NO. 102459-2

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of

ARON NIXON,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Aron Nixon seeks review of the Court of Appeals decision affirming his civil commitment as a sexually violent predator (SVP). He challenges four evidentiary rulings. Each claim either fails to establish that error occurred, or fails to show that Nixon was prejudiced or that the outcome of the trial would have been different. There is no basis for this Court's review.

Nixon first claims the trial court erred in excluding evidence to impeach a non-testifying victim. The Court of Appeals found the exclusion was erroneous but the error was harmless as the introduction of impeachment evidence would not have materially affected the outcome of the trial.

Second, Nixon claims the trial court erred by declining to give a missing witness instruction to the jury. The Court of Appeals correctly held the trial court did not abuse its discretion as the State did not have particular control over the witness and satisfactorily explained the witness' absence.

Nixon next argues he was prejudiced by the trial court's exclusion of a written statement made by a prosecuting attorney in his 2017 criminal case. The Court of Appeals correctly held the statement was properly excluded as irrelevant to this SVP proceeding.

Finally, Nixon claims he was prejudiced by the trial court's exclusion of his testimony that the possibility of a recent overt act SVP petition was "definitely an added deterrent" to any future offense. The trial court properly excluded the testimony because Nixon also testified that he did not intend to commit any additional crimes, making the recent overt act statement irrelevant and confusing to the jury. Even if exclusion of Nixon's testimony was error, the Court of Appeals properly concluded it was harmless.

The resulting unpublished decision below involved a routine application of well-settled evidentiary principles and does not raise any issue of substantial public interest. Review is not warranted.

II. COUNTERSTATEMENT OF THE ISSUES

A. Where the trial court erred by excluding evidence to impeach a non-testifying victim, but ample testimony supports that the assault was committed with sexual motivation and Nixon's counsel cross-examined the State's expert on the victim's inconsistent statements, was this error harmless?

B. Where a non-testifying victim was not peculiarly available to the State and the absence was satisfactorily explained, did the trial court abuse its discretion by declining to give a missing witness instruction?

C. Where the trial court excluded a statement by the prosecutor in a prior criminal action on the basis that it was irrelevant, did the trial court properly exercise its discretion?

D. Where Nixon testified that he had "zero" risk of re-offense and that he did not intend to commit additional crimes, did the trial court properly exclude Nixon's testimony about the possibility of a recent overt act petition if he were released? If the trial court did err by excluding the evidence, was it harmless error?

III. COUNTERSTATEMENT OF THE FACTS

A. Nixon's History of Sexual Violence

Aron Nixon is a 48-year-old man with a history of sexual violence that began when he was a teenager. VRP 2384, 1347-51. When Nixon was 13, police investigated him for sexual abuse against his two younger siblings. VRP 1347-51. Nixon admitted

that he had sexual contact with both of his siblings approximately ten times, including touching his brother's genitals and buttocks and rubbing his own penis against his brother's clothed buttocks. VRP 1362-63, 1365. Nixon also admitted groping his sister's breasts and vagina. VRP 1365. Nixon provided a written admission to the police and pled guilty to simple assault. VRP 1367-68, 1373.

Between 2006 and 2007, Nixon was in a relationship with an adult woman, S.S., who he sexually assaulted on multiple occasions. CP 1110-13, 1119-20, 1131-34, 1165-66. Nixon also threatened to kill S.S., threatened to kill her baby, and threatened her mother. *Id.* at 1134, 1143. S.S. ultimately obtained a civil protection order, but in response, Nixon broke into and destroyed her apartment. *Id*. at 1124-25, 1149, 1156-57.

In 2017, when Nixon was on supervised community custody, a man named J.S. reported that Nixon held him captive at a homeless camp in an isolated area for three days and assaulted him sexually and physically. VRP 1061, 1067, 1084,

1140-41, 1198-99, 1436, 1444-49; CP 86-87. Specifically, he disclosed that Nixon restrained him with chains, penetrated his anus with his penis and finger, penetrated his mouth with his penis, beat him until he lost consciousness, strangled him, and "licked [him] all the time." VRP 1088, 1199, 1200-02. J.S. also said that Nixon put peanut butter on his face and chewed on his flesh, bit his ear and tongue, and said that he tasted like elk. VRP 1088, 1196-97, 1202. Additionally, Nixon broke off one of his teeth and threatened to pull out the others; burned him on the arm; slept on top of him to prevent him from escaping; rubbed knives against him; and threatened to kill him. VRP 1089-90, 1197.

J.S. had numerous visible injuries including bruising around his eye, right ear, clavicle, and the underside of his tongue. VRP 1079, 1208-09. He had lacerations on his nose, abrasions on his hand and fingers, scratches on his legs, and his upper front tooth was missing. VRP 1079-80, 1207-09.

The Pierce County Prosecutor's Office initially charged Nixon with: (1) Rape in the First Degree by forcible compulsion with a deadly weapon, (2) Kidnapping in the First Degree with sexual motivation and with intent to rape, (3) Assault in the Second Degree with sexual motivation, and (4) Felony Harassment with sexual motivation. CP 78-80. In August 2018, the court granted a defense request to depose J.S. CP 82, 84; Ex 217.

Subsequently, the Prosecutor's Office moved to amend the information and filed a statement asking the court to accept the amended charges. CP 86-90; Ex 217. The amended information charged Nixon with: (1) Assault in the Second Degree; (2) Rape in the Third Degree; and (3) Felony Harassment. CP 86-87. The charge for Assault in the Second Degree no longer included the sexual motivation special allegation.

The prosecutor's statement noted that J.S. was highly traumatized by the events, jurors may have doubts about J.S.'s credibility, J.S. showed inconsistencies and memory issues but

evidence corroborated some of J.S.'s account, and witnesses were homeless and unlikely to be located for trial. Ex 217. Citing evidentiary problems but also the victim's "strong disagreement to the amended charges," the prosecutor asked the trial court to accept the proposed plea agreement. Ex 217. Nixon pled guilty to the amended charges and was sentenced to 26.75 months in prison. CP 92-116; Ex 119.

B. The State's SVP Petition

In 2019, the State filed a petition alleging that Nixon is an SVP. CP 1-15. The State moved in limine to exclude evidence regarding "recent overt acts" (ROAs). CP 283-87. The State can file a new SVP petition against someone who has previously been convicted of a sexually violent offense if the person is released from total confinement and commits an ROA.[1] RCW 71.09.030(1)(e). The State argued that evidence about

[1] An ROA 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 the history and mental condition of the person engaging in the act or behaviors." RCW 71.09.020(13).

ROAs was inadmissible under ER 401, ER 402, and ER 403. CP 283. The trial court agreed with the State and granted the motion to exclude evidence and argument about ROAs. VRP 89.

C. Civil Commitment Trial

At trial, the State was required to prove beyond a reasonable doubt that Nixon is an SVP, which requires proof of the elements set forth in RCW 71.09.202(19). CP 153; RCW 71.09.020(19), .060(1). Additionally, the State was required to prove that Nixon committed the 2017 assault against J.S. with sexual motivation to establish that Nixon has committed a sexually violent offense. CP 153, 155; RCW 71.09.020(18)(c), (19).

The State presented testimony from Dr. Erik Fox, a forensic psychologist. VRP 1476-1604, 1616-1751, 1758-1901. Dr. Fox diagnosed Nixon with antisocial personality disorder (ASPD) and stimulant use disorder. VRP 1518-19, 1593. He testified that Nixon's ASPD diagnosis qualifies as a mental abnormality and/or personality disorder, which causes him

serious difficulty in controlling his sexually violent behavior and makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. VRP 1581-83, 1648-49. He also testified in about Nixon's sexual offense history. VRP 1507-09, 1531-46, 1560-67.

J.S., the victim of the 2017 assault, did not testify at trial. To support that Nixon committed the assault against J.S. with sexual motivation, the State elicited J.S.'s statements about what occurred through a number of witnesses at trial, including a paramedic, an evidence technician, and a sexual assault nurse examiner. VRP 1067-68, 1081-90, 1123-31, 1193-1210. On cross-examination of Detective Wilcox, the lead investigator on the case, Nixon's counsel sought to impeach J.S. by admitting under ER 806 alleged statements J.S. had made to Wilcox. VRP 1249, 1292-1308, 1312, 1327-29, 1458-59. The State objected, asserting Wilcox could testify to J.S.'s alleged inconsistent statements only if she had testified on direct

examination about J.S.'s hearsay statements. VRP 1292-1308. The trial court sustained the objection. VRP 1303, 1308.

Nixon argued that he should be permitted to admit Exhibit 217, a certified copy of the prosecutor's statement regarding the amended information in the 2017 criminal case. Ex 217; VRP 1463-75, 1615, 1682-89. The State argued that the prosecutor's statement was inadmissible because it was irrelevant to this SVP case, it was an improper comment about the credibility of the victim, it contained hearsay, and it would only serve to confuse and mislead the jury. VRP 1468-71, 1683-89; CP 1067-74. The trial court denied Nixon's motion on the basis of relevance. VRP 1688-89.

Nixon presented testimony from four witnesses including forensic psychologist, Dr. Amy Phenix. VRP 1379-1423, 2331-2603. Dr. Phenix testified about Nixon's offending history and agreed with Dr. Fox that Nixon has ASPD and stimulant use disorder. VRP 2465-66, 2477-80, 2493-95, 2501-03. Dr. Phenix additionally diagnosed Nixon with schizoaffective disorder.

VRP 2465-76. But Dr. Phenix did not agree that any of Nixon's diagnoses qualify as a mental abnormality. VRP 2481-88. She opined that Nixon is "predisposed to violent acts and other acts" but not sexually violent acts. VRP 2484.

Nixon also testified and denied committing any sex offenses. VRP 2383-440, 2567-604, 2602-03.

Before closing argument, Nixon requested a missing witness instruction for J.S., claiming that J.S. was "peculiarly available" to the State. VRP 2642-49, 2653-56. The State opposed this instruction, arguing that J.S. was equally available to both parties. VRP 2649-53, 2656-57; CP 972-75. The Court denied Nixon's request. VRP 2664.

Ultimately, the jury unanimously found beyond a reasonable doubt that Nixon is an SVP. CP 170. Nixon appealed and Division Two affirmed his civil commitment.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Nixon seeks review under RAP 13.4(b)(4). Pet. at 14, 20, 24, 27. This Court will accept a petition on that ground only if it

involves an issue of substantial public interest. RAP 13.4(b)(4). This case does not present such an issue. The fact-bound issues in this appeal are routine evidentiary questions, which do not involve constitutional or statutory interpretation, and which do not have impact beyond this individual case. The Court's decision is thorough, well-reasoned, and consistent with settled decisions from this Court and the Court of Appeals. For these reasons, additional review of this case is unwarranted.

A. The Court of Appeals Correctly Concluded the Exclusion of Impeachment Evidence Was Harmless Error

The Court of Appeals correctly held that the trial court erred in prohibiting Nixon from using select hearsay statements of J.S. when cross-examining Detective Wilcox about statements J.S. made to her, but the error was harmless. The introduction of the inconsistent statements concerning a few details of the sexual assault would not have materially affected the outcome of the trial because there was ample evidence that supported Nixon committed the assault against J.S. with sexual motivation.

Nixon claims that the trial court erred in excluding the following three statements J.S. made to Wilcox. Appellant's Opening Br. at 20-21. First, paramedic John Harris testified that J.S. told him Nixon had "raped [J.S.] repeatedly." VRP 1054, 1067. In response, Nixon wanted to admit Wilcox's testimony that J.S. told her that Nixon had raped him only once. VRP 1298, 1305; Ex 160 at 618, 623. Second, Harris testified that J.S. said Nixon had held him in a homeless encampment for three days. VRP 1067. Nixon wanted to impeach this statement by admitting Wilcox's testimony that J.S. told her Nixon held him for 30 hours or less. VRP 1308; Ex 160 at 617, 622, 690. Third, sexual assault nurse examiner (SANE) Jessica Dube testified that J.S. said Nixon used a razor blade and scalpel in the course of assaulting him. VRP 1197, 1199. In response, Nixon sought to admit Wilcox's testimony that J.S. did not tell her that Nixon used a razor blade and scalpel. VRP 1329; Ex 160 at 617-18, 621-24, 690-92.

The Court of Appeals correctly held the trial court's exclusion of impeachment evidence under ER 806 was harmless. As the court recognized, an evidentiary error warrants reversal "only if it results in prejudice … An error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *In re Det. of West*, 171 Wn.2d 383, 410, 256 P.3d 302 (2011) (internal citation omitted) (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

Here, none of the statements challenge the notion that the assault was sexually motivated.[2] A crime is committed with "sexual motivation" when one of the purposes of committing the crime was for the assailant's "sexual gratification." CP 155, 165.

[2] Nixon relies heavily on *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145, 1152 (2003). However, that case involved a direct rebuttal of the allegation that Horton had sexual intercourse with the alleged victim. *Horton*, 116 Wn. App. at 920. Here, J.S.'s alleged inconsistencies relate to details of a multi-day restraint and sexual assault, not whether the assault was committed or by whom.

Whether Nixon raped J.S. once as he told Wilcox, or repeatedly as he told Harris, both scenarios support a finding of sexual motivation. Similarly, J.S.'s statement to Wilcox that Nixon held him captive at the camp for approximately 30 hours, rather than three days as he told Harris, and the fact that J.S. did not tell Wilcox that Nixon used a razor blade and scalpel in assaulting him as he told Dube, are not details that are determinative of whether Nixon committed the assault with sexual motivation.

Additionally, ample evidence supports that the assault was sexually motivated, including the guilty plea, where he stated in part, "I engaged in sexual intercourse with J.S. where J.S. did not consent to sexual intercourse and such lack of consent was clearly expressed by J.S.'s words and/or conduct." Supp. CP Ex 119 at 9. Additionally, Dube testified that J.S. said Nixon put him on his back when raping him, penetrated his anus with Nixon's penis and finger, penetrated his mouth with Nixon's penis, forced him to ejaculate using lubricant, and "licked [him] all the time." VRP 1199, 1200-02. A forensic scientist with the

Washington State Patrol Crime Lab, testified that the majority of DNA from the sperm fractions of J.S.'s penile and perineal swabs were consistent with Nixon's DNA. VRP 2188, 2200-01, 2203.

Both experts also testified about the sexual nature of this offense. VRP 1535-37, 2493. Nixon's own expert, Dr. Phenix, testified that she "believe[d] Mr. Nixon raped [J.S.]." VRP 2493. She relied on the facts that Nixon chewed on J.S.'s flesh after eating peanut butter and forced his penis into J.S's mouth. VRP 2493-95. Dr. Fox testified that he relied on the fact that Nixon raped J.S. in concluding that Nixon has ASPD. VRP 1523, 1535-36, 1581. Dr. Fox testified that Nixon put peanut butter on J.S., chewed on his flesh, threatened him with a knife, strangled him, bound him with chains, ejaculated in his mouth, and sodomized, raped, and forcefully copulated J.S. VRP 1535-37. The testimony from multiple witnesses concerning Nixon's sexual assault of J.S. supports that Nixon assaulted J.S. with sexual motivation.

Lastly, Nixon's counsel cross-examined Dr. Fox about inconsistencies in J.S.'s statements to undermine J.S.'s credibility. During cross-examination, Dr. Fox acknowledged that J.S. was not held captive by Nixon on June 24th or 25th and escaped on the 27th. VRP 1668, 1716. Counsel also cross-examined Dr. Fox about several other details to undermine J.S.'s account of events, including that J.S. said he feigned looking at a bird to escape, J.S. told Dube that Nixon used a lubricant to copulate with him, J.S. told Wilcox that someone had videotaped the sexual assault, and J.S. may have used methamphetamine. VRP 1672-73, 1680, 1690, 1703-05, 1707-08, 1711-12, 1715 1720-22. On redirect, Dr. Fox testified that the inconsistencies in J.S.'s statements did not affect his opinions VRP 1847-51.

The Court of Appeals correctly held that because the parties introduced ample evidence that the assault was sexually motivated, introduction of the impeachment evidence would not have materially affected the outcome of the trial, and the trial court's error was therefore harmless.

B. The Court of Appeals Correctly Concluded the Trial Court Did Not Abuse Its Discretion by Declining To Give a Missing Witness Instruction

Nixon challenges the trial court's refusal to give a missing witness instruction to the jury when J.S. did not testify at trial. The Court of Appeals properly concluded the trial court did not abuse its discretion by declining to give a missing witness instruction because the State did not have particular control over J.S., and J.S.'s absence was satisfactorily explained.

The purpose of a missing witness instruction is to allow the jury to make an inference that the absent witness's testimony would have been unfavorable to the party against whom the instruction is sought. *See State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). The instruction is warranted when (1) the missing witness's potential testimony is material and not cumulative; (2) the witness is "particularly under the control" of the party that would receive the negative inference rather than "equally available to both parties"; and (3) the witness's absence is not "satisfactorily explained." *Id.* at 598-99. Review of

whether the trial court correctly applied the missing witness doctrine is a factual determination reviewed for an abuse of discretion. *State v. Coryell*, 197 Wn.2d 397, 405, 483 P.3d 98 (2021).

The first criterion of the missing witness doctrine is not contested. However, the second criterion is not satisfied because J.S. was not "particularly under the control" of the State. The question of availability does not mean the witness is in court or is subject to the subpoena power. *State v. Blair*, 117 Wn.2d 479, 490, 816 P.2d 718 (1991). A witness is "particularly under the control" of a party when he is a "natural witness," and "it appears reasonable that [he] is under the [party's] control or peculiarly available to the [party], and the [party] would not have failed to produce [him] unless the testimony were unfavorable." *Montgomery*, 163 Wn.2d at 598. In addition, a witness is "available" to only one party when there exists "such a community of interest between the party and the witness," or the party has "so superior of an opportunity for knowledge of a

witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging." *Blair*, 117 Wn.2d at 490 (citation omitted).

In *State. v. Reed*, 168 Wn. App. 553, 559, 571, 278 P.3d 203 (2012), this Court affirmed Reed's conviction for Assault in the Second Degree involving his girlfriend, "Ta," holding, in part, that that the trial court properly denied Reed's request for a missing witness instruction for Ta. The Court reasoned that Ta was not peculiarly available to the State because Ta had no professional relationship with the prosecutor, and she was neither law enforcement, "nor was she unknown" to Reed. *Id.* at 572-73.

Similarly, here, J.S. was not peculiarly available to the State. Like Ta, J.S. had no professional relationship with the State, and he was neither law enforcement, nor was he unknown to Nixon. J.S. was equally available to both parties. Thus, the State had no community of interest with J.S. In fact, just as the

State could have called J.S. to provide additional information about his experience being raped and tortured to support that Nixon committed a sexually violent offense, Nixon could have called J.S. to support his testimony that he and J.S. had only consensual sex. VRP 2429, 2431, 2432-33, 2574. In addition, select evidence of J.S.'s account of the rape and assault was admitted through other witnesses' testimony under exceptions to the hearsay rule, creating less of a need for the State to call J.S. himself. VRP 1088-89, 1196, 1199, 1200-02, 2200-03; Ex 119 at 9. For these reasons, the Court of Appeals correctly held that J.S. lacked specific ties to the State such that he was under the State's particular control to satisfy the second missing witness doctrine criterion.

Moreover, the third criterion is also not satisfied because J.S.'s absence was satisfactorily explained. A witness's absence is sufficiently explained, for example, when the witness is incompetent, the witness's testimony would be self-incriminating, or if the witness cannot be located because he is

transient and left town. *Montgomery*, 163 Wn.2d at 599; *Blair*, 117 Wn.2d at 489. By contrast, daycare-related issues that would enable a witness to testify on only select days is not a satisfactory explanation. *State v. Cheatam*, 150 Wn.2d 626, 654, 81 P.3d 830 (2003).

Here, J.S. did not attend his deposition, and his attorney represented that he had been willing to participate but ultimately did not because "the anticipation of the experience was too traumatizing to relive." CP 980. The State then decided against calling him at trial and informed Nixon's trial counsel of this because it has a practice against forcing victim's to testify, in part, to avoid re-traumatizing them. VRP 2652-53. The State provided Nixon's counsel with J.S.'s attorney's contact information, which is how the State originally "track[ed] down [J.S.]" CP 973-74, 980-83; VRP 2651. The fact that the State could not locate J.S. after he unexpectedly did not attend his deposition and then decided against calling J.S. to avoid re-traumatizing him satisfactorily explains J.S.'s absence. This

situation is more akin to being unable to locate transient witnesses than a witness's availability being limited to certain days by constraints like daycare. Consequently, the Court of Appeals correctly held the third criterion was not satisfied because the trial court determined the explanation provided by the State for J.S's absence was satisfactory. Because J.S. was not particularly within the State's control and his absence was satisfactorily explained, the missing witness doctrine does not apply.

Nixon incorrectly asserts this issue is one of substantial public interest because the Court has not applied it outside of a criminal proceeding. However, the Court of Appeals did not rely on the fact that this is a civil case, and not a criminal case, in upholding the trial court's decision. The Court of Appeals properly applied pertinent law and no further direction by the this Court is necessary.

C. The Court of Appeals Properly Held the Prosecutor's Statement From Nixon's 2017 Criminal Case Was Not Relevant To the SVP Proceeding

The Court of Appeals correctly concluded that the prosecutor's statement from Nixon's 2017 criminal case was not relevant to the SVP proceeding. Nixon claims the statement should have been admitted by the trial court under ER 801(d)(2), which provides that admissions by a party opponent[3] are not hearsay. Appellant's Opening Br. at 32-36. However, the statement was excluded by the trial court on the basis that it was irrelevant. VRP 1688-89.

Evidence is relevant "only if it increases or decreases the likelihood that a fact exists that is consequential to the jury's determination whether the respondent is a sexually violent predator." *In re the Det. of West*, 171 Wn.2d 383, 397, 256 P.3d 302 (2011). "Because relevance is a judgment

[3] The Court of Appeals also correctly held the State was not the party opponent in the 2017 criminal case.

dependent on the surrounding facts, the trial court enjoys broad discretion in deciding whether evidence is relevant . . . ." *Id.*

In addition to the three elements that juries must find when making an SVP determination, here, the jury was required to find that Nixon committed assault in the second degree with sexual motivation. CP 153, 155. The trial court properly exercised its discretion when it excluded as irrelevant to this determination the prosecutor's statement explaining the reasons for amending the information in the 2017 criminal case. The statement simply reflected an assessment about the strength of the State's evidence in the criminal case at the time and provided context for the plea agreement. The statement had no bearing on the jury's determination about whether Nixon is an SVP or committed the 2017 assault with sexual motivation. It was irrelevant and properly excluded.

D. The Trial Court Properly Exercised Its Discretion To Exclude Testimony That Recent Overt Acts Would Be an "Added Deterrent" and Any Error Was Harmless

Nixon argues that the trial court erroneously excluded evidence about ROAs, even though Nixon testified in a deposition that he knew he could be subject to another SVP petition in the future if he committed an ROA and this was an "added deterrent" for him. Appellant's Opening Br. at 36-51. Nixon's argument fails because the trial court's ruling was a proper exercise of discretion.

In general, evidence that a respondent could be subject to another SVP proceeding in the future based on commission of an ROA upon release is relevant. *In re Det. of Post*, 170 Wn.2d 302, 316-17, 241 P.3d 1234 (2010). Specifically, if the person has knowledge of the consequences of engaging in such conduct and it serves as a deterrent, this evidence is relevant to the person's likelihood of committing predatory acts of sexual violence. *Id.*

But such evidence is not automatically admissible and is subject to ER 403. *Post*, 170 Wn.2d at 317. Under ER 403, even

relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, among others. A trial judge has broad discretion in balancing the probative value of the evidence against its possible prejudicial impact. *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987).

Here, the trial court properly exercised its discretion when it excluded evidence of possible future SVP petitions, including Nixon's testimony in a deposition that such petitions would be an "added deterrent." This was a reasonable decision in context since Nixon also testified in the deposition that he had "zero" risk of re-offense. *See* VRP 88-89. In addition, Nixon denied committing any offenses and testified that he did not intend to commit any crimes "whether [the threat of a future petition] is there or . . . not." CP 773-74.

The trial court appeared to rely, in part, on the unpublished decision *In re Det. of Blevins*, 80315-8-I, 17 Wn. App. 2d 1004, 2021 WL 1346113 (Wash. Ct. App. Apr. 12, 2021)

(unpublished). *See* VRP 86-87. *Blevins* held that the trial court properly excluded evidence of potential future SVP petitions after it determined that future petitions would not act as a deterrent for the respondent since he did not admit to having any urges that needed to be addressed, denied that any of the sexual assault allegations had merit, and said his risk of future violence was zero. *Blevins*, 2021 WL 1346113 at *6.n. As in *Blevins*, Nixon's refusal to acknowledge that he has committed any sexual offenses, his inability to recognize his risk, and his statement that he did not plan to reoffend regardless of a future SVP petition, supported the trial court's decision to exclude this evidence.

Given that the parties did not dispute that Nixon testified he had zero risk of re-offense, and that Nixon also testified he did not intend to re-offend "whether [the threat of a future SVP petition] is there or . . . not[,]" it was reasonable to conclude that evidence of future petitions had little to no relevance to whether Nixon is likely to commit future acts of sexual violence.

Exclusion also obviated any need to provide lengthy context relating to the mechanics and limitations of the complex SVP ROA process to the jury. The trial court properly excluded Nixon's testimony regarding ROAs.

Even if the trial court abused its discretion in excluding that piece of testimony, Nixon does not show that the outcome of the trial was materially affected given the overwhelming evidence that Nixon meets SVP criteria and is likely to re-offend. At trial, the State presented ample evidence detailing Nixon's history of extreme violence. Both testifying experts also agreed that Nixon has Antisocial Personality Disorder. Additionally, the jury heard testimony that Nixon offended while on DOC supervision, indicating that the threat of detection did not deter him in the past, and Nixon's own expert testified that he is "predisposed to violent . . . and other acts." VRP 2484, 1436, 1444-49. Any error was harmless.

V. CONCLUSION

The Court of Appeals properly applied well-settled law affirming Nixon's commitment as an SVP. Nothing in the decision presents an issue of substantial public interest. Accordingly, this court should deny Nixon's petition for review.

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RESPECTFULLY SUBMITTED this 8th day of November, 2023.

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NO. 102459-2

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of: ARON NIXON, Petitioner.	DECLARATION OF SERVICE

I, Nicole Symes, declare as follows:

On November 8, 2023, I sent via the Washington State Appellate Court's Secure Portal, a true and correct copy of State's Answer to Petition for Review and Declaration of Service, addressed as follows:

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

DATED this 8th day of November, 2023, at Federal Way, Washington.

Nicole Symes
NICOLE SYMES

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

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