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Court of Appeals No. 81367-6-I
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

Darren Perkins.

PETITION FOR REVIEW

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A. INTRODUCTION

Darren Perkins was the victim of repeated sexual molestation and rape when he was a child. 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 under RCW ch. 71.09.

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 thorough 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*.

The trial court erred in admitting this irrelevant and highly prejudicial evidence, but the Court of Appeals affirmed. The State moved to publish the opinion because the issue is of "general public interest and importance." The court denied the motion, but Mr. Perkins agrees with the State that this issue is one of substantial public interest. It is fundamentally unfair to incarcerate human beings indefinitely using utterly irrelevant scare tactics. This Court should grant review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Darren Perkins, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *In re the Detention of Perkins,* No. 81367-6-I. The court filed its opinion on June 15, 2020 and denied the State's motion to publish on July 13, 2020. These rulings are attached as appendices.

C. ISSUE PRESENTED FOR REVIEW

Irrelevant evidence is not admissible and even evidence that is relevant is not admissible if it is substantially more prejudicial than probative. In a 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.

Must courts exclude evidence of relative risk in civil commitment trials? And should this Court grant review where the State and Mr. Perkins agree the issue is one of general public interest and importance?

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 therapy 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.

The Court of Appeals affirmed. App. A.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This case presents a recurring issue that the State and Mr. Perkins agree is of general public interest and importance: whether evidence of relative risk is irrelevant, prejudicial, and inadmissible in civil commitment trials.

Civil commitment is a massive curtailment of liberty and the people subject to commitment petitions have already served sentences for their crimes. Accordingly, 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. But State's witnesses have been scaring juries with statistics regarding individuals' risk *relative to other sex offenders*, which is irrelevant to the statutory question the jury must answer.

Trial courts and the Court of Appeals have repeatedly addressed this issue, but this Court has not yet weighed in. This Court should do so now. As the prosecution stated, this issue "is of general public interest and importance." Motion to Publish at 1. This Court should grant review pursuant to RAP 13.4(b)(4).

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

State's witness Dr. Goldberg 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.

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).[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

[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.

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 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).

"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: “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 court asked the State how relative risk was relevant to Dr. Goldberg’s opinion. RP (9/17/18) 93. The State ultimately said 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. <u>The court denied the motion and the jury heard this irrelevant and highly prejudicial testimony</u>.

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.

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 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.").

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.

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. <u>The question for the jury is one of absolute risk, not relative risk, and the latter number merely serves as a scare tactic leading to permanent incarceration of individuals for legally erroneous reasons</u>.

As this Court explained in another commitment case, "[i]t 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).

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).

This 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.

In *Post*, the trial court admitted evidence of the treatment that would be available to Mr. Post 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.

While the State claimed such evidence was relevant to the determination of dangerousness, this Court disagreed. *Id.* at 313. This Court explained that the *relative* degree of risk associated with the two scenarios was irrelevant: "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.* This 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. 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. 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, 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 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]

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

The Court of Appeals 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. The Court of Appeals 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. The court concluded, "The relevancy of this evidence is not discernible" and "the prejudice to Maule was great." *Id.* "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." *Id.* "Admission of this testimony was reversible error." *Id.*

Similarly here, the admission of testimony that Mr. Perkins was more likely to reoffend than most sex offenders had indiscernible relevance and great prejudice, and this Court should grant review.

F. CONCLUSION

All persons "are entitled to a fair trial, and this means the rules of evidence must be applied evenhandedly in all cases." *Maule*, 35 Wn. App. at 297 (reversing child rape convictions because of evidentiary error).

The State and Mr. Perkins agree that the issue in this case is one of public interest and importance. This Court should grant review.

DATED this 10th day of August, 2020.

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APPENDIX A

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of DARREN THOMAS PERKINS, Appellant.	No. 81367-6-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — A jury found Perkins to be a sexually violent predator. Perkins argues that the trial court abused its discretion under ER 402 and 403 by admitting actuarial evidence regarding Perkins's risk of reoffending relative to other sex offenders. He contends that this evidence was irrelevant and substantially more prejudicial than probative because the key question is whether he is more likely than not to reoffend—not whether he is more likely than other sex offenders to reoffend. We affirm.

FACTS

Darren Perkins is a child sex abuse victim who began committing sex offenses as a young adult. His earliest sex offense occurred in 1985 when he forced two children, ages 3 and 4, to orally copulate him. He later pleaded guilty to one count of first degree statutory rape. In 1997, he pleaded guilty to one count of third degree rape of a child after engaging in a sexual relationship with a minor. Perkins's last sex offense occurred in 2004. Under the guise of taking a minor's photograph, he took the minor to his workplace, tied her up, undressed her, placed a rag in her mouth and a bag over her head, and digitally penetrated her. He

Citations and pin cites are based on the Westlaw online version of the cited material.

eventually pleaded guilty to third degree assault with sexual motivation and unlawful imprisonment.

In January 2014, while Perkins was still incarcerated for the 2004 offense, the State filed a petition to involuntarily commit him under the sexually violent predator act, chapter 71.09 RCW. Before trial, Perkins moved to exclude testimony by the State's expert witness, Licensed Clinical Psychologist Harry Goldberg, regarding his use of the "Static-99-R" tool. The Static-99-R is one of several actuarial instruments Goldberg used to assess Perkins's risk of sexual reoffense. In assessing that risk, it looks at a defendant's risk of reoffending relative to other sex offenders. Goldberg found that Perkins scored an 8 on the Static-99-R, placing him within the high range—the 99.1 percentile—for sexual reoffense compared to other sex offenders.

Perkins argued that the Static-99-R's relative risk estimates are not relevant and should be excluded under ER 402 and 403. He explained in part,

> In the [sexually violent predator] context, what the juries are supposed to figure out is, what is the percentage of this person -- of the absolute risk percentage of this person if released, if that person is not going to commit not simply a sex offense, not simply a hands-on sex, but a specific type of sex offense as that committed against strangers, essentially.
>
> . . . .
>
> 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.

Perkins further stated that the percentile "does not add any value whatsoever to what that absolute [risk percentage] is. That is the reason why it is not relevant."

The State countered by explaining why these relative risk estimates are relevant to Goldberg's ultimate opinion regarding the likelihood that Perkins will reoffend:

> [This data point] is relevant to [Goldberg's] opinion because it gives him a sense of how risky Mr. Whoever it is is in the context of the historical factors. He has to incorporate then the dynamic factors and any idiosyncratic things about -- in this case, Mr. Perkins and come to a structured clinical judgment as to whether he meets that prong or not. That is how that analysis is done. They do say it's just a data point, but that's not all they say.

The trial court denied Perkins's motion. It stated, "[I]f Dr. Goldberg is going to testify that [the relative risk estimates are] relevant and this is part of what made his opinion, then it seems to me that makes it relevant. This is really more of a weight-versus-admissibility kind of thing."

At trial, the court had the State make an offer of proof regarding Goldberg's relative risk testimony before presenting it to the jury. Upon examination by the State, Goldberg offered the following testimony about his process for determining whether a person is more likely than not to reoffend:

> Well, you look at all of the numbers. You look at the relative risk numbers. You look at the absolute risk numbers. You look at the dynamic factors, protective factors, and then you also look at the idiosyncratic aspects of each case, and then you come up with an estimate as to whether that person would be more likely than not [to reoffend].

When Perkins specifically asked Goldberg what the relative risk percentile added to his opinion regarding Perkins's individual risk level, Goldberg responded,

> 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 [a] 99 percent chance of reoffending. That is not what the jury should understand, but I think it is informative. As I see it, as evaluators, we are asking to segregate those individuals amongst the group of sex offenders who are the riskiest types. It's a starting point to say, okay, this guy is in the 99th percentile. He already looks like he is in those groups that are more risky. That doesn't mean that he is going to reoffend.

Goldberg continued, "[I]t does inform the jury that this guy is more risky than most offenders, but I'm not going to tell the jury that he's 99 percent risk." The trial court again decided that it was "not going to exclude" Goldberg's relative risk testimony and allowed the State to present it to the jury.

Goldberg testified before the jury that he diagnosed Perkins with sexual sadism disorder, mild alcohol use disorder, and antisocial personality disorder. He stated that Perkins's sexual sadism disorder constitutes a mental abnormality, while the two other disorders are aggravating factors. He explained that sexual sadism disorder means that over a period of six months, a person has experienced recurrent sexual arousal towards the physical or psychological suffering of another individual and has acted upon those urges in a nonconsensual manner.

Goldberg then testified that he assessed Perkins's risk of reoffending using a series of actuarial tools, including the Static-99-R, the Static-2002-R, and the Sex Offender Risk Appraisal Guide (SORAG). He explained that these instruments measure "static factors," or factors that do not necessarily change over time. An example of a static factor would be whether a person has ever had an

unrelated victim. Goldberg explained that if a person "had an unrelated victim at some time in their life, then obviously that will always be there." Further, he stated that he used the "Structured Risk Assessment, Forensic Version" tool. Unlike the static instruments, this tool measures psychological vulnerabilities. Goldberg also testified that he used a tool similar to the SORAG called the "Violence Risk Assessment Guide Revised." Last, he stated that he used the "Psychopathy Checklist Revised" tool, which measures antisocial personality characteristics.

In addition to these actuarial tools, Goldberg considered "protective factors," or those factors that might decrease one's risk for reoffense. 9/25 RP 926. He also considered factors specific to Perkins. Based on the above tools and factors, he concluded that Goldberg's mental abnormality makes him more likely than not to engage in sexual acts of predatory violence or sexual violence.

Forensic Psychologist Paul Spizman testified on behalf of Perkins. Spizman disagreed with Goldberg's sexual sadism disorder diagnosis. He stated that, given Perkins's age, he would need "something particularly compelling as recent evidence" in order to convince him that the diagnosis was warranted. Having scored Perkins on the Static-99-R, he also disagreed with Goldberg's conclusion that Perkins is more likely than not to reoffend in a sexually violent manner. In doing so, he stated that Goldberg's testimony about the relative risk evidence was "not relevant to the question at hand" and could "be confusing and misleading." The jury found that the State proved beyond a reasonable doubt that Perkins's mental abnormality makes him likely to commit predatory acts of sexual

violence if not confined to a secure facility. As a result, the trial court ordered that Perkins be committed to the Special Commitment Center (SCC).

Perkins appeals.

DISCUSSION

Perkins argues that the trial court abused its discretion under ER 402 and 403 by admitting expert testimony regarding Perkins's risk of reoffending relative to other sex offenders. Because he contends that this error was not harmless, he asks this court to reverse the commitment order and remand for a new trial.

RCW 71.09.060 allows the State to involuntarily commit a person found to be a "sexually violent predator." A "sexually violent predator" is defined as "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). "'Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7). This has been referred to as the "more likely than not" standard. In re Det. of Brooks, 145 Wn.2d 275, 293, 36 P.3d 1034 (2001), overruled on other grounds by In re Det. of Thorell, 149 Wn.2d 724, 753, 72 P.3d 708 (2003). "[T]he fact to be determined is not whether the defendant will reoffend, but whether the probability of the defendant's reoffending exceeds 50 percent." Id. at 298.

During his testimony regarding Perkins's risk of reoffending, Goldberg described the results he obtained using several actuarial tools. Under the Static-99-R tool, he explained that Perkins scored an 8, which is associated with a 35.1 percent chance of reoffending within 5 years. He stated that this score also gave Perkins a relative risk number of 99.1 percent. Goldberg clarified that this number does not mean that Perkins has a 99 percent chance of reoffending. Rather, he stated, "Compared to other sex offenders, he is in the 99th percentile. In other words, he is more risky in a 99th percentile compared to other sex offenders." Goldberg analogized it to taking a test where you scored better than 99 percent of other test takers, but "maybe . . . only scored 70 percent" on the test.

Perkins contends that this relative risk testimony was irrelevant and substantially more prejudicial than probative because the key question is whether he is more likely than not to reoffend—not whether he is more likely than other sex offenders to reoffend.

We review a trial court's evidentiary rulings for abuse of discretion. Peralta v. State, 187 Wn.2d 888, 894, 389 P.3d 596 (2017). A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). Evidence is relevant and admissible if it has any tendency to make the existence of a fact of consequence to the determination of the action more or less probable. ER 401; 402. But, 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

Perkins relies on In re Det. of Post, 170 Wn.2d 302, 241 P.3d 1234 (2010), to support that the relative risk evidence is irrelevant. There, over Post's objection at trial, the court allowed the State to introduce evidence of the treatment that would be available to Post at the SCC if he were committed. Id. at 306-07. The State emphasized the benefits of this treatment in its opening 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.

On appeal, this court held that evidence about treatment available at the SCC but not yet undergone by Post "is inadmissible at the [sexually violent predator] determination trial." Id. at 310. The Washington Supreme Court agreed. Id. at 317. It explained in part that this treatment "does not make it any more or less probable that Post has a mental abnormality or a personality disorder or that he is dangerous." Id. at 313. It further clarified,

> 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 acknowledged that commitment may be more likely to prevent Post from committing another predatory act of sexual violence. Id. at 314. But, it stated, "[T]his is entirely irrelevant to the likelihood that Post will reoffend if unconditionally released." Id.

Perkins argues that, like Post, "the question for the finder of fact is whether [he] 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." Perkins correctly points out the difference between these two inquiries. However, his risk of reoffending compared to other sex offenders is clearly relevant to assessing whether he is more likely than not to engage in predatory acts of sexual violence if released. Goldberg testified that looking at these relative risk numbers is a part of his process for determining whether a person is more likely than not to reoffend. He characterized it as a "starting point to say, okay, this guy is in the 99th percentile. He already looks like he is in those groups that are more risky." Thus, he explained that Perkins's score on the Static-99-R means that he is "more risky in a 99th percentile compared to other sex offenders." Based on this testimony, the trial court did not abuse its discretion in finding the relative risk evidence relevant.

Perkins next relies on State v. Maule, 35 Wn. App. 287, 667 P.2d 96 (1983), to support that the relative risk evidence is substantially more prejudicial than probative. There, a jury found Maule guilty of statutory rape of both his daughter and stepdaughter. Id. at 291. Over his objection at trial, the court had allowed the State's expert to testify that "a majority of child abuse cases involved a male parent figure, with biological parents in the majority." Id. at 289-90, 292. On appeal, this court held that admission of this testimony was reversible error. Id. at 293. It stated that the relevancy of this evidence was not discernible, while "the prejudice to Maule was great." Id. It explained, "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." Id.

Perkins argues that, like Maule, "the admission of [expert] testimony that [he] was more likely to reoffend than most sex offenders had indiscernible relevance and great prejudice." But, as established above, this evidence is relevant to determining whether Perkins is more likely than not to reoffend. While this evidence is also prejudicial, "nearly all evidence will prejudice one side or the other in a lawsuit." Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). The Washington Supreme Court has specifically noted that "[t]estimony regarding the future dangerousness of [sexually violent predators], by its nature, is prejudicial." Thorell, 149 Wn.2d at 758. After all, its purpose "is to assist the fact finder in determining whether the [sexually violent predator] is likely to commit future violent acts." Id. However, "the probative value of this testimony is high and directly relevant to whether an individual should be committed as a sexually violent predator." Id.

Goldberg testified that he used the relative risk evidence as a starting point to assess whether Perkins is more likely than not to reoffend. He also repeatedly stated that Perkins's relative risk number of 99.1 percent does not mean that he has a 99 percent chance of reoffending. Rather, he testified that Perkins's Static-99-R score is "associated with a five-year recidivism rate of about 35 percent." In contrast, he explained that Perkins's relative risk number means that he is "more risky" compared to most sex offenders. While this evidence is prejudicial, it is not

so highly prejudicial as to require exclusion. Accordingly, the trial court did not abuse its discretion in finding that the probative value of the relative risk evidence was not substantially outweighed by the danger of unfair prejudice.

We affirm.

Appelwick, J.

WE CONCUR:

Brennan, J.

APPENDIX B

FILED
7/13/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Detention of DARREN THOMAS PERKINS, Appellant.	No. 81367-6-I ORDER DENYING MOTION TO PUBLISH

The respondent, State of Washington, has filed a motion to publish. A majority of the panel has determined the motion should be denied. Now, therefore, it is

ORDERED that the motion to publish is denied.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81367-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Joshua Choate, AAG
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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 10, 2020

WASHINGTON APPELLATE PROJECT

August 10, 2020 - 4:18 PM

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Superior Court Case Number:	14-2-05127-7

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