SUPREME COURT NO. 91385-4

COURT OF APPEALS NO. 45000-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF JOHN C. ~~ANDERSON,~~

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Rules

A. IDENTITY OF PETITIONER

Petitioner John C. Anderson, asks this Court to review the decision by the Court of Appeals, Division II, referred to in Section B.

B. COURT OF APPEALS DECISION

Mr. Anderson seeks review of the Court of Appeals unpublished decision[1] that concluded the law of case doctrine barred him from raising the issue of whether he was one of the individuals subject to the defined classes of individuals subject to RCW 71.09. He also seeks review of the Court of Appeals decision that under the law of case doctrine it would not consider whether his purported acts constituted a recent overt act, despite this Court's holding that the question of whether the acts were recent and overt would need to be proved in a second trial.[2] The Court of Appeals decision is attached as an appendix.

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[1] *In re Detention of John Charles Anderson*, Court of Appeals No. 45000-3-II, filed January 27, 2015

[2] *In re Detention of Anderson,* 166 Wn.2d 543, 552, 211 P.3d 994 (2009).

C. ISSUES PRESENTED FOR REVIEW

(1) RCW 71.09 authorizes the State to file a petition for commitment on certain classes of individuals. The superior court exceeds its statutory authority when it enters a judgment for civil commitment under RCW 71.09 on an individual who is not within a class of individuals subject to the statute.

(2) The Washington Supreme Court held that whether Mr. Anderson's sexual contacts with fellow WSH patients constituted recent overt acts would need to be proven at the new trial. Mr. Anderson was denied a constitutional right to due process when the Court of Appeals declined to review the issue by holding under the law of the case doctrine the acts were overt.

(3) The Evidence Was Insufficient To Prove Beyond A Reasonable Doubt That Mr. Anderson Should Be Confined Under RCW 71.09.

D. STATEMENT OF THE CASE

The relevant facts are contained in the Brief of Appellant filed January 15, 2014, pp. 2-15, and are herein incorporated by reference.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should address the issues raised in Mr. Anderson's petition because it raises a significant constitutional issue under Washington State Constitution and the U.S. Constitution, is in direct conflict with a decision by this Court, and involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (2),(3) and (4).

1. The Law of the Case Doctrine Should Not Be Applied To Mr. Anderson's Claim That He Does Not Fall Within A Class Of Individuals Subject To RCW 71.09.

Division II of the Court of Appeals correctly reasoned that the phrase "subject matter jurisdiction", used at trial, in appellant's briefs and the State's response brief, did not properly summarize Mr. Anderson's complaint. Rather, the trial court error, briefed by both parties at trial and on appeal, was that Mr. Anderson is not within any class of individuals subject to RCW 71.09, and the trial court exceeded its statutory authority when it denied the motion to dismiss the State's petition.

Declining to answer the question of whether Mr. Anderson is subject to RCW 71.09, the Court of Appeals held the law of case

doctrine barred him from raising this issue after failure to raise it after "13 years, 2 trials, and 2 appeals". (*Slip Op.* at 7).

The Court of Appeals misconstrues the history and the application of the law of the case doctrine. The State filed a petition for commitment in February 2000. His first trial occurred in 2004. He successfully appealed to the Court of Appeals in 2006. Both parties sought review to this Court and a decision affirming the reversal and remand for a new trial was issued in 2009. *Anderson,* 166 Wn.2d at 546. He was not retried until 2013. The issue of whether Mr. Anderson was subject to RCW 71.09 *was* raised in this second trial.

The law of the case doctrine is a discretionary rule which presumes that rulings on a prior appeal will not be reviewed again. *First Small Business Inv. CO. v. Intercapital Corp.* 108 Wn.2d 324, 333, 738 P.2d 263 (1987). Where a "question was not considered ...upon the first appeal, and ...[the appellant] is not precluded from now raising the question [on remand], [it] does not fall within the rule of 'the law of the case.'" *Columbia Steel Co. v. State,* 34 Wn.2d 700, 706, 209 P.2d 482 (1949), *cert. denied,* 339 U.S. 903, 70 S.Ct. 516, 94 L.Ed. 1332 (1950). The law of the case doctrine does not and should not apply to issues that were not addressed in

an earlier ruling, and particularly where, as here, the Court of Appeals and this Court reversed and remanded for a new trial. This Court expressly stated, "Whether or not Anderson's conduct amounted to a recent overt act, *as with the other elements of the State's case, will have to be proved at that new trial.*" *Id.* at 552. This Court did not expressly rule that Mr. Anderson was subject to RCW 71.09.

Even if it could somehow be inferred that the Court ruled on the issue in the first trial, RAP 2.5(3)(c) provides that where the same case is again before the appellate court following a remand: (1) if a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case. And (2) the appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

Mr. Anderson argues that it was error to conclude he was subject to RCW 71.09. Failure to review the issue has resulted in unfairness to him and the perpetuation of judicial error.

2. The Superior Court Exceeds Its Statutory Authority When It Enters A Judgment For Civil Commitment Under RCW 71.09 On An Individual Who Is Not Within A Class Of Individuals Subject To The Statute.

The massive and potentially permanent curtailment of liberty at stake in a civil commitment requires the authorizing statute to be narrowly tailored to serve a compelling state interest. *State v. Beaver,* 336 P.3d 654, 660 (2014). As written, Washington courts have found RCW 71.09 a constitutional statute. *In re Det. of Albrecht,* 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

Under a strict reading of RCW 71.09 the Washington legislature has authorized the filing of a petition for civil commitment on five distinct classes of people. Three of the classes are pertinent to this case:

> (a) a person *convicted* of a sexually violent offense *about to be released* from total confinement;
> (b) a person found to have *committed* a sexually violent offense as a juvenile *about to be released* from total confinement;

(e) a person who at any time previously has been *convicted* of a sexually violent offense and has *since been released* from confinement and committed a *recent overt act.*

RCW 71.09.030(1)(a),(b),(e). (Emphasis added).

The statute unambiguously and specifically limits the classes of persons subject to commitment as a sexually violent predator. The statute does *not* reach persons, like Mr. Anderson, who were found to have *committed* a sexually violent offense as a juvenile, but *have since been released from total confinement.*

When the meaning of statutory language is plain on its face, the court must give effect to that plain meaning. *City of Spokane v. Spokane County,* 158 Wn.2d 661, 673, 146 P.3d 893 (2006). In determining plain meaning, the reviewing court considers the language of the provision, as well as related statutes or other provisions in the same act that disclose legislative intent. *Id.*

Under the Washington legislative scheme, an order of a court adjudging a child a juvenile offender is *not* to be deemed a conviction of a crime. RCW 13.04.240. The only time adjudication has the same meaning as *conviction* is for purposes of sentencing of sentencing under RCW 9.94A. RCW 13.04.011. Statutes that involve a deprivation of liberty must be strictly construed; a court cannot add words or clauses to an unambiguous statute when the

legislature has chosen not to include that language; the court must assume the legislature means exactly what it said. *In re Cross,* 99 Wn.2d 373, 379, 662 P.2d 828 (1983); *In re Det. of Hawkins,* 169 Wn.2d 796, 801, 238 P.3d 1175 (2010);*State v. Delgado,* 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Case law distinguishes the purposes for which juvenile adjudications are considered convictions in adult proceedings. (*See State v. Johnson,* 118 Wn.App. 259, 76 P.3d 265 (2003) (juvenile adjudications are properly considered in determining an adult offender score, as the SRA is concerned with punishing adult offenders with the same criminal history to the same extent.); *State v. Cheatham,* 80 Wn.App. 269, 273, 908 P.2d 381 (1996)(juvenile disposition can serve as a predicate offense in prosecution of felon in possession of a firearm)).

By contrast, in *Weaver,* the petitioner had been charged in juvenile court with two counts of child rape. *In re Weaver,* 84 Wn.App. 290, 929 P.2d 445 (1996). He successfully pleaded not guilty by reason of insanity and relying on RCW 10.77, the juvenile court ordered him hospitalized until age 21. *Id.* at 291. He was transferred at age 18 to WSH. *Id.* at 291. In a personal restraint petition, he argued, and the Court affirmed that he was not subject

to commitment under RCW 10.77. *Weaver,* 84 Wn.App. at 293-94. Relying on juvenile statutes, the Court reasoned that an act, which would be a crime if committed by an adult, is not a crime, and thus not a felony if committed by a juvenile. (*See* RCW 13.04.240; RCW 13.40.020(19); RCW 13.40.020(15) and RCW 13.40.020(1)). By statute, Weaver's juvenile offense could not be a felony and the statute authorizing commitment of defendants acquitted of a felony by reason of insanity did not authorize commitment of a juvenile who had been acquitted in juvenile court of first-degree child rape by reason of insanity. *Id.* at 295.

Similarly, here, by statute, a petition may only be filed on an individual found to have *committed* a sexually violent offense as a juvenile who is about to be released from confinement. The statute simply does not reach persons, like Mr. Anderson, who *committed* a sexually violent offense as a juvenile, but have since been released from total confinement.

A court does not have the authority to rewrite a statute even if it believes the legislature intended something else but failed to adequately express it. *In re Det. of Martin,* 163 Wn.2d 501, 509, 182 P.3d 951 (2008). If the legislature has enacted a statue with a perceived omission, such as a class of individuals like Mr.

Anderson, the Court may not correct it unless the entire statute is rendered absurd or meaningless. *State v. Delgado,* 148 Wn.2d 723, 730-31, 63 P.3d 792 (2003). The omission here does not undermine the effectiveness of the entire statute; at most, it may have kept a purpose of it from being comprehensively effectuated. *In re Det. of Martin,* at 512-13.

This issue raises a significant constitutional question: Where an individual does not fall within the class of people for whom a court is statutory authorized to impose civil commitment, is the fundamental constitutional right to liberty violated? In *Weaver,* the reviewing court held, "To commit, at least where commitment may last for years, is substantive... it is a long-term deprivation of liberty that must be effected with a method approved by the legislative representatives of the people." *Weaver,* at 295. Failure to dismiss the petition violated RCW 71.09, which expressly restricts the individuals subject to it. The court exceeded its statutory authority when it imposed the commitment on Mr. Anderson.

3. The Court of Appeals Wrongly Cited "Law Of The Case" Doctrine To Decline To Revisit Whether Mr. Anderson's Sexual Contacts Constituted A Recent Overt Act As A Matter Of Law.

Relying on the "law of the case" doctrine, the Court of Appeals declined to "revisit whether Anderson's sexual contacts constitute a recent overt act as a matter of law." *Slip Op. at 9.* The Court of Appeals misapplied the law of the case doctrine and erroneously failed to adhere to this Court's ruling regarding the requirement that the State prove, in a new trial, that the acts were recent and overt.

In Mr. Anderson's cross-appeal to this Court, after the first trial, this Court accepted review of the issue of whether the sexual contacts he had with fellow patients at WSH amounted to recent overt acts. *Anderson,* 166 Wn.2d at 545. This Court held, "Because Anderson does not challenge the trial court's findings of fact in this regard, we treat those findings as true...Note, however, that Anderson will receive a new trial, at which he may challenge all findings: *Id.* at 550; and again, "Anderson's sexual activities at WSH *could* constitute overt acts"; and "Whether or not Anderson's conduct amounted to a recent overt act, as with the other elements of the State's case, *will have to be proved at that new trial." Id.* at 554.

The requirement to plead and prove a recent overt act under RCW 71.09 is founded in due process concerns. *In re Pers.*

Restraint of Young, 122 Wn.2d 1, 41, 857 P.2d 989 (1993). No person may be deprived of "life, liberty, or property, without due process of law. U.S. Const. amends. V, XIV; Wash. Const. art. 1, § 3. "Involuntary civil commitment is a substantial curtailment of individual liberty so due process is required." *In re Det. of Lewis,* 163 Wn.2d 188, 193, 177 P.3d 708 (2008). Moreover, the application of constitutional due process guaranty is a question of law subject to *de novo* review. *In re Det. of Fair,* 167 Wn.2d 357, 362, 219 P.3d 89 (2009).

In this case, this Court expressly held that whether the acts were recent and overt would need to be proved at a second trial. "A decision by the Supreme Court is binding on all lower courts in the State...[I]t is error for the Court of Appeals not to follow directly controlling authority by the Supreme Court." *State v. Pedro,* 148 Wn.App. 932, 950, 201 P.3d 398 (2009). In declining to review the issue raised on appeal, the Court of Appeals' decision is in direct conflict with this Court's ruling.

4. The Acts As Presented At Trial Do Not Amount To Recent Overt Acts.

The four sexual relationships the State presented as evidence of recent overt acts took place while Mr. Anderson was a

voluntary patient at WSH. (RP 466; 468; 470;630). Like him, each of the individuals was housed on the sex offender unit.

At trial, the treating psychologist at WSH testified that all individuals who are civilly committed at WSH whether voluntary or involuntary, maintain their civil rights. (RP 786-87); RCW 71.05.380. By statute, no person "shall be presumed incompetent as a consequence of receiving...voluntary or involuntary treatment for a mental disorder; competency shall be determined or withdrawn except under the provisions of 10.77 or 11.88 RCW." RCW 71.05.360(1)(b). The treating psychologist also testified that WSH policy recognized that patients established close relationships, which may involve sexual intimacy. The hospital was responsible to prevent exploitation, provide knowledge and means to prevent STDS, assist patients to acquire skills to make reasoned judgments regarding management of their sexual behavior, and to provide a safe enforcement to discuss sexual behavior. (RP 786;464). Patient, including Mr. Anderson, could and did obtain prophylactics such as condoms from the nursing staff. (RP 783-85).

By hospital policy, if a developmentally disabled/delayed patient engaged in sex with another patient and there was a

concern regarding capacity to consent, the staff psychiatrist was to be informed and an incident report filed. (RP 796). The psychiatrist was responsible to determine whether that individual had the capacity to consent to sexual activity. (RP 796). If there was a complaint about or an incident amounting to a sexual assault, as mandatory reporters, the staff at WSH were obligated to notify law enforcement. (RP 794-96).

Although Mr. Anderson was counseled that his partners were at a lower level of emotional or intellectual functioning, the State presented no evidence establishing the mental age of the partners- no evidence that he ever used physical coercion of bribery to engage in sexual activity with any partner, and most significantly, no incident reports by WSH staff alleging Mr. Anderson's partners lacked the capacity to consent to sexual activity. (RP 469;472-72; 793;797). Additionally, the hospital psychologist testified that each of Mr. Anderson's partners was very promiscuous, and at least three of them had believably had sexual relations with everyone on the ward. (RP 466; 469;470;642).

The freedom to engage in private, adult, consensual sexual conduct without interference of government is rooted in the fundamental right to freedom of association and right to privacy

protected by the due process clause of the Fourteenth Amendment. *Griswold v. Connecticut,* 381 U.S. 479, 484-85, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *State v. Clinkenberd,* 130 Wn.App. 552, 561-62, 123 P.3d 872 (2005). RCW 71.05 does not forbid committed patients from engaging in consensual sexual activity. Here, even if the individuals were mentally/emotionally challenged, the State did not present any evidence that Mr. Anderson's partners had been adjudicated as incompetent under RCW 10.77 or 11.88. Further, there was no evidence that any of them had previously or since been recognized as incapable of consent.

During Mr. Anderson's stay at WSH, there were no internal incident reports about the sexual activity between him and his partners and no investigations of whether either Mr. Anderson or his partners were incapable of consent. There were no crimes reported to law enforcement. As a voluntary patient, Mr. Anderson was required to comply with treatment: there was no evidence presented at trial suggesting that his sexual relationships were of such concern that WSH staff took steps to revoke his stay at the hospital to protect others.

The criminal standard of review applies to a sufficiency of the evidence challenge under RCW 71.09.030. Based on the

evidence and the law, the State failed to prove an overt act beyond a reasonable doubt.

F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Anderson respectfully asks this Court to accept review of his timely Petition.

Respectfully submitted this 26th day of February, 2015.

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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.