

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UNPUBLISHED OPINION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

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 99[th] percentile. In other words, he is more risky in a 99[th] 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 99[th] 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.

Luppelwick, J.

WE CONCUR:

Bruner, J.

H. E. J.