 397). The doctor also felt completion of the 10-month treatment program ending in June 2005 did not reduce Mr. Brooks’ risk as a protective factor because he was still indulging in deviant fantasies and reported masturbating to them in 2008. (*Id.* at 398).

Dr. Judd testified the definition of “predatory” under RCW

71.09 was “acts directed towards (a) strangers, (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization, or persons of casual acquaintance with whom no substantial personal relationship exists.” (8/23/12 RP 403-04). To a reasonable degree of psychological certainty, Dr. Judd opined Mr. Brooks was likely to commit a predatory act of sexual violence if released as all victims, except Darcy L, were strangers and unknown to him, thus meeting the definition of predatory. (*Id.* at 404).

Dr. Judd acknowledged there was no evidence of arousal in the incident with SN. (8/23/12 RP 408). He also just assumed Mr. Brooks committed the offenses against Darcy L, SN, and DL. (*Id.*). Dr. Judd said Mr. Brooks did not display evidence of deviant behavior while incarcerated. (*Id.* at 417).

Dr. Theodore Donaldson was the defense expert who met with and evaluated Mr. Brooks. (8/23/12 RP 544). His usual focus was on mental abnormality and risk prediction. (*Id.* at 545). Dr. Donaldson opined that clinicians did not do any better than lay people in predicting long-term recidivism. (*Id.* at 548). He determined there was insufficient evidence of a mental abnormality

in Mr. Brooks and the diagnosis of Dr. Judd could not be supported. (*Id.* at 549). Dr. Donaldson testified there was neither any such thing as paraphilia not otherwise specified nor any evidence of arousal by nonconsent. (*Id.* at 550). The incident involving TN played no role in his conclusion because there was insufficient evidence. (*Id.* at 552). As for the incident involving SN, Dr. Donaldson also found no evidence of arousal to nonconsent. (*Id.* at 565). With respect to the rape of DW in 1979, Dr. Donaldson stated there was nothing in the materials he reviewed relating to nonconsent and Mr. Brooks just wanted sex. (*Id.* at 556). There was also no evidence of arousal to nonconsent in the incident involving DL. (*Id.*).

On the requirement of volitional impairment or control, Dr. Donaldson testified the DSM had no diagnosis telling anyone anything about a person's ability to control the behaviors associated with a diagnosis, here paraphilia not otherwise specified, at any particular point in time. (8/27/12 RP 563). He said there is no science about volition. (*Id.*).

Dr. Donaldson further opined to a reasonable degree of

psychological certainty that there was insufficient evidence of pedophilia partly because the criteria in the DSM have never been determined to be valid indicators of pedophilia. (8/27/12 RP 565). He noted psychiatrists using the criteria did not come up with a group that was any different from child molesters in terms of recidivism risk, thus raising questions as to the validity of the diagnosis. (*Id.*). Dr. Donaldson also stated that in the International Classification of Diseases, pedophilia was under the general classification of a personality disorder, *i.e.*, a learned behavior, not pathology. (*Id.*).

Dr. Donaldson opined there was nothing significant to a diagnosis of pedophilia in the SN incident because it just happened to involve a child and, likewise, there was nothing in the DL incident. (*Id.* at 566, 568-69). He further stated the conviction for the rape of KG, in and of itself, did not support a diagnosis of pedophilia. (*Id.* at 569).

Dr. Donaldson testified age was the most important factor regarding risk and Mr. Brooks posed a very low risk due to his age. (8/27/12 RP 571). The doctor opined the actuarial instruments used to assess the risk of recidivism were highly overrated and

the current state of the art did not allow anyone to reach a conclusion about a person's risk with some high degree of confidence or accuracy about the risk estimate. (*Id.* at 572). Based on studies, Dr. Donaldson indicated the Static-99R did not adequately account for age. (*Id.* at 576). He stated:

So those age corrections are conservative. Probably they should be bigger. But it doesn't make any difference. When we take a look at age, you can't get a risk that's very high, even – and there's been the habit of comparing with the so-called high-risk, high-need group which is probably somewhat controversial. (*Id.* at 577).

Considering that Mr. Brooks was 67 at the time of trial and would be 72 in five years, the doctor opined it was absolutely ridiculous to conclude he was more likely than not to engage in crimes of sexual violence. (*Id.* at 578).

As for the SORAG, Dr. Donaldson testified he would not use it because the test was based on a very high base rate, *i.e.*, what percentage of released sex offenders recidivate. (8/27/12 RP 578-79). Recidivism rates, however, have gone down dramatically, by about 5%, since 1992 when it was 20%. (*Id.*). To a reasonable degree of psychological certainty, a term which Dr. Donaldson equated to more likely than not, he opined there was "insufficient

evidence for a diagnosis and there's – and there's absolutely no way to get a risk estimate anywhere close to 50 percent.” (*Id.* at 580).

Mr. Brooks had no exceptions to the court's instructions. (8/27/12 RP 723-26, 729-43; CP 2044-71). The jury returned a verdict that, beyond a reasonable doubt, Mr. Brooks was a sexually violent predator. (8/27/12 RP 801; CP 2072). The court entered an order of commitment on August 27, 2012. (8/27/12 RP 803; CP 2073). This appeal follows.

III. ARGUMENT

A. The court erred by admitting evidence of bad acts under ER 404(b) when its probative value was far outweighed by its prejudicial effect.

The State sought to admit evidence of other crimes under ER 404(b). (CP 1349-1467). After a hearing, the court excluded an incident involving Darcy L as being more prejudicial than probative, but allowed evidence of other unadjudicated incidents involving TN in September 1978, SN in January 1979, and DL in 1986. (8/10/12 RP 27-53). Mr. Brooks contends the court erred by admitting the ER 404(b) evidence of the unadjudicated incidents

because its prejudicial effect far outweighed its probative value.

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

But ER 403 provides in relevant part that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Although the court so excluded evidence of one incident, it admitted evidence of the others when the circumstances were very similar to that which was excluded. In these circumstances, it was an abuse of discretion for the court to allow the other incidents because its decision was based on untenable grounds or reasons. *In re Det. of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009).

Darcy L was 10 or 11 years old when Mr. Brooks was her neighbor. (8/10/12 RP 14). She knew him as was his son’s friend.

(*Id.*). As argued by the State:

We even have documents from back at that time period when she reported it in 1979. She told police that he rubbed himself against her, rubbed

his penis against her.

And so we have sexual behavior against a child, which is highly relevant in this case, and [Mr. Brooks] has been identified by the victim. (*Id.*).

Mr. Brooks' counsel argued the prejudicial effect of the allegation of attempted rape or child molestation was "huge" and it was also an unadjudicated offense. (*Id.* at 20). In excluding the evidence, the court stated:

Counsel, I have in mind this particular alleged episode of prior bad acts, misconduct. I do see somewhat of a difference this event and the other uncharged events and the charged events which led to convictions. And based on that, counsel, I a finding that the prejudicial effect does outweigh the probative value as to victim – alleged victim Darcy. So I would grant the motion, or deny the motion, rather, to introduce – permit introduction of that particular alleged and uncharged act. (*Id.* at 24).

In the other unadjudicated offenses involving TN, SN, and DL, the circumstances were essentially the same or even more prejudicial than those in the Darcy L incident, but the court nevertheless admitted them. Indeed, despite noting the "powerful prejudicial effect", the court found "strong, compelling probative value to this evidence as well" in the TN incident. (See, e.g.,

8/10/12 RP 37). Without weighing the competing interests and having in mind the elements the State had to prove, the court summarily concluded “the prejudicial impact does not substantially outweigh the probative value.” (*Id.*).

When considering whether to admit evidence of the incident involving SN, the court gave the same reasons for letting it in. (8/10/12 RP 46). Again, the court stated it had in mind “the need for the petitioner to prove the elements as stated” to allow the evidence. (*Id.*). But there was no weighing process and helping to prove the petitioner’s case with unadjudicated offenses is no reason to allow evidence that is substantially more prejudicial than its probative value. ER 403.

With respect to the DL incident, the court once more alluded to the petitioner’s burden to show Mr. Brooks was dangerous and his mental condition such that it called for that conclusion so the probative value was clear and not substantially outweighed by its prejudicial impact. (8/10/12 RP 53). The petitioner’s burden of proof, however, is not a tenable ground or reason for allowing the evidence of this unadjudicated offense. *In re Det. of Duncan*, 167 Wn.2d at 402.

The circumstances of the admitted incidents involving TN, SN, and DL were not substantively different than the excluded incident involving Darcy L. Without a meaningful articulation by the court explaining why there was a difference in its reasoning why the TN, SN, and DL incidents should be admitted when the equally prejudicial and probative Darcy L incident was excluded, its decision is not supported by tenable grounds or reasons. *In re Det. of Duncan*, 167 Wn.2d at 402-03. The court abused its discretion. Moreover, discretion unexercised is discretion abused. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999). The court abdicated its function and essentially did not exercise any discretion in admitting the TN, SN, and DL incidents under ER 404(b). The court's error prejudiced Mr. Brooks to such a degree that the outcome of the trial was affected and reversal is required. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

B. The State did not prove beyond a reasonable doubt that Mr. Brooks suffers from a mental abnormality and that the abnormality causes him to have serious difficulty controlling his dangerous behavior and makes him likely to engage in predatory acts of sexual violence unless confined to a secure facility.

Sexually violent predator proceedings are civil in nature, but challenges to the sufficiency of the evidence under RCW 71.09 are reviewed under the criminal standard. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). The evidence is sufficient if a rational trier of fact could find each essential element beyond a reasonable doubt, viewing the evidence in a light most favorable to the State. *Id.* The reviewing court defers to the trier of fact on issues of witness credibility, persuasiveness of the evidence, and conflicting testimony. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004).

The court may civilly commit a person to a secure facility if it determines beyond a reasonable doubt he is a sexually violent predator. RCW 71.09.060(1). To do so, the State must prove that the individual (1) has been convicted of or charged with a crime of sexual violence; (2) suffers from a mental abnormality or personality disorder, and (3) is more likely than not, because of the abnormality, to engage in predatory acts of sexual violence if not committed to a secure treatment facility. RCW 71.09.020(18). Civil commitment only satisfies due process if the State proves a person is “mentally ill and currently dangerous.” *In re Det. of Moore*, 167

Wn.2d 113, 124, 216 P.3d 1015 (2009).

Mr. Brooks does not dispute the first element requiring a conviction of sexual violence. But he contends he does not currently suffer from a mental abnormality.

Although Dr. Judd diagnosed him with pedophilia and paraphilia not otherwise specified, nonconsent, he stated Mr. Brooks had not displayed any deviant sexual behavior during his incarceration from 1988 on. (8/23/12 RP 417). Nothing had changed with Mr. Brooks' mental health or behavior. Yet, in 2003, when he interviewed him for eight hours, Dr. Judd did not diagnose Mr. Brooks with pedophilia, much less paraphilia not otherwise specified, nonconsent. (8/23/12 RP 410). If Mr. Brooks did not suffer from those mental abnormalities then, there is nothing now to support Dr. Judd's diagnosis which was made about the time the petition was filed. Dr. Judd cited what he considered evidence to support his diagnosis of pedophilia and paraphilia not otherwise specified, but the same evidence was always there and he made no such diagnosis before. Dr. Donaldson made these same points in his testimony as to the insufficiency of evidence of pedophilia. (8/23/12 RP 565). He also went so far as to say there was no such

thing as paraphilia not otherwise specified. (8/23/12 RP 550). Dr. Judd acknowledged there was no explicit diagnosis of paraphilia not otherwise specified, nonconsent, in the DSM and there was an ongoing debate about its inclusion. (8/22/12 RP 347-48). This is certainly not proof beyond a reasonable doubt of a current mental abnormality. *In re Det. of Thorell*, 149 Wn.2d at 744.

Even if it is assumed Mr. Brooks suffers from a mental abnormality, there was no proof beyond a reasonable doubt that the abnormality made him likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18). Dr. Judd used the Static-99R and SORAG, actuarial instruments based on static factors, to assess the risk, but he testified they were only moderately predictive. (8/22/12 RP 369-71). The Static-99R did not show more than a 20% to 30% likelihood of recidivism. (*Id.* at 374-76). Dr. Judd would not have predicted any kind of future re-offense if he had seen Mr. Brooks in October 1985. (*Id.* at 385). He did not explain why his opinion had changed when the factors scored in the Static-99R had not changed. This is not proof beyond a reasonable doubt that Mr. Brooks was likely to engage in predatory acts of sexual violence if

not confined.

The SORAG was more general and looked at violent recidivism, not sexually violent re-offense. (*Id.* at 377). Since the SORAG, only moderately predictive, showed a risk of recidivism above 50% for Mr. Brooks, Dr. Judd said it supported his opinion Mr. Brooks had a more-likely-than-not probability of recidivating. (*Id.*). But this is no more than voodoo science. Nothing had changed about Mr. Brooks' actual behavior since he was put in jail in 1988. Other information, such as charged and uncharged offenses, convictions, and records from DOC and treatment providers, were static and did not change either. The one important factor that did change, Mr. Brooks' advancing age, was disregarded by Dr. Judd, who acknowledged that it reduces the risk. In these circumstances, nothing but a moderately predictive SORAG was the basis for Dr. Judd's opinion. Dr. Donaldson debunked the SORAG's accuracy as it was premised on an incorrect base rate and there was no way to get a risk estimate close to 50%. (8/27/12 RP at 578-80).

Even when viewed in a light most favorable to the State, no

rational trier of fact could find beyond a reasonable doubt that Mr. Brooks was likely to commit sexually violent crimes if not confined. The order of commitment must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Brooks respectfully urges this court to reverse the order of commitment.

DATED this 27th day of May, 2014.



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CERTIFICATE OF SERVICE

I certify that on May 27, 2014, I served a copy of the brief of appellant by first class mail, postage prepaid, on Albert Brooks, Special Commitment Center, PO Box 88600, Steilacoom, WA 98388; and by email, as agreed by counsel, on Malcolm Ross and James Buder at CRJSVPEF@atg.wa.gov.


