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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Detention of:

DERWIN PASLEY,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES PRESENTED FOR REVIEW .....	2
	A. Did the Court of Appeals’ fact-specific analysis of the sufficiency of the recent overt act evidence presented at trial create an issue of substantial public interest? .....	2
	B. In the context of a sufficiency of evidence claim, did the Court of Appeals properly look beyond Pasley’s testimony that the victim of his most recent crime “consented” when evaluating the evidence?.....	2
III.	RESTATEMENT OF THE CASE.....	2
	1. Pasley’s History of Mental Illness, Sexual Violence, and Civil Commitment as an SVP .....	2
	2. Court of Appeals’ Review and Opinion.....	8
IV.	REASONS WHY REVIEW SHOULD BE DENIED .....	9
	A. A “Recent Overt Act” is Just One of Several Elements in an SVP Trial.....	10
	B. The Court of Appeals Sufficiency of the Evidence Decision Does Not Warrant Review Under RAP 13.4(b)(4) .....	11
	1. The issue Pasley raises is not presented by the facts of this case.....	11

2. The Court of Appeals decision is fact-specific.....	13
3. Pasley is also wrong on the merits .....	14
V. CONCLUSION .....	18

## TABLE OF AUTHORITIES

### Cases

<i>In re Barr,</i> 102 Wn. 2d 265, 684 P.2d 712 (1984).....	3, 4
<i>In re Detention of Broten,</i> 130 Wn. App. 326, 122 P.3d 942 (2005).....	15
<i>In re Detention of Hovinga,</i> 132 Wn. App. 16, 130 P.3d 830 (2006).....	15
<i>In re Detention of Thorell,</i> 149 Wn.2d 724, 72 P.3d 708 (2003).....	11

### Statutes

RCW 71.09.020(9)-(10) .....	7
RCW 71.09.020(13) .....	passim
RCW 71.09.020(18) .....	15

### Court Rules

RAP 13.4(b).....	9, 17
RAP 13.4(b)(4).....	11, 13, 14
RAP 18.17 .....	18

## I. INTRODUCTION

The Court of Appeals correctly concluded that sufficient evidence supports the trial court's order civilly committing Derwin Pasley as a sexually violent predator. Taken in the light most favorable to the State, Pasley's sexual abuse of a vulnerable young adult, who was similar to Pasley's past victims, was sufficient to establish a "recent overt act," as that term is statutorily defined. Pasley does not meaningfully argue otherwise.

Instead, Pasley attempts to raise an issue not presented by the facts of this case, ignores the fact-specific nature of the Court of Appeals decision, and relies a novel and unsupported standard that is inconsistent with existing precedent. Whether a consensual act can be a "recent overt act" is not presented here, where Pasley's sexual assault of K.R. was decidedly *not* consensual and was even the basis for two of Pasley's criminal convictions. The Court of Appeals' discussion of consent is expressly fact-specific, leaving its role in future cases to case-

specific facts. And Pasley identifies no support for his novel argument that non-consent is an element of proving a recent overt act, either in that term's statutory definition or in case law. In fact, Court of Appeals decisions point in the opposite direction.

This Court should deny review.

## **II. ISSUES PRESENTED FOR REVIEW**

- A. Did the Court of Appeals' fact-specific analysis of the sufficiency of the recent overt act evidence presented at trial create an issue of substantial public interest?
- B. In the context of a sufficiency of evidence claim, did the Court of Appeals properly look beyond Pasley's testimony that the victim of his most recent crime "consented" when evaluating the evidence?

## **III. RESTATEMENT OF THE CASE**

### **1. Pasley's History of Mental Illness, Sexual Violence, and Civil Commitment as an SVP**

This is an appeal from an initial commitment bench trial in a sexually violent predator (SVP) case. Pasley is a 46-year-old man who has a long history of sexually assaulting teenage boys. Ex. 1; Ex. 29; CP at 395. In August 2010, Pasley pled guilty to two counts of Child Molestation in the Second Degree and one count of Child Molestation in the Third Degree for sexually

assaulting three boys between the ages of 12 and 14. Ex. 1. He remained incarcerated for these offenses until approximately June 2018 when he was released to the community. VRP at 224, 244, 594-95. He completed sex offender treatment in the community in November 2019. VRP at 595, 604-06.

A few months later, in February 2020, 18-year-old K.R. reported that Pasley sexually assaulted him. Ex. 2; Ex. 32 at 10; VRP at 303. Pasley was later convicted of two counts of Assault in the Third Degree – Negligence. Ex. 2 at 1; Ex. 32 at 10. Pasley pleaded guilty to the crimes, and in his Statement of Defendant on Plea of Guilty, he stated, “I do agree that [on or] about February 9, 2020, and again on [or] about February 10, 2020, in Thurston County, Washington, I did intentionally touch [K.R.] in an offensive manner.” Ex. 32 at 10.

Pasley’s guilty pleas were made pursuant to *In re Barr*, 102 Wn. 2d 265, 684 P.2d 712 (1984). In an *In re Barr* plea, the defendant accepts a conviction for an offense for which there is no factual basis, in exchange for dismissal of greater charges for

which a factual basis exists. Petition at 4 (citing *Barr* at 270). Pasley specifically agreed there was a “substantial likelihood” that he could have been found guilty of more serious charges as a result of the assault, namely Indecent Liberties with Forcible Compulsion (a “sexually violent offense”) and Rape in the Third Degree. Ex. 32 at 10; VRP 556.

At the SVP commitment trial, via videotaped deposition, Pasley testified in detail about his offenses against minors. See Ex. 29. This testimony covered the 2020 assaults against K.R. Ex. 29 at 86-105. Pasley testified that he knew that K.R. was 18 years old, and Pasley believed that K.R. looked his age. Ex. 29 at 87, 91, 98. Pasley also knew K.R. was a member of a Special Olympics basketball team. Ex. 29 at 89. Pasley testified that he nonetheless approached K.R. about sex. Ex. 29 at 96. Pasley’s nephew was also a member of the basketball team and was friends with K.R. Ex. 29 at 87-89. Pasley’s nephew would occasionally invite K.R. to Pasley’s home, and the nephew is



someone Pasley knew to be a person with a developmental disability. *Id.*

Pasley testified that he decided to approach K.R. because he believed K.R. acted in a way that was conducive to a “fluid lifestyle” based on K.R.’s “mannerisms, the way he carried himself, [and] the way he acted,” including style of dress. Ex. 29 at 95. According to Pasley, his first sexual contact with K.R. involved fondling each other’s penises over and under their clothing for five-to-ten minutes and stopped because Pasley had to go to work. Ex. 29 at 97. Pasley testified he believed that K.R. was willingly participating in the sexual activity. Ex. 29 at 92.

Pasley approached K.R. a second time late that night. Ex. 29 at 100-01. Pasley testified that he and K.R. proceeded to mutually masturbate each other for about five minutes. Ex. 29 at 101, 103. They stopped when Pasley said “I’m good” because Pasley was tired. Ex. 29 at 100, 102. Later on, Pasley saw K.R. on the phone and noticed that he looked “distracted” and was crying. Ex. 29 at 103. Around midnight, Pasley awoke to a bang

and the sound of his home alarm. Ex. 29 at 104-05. Pasley went upstairs, saw the front door was open, and realized K.R. was gone. Ex. 29 at 105.

Thurston County Sherriff's Detective Howard Reynolds, who investigated K.R.'s report that Pasley sexually abused him, also testified at during the commitment trial. VRP at 295-335. Detective Reynolds noted that K.R.'s vocabulary was limited and he seemed confused when asked certain questions. VRP at 305-06. He testified that K.R. did not appear his stated age of 18, but rather 13 or 14 years old. VRP at 318-19. Detective Reynolds based this age estimation on K.R.'s language limitations, his slight build at five feet seven inches and approximately 140 to 150 pounds, his timid demeanor, and the fact that he had braces on his teeth. VRP at 319. Detective Reynolds requested that K.R. be interviewed by a facility specializing in interviewing child victims and people with disabilities. VRP at 304.

The State's expert, forensic psychologist Dr. Erik Fox, testified and opined to a reasonable degree of psychological

certainty that Pasley suffers from two disorders: (1) Other Specified Paraphilic Disorder, deviant sexual interest in pubescent-aged males, a qualifying mental abnormality under the statute, and (2) Other Specified Personality Disorder, antisocial and narcissistic features, a qualifying personality disorder under the statute. VRP at 112, 117, 123-24, 139-41; RCW 71.09.020(9)-(10). He used the Diagnostic and Statistical Manual as a guide for these diagnoses. VRP at 89. Dr. Fox testified about Pasley's prior offenses and stated that Pasley's behavior with K.R.—a male who looked like a teenager and who had some cognitive limitations—“[was] consistent . . . with the pattern of behavior with the other victims.” VRP at 107. Dr. Fox noted examples of K.R.'s “cognitive limitations” including that K.R. struggled to know his right side from his left, and when asked about his progress in school he answered that he was “really good in math” and had made it to “times.” VRP at 109-10.

Dr. Fox stated that Pasley's sexual conduct with K.R. also supports this diagnosis because K.R. appeared much younger than his chronological age, had impaired intellectual ability and emotional maturity, and Pasley acknowledged he was sexually aroused by having power and authority over his victims. VRP at 118, 625. At the conclusion of the trial, the court found Pasley met the SVP definition and also that Pasley's assault of K.R. was a recent overt act (ROA). CP 402.

## **2. Court of Appeals' Review and Opinion**

Pasley appealed, and Division Two affirmed the trial court's verdict that Pasley met the SVP definition, including the finding that he had committed an ROA. Pasley argued on appeal that insufficient evidence supported the trial court's ROA finding given his claim that K.R. "consented" to the assault. Op. at 13. Viewing the evidence in the light most favorable to the State, held that, "[t]he State presented sufficient evidence of Pasley's history and mental condition, such that a rational trier of fact could find that Pasley's behavior with K.R. creates a reasonable

apprehension of sexually violent harm and thereby constitutes an ROA.” Op. at 15. The Court of Appeals specifically noted that “an objective person who knows of Pasley’s history and mental condition . . . could recognize the similarities among the sexual acts Pasley perpetrated against his victims and the parallels among the victims’ profiles.” *Id.* With respect to Pasley’s arguments about consent, the Court of Appeals stated that “consent is not the crux of this case” and “[c]onsent is unrelated to the ROA inquiry in the case before us.” Op. at 13-14.

Pasley now seeks review in this Court.

#### **IV. REASONS WHY REVIEW SHOULD BE DENIED**

The fact-specific issues presented in Pasley’s petition for review do not warrant review by this Court. Pasley relies exclusively on RAP 13.4(b)’s “substantial public interest” factor to justify review. But Pasley’s argument relies on a misreading of the Court of Appeals decision. The Court of Appeals held only that, on the facts “of *this* case,” taken in the light most favorable to the State, consent was not “the crux.” Op. at 15 (emphasis

added). That was both correct and specific to Pasley’s individual case. Given the limited applicability of the facts of Pasley’s ROA to other future SVP ROA issues that may be litigated, Pasley fails to show that review is warranted.

**A. A “Recent Overt Act” is Just One of Several Elements in an SVP Trial**

The issue in this case concerns the sufficiency of the evidence establishing that Pasley committed a “recent overt act.”

A “recent overt act” means “any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.” RCW 71.09.020(13).

That Pasley committed a recent overt act was only one of several elements that the State was required to prove at trial. In this appeal, Pasley does not dispute that he has been convicted of a “crime of sexual violence” or that he “suffers from a mental abnormality or personality disorder.” RCW 71.09.020(13). Nor

does he dispute the third component of the SVP definition: that he is “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” *Id.*

**B. The Court of Appeals Sufficiency of the Evidence Decision Does Not Warrant Review Under RAP 13.4(b)(4)**

**1. The issue Pasley raises is not presented by the facts of this case**

The issue Pasley identifies in his petition for review is not presented by the facts of this case. Pasley seeks review of whether “consensual sexual activity may constitute a ‘recent overt act’” in an SVP civil commitment trial. Pet. for Rev. at 1. But this case does not involve consensual sexual activity. Because Pasley challenged the sufficiency of the evidence supporting the recent overt act determination, appellate courts view the evidence in the light most favorable to the State. *In re Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). Pasley’s petition for review ignores this standard and continues to make arguments that view the evidence in a light most favorable to himself.

In the light most favorable to the State, Pasley’s conduct was decidedly *not* consensual. Indeed, Pasley pleaded guilty to criminal assault as a result of his sexual abuse of K.R. Ex. 2; Ex 32. In the related court documents, Pasley described his actions as “intentional” touching “in an offensive manner” and specifically agreed there was a “substantial likelihood” that he could have been found guilty of more serious charges, namely Indecent Liberties with Forcible Compulsion (a “sexually violent offense”) and Rape in the Third Degree. Ex. 32 at 10; VRP 556.

Further supporting the conclusion that Pasley’s sexual assault was not consensual is Pasley’s own testimony that K.R. made a phone call shortly after the second incident during which he looked distraught and was crying, a clear and obvious indication K.R. was distressed by what occurred. Ex. 29 at 92, 103. K.R. later left Pasley’s house without telling him in the middle of the night. Ex. 29 at 104-05.

Viewed in the light most favorable to the State—as it must be in this sufficiency of the evidence challenge—Pasley’s sexual



abuse of K.R. was clearly not “consensual.” Because the facts of this case do not present issue that Pasley seeks to raise, Pasley cannot satisfy RAP 13.4(b)(4).

**2. The Court of Appeals decision is fact-specific**

The discussion of consent by the Court of Appeals is fact-specific and does not create a bright-line rule. In an appropriate case, evidence that an act was consensual may be relevant to an argument that the act did not constitute a “recent overt act” for purposes of RCW 71.09.020(13). Here, the Court of Appeals held only that, under the facts of this case, which involved a vulnerable victim who was similar to past victims of Pasley’s sexual offenses, Pasley’s arguments about consent were misplaced.

The Court of Appeals decision repeatedly emphasized that “[t]he determination as to whether an act qualifies as an ROA is fact specific.” Opinion at 10. Specifically with respect to the issue of consent that Pasley raises, the Court of Appeals stated that it “is not the crux *in this case*” and that “[c]onsent is

unrelated to the ROA inquiry *in the case before us.*” Op. at 13-14 (emphasis added). By continuously limiting its analysis to “the case before us,” the Court intentionally avoided making rules of general applicability. The fact-specific holding is not “an issue of substantial public interest that should be determined by” this Court. RAP 13.4(b)(4).

### **3. Pasley is also wrong on the merits**

In any event, Pasley’s novel and unsupported arguments on the merits do not warrant review. Pasley’s fundamental argument is that “[n]on-consent is a necessary element” of proving a recent overt act. Pet. for Rev. at 21. Even if that issue were presented in this case, it still would not warrant review. Tellingly, Pasley cites no case law in support of this argument, nor does he cite the statutory definition of “recent overt act” in RCW 71.09.020(13). The statutory definition does not mention consent:

“Recent overt act” means any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an

objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

RCW 71.09.020(13). Instead, Pasley relies on the statutory definition of “sexually violent offense” in RCW 71.09.020(18). Pet. for Rev. at 21. But the term “sexually violent offense” is not part of the definition of “recent overt act.”

Pasley’s argument that non-consent is an element of proving a recent overt act is also inconsistent with existing precedent. For example, in *In re Detention of Hovinga*, 132 Wn. App. 16, 24, 130 P.3d 830 (2006), the Court of Appeals held that a person’s act of masturbating while covertly following girls around a store constituted a recent overt act without any discussion of consent. Similarly, in *In re Detention of Broten*, 130 Wn. App. 326, 335-36, 122 P.3d 942 (2005), the Court of Appeals held that a person’s act of being in a park at a children’s playground without a chaperone was a recent overt act given his specific factual history. These decisions are inconsistent with

Pasley's argument that the State must always prove non-consent beyond a reasonable doubt in order to prove a recent overt act.

Under the statutory definition of "recent overt act," the Court of Appeals was correct that, taking the evidence in the light most favorable to the State, "an objective person" who knew Pasley's mental condition and long history of sexually victimizing similarly vulnerable victims could reasonably apprehend future harm of a sexually violent nature from his sexual assault of K.R. RCW 71.09.020(13).

Here, the State's evidence on this point was overwhelming. The State presented expert testimony from Dr. Fox that Pasley's behavior with K.R. "[was] consistent . . . with the pattern of behavior with the other victims." VRP at 107. Dr. Fox noted examples of K.R.'s "cognitive limitations" including that K.R. struggled to know his right side from his left, and when asked about his progress in school he answered that he was "really good in math" and had made it to "times." VRP at 109-10. Dr. Fox stated that Pasley's sexual conduct with K.R.

also supported Pasley’s paraphilic disorder diagnosis because K.R. appeared much younger than his chronological age, had impaired intellectual ability and emotional maturity, and Pasley acknowledged he was sexually aroused by having power and authority over his victims. VRP at 118, 625. Pasley himself agreed there was a “substantial likelihood” that he could have been found guilty of a sexually violent offense as a result of the assault of K.R. Ex. 32 at 10; VRP 556.the

The State presented sufficient evidence such that a rational trier of fact could find that Pasley’s assault of K.R. creates a reasonable apprehension of sexually violent harm and thereby constituted an ROA. Pasley’s novel arguments, unsupported by case law and untethered from the statutory definition of “recent overt act,” do not satisfy RAP 13.4(b).

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## V. CONCLUSION

For the foregoing reasons, this Court should deny discretionary review.

This document contains 2,983 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of April, 2024.

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NO. 102894-6

**SUPREME COURT OF THE STATE OF WASHINGTON**

In Re Detention of:

DERWIN PASLEY,

Appellant.

DECLARATION  
OF SERVICE

I, Malia Anfinson, declare as follows:

On April 19, 2024, I sent via electronic mail, per service agreement, a true and correct copy of Answer to Petition for Review and Declaration of Service, addressed as follows:

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

DATED this 19<sup>th</sup> day of April, 2024, at Seattle, Washington.

  
MALIA ANFINSON

**WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION**

**April 19, 2024 - 10:44 AM**

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