

No. 42616-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

IN RE THE DETENTION OF,
CHARLES URLACHER, Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-2-13180-4
The Honorable Ronald Culpepper, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erroneously excluded testimony under ER 703 regarding an actuarial test used by Charles Urlacher's expert witness.
2. The trial court erred when it allowed the State to introduce sexually explicit photographs recovered from Charles Urlacher's computer equipment.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where Charles Urlacher's expert relied upon an actuarial test of the type commonly relied upon in the field in forming his opinion, and where the State's challenges to the tool actually went to the weight of the evidence, not its admissibility, did the trial court err by ruling that testimony about that actuarial instrument was inadmissible under ER 703? (Assignment of Error 1)
2. Did the trial court err when it allowed the State to introduce 11 photographs depicting children in sexually explicit circumstances, where the evidence was cumulative and more prejudicial than probative? (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

In 1999 Charles Urlacher pleaded guilty to one count of first degree rape of a child and one count of second degree rape of a child. (CP 1-2, 5; RP 153; Exh. P9, P10, P11) On September 21, 2010, shortly before Urlacher's scheduled release from confinement, the State filed a petition under RCW 71.09, seeking a civil commitment of Urlacher as a sexually violent predator (SVP). (CP 1-2, 4) The State alleged that Urlacher suffers from a mental abnormality, specifically pedophilia, and that this condition causes him to have "serious difficulty controlling his sexually violent behavior" and makes him "likely to engage in predatory acts of sexual violence unless confined to a secure facility." (CP 1-2, 8)

A jury trial began on August 19, 2011. The jury unanimously found that Urlacher met the criteria of being a SVP. (CP 283; RP 1096) The trial judge entered an order of commitment on September 2, 2011. (CP 284; RP 1100) Urlacher now appeals. (CP 285)

B. URLACHER'S CRIMINAL AND SEXUAL HISTORY

In 1994, a 12-year old girl named Marie reported that Urlacher had sexual contact with her during a sleepover at

Urlacher's home. (CP 6; RP 154, 157) Urlacher denied any sexual contact with Marie, but he eventually pleaded guilty to fourth degree assault.¹ (RP 152-53, 153, 158; CP 6; Exh. P2, P3, P4)

Urlacher was on community supervision for 24 months following his release on that conviction. (RP 454; Exh. P4) One of the conditions of supervision was to stay away from minor children, other than his two sons. (RP 456; Exh. P4) Urlacher was also ordered to undergo a sex offender treatment program while on supervision. (RP 456-57; Exh. P4) Urlacher successfully completed a treatment program in 1997. (RP 457, 462-63)

Urlacher's two 1999 child rape convictions stemmed from allegations that he engaged in sexual contact (masturbation and oral sex) with his son, CJ, and with his son's friend, Jeremiah, who were both minors at the time. (CP 5-6; RP 153; Exh. P10)

CJ testified at trial that the molestation began with Urlacher showing him pornographic images, and evolved into regular incidents of sexual contact. (RP 198-99) CJ also testified that Urlacher took videos and photographs of him in the nude and while masturbating. (RP 199, 200) Urlacher would also encourage CJ

¹ Although the adjudicated and alleged victims are now of majority age, their last names are omitted in order to protect their privacy.

and his friends to be sexually intimate with each other, and sometimes Urlacher would disappear into his bedroom with CJ's friends. (RP 202-03) After an explosive argument with Urlacher in 1999, when CJ was about 14 or 15 years old, CJ moved to Arizona to live with relatives. (RP 204)

Two other men also testified that Urlacher had sexually molested them when they were minors, although those acts were never charged or adjudicated. Urlacher's second son, Nicholas, testified that Urlacher showed him sexually inappropriate images and encouraged him to discuss sex, and Urlacher eventually began touching him inappropriately. (RP 210-11) The molestation ended when Nicholas moved with CJ to Arizona in 1999 at the age of 10 or 11. (RP 215)

Arthur, a friend of CJ's, regularly spent time at the Urlacher home, and testified that Urlacher showed him pornographic images and encouraged Arthur to explore and discuss sex. (RP 218, 219, 220-21) Urlacher encouraged Arthur, who was about 13 years old, to masturbate with him, and Urlacher also performed oral sex on Arthur. (RP 221) This began when Arthur was 13 years old, and occurred on multiple occasions. (RP 222)

Arthur testified that he and Urlacher engaged in anal sex one

time. (RP 222) Urlacher also took videos and pictures of Arthur naked. (RP 223) Arthur felt that Urlacher took advantage of him and other boys by acting as a surrogate father; he would take them places and build a bond of trust, then he would gradually turn the relationships toward sex. (RP 225)

During a post-arrest interview with a police detective, Urlacher admitted to sexual contacts with CJ and Nicholas, and with at least three other boys. (RP 241, 243-45) Detectives also recovered hard drives and discs from Urlacher's computer, which contained approximately 160-170 photographic images of minors engaged in sexually explicit conduct. (RP 367-68, 400, 401, 413) Some images had been downloaded from the internet and some appeared to have been taken and saved by Urlacher. (RP 398-99) Detectives also found a videotape recording that Urlacher had made showing CJ naked. (RP 415)

C. TESTIMONY OF STATE'S EXPERT WITNESSES

Kari Cook ran the sex offender treatment program (SOTP) that Urlacher participated in while incarcerated following his 1999 convictions. (RP 255, 263) She testified that Urlacher applied for and was accepted to the SOTP program, and was making progress in treatment. (TRP 259, 263, 275, 286, 288) As part of his

treatment, Urlacher disclosed having sexual contact with eight minors. (RP 265) He also began setting goals for release and making a plan that would keep him from reoffending if he were released into the community. (RP 264)

According to Cook, Urlacher was having trouble communicating and receiving feedback during group therapy sessions, and after a particularly confrontational meeting he wrote a letter resigning from the program. (RP 279, 301, 323, 341-42; Exh. P31) A few days later Urlacher wrote another letter asking to return to treatment, but he was denied the opportunity. (RP 302; Exh. P32, P33) According to Cook, Urlacher still had considerable work to do in each of the significant areas of treatment when he quit the program. (RP 284, 294-95, 300, 344)

Forensic psychologist Dr. Harry Goldberg was asked by the State to evaluate Urlacher and determine his likelihood of reoffending if released. (RP 491, 501, 510-11) He reviewed documents detailing Urlacher's history and interviewed Urlacher in June of 2011. (RP 502-06) Dr. Goldberg concluded that Urlacher suffers from a mental abnormality, specifically pedophilia, and that he also displays narcissistic personality traits. (RP 527, 528) Dr. Goldberg testified that pedophilia, which involves sexual attraction

to prepubescent children, is a sexual orientation that will not disappear during a person's lifetime. (535, 539) Dr. Goldberg also opined that Urlacher's pedophilia, coupled with narcissistic personality traits, makes him likely to engage in predatory acts of sexual violence if not confined. (RP 544, 545-46, 547)

In order to assess the likelihood that Urlacher would reoffend, Dr. Goldberg applied several actuarial instruments, the Static-99R, the Static 2002-R, MnSOST-R, and the SORAG. (RP 549, 555-56) These instruments identify a number of risk factors that, when applied to a particular offender, will result in a score that predicts the likelihood that the offender will be rearrested or reconvicted of any sexual offense in the future. (RP 555)

Urlacher's scores on the Static-99R and Static-2002R placed him in the low to moderate risk category, with a reoffense risk between 15.8 percent and 28.4 percent within ten years of release. (RP 560-61, 564) Urlacher's score on the MnSOST-R and SORAG placed him in the moderate to high risk category, with a 30-59 percent reoffense risk. (RP 565-68)

Dr. Goldberg conceded that these actuarial risk scores do not always provide an accurate assessment of a specific offender's risk of reoffending, so he also relies upon his clinical judgment.

(RP 570, 573) He looks at certain “dynamic risk factors” to determine whether an individual should be considered a high risk to reoffend. (RP 573)

So, even though Urlacher’s actuarial scores did not consistently rate him as a high risk to reoffend, Dr. Goldberg believed that Urlacher was more likely than not to reoffend if released because: he is aroused by coercive sexual behavior; his sexual interest in children is high; his sexual preoccupation is high; and his ability to self-manage his sexual behavior is low. (RP 572, 573, 576-79, 594) Dr. Goldberg also believed that Urlacher’s coping skills and impulse control are low, as evidenced by his decision to quit SOTP. (RP 582, 587-88, 589) Dr. Goldberg expressed concern with the type and quantity of pornographic images possessed by Urlacher, citing studies that point to possession of child pornography as an indicator of a higher reoffense risk. (RP 536, 592-93) Dr. Goldberg was also concerned that Urlacher has little or no “protective factors” such as family support or employment, in the outside community. (RP 584, 585, 590, 591)

D. TESTIMONY OF URLACHER'S EXPERT DR. RICHARD WOLLERT

Dr. Richard Wollert is a certified sex offender treatment provider, licensed to practice in the state of Washington. (RP 697-98) Dr. Wollert also reviewed Urlacher's history and conducted an in-person interview. (RP 691, 701-02)

Dr. Wollert testified that the treatment that Urlacher received while on probation for his 1995 conviction focused more on Urlacher's own childhood traumas of sexual and physical abuse, and not on treating his sexual behavior. (RP 714-15) He also testified that Urlacher benefited from his 9-month participation in SOTP, because he now takes responsibility for his offenses and understands his victims were not responsible, he feels remorse for his actions, and he understands the extremely negative consequences that his victims have suffered as a result of his acts. (RP 719-20, 751-52, 753) During SOTP, Urlacher also developed a plan for preventing relapse when released, which includes recognition that he must not and will not use children for sexual gratification. (RP 754)

Dr. Wollert does not believe that Urlacher meets the criteria of a pedophile, or that he has a mental abnormality that would

make him unable to control his behavior. (RP 762) He believes that Urlacher's prior offenses resulted not from an inability to control his sexual attraction toward children, but instead from a choice to act on those attractions. (RP 763) Furthermore, because Urlacher is sexually attracted to adults as well as children, he is less predisposed to offend against children in the future. (RP 764, 765, 766) Dr. Wollert also cited studies indicating there is no connection between possession of child pornography and reoffense risk. (RP 788-90)

Dr. Wollert also assessed Urlacher using the Static-99R and Static-2002R actuarial instruments, but he did not use the MnSOST-R actuarial because it has been widely criticized for its inaccuracies. (RP 768, 779-80). Like Dr. Goldberg, Dr. Wollert found that Urlacher was in the moderate risk category. (RP 775-777)

However, unlike Dr. Goldberg, Dr. Wollert believes that other risk factors do not indicate that Urlacher is more likely than not to reoffend. (RP 785) Dr. Wollert explained that most pedophiles generally begin offending at a young age, but Urlacher's first offense was when he was 40 years old. Urlacher did not seek out the victims, instead they were present within the "closed system" of

his private home but that system is broken now and he is unlikely to be able to recreate it if released. Additionally, after Urlacher was apprehended he expressed remorse, and he has benefited from treatment he received while in confinement. Finally, at the time of his offenses Urlacher was a homosexual man attempting to live as a heterosexual man, whereas now he has accepted his homosexuality and plans to live as such upon release. (RP 755, 762, 792, 934)

E. TESTIMONY OF URLACHER'S LAY WITNESSES

Ryan Denzer is a counselor at the SVP unit where Urlacher is currently residing. (RP 433) Urlacher has been assigned to "minimum custody" because he has been in compliance with the rules of the program, and he is not a behavioral concern. (RP 435-36) Urlacher is employed within the unit and works well with other inmates and staff. (RP 436-37) And, although pornography is widely available within the prison, Urlacher has avoided it. (RP 443-44)

Randy Town is an inmate who met Urlacher when they participated in a group therapy program called Alternatives to Violence. (RP 681) The program teaches inmates to control their anger and to communicate with words not violence. (RP 682)

Urlacher was a successful participant and became a group leader and mentor. (RP 683) Urlacher got along with other offenders and Town never saw him trying to take advantage of anyone. (RP 684-85, 687) Town never saw Urlacher act impulsively or lose control of his emotions. (RP 684-85) He confirmed that inmates have access to pornography, but that he never knew of Urlacher trying to access it. (RP 686-87)

Beverly and Roger McKown run a program at various DOC facilities that helps offenders prepare for their release into the community. (RP 845, 848-49, 857) Urlacher participated in one of their programs and was cooperative and helpful with other inmates. (RP 846, 857) Urlacher also regularly attended the McKowns' bible study class. (RP 847, 858) The McKown's have found several homes that are willing to take Urlacher as a tenant, and have found several positive employment prospects as well. (RP 850, 859, 862) They are willing and able to assist Urlacher with his transition into the community if he is released. (RP 851, 860)

Urlacher also testified at trial. He admitted his offenses and expressed a great deal of sorrow and remorse for the impact his actions had on his victims. (RP 159, 165-66, 168, 171, 178-80, 944, 975) He testified that he no longer has sexual fantasies or

urges involving children, and believes his chance of reoffending is "minuscule." (RP 175, 176) He feels he has benefited from the nonviolent communication class, and his sex offender treatment. (RP 946, 956) He even refused to view the photographs provided by the State as part of pretrial discovery because he believes that to do so would be like reoffending and revictimizing those children. (RP 182, 976)

He has begun working on a detailed release plan, which includes partnering with a safe chaperone when he goes places where he knows children will be present, such as church or the mall; he will find a home and employment; he will contact homosexual support groups; and keep in contact with the McKowns. (RP 964-74)

Urlacher stated that he took advantage of the boys' curiosity about sex, but that if he could go back in time he would make different choices and be a better person and parent. (RP 160, 166, 178) He understands now that children are human beings not objects to be used for sexual gratification. (RP 185)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT ERRED BY RULING THAT DR. WOLLERT'S TESTIMONY ABOUT HIS ACTUARIAL INSTRUMENT WAS INADMISSIBLE UNDER ER 703.

To involuntarily commit a person under the Sexually Violent Predator Act, the State must prove beyond a reasonable doubt that the person is a SVP. In re Det. of Fair, 167 Wn.2d 357, 363, 219 P.3d 89 (2009) (citing RCW 71.09.060(1)). An SVP is "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).

Before trial, the State moved to exclude from Dr. Wollert's testimony any reference to an actuarial instrument called the MATS-1, which Dr. Wollert had relied upon in assessing Urlacher's future dangerousness under RCW 71.09. (CP 143-44; RP 60) The State argued that this evidence was not admissible under ER 703 because, in the State's opinion, that particular actuarial instrument was not reasonably relied upon by others in the field and because only "defense-oriented evaluators" use it. (RP 60, 744-45; CP 143-46)

The defense argued that the MATS-1 met the test for admissibility under ER 703 because it was the type of tool commonly used by those in the field—an actuarial test that had been peer-reviewed and published—and was relied upon by Dr. Wollert in reaching his opinion. (RP 64, 66, 67-68, 734, 743-44, 746) The defense also presented declarations from several risk assessment experts who have used the MATS-1 in their practices. (RP 64; Sup CP 293-203, 204-05)

In voir dire testimony, Dr. Wollert testified that he and four other psychologists began developing the MATS-1 in 2005, and published the test and data in a peer reviewed journal, “Law Probability and Risk” in 2006. (RP 726-27) They compiled sample data from 9,305 sexual offenders obtained from both the Static-99 tables and a study conducted by New Zealand corrections researchers. (RP 727, 729) Their actuarial table and the risk items that pertained to their data set were again published in a peer-reviewed journal on sexual abuse. (RP 727)

The “items” for comparison in the MATS-1 are six of the ten items that are also included in the Static-99 assessment, with the additional item that considers the age of the offender. (RP 723-24, 726) Dr. Wollert testified that it is commonly recognized in the field

that age is strongly correlated with the rate of recidivism. (RP 724)
According to Dr. Wollert, the MATS-1 is a more reliable predictor of recidivism than other common actuarial measurements because it takes into account the effect of advancing age on recidivism rates. (RP 729)

At the time of trial, Dr. Wollert was aware that the MATS-1 had been used by experts throughout the country, and was soon to be adopted as an assessment tool by the New Zealand Department of Corrections. (RP 728, 731)

The court ruled that Dr. Wollert's testimony about the MATS-1 was inadmissible under ER 703 because it was not "of a type of test reasonably relied on by experts in the field." (RP 748-49)

The trial court erroneously excluded the MATS-1 under ER 703. While the admissibility of expert opinion is subject to the abuse of discretion standard, State v. Nation, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002), that discretion must be based on tenable grounds and reasons. State v. Athan, 160 Wn.2d 354, 376, 158 P.3d 27 (2007) (abuse of discretion occurs when the trial court's decision is based on untenable grounds or untenable reasons).

In State v. Thorell, the Washington Supreme Court considered "whether actuarial instruments may be admitted to aid

in the prediction of future dangerousness and, if these instruments are admitted, whether Frye or Evidence Rule (ER) 702 is the appropriate test of their reliability.” 149 Wn.2d 724, 730, 72 P.3d 708 (2003).² The Court held that “actuarial instruments may be admitted if they satisfy the requirements of ER 702.” 149 Wn.2d at 731. Any opposition to the evidence of actuarial instruments goes to the weight of this evidence, not its admissibility. 149 Wn.2d at 756 (citing In re Det. of Campbell, 139 Wn.2d 341, 358, 986 P.2d 771 (1999)).

The Thorell court noted that “[b]ecause actuarial models are based on statistical analysis of small sample sizes, they have a variety of potential predictive shortcomings.” 149 Wn.2d at 753. The parties disputed whether actuarial tests depended on novel scientific evidence. 149 Wn.2d at 754. The State contended that “actuarial instruments are not novel scientific evidence, so the trial court need not conduct a Frye hearing.” 149 Wn.2d at 754. The State argued that “the methods and procedures used to construct actuarial instruments are well accepted in the scientific community

² The Frye standard requires a trial court to determine whether a scientific theory or principle has achieved general acceptance in the relevant scientific community before admitting it into evidence. Frye v. United States, 293 F. 1013 (DC 1923); Thorell, 149 Wn.2d at 754.

and that [the defendant's] arguments go to weight rather than admissibility.” 149 Wn.2d at 754. The Court concluded that “we reiterate that the Frye standard has been satisfied by . . . actuarial determinations of future dangerousness.” 149 Wn.2d at 756.

ER 702 provides: “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” “In the case of scientific testimony, the expert (1) must qualify as an expert, (2) the expert’s opinion must be based upon a theory generally accepted in the relevant scientific community, and (3) the testimony must be helpful to the trier of fact.” State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003) (citations omitted). Under ER 702, questions related to reliability may be considered by the court under the “helpfulness to the jury” standard of admissibility. State v. Copeland, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996); State v. Janes, 121 Wn.2d 220, 235-36, 850 P.2d 495 (1993).

ER 703 provides the standard for the admission of opinion evidence from expert witnesses:

The facts or data in the particular case upon which an

expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ER 703 is, in other words, not an exclusionary rule, but rather is a mechanism to admit otherwise inadmissible hearsay. See 1A WASH. PRAC., METHODS OF PRACTICE § 35:5 (citing EVIDENCE, Tegland, §§ 703.1, 703.2 (explaining that the purpose and scope of ER 703 is to allow an expert to explain the basis of his or her opinion even though the opinion is not based on the expert's firsthand observations)).

The 'reasonably relied upon' language in Rule 703 should not be confused with the *Frye* rule, which requires general acceptance in the scientific community. The *Frye* rule relates to the scientific principles and techniques employed by the expert in reaching an opinion. By contrast, Rule 703 relates to the factual information relied upon by the expert

1A WASH. PRAC., § 35:5 (quoting EVIDENCE, Tegland, § 703.2). Moreover, according to Tegland: "The admissibility of an expert's opinion under Rule 703 should not be confused with the weight of that opinion after it is admitted as evidence[.]" 1A WASH. PRAC., § 35:5 (quoting EVIDENCE, Tegland, § 703.2). Under ER 703, the issue is not whether the actuarial instrument is reliable, but whether it constitutes information that is "of a type" relied on by experts in

the field.

There is no question that actuarial instruments are “of a type” of information used by evaluators in RCW 71.09 cases. See Thorell, 149 Wn.2d at 755-756. It is uncontroverted in this case that Dr. Wollert used accepted scientific methods to develop the test and the development of the test mirrors other commonly-used versions—specifically, it was developed by psychologists, peer-reviewed, cross-validated, and published.

If the State believes the MATS-1 is illegitimate, then its issues with the MATS-1 can be addressed in cross-examination because they go to weight, not admissibility. See Thorell, 149 Wn.2d at 756 (the experts’ disagreement as to the reliability of actuarial assessments goes to the weight of this evidence, not its admissibility) (citing Campbell, 139 Wn.2d at 358).

For example, in In re Det. of Robinson, Division 1 held that the Screening Scale for Pedophilic Interests (SSPI), which evaluates a limited set of predictors, such as victim characteristics, and combines them using a numerical weighting system to determine pedophilic interests and likelihood of recidivism, is an actuarial instrument and therefore not novel and not subject to a Frye hearing when used in (SVP) proceedings to determine

pedophilic interests and likelihood of recidivism. 135 Wn. App. 772, 786-87, 146 P.3d 451 (2006). See *also*, In re Det. of Strauss, 106 Wn. App. 1, 20 P.3d 1022 (2001); In re Det. of Halgren, 124 Wn. App. 206, 98 P.3d 1206 (2004); In re Det. of Taylor, 132 Wn. App. 827, 837, 134 P.3d 254 (2006).

The MATS-1 was admissible under ER 702 and ER 703 because it was of a type commonly relied on by experts—an actuarial tool—and Dr. Wollert relied upon the test in reaching his opinion. Therefore, the trial court abused its discretion in excluding Dr. Wollert’s testimony about the MATS-1 actuarial instrument because that decision is in direct conflict with precedent and the evidence rules.

The trial court’s erroneous exclusion of Dr. Wollert’s testimony regarding the MATS-1 was prejudicial to Urlacher’s ability to present his defense. Dr. Wollert testified that the MATS-1 was the most accurate test to use for this type of proceeding, and was the basis for his opinion that Urlacher’s chance of recidivism declines with age and takes into account declining rates of recidivism generally over the past 20 years. (RP 727-29, 732) Thus, even though Dr. Wollert eventually testified to the results of other actuarial tests, erroneously excluding his testimony about the

results in the MATS-1 prejudiced his ability to fully testify to the basis of his opinion and prejudiced Urlacher's defense. Consequently, the trial court's erroneous suppression of Dr. Wollert's testimony regarding the MATS-1 requires reversal and a new trial.

B. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO SHOW THE JURY IMAGES OF CHILD PORNOGRAPHY TAKEN FROM URLACHER'S COMPUTER EQUIPMENT BECAUSE THE IMAGES WERE UNNECESSARY, CUMULATIVE, AND UNDULY PREJUDICIAL.

Before trial, Urlacher moved to exclude reference to and admission of pornographic images found on Urlacher's computer hard drives and discs, arguing that the evidence was more prejudicial than relevant. (CP 127-28; RP 119-21, 123-25) The State argued that the evidence was necessary to establish the nature of Urlacher's mental disorder—pedophilia—and to establish his risk to reoffend based on the existence of studies indicating that collecting child pornography correlates with a propensity to commit sexual acts against children. (RP 125-27)

The trial court denied Urlacher's motion to exclude the evidence, as long as the State's witnesses could link the possession of the images to a finding that Urlacher is an SVP. (RP 130, 131) During trial, several witnesses, including Urlacher,

testified that Urlacher took sexually explicit photographs and video recordings of CJ. and of other boys. (RP 168, 200, 223) Detective Richard Voce testified that he found 160-170 images on Urlacher's computer equipment, that depicted pre-pubescent children engaged in sexually explicit conduct or posed in sexually explicit ways. (RP 122, 413) The State was also allowed, over a renewed objection from Urlacher, to show the jury 11 of these explicit images. (RP 383-84, 388, 396, 407)

Washington courts have held that evidence of unadjudicated offenses or acts are admissible in SVP proceedings if the evidence is relevant in determining an individual's risk to the community if not confined. See In re Det. of Turay, 139 Wn.2d 379, 401-02, 986 P.2d 790 (1999); In re Det. of Mines, 165 Wn. App. 112, 128, 266 P.3d 242 (2011). In this case, Dr. Goldberg testified that there are studies showing that sex offenders who collect or access child pornography have an increased recidivism risk. (RP 592) Dr. Goldberg believed that Urlacher's collection of child pornography (from approximately 12 years ago) was a risk factor to be considered in determining Urlacher's likelihood of reoffending. (RP 592-93) Accordingly, the fact that Urlacher possessed images of child pornography was arguably relevant to facts at issue in this

case.

However, it was not necessary to show the jury the actual images of children posed or engaged in sexually explicit conduct. ER 403 requires exclusion of evidence, even if relevant, if its prejudicial effect substantially outweighs its probative value. “Careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.” State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984).

Additionally, the admissibility of photographs is generally within the discretion of the trial court, and is reviewed for abuse of discretion. State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). However, Washington courts have generally looked unfavorably on the admission of repetitious or inflammatory photographs. See Crenshaw, 98 Wn.2d at 807. The trial court may only admit such photographs if their probative value outweighs their prejudicial effect. State v. Lord, 117 Wn.2d 829, 871, 882 P.2d 177 (1991).

For example, in State v. Sargent, the court reversed the defendant’s conviction of first degree murder and second degree arson in part because the trial court allowed the State to introduce

gruesome photographs. 40 Wn. App. 340, 698 P.2d 598 (1985). The court noted that because there was testimony from other individuals, including firefighters who discovered the body, which reviewed the same information as that depicted in the photographs, the prejudicial effect of the photographs outweighed their probative value. Sargent, 40 Wn. App. at 349.

Similarly here, the information about the existence and content of the images was presented to the jury through the testimony of several victims, Detective Voce, and Urlacher himself. Furthermore, Dr. Goldberg did not see the images before he conducted his evaluation and completed his report, so they were not used in formulating his opinion about Urlacher's future dangerousness. (RP 391-94)

The only reason to show the jury the actual images of children engaged in sexually explicit behavior is to inflame the jury. The limited probative value of the images was far outweighed by the highly prejudicial impact that they would have on a juror. Therefore, the trial court abused its discretion when it allowed the images to be shown to the jury.

V. CONCLUSION

The commitment order entered under RCW 71.09 should be

reversed in this case because the trial court's error in admitting the overly prejudicial pornographic images, and in erroneously excluding Dr. Wollert's testimony regarding the MATS-1, prejudiced Urlacher's defense and deprived him of a fair trial.

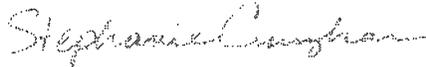
DATED: May 18, 2012



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Charles Urlacher

CERTIFICATE OF MAILING

I certify that on 05/18/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Charles Urlacher, Special Commitment Center, PO Box 88600, Steilacoom, WA 98388.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 42616-1-II

IN RE THE DETENTION OF,
CHARLES URLACHER, Appellant.

CERTIFICATE OF SERVICE

I, Stephanie C. Cunningham, court-appointed counsel for Appellant Charles Urlacher, certify that on this day I caused a PDF copy of the OPENING BRIEF OF APPELLANT, and this CERTIFICATE OF SERVICE, to be served on James Buder, Attorney for Respondent State of Washington, at JamesB3@atg.wa.gov.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: May 18, 2012



STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Appellant Charles Urlacher

CUNNINGHAM LAW OFFICE

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