Supreme Court No. 100340-4
(COA No. 80843-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: DETENTION OF

THOMAS QUINN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Thomas Quinn, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Quinn seeks review of the decision by the Court of Appeals dated August 2, 2021, for which reconsideration was denied on September 29, 2021. Copies are attached as Appendix A and B.

C. ISSUE PRESENTED FOR REVIEW

Before civilly committing someone under RCW ch. 71.09, principles of due process require the State to prove the person is currently dangerous based on recent behavior. The State avoids proving this essential element to a unanimous jury beyond a reasonable doubt only when a judge finds this element has been established as a matter of law. To take this issue away from the jury, the factual basis of the recent overt

act must have been either already proven in an underlying case or based on undisputed facts.

Thomas Quinn had not been recently convicted of the necessary overt act. While he possessed two images of child pornography, he explained these pictures were in the back of a drawer for a long time and otherwise disputed the State's allegations. The trial court relied on these contested claims to rule the State proved a recent overt act as a matter of law, removing this element from the jury's consideration. In an indefinite civil commitment prosecution, does it violate due process for the trial court to relieve the State of its burden of proving an essential element to a unanimous jury based on the judge's view of contested factual allegations?

D. STATEMENT OF THE CASE

Thomas Quinn was 46 years old when the State filed its petition for civil commitment under RCW ch. 71.09. CP 273, 576. He has an intellectual disability with an IQ measured at

60. 2RP 16; 7RP 639; 11RP 1174. He has a very limited ability to read and write. 2RP 16.

When the State filed its petition, Mr. Quinn was serving an 84-month sentence for two counts of possession of a photograph of a minor engaged in sexually explicit conduct. CP 426. These charges stemmed from two photographs the police found in a drawer in his bedroom. CP 306, 377. Mr. Quinn pled guilty to these two counts in 2010. CP 306.

The State agreed it needed to prove Mr. Quinn committed a recent overt act to meet the due process requirements of civil commitment because Mr. Quinn was not incarcerated for a sexually violent offense at the time the State filed its petition. CP 425, 427; 2RP 7, 9. It asked the court to find this element was established as a matter of law instead of submitting the recent overt act element to the jury. CP 425-563.

Mr. Quinn's only convictions for acts that qualify as a "sexually violent offense" necessary for civil commitment occurred when he was 21 years old, in 1993. At that time, his

girlfriend was babysitting two seven-year-old sisters. 2RP 8; 7RP 534. The girls said Mr. Quinn sexually touched them at the same time. CP 428; 7RP 538-39. Mr. Quinn entered an *Alford*[1] plea to two counts of child molestation in the first degree. CP 446; 7RP 541-42. He received a sentence of nine years in prison. CP 429. When questioned about this incident in the deposition the State relied upon to prove the threshold questions regarding his commitment, Mr. Quinn said he spanked the girls and did not otherwise touch them, but he "took the deal." CP 351-52.

A second incident occurred in 2004 that does not qualify as the statutorily required sexually violent offense. At that time, Mr. Quinn was living in an apartment complex with his wife and met a 15-year-old who was staying with her aunt. CP 358-59; 7RP 579-80. One day, the teenager fought with her aunt and left her apartment. 7RP 582. She saw Mr. Quinn and he

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

invited her to his apartment. 7RP 582. Once there, he rubbed the outside of her clothing, but she said "no" to further contact and left when he fell asleep. 7RP 584-85. Mr. Quinn entered an *Alford* plea to one count of assault in the third degree and one count of unlawful imprisonment for this incident. CP 362; 5RP 402-03. He received a 22-month sentence. CP 430. In the deposition the State relied upon to prove a recent overt act, Mr. Quinn denied touching her. CP 358-60, 362.

The act on which the State relied to bypass the jury's determination of a recent overt act occurred in 2010, when two officers came to Mr. Quinn's apartment for a routine check to verify his address as required by his sex offender registration obligation. CP 376; 6RP 472. Just a few days before, Mr. Quinn's mother had unexpectedly died and Mr. Quinn was extremely distraught. 6RP 422. Her death caused him to relapse after several years of sobriety and he had used marijuana and methamphetamine. CP 376-77. The officers smelled marijuana and saw that Mr. Quinn, who was wearing only underwear,

seemed intoxicated. CP 366. Mr. Quinn admitted he had some drugs in his home. *Id*.

The police obtained a search warrant for drugs and in a drawer, they found some photographs of children in sexually explicit poses. 6RP 476, 480-81. They also found some children's toys and girl's underwear. CP 434. Mr. Quinn explained these items belonged to a friend from church who was storing possessions in his apartment. CP 382. As a result of this incident, Mr. Quinn was convicted for possessing two pictures the police found when searching his apartment. CP 377.

The State filed its petition to civilly commit him when he was serving the sentence imposed for this conviction. CP 576.

After a pretrial hearing, the court ruled that Mr. Quinn's 2010 convictions for possessing the two images of child pornography constituted a recent overt act as a matter of law so the State did not need to prove this element to the jury at the commitment trial. 2RP 17; CP 273-77.

The jury was not asked to consider whether Mr. Quinn committed a recent overt act. CP 277. It found the State met its burden of proving Mr. Quinn satisfied the remaining criteria for commitment. CP 19.

E. ARGUMENT

By allowing the trial court to resolve a contested element of commitment instead of the jury, the Court of Appeals deprived Mr. Quinn of his right to trial by unanimous jury and relieved the State of its burden of proof

1. The right to trial by jury demands jurors resolve contested factual issues regarding essential elements.

The "core" of "the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts." *Furnstahl v. Barr*, 197 Wn. App. 168, 175, 389 P.3d 635 (2016). "[I]n keeping with the principles enshrined in Washington's Constitution, in a jury trial, it is the jury who must declare the facts found to be proved." *Id*. at 176; Const. art. I, § 21.

It is the jury's role, "under the constitution" to "weigh the evidence and determine the facts." *Sofie v. Fibreboard Corp*., 112 Wn2d 636, 646, 771 P.2d 711 (1989). Neither this Court nor the legislature may "encroach upon constitutional protections" and deny litigants "an essential function of the jury." *Id*. at 651.

Even a "'mixed question of law and fact,' has typically been resolved by juries" historically. *United States v. Gaudin,* 515 U.S. 506, 511-12, 516, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

2. Proof of a recent overt act is an essential element of civil commitment by statute and as a matter of due process.

Involuntary civil commitment is a massive curtailment of the fundamental right to liberty that triggers strict due process protections. *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d (1979); *In re Det. of Thorell,* 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. amend. XIV; Const. art, I, § 3. For civil commitment to satisfy due process, it must

be predicated on a narrowly tailored statutory scheme that ensures the individual is currently both mentally ill and dangerous. *In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

In *In re Det. of Young*, 122 Wn.2d 1, 41, 857 P.2d 989 (1993), this Court ruled that for civil commitment under RCW 71.09 to satisfy the constitutional requirements of due process, the State must prove a person's present dangerousness rests on a recent overt act. This proof "is necessary" to satisfy due process. *Id*. After *Young*, the legislature added a recent overt act requirement for anyone who has been released from total confinement after committing a sexually violent offense. RCW 71.09.030(1)(e).

If a person has been released from confinement and is living in the community at the time the State seeks civil commitment, the State must prove at the commitment trial, beyond a reasonable doubt, that the person committed a recent overt act. *Id*.; *see* RCW 71.09.060(1). A person is not

"currently dangerous" as required for civil commitment if the person has been free in the community and is "subsequently incarcerated for an act that would not in itself qualify as an overt act." *Albrecht*, 147 Wn. 2d at 8.

A recent overt act is an act or threat 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(12).

Several Court of Appeals cases hold that the State may avoid a jury trial on this element if it presents undisputed facts that meet the element of a recent overt act as a matter of law. *See In re Det. of Leck*, 180 Wn. App. 492, 509-10, 334 P.3d 1109 (2014) (court relied "only on uncontroverted facts" in making its recent overt act ruling); *In re Det. of Brown*, 154 Wn. App. 116, 127-28, 225 P.3d 1028 (2010) (court relied on "undisputed facts" to determine whether convictions for seven counts of possession of depictions of a minor engaged in

sexually explicit conduct satisfied recent overt act definition); *In re Det. of Hovinga*, 132 Wn. App. 16, 24, 130 P.3d 830 (2006) (relying on the defendant's numerous factual admissions to find a recent overt act); *see also In re Det. of Jones*, 193 Wn. App. 1038, 2016 WL 1643060, *9-10 (2016) (unpublished, cited pursuant to GR 14.1) (holding that because it had "sketchy facts" and no "testimony under oath," jury must decide whether there was a recent over act).

Similarly, in *In re Det. of Marshall*, 156 Wn.2d 150, 158-59, 125 P.3d 111 (2005), the defendant had been convicted after trial of third degree rape against an adult with a severe developmental disability. He had numerous prior sexually violent convictions. *Id*. at 153-54, 159. Based on the allegations proved at trial for the underlying third degree rape, coupled with his lengthy uncontested history of sexual assaults on children and his admitted fantasies, the court found he committed a recent overt act and did not need to separately plead and prove this element of commitment. *Id*.

The Court of Appeals impermissibly extended the reasoning of those cases to Mr. Quinn's case, authorizing the trial court to rely on contested, disputed factual allegations even though no jury had ever found Mr. Quinn committed the conduct necessary for a recent overt act and he expressly disputed these allegations in the record before the court. Slip op. at 8-10.

The court's authority to remove the mandatory recent overt act finding from the jury is limited to the established record of proven facts from prior convictions. Here, the State presented unproven, disputed allegations to the court in its motion for a recent overt act ruling. CP 428-37, 493-96. The court listed many of these unproven allegations and disputed facts in its ruling that relieved the State of its burden to prove a recent overt act to the jury. *See* CP 274-76; 2RP 14-17.

The State had to prove his behavior constituted a recent overt act as an essential element of his commitment and to a unanimous jury. CP 246, 420-24; 2RP 13. Mr. Quinn disputed

the critical facts on which the court relied. CP 274-76; 2RP 14-17. He explained he possessed the suspicious materials innocently and had done nothing dangerous or threatening to anyone at any recent time while in the community. *See, e.g.*, CP 377, 381-84.

The two images he was convicted of possessing were in a drawer. CP 377. They had date stamps indicating the images were taken years earlier. CP 424; 2RP 13. Mr. Quinn had been living in the community for several years and was not accused of committing in sexually violent conduct during that time. There was no evidence that possessing two images of pornography triggered him to act in a sexually violent manner. On the contrary, he possessed the images for a long time and had not acted in sexually violent manner. 2RP 13. Mr. Quinn's 2010 convictions for having two illicit images of children do not constitute harm of a sexually violent nature as a matter of law. He was entitled to demand the State prove this essential element of his commitment to the jury.

3. This Court should review the violation of Mr. Quinn's due process right to have contested, material facts proven to a jury.

As a matter of due process, the State must establish a recent overt act as a predicate to a constitutionally valid commitment when a person is not incarcerated for a sexually violent offense at the time the State seeks commitment. *Young*, 122 Wn.2d at 27, 41; *Marshall*, 158 Wn.2d at 157.

And Mr. Quinn "is entitled to a jury determination of his status" as a person who meets the criteria for commitment and the State's "burden of proof is beyond a reasonable doubt." *Broten*, 115 Wn. App. at 257 n.3. He has a right to a unanimous jury finding involving the contested allegations essential to the lawfulness of his commitment. RCW 71.09.060(1). Article I, section 21 strongly protects this jury trial right. *Furnstahl*, 197 Wn. App. at 175.

The court is not permitted to substitute its judgment of contested allegations. *Id*. Here, the jury was not required to find Mr. Quinn was currently dangerous based on a recent overt act.

Due process requires the State to prove this contested issue to the jury beyond a reasonable doubt. This Court should grant review of the Court of Appeals decision diluting Mr. Quinn's jury trial rights.

F. CONCLUSION

Based on the foregoing, Petitioner Thomas Quinn respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 2471 words and complies with RAP 18.7(b).

DATED this 29th day of October 2021.

Respectfully submitted,

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APPENDIX A

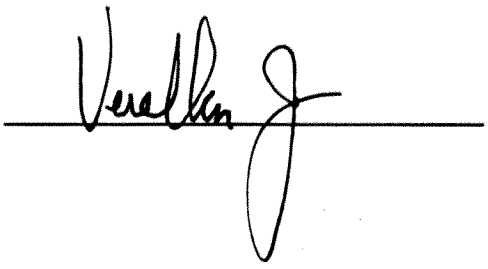
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Detention of	)	No. 80843-5-I
	)	
	)	
	)	
THOMAS QUINN	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
Appellant.	)	
	)	

Appellant Quinn filed a motion for reconsideration of the court's August 2, 2021 opinion. Upon request of the court, the respondent State of Washington filed an answer to the motion. The court has reviewed both documents and determined that the appellant's motion for reconsideration should denied. Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE PANEL:



APPENDIX B

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

In the Matter of the Detention of	)	No. 80843-5-I
	)	
	)	
	)	
THOMAS QUINN,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	
	)	

VERELLEN, J. — When the State files a commitment petition pursuant to chapter 71.09 RCW for an alleged sexually violent predator (SVP), it can establish the alleged SVP is presently dangerous by proving the commission of a recent overt act. But the State is relieved of this burden if the trial court concludes the alleged SVP was, at the time the petition was filed, incarcerated for an act that qualified as a recent overt act, as defined in RCW 71.09.020.

Thomas Quinn alleges the trial court erred by concluding his possession of child pornography qualified as a recent overt act because the court's findings of fact were based upon disputed or unadjudicated allegations from the records of his established convictions. Because a trial court can consider the entire record of an alleged SVP's established convictions when weighing this question, the court's findings of fact were not improperly entered. And because it properly applied the facts to the law, Quinn fails to prove the court erred by concluding his possession of child pornography was a recent overt act.

Therefore, we affirm.

FACTS

In 1993, Thomas Quinn pleaded guilty to two counts of first degree child molestation. The seven-year-old victims were twin sisters, and Quinn's fiancé had been babysitting them. Quinn exposed his penis to the girls and put his hands in their underwear. According to Quinn, he merely spanked each girl once because he caught them watching the Playboy Channel, and he pleaded guilty because his mother and fiancé were "freaking out" and told him to "take the offer."[1]

In 2005, Quinn pleaded guilty to third degree assault and unlawful imprisonment. He had originally been charged with indecent liberties and unlawful imprisonment. The victim was a 15-year-old girl who had left a neighboring apartment after a fight with her aunt. Quinn—who was acquainted with the victim—grabbed her, pulled her into his apartment, attempted to grope her breasts, and put his hands inside of her pants and underwear. According to Quinn, the victim lied about the entire encounter, merely spending the night on his couch. Quinn explained he pleaded guilty "[b]ecause of my mom and my wife," as they thought it was a good idea.[2]

In 2010, Quinn pleaded guilty to two counts of possession of child pornography and was sentenced to 84 months incarceration. The pictures were in Quinn's junk drawer. Quinn admitted he possessed the pictures and regretted having them. But he explained that the pictures belonged to Scott, a prison friend whose

[1] Clerk's Papers (CP) at 350-351.

[2] CP at 362-63.

last name Quinn did not know, and that he had forgotten for five years about agreeing to "hold onto 'em until [Scott] gets back" from "out of state somewhere."[3]

In 2017, while he was still incarcerated, the State petitioned for Quinn to be civilly committed as an SVP. The State alleged possessing child pornography was a "recent overt act" demonstrating Quinn's present dangerousness.[4] Because the State filed the petition while Quinn was incarcerated, it moved for a pretrial determination that the recent overt act alleged satisfied the requirements of the SVP statute as a matter of law and did not need to be proven to the jury. The court entered findings of fact, including findings based upon information in charging documents and other materials from the trial records of Quinn's convictions. It concluded Quinn's possession of child pornography constituted a recent overt act "that would create a reasonable apprehension of such harm of a sexually violent nature in the mind of an objective person who knows of the history and mental condition of [Quinn]."[5] After a trial, a jury concluded Quinn was an SVP, and the court ordered him confined to the Special Commitment Center.

Quinn appeals.

ANALYSIS

To prove a person is an SVP, the State must establish he has a "'mental abnormality' which 'is tied to present dangerousness."[6] The State can establish

[3] CP at 378.

[4] CP at 652.

[5] CP at 277.

[6] In re Det. of Marshall v. State, 156 Wn.2d 150, 157, 125 P.3d 111 (2005) (quoting In re Det. of Henrickson v. State, 140 Wn.2d 686, 692, 2 P.3d 473 (2000)).

"present dangerousness" by showing proof of a recent overt act.[7] It is not required to prove to the jury that the person committed a recent overt act when, on the day the petition is filed, the person is incarcerated for an act that itself qualifies as a recent overt act.[8] Under those circumstances, whether an act qualifies as a recent overt act, as defined in RCW 71.09.020(13), is a question for the court to decide.[9]

A "recent overt act" is "any act, threat, or combination thereof that . . . creates a reasonable apprehension of [sexually violent] 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."[10] This pretrial determination presents a mixed question of law and fact.[11] The trial court first makes "an inquiry . . . into the factual circumstances of the individual's history and mental condition" and "second, a legal inquiry . . . as to whether an objective person knowing the factual circumstances of the individual's history and mental condition would have a reasonable apprehension that the individual's act would cause harm of a sexually violent nature."[12] Because this is a

[7] Id. at 157.

[8] In re Det. of Brown, 154 Wn. App. 116, 122, 225 P.3d 1028 (2010) (citing Henrickson, 140 Wn.2d at 695).

[9] Id. at 123-24. We note that since trial, the legislature amended RCW 71.09.020 but did not alter definitions or terms relevant here. LAWS OF 2021, ch. 236, § 2. Accordingly, we cite to the current statute.

[10] RCW 71.09.020(12). A "recent overt act" can also be "any act, threat, or combination thereof that has . . . caused harm of a sexually violent nature." Id. The State does not allege Quinn's possession of child pornography qualifies.

[11] In re Det. of Leck, 180 Wn. App. 492, 509, 334 P.3d 1109 (2014) (citing Marshall, 156 Wn.2d at 158).

[12] Marshall, 156 Wn.2d at 158 (citing State v. McNutt, 124 Wn. App. 344, 350, 101 P.3d 422 (2004)).

mixed question of law and fact, we must establish the relevant facts, determine the applicable law, and apply the law to the facts.[13] We review the trial court's application of the law de novo.[14]

Relying upon State v. Brown,[15] Quinn contends several of the trial court's findings of fact were improperly entered because they were based upon disputed or unadjudicated facts when "[t]his pretrial determination by the court is limited to already proven facts."[16] Brown does not support his position.

In that case, Brown was incarcerated for possession of child pornography when the State filed its petition for civil commitment, and the trial court determined the possession crime constituted a recent overt act.[17] He argued the trial court had to conduct an evidentiary hearing before entering findings of fact about an alleged recent overt act.[18] This court disagreed.[19] When a trial court conducts a pretrial

[13] State v. Samalia, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016) (citing Tapper v. Emp't Sec. Dep't, 122 Wn.2d 397, 403, 858 P.2d 494 (1993)). Quinn asserts we should apply a de novo standard and disregard the trial court's findings of fact. He relies upon In re Detention of Anderson, 166 Wn.2d 543, 549, 211 P.3d 994 (2009), for support. But the Anderson court did not review any of the trial court's findings of fact because they were unchallenged. 166 Wn.2d at 549. Nor did it overrule precedent establishing the trial court's inquiry as a mixed question of law and fact.

[14] Samalia, 186 Wn.2d at 269 (citing Anderson, 166 Wn.2d at 555).

[15] 154 Wn. App. 116, 225 P.3d 1028 (2010).

[16] Appellant's Br. at 14. The State argues Quinn waived this argument because he did not make it before the trial court. Under RAP 2.5(a), we can exercise our discretion to decline to review an error not raised below. On this record, we will reach the merits of Quinn's appeal.

[17] Brown, 154 Wn. App. at 120.

[18] Id. at 122.

[19] Id. at 124-25.

recent overt act hearing, it is not acting as a fact finder.[20] It "need only review facts already established, including those established in the record of the conviction resulting in incarceration."[21] "[T]he original proceeding provided Brown with an opportunity to contest the factual allegations supporting the conviction," and SVP adjudication was not an opportunity to relitigate the facts supporting his convictions.[22]

Rather than standing as a mandatory limitation on a trial court's consideration of the evidence, Brown explains that a trial court can consider the entire record supporting established convictions. And other cases illustrate a trial court's discretion to consider facts beyond those established by the conviction resulting in incarceration.

In State v. McNutt, this court reviewed a trial court's pretrial "recent overt act" determination.[23] It explained that the trial court erred to the extent it made a "per se" legal conclusion that an offender's communications with a minor were a "recent overt act."[24] Before making a legal conclusion, "[a] factual inquiry is necessary" to determine the person's history and mental condition.[25]

The court then considered the offender's diagnoses and history. The offender was diagnosed with pedophilia and sexual masochism. In 1973, he had been

[20] Id. at 125.

[21] Id. at 125.

[22] Id.

[23] 124 Wn. App. 344, 349-50, 101 P.3d 422 (2004).

[24] Id.

[25] Id. at 350.

convicted on a single count of indecent liberties.[26] In 1998, the offender entered an Alford[27] plea on a single felony charge of communicating with a minor for immoral purposes.[28] In addition to his prior convictions, he had "a history of offering young boys money, beer, or cigarettes to perform sadistic acts upon him while he masturbates."[29] Although the offender had entered an Alford plea, the court also considered the factual allegations behind his current incarceration for communication with a minor for immoral purposes.[30] The State alleged the offender had invited a 14-year-old girl to his home, given her beer, and asked the girl to perform various violent and sexual acts with him.[31]

During his incarceration from this conviction, the State filed a commitment petition.[32] Based upon the offender's diagnoses and history, the court concluded his communications with the girl "could only create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person."[33]

Similarly, in In re Detention of Hovinga, this court again relied upon unadjudicated facts to conclude an accused SVP had been incarcerated for a

[26] Id. at 346.

[27] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[28] McNutt, 124 Wn. App. at 346.

[29] Id. at 351.

[30] Id. at 349, 351.

[31] Id. at 351.

[32] Id. at 346.

[33] Id. at 351.

statutory "recent overt act."[34] The accused SVP was first incarcerated in 1981 after entering an Alford plea to first degree statutory rape of a nine-year-old girl.[35] He was released on parole in 1988.[36] After a store security camera recorded him following young girls around the store while masturbating, his parole was revoked.[37] The State filed the commitment petition while the accused SVP was still incarcerated following his parole violation.[38] In his parole revocation hearing, the accused SVP admitted he had been recorded following the girls while masturbating, and he admitted to doing the same thing six to eight other times.[39] Based upon this history and the accused SVP's mental conditions, the court concluded the act that caused his parole revocation constituted a "recent overt act."[40]

Here, Quinn challenges several written and oral findings of fact because they were based upon "unproven, disputed allegations."[41] But, as shown by Brown, McNutt, and Hovinga, the trial court is free to consider more than a verdict form or stipulated facts in a plea agreement when evaluating, as RCW 71.09.020(13) requires, an accused SVP's "history and mental conditions" to determine if an act constitutes a "recent overt act." Because the trial court could consider a range of

[34] 132 Wn. App. 16, 24, 130 P.3d 830 (2006).

[35] Id. at 18.

[36] Id. at 19.

[37] Id. at 19.

[38] Id. at 22.

[39] Id. at 24.

[40] Id.

[41] Appellant's Br. at 16.

evidence from Quinn's history of established convictions to determine whether his 2010 possession of child pornography constituted a recent overt act, the court did not err by entering its written and oral findings of fact.[42]

Quinn contends the trial court erred by concluding his possession of child pornography constituted a recent overt act when "[t]here was no evidence that possessing two images of pornography triggered him to act in a sexually violent manner."[43] But the correct legal question is "whether an objective person knowing the factual circumstances of the individual's history and mental condition would have a reasonable apprehension that the individual's act would cause harm of a sexually violent nature."[44] The record here supports the trial court's conclusion.

Quinn has been diagnosed with pedophilic disorder, nonexclusive type, with a sexual attraction to females, antisocial personality disorder, an intellectual disability, and two substance use disorders. Quinn has reported he does "stupid things" and becomes "angry and mean" when drinking.[45] Substance use may have played a role in some of his sexual conduct, such as assaulting and falsely imprisoning the 15-year-old. Also, the court found Quinn has never acknowledged his inappropriate

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[42] Although Quinn styles his assignments of error as a substantial evidence challenge, he makes legal arguments only and does not argue insufficient evidence supported the trial court's findings. Nor does he cite to the record to demonstrate the insufficiency of the evidence. Thus, we decline to review the challenged findings of fact for substantial evidence. See Matter of Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) ("It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument.") (citing RAP 10.3).

[43] Appellant's Br. at 22.

[44] Marshall, 156 Wn.2d at 158 (citing McNutt, 124 Wn. App. at 350).

[45] CP at 524.

sexual behavior. It found he was an "untreated" sex offender who has declined to participate in treatment, even when offered the opportunity.[46] And it found he "clearly has the ability to make plans and execute them" and has poor impulse control.[47]

In 1993, Quinn was convicted of a violent sex crime for molesting two seven-year-old girls. He was convicted of third degree assault and false imprisonment in 2005 after dragging a 15-year-old girl into his home, attempting to grope her breasts, and forcing his hands down her pants. And in 2010, although the State chose to charge Quinn with only two counts of possession of child pornography, detectives actually found 10 images of child pornography showing prepubescent girls in sexually provocative positions. Officers found photos Quinn took of a prepubescent girl's clothed vaginal area and of young children wrestling. They also found photos of neighborhood children that Quinn took "from his apartment window as if he was surveilling the children."[48]

In addition to the child pornography and photos of neighborhood children, police officers found three pairs of girl's underwear in Quinn's bedroom, which were stashed with child pornography under his mattress. They found "countless" children's toys, stickers, magazines, stuffed animals, and costumes in Quinn's bedroom.[49] Officers found dozens of scraps of paper each with female names, phone numbers, and social networking website screen names.

[46] Report of Proceedings (Feb. 28, 2019) at 17.

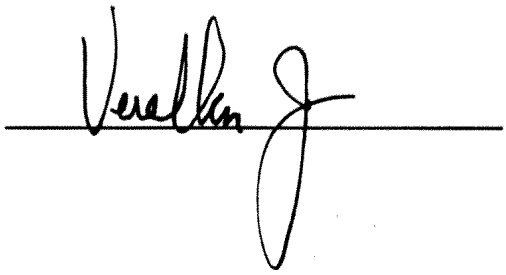
[47] Id. at 16.

[48] Id. at 15.

[49] CP at 275.

Based upon Quinn's mental conditions and history, an objective person would have a reasonable apprehension of harm of a sexually violent nature due to Quinn's possession of child pornography. The trial court did not err by concluding Quinn's 2010 convictions constituted a recent overt act.

Therefore, we affirm.



WE CONCUR:

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. 80843-5-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:

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Washington Appellate Project

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