NO. 91385-4

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of John Anderson:

STATE OF WASHINGTON,

Respondent.

v.

JOHN ANDERSON,

Petitioner.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

II. DECISION BELOW

The decision below is an unpublished decision by the Court of Appeals, Division II, that affirmed a superior court order civilly committing John Anderson as a sexually violent predator (SVP). *In re Detention of Anderson*, 2015 WL 422973 (*Anderson* III, attached as Appendix 1).

III. ISSUES PRESENTED FOR REVIEW

This Court should deny review because the decision below does not meet any of the RAP 13.4(b) criteria. The State does not seek review of any issues; however, if the Court were to accept review, the following issues would be presented:

1. **Anderson argued below that the trial court lacked subject matter jurisdiction because RCW 71.09.030(1)(e) allows an SVP petition only where a person has been "convicted" of a predicate offense, and as a juvenile Anderson could not be considered to have been "convicted" of a crime. Did the Court of Appeals err by concluding that the Superior Court had subject matter jurisdiction over the SVP petition?**

2. **This Court has previously concluded that: "Anderson's sexual activities at WSH could constitute overt acts." *In re Detention of Anderson*, 166 Wn.2d 543, 550, 211 P.3d 994 (2009) (*Anderson* II). Did the Court of Appeals err in concluding that this law of the case controlled at trial, and that sufficient evidence proved Anderson had committed a recent over act?**

3. **Whether the Court of Appeals correctly concluded that there was sufficient evidence to prove that Anderson committed a recent overt act?**

IV. COUNTER STATEMENT OF THE CASE

A. Procedural History

In February 2000, the State filed a petition to civilly commit Anderson as a sexually violent predator pursuant to RCW 71.09. *In re Detention of Anderson*, 134 Wn. App. 309, 315, 139 P.3d 396 (2006) (*Anderson* I). The petition was tried to the court in April 2004 and Anderson was civilly committed. *Id.* at 315-18. The Court of Appeals reversed the commitment, holding the trial court abused its discretion by denying Anderson a second expert prior to trial. *Id.* at 321-22. Both parties sought review and this Court affirmed. *Anderson* II, 166 Wn.2d 543. On remand, the petition was tried to a jury in May 2013, Anderson was civilly committed and his appeal therefrom was denied. *Anderson* III.

B. Substantive History

1. Anderson's Sexually Violent Offense

On June 29, 1988, Anderson was found to have committed Statutory Rape First Degree, a sexually violent offense pursuant to RCW 71.09.020. Exs. 2, 3. As a 17-year-old, Anderson had anally raped a two-and-a-half-year-old boy. Ex. 2. The sentencing court found a manifest injustice based upon the brutality of the crime, the vulnerability of the victim, and the danger Anderson posed to the community. Ex. 3. Following completion of his sentence, Anderson voluntarily committed himself to Western State Hospital (WSH), arriving in June 1990. Ex. 8 at 31. He remained there for a decade and when he sought to leave in February 2000 the State filed an SVP petition. Ex. 8 at 33, Ex. 191; RP 798-99, 853, 874; *Anderson* II, 166 Wn.2d at 547-48.

2. Anderson's Sexual Offense History

When Anderson was 13 years old, he manipulated his cousin into fellating him. Ex. 8 at 7. Also at the age of 13, he sexually fantasized about his five-year-old neighbor. Ex. 8 at 9. Anderson attempted to lure a different five-year old girl to a park to rape her. Ex. 8 at 10. When he was 15 years old, he had anal sex with a 13-year-old neighbor. Ex. 8 at 15. The boy told Anderson to stop; but Anderson did not. Ex. 8 at 15.

At the age of 15, Anderson raped a two-and-a-half-year-old boy he was babysitting.[1] Ex. 8 at 16. Anderson removed the child's diaper, laid him face down on his mother's bed, and inserted his penis into the screaming child's anus. Ex. 8 at 16-17. Anderson went on to rape the child as many as 12 to 13 times. Ex. 8 at 18. On one occasion Anderson covered the toddler's head with a pillow to muffle his screams, and ejaculated inside him. Ex. 8 at 18-19. In between the rapes, Anderson fantasized about sexually assaulting the child. Ex. 8 at 20.

While confined at Maple Lane School for his conviction for the rape of B.H., Anderson exposed his penis on several occasions to a female staff member. Ex. 8 at 24-25. On September 15, 1989, Anderson pleaded guilty to Public Indecency for exposing himself at Maple Lane and was sentenced to 90 days in the Thurston County Jail. Exs. 4, 5.

After Anderson arrived at WSH in June 1990, he engaged in sexual contact with other patients, some of whom were developmentally disabled or delayed. Ex. 8 at 31-36; *Anderson* II, 166 Wn.2d at 547.

3. Dr. Larry Arnholt

The State presented expert testimony from Dr. Larry Arnholt, a licensed psychologist and certified sex offender treatment provider. RP 454-55. Dr. Arnholt worked with Anderson from July 1994 to 1998

[1] This is a different victim from Anderson's sexually violent offense conviction.

and again around 2000. RP 457. Dr. Arnholt testified that Anderson was voluntarily committed to WSH and could have requested to leave the hospital at any point. RP 458. However, if the physicians believed that he was not ready, the county-designated mental health professional would have been contacted to detain him. RP 458; *See* RCW 71.05.050.

Dr. Arnholt described Anderson's authorized leaves from WSH. RP 461. A doctor or psychiatrist at WSH issues an order allowing certain individuals to be out of hospital grounds, to a specific place for a specific amount of time. RP 461, 462. During his leaves, Anderson was not allowed to have any contact with minors, or to use drugs and alcohol. RP 462-63. Additionally, he was never allowed to leave on his own—he had to be chaperoned by his mother. RP 463.

Dr. Arnholt recalled that Anderson had sexual contact with four WSH patients: R.W., D.P., B.B., and C.S.[2] RP 465-70. R.W. was a vulnerable, emotionally unstable individual with borderline personality disorder. RP 466-67. D.P. was a vulnerable, moderately retarded individual, with an IQ of 45. RP 469. B.B. was moderately retarded. RP 470. C.S. was at least mildly retarded and had an IQ around the 60 or 70 range. RP 470-71.

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[2] These victims are identified by their initials to protect their privacy consistent with RCW 71.05.385(3) and .390(19).

4. Dr. Amy Phenix

The State presented expert testimony from Dr. Amy Phenix, a licensed psychologist who specializes in sex offender risk evaluation and assessment. RP 491. She reviewed records about Anderson's criminal history, school history, and institutional and mental history. RP 499. Dr. Phenix also interviewed Anderson on two occasions. RP 498-99. She diagnosed him with: sexual sadism; pedophilia, sexually attracted to males and females, non-exclusive type; and a personality disorder not otherwise specified, with antisocial, borderline and narcissistic traits. RP 501, 538. Dr. Phenix opined that these disorders qualify as a mental abnormality. RP 553-555. She testified that Anderson was likely to engage in predatory acts of sexual violence if not confined in a secure facility. RP 561.

Dr. Phenix reached these conclusions based on a risk assessment that utilized actuarial instruments and research factors that aggravate or mitigate an offender's recidivism risk. RP 635-36. Actuarial instruments are tools that assess an offender's recidivism risk compared to other offenders with similar characteristics. RP 567. They are known to under-predict overall risk. RP 578. Dr. Phenix utilized the Static 99R and the Static 2002R. RP 567. Anderson received a score of five on the Static 99R, placing him in the medium high level for reoffending. RP 569.

Anderson received a score of nine on the Static 2002R. RP 577. That score placed Anderson in the high risk range, with a 41.6 percent chance of reconviction in the next five years, and 52.3 percent chance in the next ten years. RP 569-70. Dr. Phenix also measured Anderson's psychopathy using the Hare Psychopathy Checklist – Revised (PCL-R). RP 581. Anderson scored 32.2 out of 40, which indicated the presence of psychopathy. RP 580.

Finally, Dr. Phenix analyzed protective factors that could reduce Anderson's risk of sexual reoffense, if they were present. RP 620. These included: (1) Whether he had lived in the community for ten years without offending; (2) whether he has 15 or less years of lifetime expectancy due to illness or physical conditions; (3) whether he is of advanced age; and (4) whether he received sexual deviancy treatment. RP 620-21. After considering these factors as they related to Anderson, Dr. Phenix opined that he continued to have a high risk to reoffend. RP 636.

5. Maureen Saylor

The State also presented expert testimony from Maureen Saylor, a licensed Sex Offender Treatment Provider. RP 681. Anderson was referred to Ms. Saylor in 1990 by the adult psychiatric unit where he had been admitted. RP 684. She saw him almost weekly while he was in the observation ward at WSH. RP 684. Ms. Saylor performed the first penile

plethysmograph (PPG) testing of Anderson in 1991. RP 684-85. He showed significant arousal to almost all of the stimuli he heard and at least 70 percent of the slides that he viewed. RP 686. Significant arousal is identified at 20 percent of full arousal or greater. RP 686. Anderson showed 94 percent arousal to rape of a minor male, and 29 percent arousal to sadism with a minor male. RP 687.

Ms. Saylor conducted another PPG in 1998. RP 689-690. Anderson showed 100 percent arousal to rape of a minor female, 87 percent to minor female sadism, and 44 percent to a tape depicting just physical aggression. RP 695. When asked to suppress his urges he was able to reduce the arousal to four percent. RP 696. His ability to reach those levels of arousal was particularly surprising because Anderson was on Depo-Provera, a drug specifically designed to decrease arousal. RP 696.

V. REASONS WHY REVIEW SHOULD BE DENIED

A. Standard for Accepting Review

A petition for review is granted when there is a conflict between the Court of Appeals decision and a decision of this Court, a conflict within the Court of Appeals, a significant constitutional question, or a question of significant public interest. RAP 13.4(b).

Although on the third page of his petition Anderson suggests in passing that three of these criteria apply, he never mentions them again or provides any argument supporting acceptance of review under RAP 13.4(b). The State is uncertain to which criteria Anderson addresses his arguments. The Court should deny review because of Anderson's failure to address the applicable criteria and because his petition does not present a significant constitutional question, an issue of substantial public interest, or a conflict in Washington appellate law.

B. The Court of Appeals' Holding That the Trial Court Had Subject Matter Jurisdiction Over the SVP Petition Does Not Warrant Review Under RAP 13.4(b)

Anderson argued in the trial court and in the Court of Appeals that the trial court lacked subject matter jurisdiction. Both courts correctly rejected that argument. In this Court, Anderson attempts to cast his argument as something other than subject matter jurisdiction. He now claims that the trial court exceeded its statutory authority. The Court of Appeals, however, correctly rejected Anderson's subject matter jurisdiction argument and Anderson cannot raise a new claim in his Petition for Review.

1. Having Challenged Subject Matter Jurisdiction Below Anderson Cannot Raise a New Issue in His Petition For Review

In November 2012, Anderson filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction based on CR 12(b) and CR 12(h)(3). CP at 144. He argued that the trial court lacked subject matter jurisdiction over the State's SVP petition. CP at 144. On December 3, 2012, Anderson's trial counsel argued the motion "concerning the subject matter jurisdiction." 12/3/12 VRP at 54, 58. The trial court ruled: "So I am going to deny that motion for subject matter jurisdiction." 12/3/12 VRP at 133.

In his Division II Brief of Appellant, Anderson's first assignment of error reads: "The court lacked subject matter jurisdiction to try Mr. Anderson under RCW 71.09." Brief of Appellant at 1. Anderson's brief then argued that the trial court lacked subject matter jurisdiction. *Id.* at 15. The Court of Appeals correctly recognized that "Anderson has failed to define any error regarding RCW 71.09.030(1)(e) as anything other than a lack of subject matter jurisdiction." *Anderson* III at *4. The court concluded that the superior court had subject matter jurisdiction to preside over an SVP petition and rejected Anderson's challenge. *Id.*

His subject matter jurisdiction claim rejected below, Anderson now claims the trial court "exceeded its statutory authority[.]" Petition for Review at 3. This Court should decline to grant review of this new claim

because it was not raised in either the trial court or the Court of Appeals. RAP 2.5(a); *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) (generally, parties cannot raise a new issue in a petition for review).

2. The New Issue Does Not Warrant Review Because There was Statutory Authority to Try the SVP Petition

Anderson now argues that the trial court lacked statutory authority to hold a trial because RCW 71.09 does not permit a petition to be filed where a person has committed a sexually violent offense as a juvenile and then commits a recent overt act after release from confinement. Petition for Review at 3-10. His foundational premise is that juveniles cannot be "convicted" of offenses and the legislature's use of that term in RCW 71.09.030(1)(e) shows intent to preclude petitions under facts such as those in this case.

Anderson's claim does not merit review because, while juveniles cannot be considered to be convicted of crimes or felonies, they can be convicted of "offenses," including, in this case, of a "sexually violent offense." A plain reading of the statute in the context of related provisions and the statutory scheme as a whole demonstrates that the legislature intended to permit the filing of sexually violent predator petitions under the facts presented here. Thus, this claim in Anderson's Petition does not

present a significant constitutional question, an issue of substantial public interest, or a conflict in Washington appellate law. RAP 13.4(b).

a. Applicable Statutory Interpretation Standards

When interpreting a statute, a court's fundamental objective is to ascertain and carry out the legislature's intent. *In re Detention of Mines*, 165 Wn. App. 112, 120, 266 P.3d 242 (2011). Where a statute's meaning is plain on its face, a reviewing court must give effect to that plain meaning to carry out legislative intent. *Id.* Plain meaning is derived not only from the ordinary meaning of the statute's language, but also from the context of the statute in which a specific provision is found, related provisions, and the statutory scheme as a whole. *Id.*

b. Juveniles Can Be "Convicted" of "Offenses"

A sexually violent predator, among other things, must have been convicted of a "sexually violent offense." RCW 71.09.020(18). The term "sexually violent offense" includes a number of sexual crimes identified in RCW 71.09.020(17). Additionally, if the person is living in the community when the petition is filed, the State must show the person to be currently dangerous by proving he has committed a "recent overt act." RCW 71.09.020(12), .060(1).

RCW 71.09.030(1) provides, in pertinent part, that a petition "may be filed" when: (e) a person previously *convicted* of a sexually violent

offense who has been released has committed a recent over act (emphasis added). Anderson argues that the term "convicted" in RCW 71.09.030(1)(e) indicates the Legislature intended to apply that provision only to those who committed a predicate offense as an adult. Petition for Review at 7-10. He asserts that, based on RCW 13.04.240, juveniles cannot be convicted of crimes.[3] *Id.* at 7. Thus, he argues, juveniles cannot be considered to have been convicted of a "sexually violent offense" as that term is defined in RCW 71.09.020(17) and used in RCW 71.09.030(1)(e). Anderson is incorrect because juveniles can be convicted of an "offense." *See State v. Michaelson*, 124 Wn.2d 364, 367, 878 P.2d 1206 (1994) ("While a juvenile cannot be convicted of a felony, he or she can be convicted of an offense as contemplated by RCW 46.20.270(4)."); *State v. McKinley*, 84 Wn. App. 677, 681, 929 P.2d 1145 (1997) ("The term 'offense' applies equally to adult and juvenile crimes.") (citing *In re A, B, C, D, E*, 121 Wn.2d 80, 87, 847 P.2d 455 (1993)).

This Court has noted that other juvenile justice statutes often use the term "conviction" to apply to both juvenile and adult offenses. *Juveniles A, B, C, D, E*, 121 Wn.2d at 87-88 (statute mandating HIV

[3] RCW 13.04.240 provides: "An order of court adjudging a child a juvenile offender or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime."

testing for sexual offenders applies to juvenile sex offenders). The Court noted that "the Legislature's use of 'conviction' in statutes to refer to juveniles appears to be endemic." *Id.* at 87 (citing other statutes).

Here, the plain language of RCW 71.09 authorizes petitions against individuals whose predicate offenses were committed when they were juveniles. First, its notification procedures explicitly include juvenile offenders in the class of those whose imminent release from confinement requires a referral to a prosecuting attorney. RCW 71.09.025(1)(a)(ii). Second, RCW 71.09.030(1)(b) explicitly includes juvenile offenders who are about to be released from confinement in the group of individuals against whom petitions can be filed. *Dependency of Q.L.M. v. State, Dep't of Soc. & Health Servs.*, 105 Wn. App. 532, 536-37, 20 P.3d 465 (2001) (citing RCW 71.09.030). Because those who commit offenses as juveniles can be considered to have been "convicted" of an offense, the Legislature included in RCW 71.09.030(1)(e) offenders who were "convicted" of a sexually violent offense as a juvenile and who later commit a "recent overt act." The plain language of the statute compels this conclusion.

It is clear the Legislature frequently uses the term "convicted" to refer to juvenile adjudications. The endemic use of the term shows the Legislature did not intend to exclude those with juvenile predicate

offenses when it adopted RCW 71.09.030(1)(e). Anderson's argument should be rejected and his civil commitment order affirmed.

C. The Court of Appeals Correctly Concluded That Anderson's Sexual Acts at Western State Hospital Could Constitute Recent Overt Acts as a Matter of Law

Anderson argues that what he characterizes as consensual adult sexual activity cannot constitute a recent overt act.[4] Petition for Review at 10-12. But the issue of whether predatory sexual behavior with adults can legally constitute a recent overt act in a case involving a pedophilia diagnosis was already decided in *Anderson* II. This issue does not merit review under RAP 13.4(b).

Anderson's argument misinterprets the prior holding from *Anderson* II. The Court of Appeals correctly rejected his argument because the issue was already decided against him in the prior appeal. *Anderson* II, 166 Wn.2d at 550 ("Anderson's sexual activities at WSH could constitute overt acts."). In so deciding, *Anderson* II noted that confined pedophiles may sometimes use vulnerable adults when their preferred victims are unavailable. *Id.* at n.6 ("This court has previously decided that sex with a developmentally disabled person may have a nexus

[4] RCW 71.09.020(12) defines "recent overt act" as follows:

"Recent over 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.

to child sex.") (citing *In re Detention of Marshall*, 156 Wn.2d 150, 159, 125 P.3d 111 (2005)).

Here, the Court of Appeals correctly concluded that this holding was the law of the case at the trial below and that, while the State would still have to prove that Anderson committed the alleged acts, the legal issue had been decided:

> Our Supreme Court held that Anderson's sexual contacts with vulnerable WSH patients, whether consensual or not, could constitute a "recent overt act" as a matter of law. *Anderson II,* 166 Wn.2d at 550. Under the law of the case doctrine we will not revisit whether Anderson's sexual contacts constitute a recent overt act as a matter of law. To the extent Anderson argues that insufficient evidence supports a factual finding that his sexual contacts meet the definition of recent overt act, his argument is addressed below.

Anderson III, 2015 WL 422973 at *4-5.

Anderson appears to confuse the issue of whether sex with vulnerable adults could constitute a recent overt act as a matter of law, with whether the State was required to prove a recent overt act at trial. Petition for Review at 12 ("In this case, this Court expressly held that whether the acts were recent and overt would need to be proved at a second trial. . . . In declining to review the issue raised on appeal, the Court of Appeals' decision is in direct conflict with this Court's ruling."). The recent overt act issue, however, was: (1) alleged by the State;

(2) the subject of extensive testimony presented by both parties at trial; (3) an element on which the jury was instructed; and (4) an element the jury found to have been proved beyond a reasonable doubt by the State. CP at 755, 772.

Anderson also asserts that the overt acts alleged by the State cannot be considered "recent" because they occurred from 1990 through 1999 and can therefore have no bearing on his current dangerousness. He again raises an issue which is controlled by the law of this case. *Anderson* II, 166 Wn.2d at 550 ("Anderson's overt acts were recent."). Anderson has not shown any basis under RAP 13.4(b) for reviewing *Anderson* III and his petition should be denied.

D. The Court of Appeals Correctly Concluded That the State Had Proved Anderson Committed a Recent Overt Act

Anderson challenges the sufficiency of the evidence supporting the jury's finding that he committed a recent overt act. The State produced substantial evidence that Anderson's sexual relationships with four vulnerable and mentally disabled WSH patients constituted recent overt acts. The State's expert, Dr. Phenix, considered Anderson's sexual acts with vulnerable patients that occurred from 1990 through 1999 and opined that he had committed recent overt acts. RP 627-28, 634. She testified it was not an unusual occurrence, as recognized by professionals in her field

of expertise, that persons with pedophilia sometimes turn towards other types of victims when children are not available. RP 632. A key link is that children are vulnerable, and so were the WSH patients. RP 629. Dr. Phenix testified:

> So there is a parallel of taking advantage of vulnerable people that you can have control over and recognizing that they are really immature and child-like, similar to the kinds of victims that he had in the community.

RP 629. In fact, a major goal of sex offender treatment is to stop the person from targeting people who are child-like and vulnerable due to mental disability. RP 632-33. Dr. Phenix discussed her knowledge of each of the four men Anderson targeted, why their disabilities made them vulnerable and why these acts led her to believe that Anderson was currently dangerous. RP 628-32.

Dr. Larry Arnholt also testified about the vulnerabilities of the four men with whom Anderson had sexual contact and his concern about Anderson's behaviors. RP 466-71. He and Anderson's treatment team tried to get Anderson to stop having sex with vulnerable patients; they made it clear to him that it was similar to his offending against children. RP 817. Dr. Arnholt testified:

> Yes, there were many occasions when it was pointed out to Mr. Anderson that the developmentally disabled individuals are in many ways child-like in their emotional

> and intellectual development, and there were some parallels.

RP 817. Anderson understood what they were telling him. RP 818. He was quite intelligent and had a "cognitive emotional power differential" with the vulnerable residents. RP 818. That is to say, his high functioning gave him a position of power on the unit. RP 818. Yet, he told Dr. Arnholt that he sometimes "felt powerless" to stop having sex with a vulnerable patient. RP 819. At one point, Anderson told Dr. Arnholt there had been an "improvement" in his relations with a vulnerable patient because, instead of having the patient fellate him, Anderson had the patient anally penetrate him. RP 819-20. That patient immediately afterward decompensated and regressed in his treatment. RP 820. Dr. Arnholt also acknowledged an incident in August 1999, when WSH staff intervened because Anderson was circling a tub in which a patient was bathing, while holding his erect penis in his hand. RP 823.

Anderson's overt acts must be viewed in light of his WSH confinement. "[I]n considering whether an overt act, evidencing dangerousness, satisfies the recentness requirement, it is appropriate to consider the time span in the context of all the surrounding relevant circumstances." *In re Pugh*, 68 Wn. App. 687, 695-96, 845 P.2d 1034

(1993); *See also Froats v. State*, 134 Wn. App. 420, 437-40, 140 P.3d 622 (2006).

Lastly, it is the law of this case that, in determining whether Anderson's overt acts were recent, relevant periods of confinement and whether he had access to victims were to be considered. That was the trial court's instruction to the jury, and Anderson has not challenged that instruction. *See* CP at 761. Taking into account the law of this case, and viewing the evidence in light of Anderson's confinement and lack of access to child victims, the overt acts proved by the State must be considered recent at the time the State filed the SVP petition.

VI. CONCLUSION

Anderson has not established a basis for review by this Court. The State respectfully requests that the Court deny his petition for review.

RESPECTFULLY SUBMITTED this 30TH day of March, 2015.

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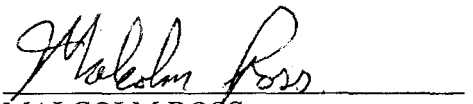

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Appendix 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Detention of JOHN CHARLES ANDERSON, Appellant.	No. 45000-3-II UNPUBLISHED OPINION

SUTTON, J. — After approximately 13 years, 2 trials, and 2 appeals, the trial court ordered John Charles Anderson committed to the Special Commitment Center at McNeil Island as a sexually violent predator. Anderson appeals his commitment, arguing that (1) the trial court lacked subject matter jurisdiction to commit him under RCW 71.09.030(1)(e)[1]; (2) his sexual contacts with mental patients during his voluntary commitment do not qualify as a "recent overt act" as a

[1] RCW 71.09.030(1) states:

> A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that: (a) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement; (b) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement; (c) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released, pursuant to [former] RCW 10.77.086(4) [(2012)]; (d) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released, pursuant to RCW [ ]10.77.020(3), 10.77.110(1) or (3), or 10.77.150; or (e) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.

matter of law; and (3) there is insufficient evidence to support the jury's verdict finding that he is a sexually violent predator. We affirm.

FACTS

Anderson's case began 26 years ago when Anderson, then 17 years old, anally raped a two-and-a-half-year-old boy. In May 1988, Anderson pleaded guilty to first degree rape of a child. The juvenile court imposed a manifest injustice sentence and sentenced Anderson to 100 weeks confinement at the Maple Lane School. While at Maple Lane, Anderson exposed himself to a female staff member at the school. Anderson was convicted of indecent exposure and sentenced to 45 days in jail. After serving his sentence, Anderson returned to Maple Lane. At this point, Anderson began expressing sadistic and homicidal ideations including sexually explicit, violent fantasies about the woman to whom he exposed himself.[2]

In 1990, after Anderson was released from Maple Lane, he voluntarily committed himself to Western State Hospital (WSH). Anderson stayed at WSH as a voluntary patient for 10 years. *In re Det. of Anderson*, 166 Wn.2d 543, 547, 211 P.3d 994 (2009) (*Anderson* II). During his time at WSH, Anderson earned grounds privileges and authorized leave with his mother. Anderson also engaged in sexual contacts with at least four other male patients at WSH. Three of the male patients suffered from developmental disabilities. The fourth patient suffered from severe mental illness. Although Anderson was repeatedly counseled to stop engaging in sexual contacts with other patients, he did not.

[2] Anderson's sexual history also includes a disturbing litany of sexually violent and deviant behavior prior to Anderson's incarceration at Maple Lane.

When the State was notified that Anderson was going to leave WSH, it filed a petition in 2000 to have Anderson committed at the Special Commitment Center (SCC) as a sexually violent predator. *Anderson* II, 166 Wn.2d at 547. The State conceded that Anderson had not been in total confinement while at WSH; therefore, it had to prove a recent overt act.[3] *Anderson* II, 166 Wn.2d at 549. The State alleged that Anderson's relationships while at WSH were recent overt acts that proved Anderson's current dangerousness. *Anderson* II, 166 Wn.2d at 549-50. In 2004, four years after the State filed its petition, Anderson's case proceeded to a bench trial. *In re Det. of Anderson*, 134 Wn. App. 309, 315, 139 P.3d 396 (2006) (*Anderson* I), *aff'd*, 166 Wn.2d 543, 211 P.3d 994 (2009). The trial court entered an order committing Anderson to the SCC as a sexually violent predator. *Anderson* II, 166 Wn.2d at 548. Anderson has been confined in the SCC since the State filed its original petition to commit him as a sexually violent predator. *Anderson* II, 166 Wn.2d at 547-48.

Anderson appealed the 2004 order committing him to the SCC as a sexually violent predator. *Anderson* I. In that appeal, Anderson argued that (1) the trial court erred by denying his motion to appoint another expert to testify at his trial, and (2) that his relationships at WSH could not be considered recent overt acts because they were consensual relationships with adult men. *Anderson* I, 134 Wn. App. at 312, 323. In 2006, we reversed the trial court's order committing Anderson because the trial court abused its discretion by failing to appoint a new expert to testify for Anderson at his trial; we remanded for a new trial. *Anderson* I, 134 Wn. App. at 321-22. And,

[3] A recent overt act is "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(12).

we determined that whether Anderson's relationships were recent overt acts was an issue of fact that the State bears the burden of proving to the jury. *Anderson* I, 134 Wn. App. at 322-24.

Both parties appealed our decision to the Washington State Supreme Court. *Anderson* II, 166 Wn.2d at 546. The Supreme Court affirmed our decision. *Anderson* II, 166 Wn.2d at 552. The court held that Anderson's sexual contacts with mental patients could be considered recent overt acts. *Anderson* II, 166 Wn.2d at 550. However, our Supreme Court also noted that "[w]hether or not Anderson's conduct amounted to a recent overt act, as with the other elements of the State's case, [would] have to be proved at that new trial." *Anderson* II, 166 Wn.2d at 552.

Prior to his second commitment trial in April 2013, Anderson moved to dismiss the State's petition. Anderson argued that the trial court lacked subject matter jurisdiction to commit him under RCW 71.09.030(1)(e). The trial court denied Anderson's motion to dismiss and the State's petition to commit Anderson as a sexually violent predator proceeded to a jury trial.

Dr. Larry Arnholt, Anderson's treating psychologist at WSH from 1994-2000, testified at trial. He testified that, although sexual relationships were not explicitly prohibited, they were discouraged. Throughout Anderson's treatment at WSH, Anderson was repeatedly counseled about his relationships with other patients. Arnholt stated that "there were many occasions when it was pointed out to Mr. Anderson that the developmentally disabled individuals are in many ways child-like in their emotional and intellectual development, and there were some parallels." 10 Report of Proceedings (RP) at 817. It was made clear to Anderson that he should not be engaging in those relationships because it was similar to what he had done with children. And, Anderson knew that his relationships with the men at WSH were "wrong," "hurtful," and "selfish". 10 RP at 840.

The State's expert, Dr. Amy Phenix, testified regarding Anderson's diagnoses and likelihood of reoffending. Phenix diagnosed Anderson with pedophilia, both male and female non-exclusive type, and sexual sadism. According to Phenix, neither pedophilia nor sexual sadism can be cured. They are permanent, life-long conditions that can only be managed. Phenix also diagnosed Anderson with a personality disorder with antisocial, borderline, and narcissistic traits. Antisocial personality traits include violating the rights of others, committing crimes, lying, acting impulsively, and being aggressive, irritable, and irresponsible. People with borderline personality traits have extreme difficulties with interpersonal relationships, have an unstable mood and self-image, and see themselves as victims rather than taking responsibility for their actions. And, narcissistic personality traits include being self-focused and selfish with a grandiose sense of self. Narcissistic personalities also lack empathy which enables them to be exploitive of others.

Phenix opined that Anderson's relationships during his time at WSH were recent overt acts because they demonstrated a continued pattern of taking advantage of vulnerable victims. She explained that the developmentally delayed and mentally ill men that Anderson became involved with were child-like in the sense that they were simplistic, immature, and easy to control. Phenix expressed particular concern because Anderson was counseled about the inappropriate nature of the relationships and he understood the parallels between children and vulnerable victims; however, Anderson chose to continue engaging in the sexual behavior. Ultimately, Phenix opined that, to a reasonable degree of psychological certainty, Anderson had committed recent overt acts by engaging in these relationships during his commitment at WSH.

Phenix testified that Anderson's pedophilia, sexual sadism, and personality disorders all affect his volitional capacity. Phenix stated that she believed Anderson would continue to have

"serious difficulty with his volition once he is released." 8 RP at 557. And, although treatment could allow a person to improve their volition, she did not believe that applied to Anderson. Phenix testified that Anderson had not made significant treatment gains while at WSH and he had not meaningfully participated in treatment since being confined at the SCC for 13 years. She expressed particular concerns about Anderson's inability to identify high risk factors because he admitted he was "'out of practice.'" 8 RP at 622. Phenix opined that Anderson had a high risk of reoffending.

The jury found that the State proved beyond a reasonable doubt that Anderson was a sexually violent predator. The trial court entered an order committing Anderson. Anderson appeals.

ANALYSIS

Anderson argues that (1) the trial court lacked subject matter jurisdiction to commit him under RCW 71.09.030(1)(e); (2) his sexual contacts with mental patients were consensual and too remote in time to qualify as a "recent overt act" as a matter of law; and (3) there is insufficient evidence to support the jury's verdict finding that he is a sexually violent predator. We disagree.

A. SUBJECT MATTER JURISDICTION

First, Anderson argues that the trial court lacked subject matter jurisdiction because RCW 71.09.030(1)(e) does not apply to him. He frames this argument as an issue of subject matter jurisdiction, which can be raised at any time, presumably to account for the fact that he declined to raise the issue during his first trial, during his first appeal to our court, and during his appeal to the Supreme Court. However, Anderson is mistaken; whether RCW 71.09.030(1)(e) applies to him is not an issue of subject matter jurisdiction. Because Anderson has failed to offer any other

reason why the law of the case doctrine does not bar him from raising this issue after his failure to raise it in either of his prior appeals, we consider only his argument of subject matter jurisdiction.

"Subject matter jurisdiction refers to a court's ability to entertain a *type* of case, not to its authority to enter an order in a particular case." *In re Marriage of Buecking*, 179 Wn.2d 438, 448, 316 P.3d 999 (2013) (emphasis added), *cert. denied*, 135 S. Ct. 171 (2014). The Washington State Constitution grants superior courts subject matter jurisdiction over all types of cases unless jurisdiction is vested exclusively in another court. WASH. CONST. art. IV, § 6. "'If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.'" *In re Marriage of McDermott*, 175 Wn. App. 467, 482, 307 P.3d 717 (2013) (quoting *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 209, 258 P.3d 70 (2011)), *review denied*, 179 Wn.2d 1004 (2013).

Here, the type of controversy before our court was the State's petition to commit Anderson under RCW 71.09.030(1)(e) as a sexually violent predator. Under the Washington Constitution's broad grant of jurisdiction to the superior courts in article IV, section 6, the trial court had subject matter jurisdiction over the State's petition to commit Anderson as a sexually violent predator. Therefore, any error under RCW 71.09.030(1)(e) must go to something other than subject matter jurisdiction. *McDermott*, 175 Wn. App. at 482 (quoting *Cole*, 163 Wn. App. at 209).

Anderson has failed to define any error regarding RCW 71.09.030(1)(e) as anything other than a lack of subject matter jurisdiction. And, more importantly, he has offered no other justification for asking us, or the trial court, to consider this issue after more than 13 years, 2 trials, and 2 appeals. *State v. Elmore*, 154 Wn. App. 885, 896, 228 P.3d 760 (2010) ("Under the law of the case doctrine, we may refuse to address issues that were raised or could have been raised in a

prior appeal") (internal quotation marks omitted). Accordingly, we do not address the issue any further.

B. RECENT OVERT ACT AS A MATTER OF LAW

Anderson next argues that the State did not prove he committed a recent overt act[4] because: (1) his sexual contacts at WSH were consensual and thus cannot form the basis for a recent overt act, and (2) his sexual contacts at WSH from 1990-2000, 13 years ago from the date of trial in 2013, are too remote in time to be considered "recent." Br. of Appellant at 21.

1. Sexual Contacts as Recent Overt Acts

Whether an act is a "recent overt act" is a mixed question of law and fact. *In re Det. of Brown*, 154 Wn. App. 116, 121, 225 P.3d 1028 (2010) (citing *In re Det. of Marshall*, 156 Wn.2d 150, 158, 125 P.3d 111 (2005)). De novo review would normally apply. *Anderson* II, 166 Wn.2d at 549. But, "[w]here there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re[-]deciding the same legal issues in a subsequent appeal." *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988).

Anderson argues that, as a matter of law, consensual sexual relationships cannot be considered recent overt acts. Our Supreme Court held that Anderson's sexual contacts with vulnerable WSH patients, whether consensual or not, could constitute a "recent overt act" as a matter of law. *Anderson* II, 166 Wn.2d at 550. Under the law of the case doctrine we will not

[4] A "recent overt act" is "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(12). The trial court's instructions to the jury at trial included this definition which was not challenged on appeal.

revisit whether Anderson's sexual contacts constitute a recent overt act as a matter of law. To the extent Anderson argues that insufficient evidence supports a factual finding that his sexual contacts meet the definition of recent overt act, his argument is addressed below.

2. The Recency Requirement of an Overt Act

Anderson argues by the time of trial in May 2013 that his 1990-2000 sexual contacts were too remote in time to have any bearing on his current dangerousness since it had been 13 years since his commitment as a sexually violent predator in 2000.[5] We reject Anderson's argument. His argument ignores the unusual facts of this case. Anderson has been in confinement continuously since 1988 and not living in the outside community; first confined at Maple Lane from 1988-1990, then at WSH voluntarily from 1990-2000, and then confined to SCC from February 2000 continuously up to today.

Washington courts recognize the difficulty, if not impossibility, of requiring the State to prove a "recent overt act" when a person is confined and has not lived in or had access to the outside community. When an individual is incarcerated, the State is not required to produce evidence of a "recent overt act" because "'for incarcerated individuals, a requirement of a recent overt act under the Statute would create a standard which would be impossible to meet.'" *In re Det. of Albrecht*, 147 Wn.2d 1, 8, 51 P.3d 73 (2002) (quoting *In re Pers. Restraint of Young*, 122 Wn.2d 1, 41, 857 P.2d 989 (1993)). "Due process 'does not require that the absurd be done before

[5] In *Anderson* II, our Supreme Court held that Anderson's acts were recent based on the fact that the most recent act occurred two months before the State filed the petition. *Anderson* II, 166 Wn.2d at 550. The Supreme Court's opinion does not, however, resolve the specific issue Anderson raises before us—whether the intervening 13 years he was confined at the SCC prevent the acts from being considered recent.

a compelling state interest can be vindicated.'" *Albrecht*, 147 Wn.2d at 8 (internal quotation marks omitted) (quoting *Young*, 122 Wn.2d at 41).

Under this well-settled principle of law, the period of time from 1990-2000, is the relevant period to determine whether Anderson's sexual contacts at WSH are recent overt acts and the jury was instructed and found that these acts were a "recent overt act."

C. SUFFICIENCY OF THE EVIDENCE

Anderson claims insufficient evidence supports his sexually violent predator commitment. To prove that Anderson is a sexually violent predator, the State must prove that (1) he has a mental abnormality or personality disorder, (2) his mental abnormality or personality disorder makes him likely to engage in predatory acts of sexual violence if not confined to a secure facility, and (3) that Anderson committed a recent overt act. RCW 71.09.020(18), .060(1). The criminal standard of review applies to a sufficiency of the evidence challenge under RCW 71.09.030. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). "[T]he evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Thorell*, 149 Wn.2d at 744. All reasonable inferences must be drawn in favor of the State and interpreted most strongly against Anderson. *In re Det. of Audett*, 158 Wn.2d 712, 727, 147 P.3d 982 (2006). We do not second guess the credibility determinations of the fact finder. *In re Det. of Halgren*, 156 Wn.2d 795, 811, 132 P.3d 714 (2006). We defer to the trier of fact regarding conflicting testimony and the persuasiveness of the evidence. *In re Det. of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005).

Because the sufficiency of the evidence test requires that we look at the evidence in the light most favorable to the State, we do not consider whether there is evidence in the record

supporting Anderson's assertions that he does not meet the definition of a sexually violent predator. Anderson's argument requires us to reweigh his evidence against the State's evidence; and, we do not reweigh evidence on appeal. Therefore, our review is limited to looking at whether the State's evidence is sufficient to support the jury's findings on the specific elements Anderson challenges. Here, Anderson does not challenge the sufficiency of the evidence proving that he has a mental abnormality or personality disorder—pedophilia, sexual sadism, and a personality disorder with borderline, antisocial, and narcissistic traits. Instead he argues there is insufficient evidence to prove that (1) his mental abnormalities and personality disorder cause a lack of control over his behavior, and (2) he committed a recent overt act.

1. Lack of Control

Anderson argues that the State failed to prove that his mental abnormalities and personality disorder cause a lack of control over his sexually violent behavior. Although "lack of control" is not a separate element required for commitment of a sexually violent predator, the jury's findings "must support the conclusion that the person has serious difficulty controlling behavior." *Thorell*, 149 Wn.2d at 742. A diagnosis of a mental abnormality or personality disorder alone is not sufficient to support a finding of a serious lack of control. *Thorell*, 149 Wn.2d at 761-62. But, if the finder of fact finds that there is a link between the mental abnormality or personality disorder and the likelihood of future acts of predatory acts of sexual violence, the fact finder has necessarily made a finding that the offender seriously lacks control of his or her sexually violent behavior. *Thorell*, 149 Wn.2d at 742-43. Anderson does not dispute that he has been diagnosed with a mental abnormality or personality disorder, nor does he dispute that he is likely to engage in predatory acts of sexual violence if not confined. Therefore, the question is whether the State presented

evidence proving that there is a link between Anderson's mental abnormalities and personality disorders and the likelihood that he will engage in predatory acts of sexual violence if not confined to a secure facility.

Here, Dr. Phenix testified that Anderson suffered from pedophilia and sexual sadism which were incurable, life-long conditions. And, that without meaningful and continued participation in treatment, Anderson would not be able to control the urges resulting from these mental abnormalities. She also testified that the characteristics of his personality disorder resulted in a disregard for rules, disrespect for the rights of others, and selfish behavior that focused on meeting his own needs and desires. And, Phenix testified that she did not believe that Anderson had learned how to control his behavior because he had not meaningfully participated in treatment while confined at the SCC, did not meet all his treatment goals at WSH, and had stated that he was "'out of practice'" in recognizing his triggers for reoffending. 8 RP at 622.

Phenix explicitly opined that Anderson's mental abnormalities and personality disorder affected his volitional control, and, she did not believe that Anderson would be able to control his behavior in the community. Based on Phenix's testimony, the State presented sufficient evidence to prove that there was a link between Anderson's mental abnormalities and the likelihood that he would engage in predatory acts of sexual violence if not confined to a secure facility. Therefore, there was necessarily sufficient evidence to prove that Anderson's mental abnormalities and personality disorders resulted in a lack of control over his behavior.

2. Recent Overt Acts

Anderson next argues that the State failed to present sufficient evidence that his sexual contacts with patients at WSH were recent overt acts.

Dr. Phenix testified that Anderson's sexual contacts with the four male patients at WSH shared characteristics that were consistent with his prior sexual offenses. Like child victims, the male patients Anderson had sex with at WSH were vulnerable and presented Anderson with the opportunity to take advantage of them. Dr. Phenix specifically testified that Anderson's sexual contacts with other male patients at WSH demonstrated that he was currently dangerous. The State also presented evidence that Anderson was repeatedly counseled not to enter into or continue these sexual contacts because they indicated continued manifestations of his sexual pathology and interfered with his treatment. And, at trial, Anderson testified that he engaged in these sexual contacts because he was a "horny individual" and because he "felt like it" even though he knew these acts were wrong. 10 RP at 876. Ultimately, Phenix testified that, to a reasonable degree of medical certainty, Anderson's relationships at WSH qualified as recent overt acts.

The evidence, viewed in the light most favorable to the State, was sufficient to allow a jury to find beyond a reasonable doubt that Anderson's sexual contacts at WSH were "recent overt

acts" that created a reasonable apprehension of sexually violent harm.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

We concur:

Worswick, P.J.

Lee, J.

NO. 91385-4

WASHINGTON STATE SUPREME COURT

In re the Detention of: JOHN CHARLES ANDERSON, Appellant.	DECLARATION OF SERVICE

I, Joslyn Wallenborn, declare as follows:

On March 30, 2015, I sent via electronic mail a true and correct copy of Respondent's Answer to Petition for Review and Declaration of Service, addressed as follows:

Marie Trombley
marietrombley@comcast.net

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

DATED this 30th day of March, 2015, at Seattle, Washington.

JOSLYN WALLENBORN

OFFICE RECEPTIONIST, CLERK

To: Wallenborn, Joslyn (ATG)
Cc: Ross, Malcolm (ATG); marietrombley@comcast.net
Subject: RE: In re the Detention of John C. Anderson, WSSC no. 91385-4

Received 3-30-15

From: Wallenborn, Joslyn (ATG) [mailto:JoslynW@ATG.WA.GOV]
Sent: Monday, March 30, 2015 3:27 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Ross, Malcolm (ATG); marietrombley@comcast.net
Subject: In re the Detention of John C. Anderson, WSSC no. 91385-4

Good Afternoon,

Attached for filing and service is the Respondent's Answer to Petition for Review and Declaration of Service in the above-entitled case.

Filed on behalf of:

MALCOLM ROSS
WSBA #22883, OID #91094

Thank you,
Joslyn Wallenborn
Legal Assistant to Assistant Attorneys General Malcolm Ross, Fred Wist, and Farshad Talebi
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