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COA NO. 70421-4-I

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

In re Detention of M.P.;

STATE OF WASHINGTON,

Respondent,

v.

M.P.,

Appellant.

**COPY RECEIVED**

DEC 31 2013

King County Prosecuting Attorney's Office  
Criminal Division  
Civil Commitment Unit

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

The Honorable James D. Cayce, Judge

BRIEF OF APPELLANT

CASEY GRANNIS  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court erred in ordering the 14-day involuntary commitment. CP 19-21, 39-41.

2. The court erred in entering the following designated findings of fact:

(a) "as a result of Respondent's mental disorder, Respondent presents a substantial risk of harm to others, as defined under RCW 71.05.020(25)(a)(ii)." CP 40 (FF 6);

(b) "The Respondent, as a result of a mental disorder, presents a likelihood of serious harm to others[.]" CP 22 (FF 2.1).

3. The court erred in entering the following conclusion of law: "The Petitioner proved by a preponderance of the evidence that the Respondent has a mental disorder, and as a result of that mental disorder presents a substantial risk of harm to others." CP 41 (CL 2).

Issue Pertaining to Assignments of Error

Whether the court erred in involuntarily committing appellant under chapter 71.05 RCW on grounds he presented a substantial risk of harm to others in the absence of sufficient evidence showing a recent overt act that either caused harm or created a reasonable apprehension of dangerousness?

B. STATEMENT OF THE CASE

M.P. was initially taken into emergency custody for the purpose of detention in a hospital. CP 1-14. The State then petitioned for M.P.'s 14-day involuntary commitment under chapter 71.05 RCW on the grounds that M.P. was gravely disabled and had a mental disorder that caused him to present a substantial risk of harm to others. CP 15-18. The State later withdrew the allegation of grave disability and proceeded solely on the substantial risk of harm theory. RP 3.<sup>1</sup> The court presided over a hearing on the matter on May 8, 2013, at which the following evidence was produced. RP 3-57.

Uy Tu is a housing case manager at Aurora House. RP 18-19. She testified M.P. was polite to staff when he first moved into his apartment in March 2013 and there was no report of any problems. RP 19. In the latter part of April, M.P. started voicing concerns about people entering his apartment and a strong odor of heroin or crack coming from his neighbor. RP 20-22. M.P. believed people were making a fool of him and were trying to "mess" with him. RP 21.

Tu did not smell anything. RP 23. Tu talked with M.P. about the issue, during which time M.P. began to exhibit what Tu described as

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: RP – 5/8/13.

"menacing behavior" toward her: "He would start to lean forward to me, give me a thick stare . . . and would not like let me look anywhere except at him, and to give him the answer he wants." RP 20. Tu told M.P. that she could not figure out what M.P. was talking about. RP 23. M.P. wanted to speak with Lisa Hilton, the project manager. RP 23.

M.P. later requested to speak with Tu again. RP 23. Tu told him to wait. RP 23. M.P. went outside. RP 23. Tu and Hilton then saw M.P. peering into the window as if looking for them. RP 23. Tu started feeling unsafe about meeting with M.P. by herself and asked Hilton to be present. RP 24. The meeting did not go well. RP 24. M.P. wanted to know why Hilton was there. RP 24. Tu told him that she did not feel safe around M.P. RP 24. According to Tu, M.P. became angry and "menacing" — "the same menacing behavior I saw him in the previous meeting, like he was leaning toward me. He made a big stare at me like would not leave my eye -- like wouldn't let my eye look anywhere beside him until I gave him the answer he wanted." RP 24. Tu and Hilton told M.P. his behavior was inappropriate. RP 24.

M.P. demanded they fix his stove. RP 25. M.P. was told they could not go into his unit without having two staff members accompany them. RP 25. M.P. then said "I don't want anyone in my room, then." RP

25. Tu had never been assaulted by M.P. and had never seen M.P. assault anyone else. RP 26.

Todd Ryburn is an outreach case manager at an organization that works with people that are vulnerable and homeless. RP 4-5. Ryburn first met M.P. in February 2012 and helped him obtain an apartment in Aurora House. RP 5-6, 19. M.P.'s earlier interactions with Ryburn were polite and friendly. RP 6, 10. M.P. was "always intense" and felt "strongly about matters," but was "really a pleasure to visit with." RP 6.

More recently, M.P. called Ryburn to complain of smells emanating from another room and that people were getting into his room. RP 7-8. M.P. was not angry during the first phone call on the subject. RP 7. During the second phone call, M.P. was angry, uncharacteristically yelling and cussing at Ryburn. RP 7. Ryburn believed M.P. was paranoid or delusional based on the phone calls. RP 15.

On May 3, 2013, Ryburn went to Aurora House to meet with M.P. RP 9. The meeting went poorly. RP 9. M.P. wanted to meet in private. RP 9. Ryburn wanted to meet in a common area. RP 9. Ryburn did not feel safe because of M.P. was angry and loud, intense and "glaring." RP 9-10.

Ryburn and M.P. went to a conference room, but M.P. was angry that Ryburn would not close the door so that the two could have more

privacy. RP 10. Ryburn told M.P. that he felt unsafe and uncomfortable, which upset M.P. RP 10. M.P. glared at Ryburn, requested the meeting be rescheduled, and angrily wanted to know what Ryburn was going to do about the problem in the interim. RP 11. M.P. fixated on Ryburn as part of a conspiracy to "mess with him." RP 11, 15.

Ryburn announced the meeting was over, went to the front office, and stood behind the counter. RP 11. M.P. initially did not back away, but then went somewhere else. RP 11. Ryburn went into another office down the hall to work. RP 11. M.P. started yelling to Ryburn and knocking hard on the door, but not pounding. RP 11. Ryburn felt unsafe but did not lock the door and testified M.P. "wasn't going to break the door." RP 12. Ryburn left the room through another doorway. RP 12.

Mental Health Professionals (MHP's) arrived and expressed concern upon contacting M.P. but decided not to meet with him further. RP 12-13. The police arrived. RP 12-13. M.P. was strapped onto an ambulance stretcher and hauled off to the hospital. RP 14, 41. At some point during this process, M.P. told a police officer in an "intense" manner "I'm going to come back and blow away the person in room 322" and asked "Do you hear me?" RP 14. The officer replied, "Yeah, we hear you, [M.]. We hear it all the time." RP 14. When asked at the hearing how he

felt about what M.P. had said to police, Ryburn answered, "There are apartments here with real people . . . that person could be at risk." RP 14.

Ryburn later observed video footage of an altercation between M.P. and another client over a phone that took place after police arrived. RP 12-13. Both were posturing to fight but then stopped. RP 13. There was no sound to the video and Ryburn did not know who started what. RP 17.

Ryburn learned that M.P. had a pending district court case for assault. RP 16. M.P. had never assaulted Ryburn nor had Ryburn ever observed M.P. physically assault anyone else. RP 17.

Dr. Janice Edwards is a psychologist at Northwest Hospital, functioning as a court evaluator. RP 29. Dr. Edwards met with M.P. after he was detained in the hospital. RP 29. M.P. was in four point restraints when she saw him. RP 32.

Dr. Edwards opined M.P. had a mental disorder and diagnosed him with psychosis (not otherwise specified). RP 30. M.P. may have a history of traumatic brain injury (organic disorder), as evidenced by olfactory hallucinations. RP 30-31. M.P.'s impairments had a substantial adverse effect on his cognitive and volitional functions. RP 31. Edwards believed M.P. presented a substantial risk of physical harm to others as a result of his mental disorder. RP 31. The basis for this opinion was that M.P. was recently agitated with those he had previously gotten along with in the past

and he smelled crack and heroin coming from the next apartment although no one else in the building smelled it. RP 31. M.P. told Edwards that people were breaking into his apartment, that Aurora House staff were involved in this activity, people were putting heroin in his coffee to get him addicted and turn him gay, and he was going to take the spiked coffee down to an FBI bunker on 4th Avenue to get it tested. RP 31-32.

Edwards found M.P. to be very loud and did not want to listen to people's answers. RP 32. She maintained several people at the hospital in several situations had felt menaced and threatened, "not necessarily by the words that he is using, but how he uses his words and how he uses his body and how close he comes to -- to other people." RP 35. Edwards believed M.P. was at risk to escalate to actually assaulting people because he believed others were out to harm him. RP 36.

M.P. did not believe he needed treatment and repeatedly asked why he was in the hospital. RP 37. Edwards recommended continued mental health treatment. RP 39.

M.P., testifying on his own behalf, denied that he menaced anyone. RP 44-45, 52. He described a problem he had with a neighbor who smoked crack and heroin, resulting in a stench. RP 46-48. He also was concerned that people were entering his apartment. RP 48-49. Staff did not meaningfully address his concerns. RP 48-50.

The court concluded the State proved by a preponderance of the evidence that M.P. presents a substantial risk of harm to others as a result of a mental disorder. CP 41 (CL 2). The court further determined a less restrictive alternative was not in his best interest. CP 41 (FF 8). The court ordered 14 days of involuntary commitment for inpatient treatment. CP 19-21. This appeal follows. CP 30-36.

C. ARGUMENT

1. THE 14-DAY COMMITMENT WAS UNJUSTIFIED BECAUSE THE STATE FAILED TO PROVE M.P. POSED A SUBSTANTIAL RISK OF HARM TO OTHERS.

The court granted the commitment petition on the basis that M.P. posed a substantial risk of harm to others under RCW 71.05.020(25)(a)(ii). CP 22 (FF 2.1); CP 40 (FF 6), CP 41 (CL 2). Contrary to the court's conclusion, however, the State failed to prove M.P. committed a recent overt act demonstrating a substantial risk of harm. The court therefore erred in ordering the commitment.

a. Standard of Review

Challenged findings of fact must be supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Evidence is substantial only if it is sufficient to persuade a fair-minded, rational person of the finding's truth. State v. Garvin, 166 Wn.2d 242, 249,

207 P.3d 1266 (2009). Speculation is not substantial evidence. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Unchallenged findings of fact are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

"The determination of whether particular statutory language applies to a factual situation is a conclusion of law and is fully reviewable by the appellate court." In re Detention of Meistrell, 47 Wn. App. 100, 107, 733 P.2d 1004 (1987). Whether a person has committed a recent overt act that constitutes a substantial risk of harm to others is therefore reviewed as a conclusion of law. Meistrell, 47 Wn. App. at 107. Conclusions of law are reviewed de novo. State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995).

The trial court found M.P., as a result of his mental disorder, "presents a substantial risk of harm to others, as defined under RCW 71.05.020(25)(a)(ii)." CP 40 (FF 6). This "finding" reflects its earlier written "finding" to the same effect. CP 22 (FF 2.1). This "finding" is, in reality, a conclusion of law. Meistrell, 47 Wn. App. at 107. "Conclusions of law cannot be shielded from review by denominating them findings of fact." State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981). "A conclusion of law that is erroneously denominated a finding of fact is reviewed as a conclusion of law." State v. Gaines, 122 Wn.2d 502, 508,

859 P.2d 36 (1993). Indeed, the trial court also entered a conclusion of law that the State "proved by a preponderance of the evidence that the Respondent has a mental disorder, and as a result of that mental disorder presents a substantial risk of harm to others." CP 41 (CL 2). Whether the State proved that M.P. presented a substantial risk of harm to others under RCW 71.05.020(25)(a)(ii) is a conclusion of law reviewed de novo.

b. The Facts Do Not Support The Conclusion That M.P.'S Commitment Was Permitted Under RCW 71.05.020(25)(a)(ii).

Involuntary commitment for mental disorders is a significant deprivation of liberty protected by due process of law. In re Detention of LaBelle, 107 Wn.2d 196, 201, 728 P.2d 138 (1986); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Mental illness alone is not a constitutionally adequate basis for involuntary commitment. LaBelle, 107 Wn.2d at 201 (citing O'Connor v. Donaldson, 422 U.S. 563, 575, 95 S. Ct. 2486, 2493, 45 L. Ed. 2d 396 (1975)). Thus, "a state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." O'Connor, 422 U.S. at 576.

Under chapter 71.05 RCW, persons may be involuntarily committed for up to 14 days for treatment of a mental disorder if, as a result of such disorder, they pose a "likelihood of serious harm." RCW

71.05.020(25), RCW 71.05.150(10), RCW 71.05.240(3); LaBelle, 107

Wn.2d at 201-02. "Likelihood of serious harm" means:

(a) A substantial risk that: (i) Physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself; (ii) physical harm will be inflicted by a person upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm; or (iii) physical harm will be inflicted by a person upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; or

(b) The person has threatened the physical safety of another and has a history of one or more violent acts[.]

RCW 71.05.020(25).

Again, the trial court relied on RCW 71.05.020(25)(a)(ii) as the basis for M.P.'s commitment: a substantial risk that "physical harm will be inflicted by a person upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm." CP 22 (FF 2.1); CP 40 (FF 6), CP 41 (CL 2).

The court found that M.P., in accordance with Ryburn's testimony, told police that "I'm gonna come back and blow away the person in room 322," followed by "Do you hear me?" CP 40 (FF 6). This finding cannot be used to support a reasonable fear of sustaining such harm on the part of

Ryburn, the only person who testified to an awareness of M.P.'s statements.

RCW 71.05.020 plainly distinguishes between threats directed "toward the physical safety of another" under RCW 71.05.020(b) and behavior "which places another person or persons in reasonable fear of sustaining" physical harm under RCW 71.05.020(25)(a)(ii).

"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Statutory provisions are therefore construed in a manner that avoids reducing any provision to a redundancy of another. City of Bellevue v. Lorang, 140 Wn.2d 19, 25, 992 P.2d 496 (2000). RCW 71.05.020(b) and RCW 71.05.020(25)(a)(ii) are different bases, with distinct requirements, by which a person may be involuntarily committed. M.P.'s threat directed to the person in room 322 is legally relevant to subsection (b) but not subsection (a)(ii). To conclude otherwise would render the "threatened the physical safety of another" language of subsection (b) superfluous and redundant to subsection (a)(ii).

Even if the threat directed to the physical safety of another could be taken into account under RCW 71.05.020(25)(a)(ii), it adds nothing to whether it caused anyone to be in reasonable fear of sustaining physical

harm under the facts of this case. Ryburn did not testify that overhearing M.P.'s statements caused him to fear for his own safety. On the contrary, he only expressed fear about the person in room 322 being at risk. RP 14. M.P.'s statements related to blowing away the person in room 322 is therefore irrelevant to whether the State proved M.P.'s behavior placed Ryburn in reasonable fear of physical harm under RCW 71.05.020(25)(a)(ii). He did not testify that the statements caused him to fear for himself. Cf. State v. C.G., 150 Wn.2d 604, 607, 610, 80 P.3d 594 (2003) (felony harassment conviction based on threat to kill reversed due to insufficient evidence of reasonable fear where person threatened only testified to fear of harm, not fear of being killed).

Under these circumstances, the perceived threat directed toward another that was overheard by Ryburn could only theoretically form a basis to commit under RCW 71.05.020(b). The trial court, however, did not commit M.P. under RCW 71.05.020(b). The court could not have relied on RCW 71.05.020(b) as a matter of law because M.P. did not have "a history of one or more violent acts" as required by that provision.<sup>2</sup>

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<sup>2</sup> The court admitted evidence of the pending assault charge in district court only for the reasonableness of Ryburn's fear, not for its truth. RP 16. In sustaining the defense objection to the State's attempt to ask Dr. Edwards about the assault charge, the court stated "There is only evidence of a charge; there is no evidence of an assault." RP 37.

The remaining evidence relied on by the trial court to conclude M.P. posed a likelihood of serious harm to others centered upon "intimidating" and "menacing" behavior. CP 40 (FF 6). That evidence is too insubstantial to show a likelihood of serious harm to others.

The risk of danger must be substantial and the harm must be serious before involuntary commitment is justified. In re Detention of Harris, 98 Wn.2d 276, 284, 654 P.2d 109 (1982). To satisfy the requirements of RCW 71.05.020(25), the State must prove "a substantial risk of physical harm as evidenced by a recent overt act." Harris, 98 Wn.2d at 284. The overt act is "one which has caused harm or creates a reasonable apprehension of dangerousness." Id. at 284-85.

M.P.'s behavior did not harm anyone. The "menacing" behavior described by witnesses showed M.P. had an uncomfortable way of interacting with others, but did not prove he posed a substantial risk of harming others. The apprehension of harm testified to by the witnesses was not reasonable.

Tu described the menacing behavior as such: "He would start to lean forward to me, give me a thick stare . . . and would not like let me look anywhere except at him, and to give him the answer he wants." RP 20. Tu similarly testified on another occasion M.P. "made a big stare at me like would not leave my eye -- like wouldn't let my eye look anywhere

beside him until I gave him the answer he wanted." RP 24. According to Ryburn, M.P. was angry and loud, intense and "glaring." RP 9-10. Dr. Edwards vaguely mentioned several people at the hospital had felt menaced and threatened, "not necessarily by the words that he is using, but how he uses his words and how he uses his body and how close he comes to -- to other people." RP 35.

M.P. exhibited paranoid thoughts and expressed his concerns in a manner that caused others to be uneasy in his presence. But as a matter of due process, a mentally ill person cannot be involuntarily committed simply because his behavior causes public unease. O'Connor, 422 U.S. at 575. RCW 71.05.020 must be interpreted to comply with this constitutional requirement. See Addleman v. Bd. of Prison Terms & Paroles, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986) ("Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality.").

M.P. has no history of assaulting anyone. He did not assault Ryburn, Tu or anyone at the hospital. RP 17, 26, 42. He had a pending assault charge, but no facts were introduced to show that the allegation involved an actual or attempted battery. Further, a mere allegation is not probative of whether M.P. actually committed an assault at all. The trial court recognized the charge was not evidence that an assault took place.

RP 37. The reasonableness of any fear based on the existence of a pending assault charge must be measured and found wanting in light of the absence of evidence that an actual assault took place.

M.P. lacked social skills. M.P. was "always intense," even before his recent interactions at issue in the commitment hearing. RP 6. That is his manner. Glaring intently at another person, moving into their personal space, and speaking in a loud and angry voice is a poor and socially unacceptable way to communicate with others. But such behavior does not rise to the level of showing a substantial risk of harm to others under the circumstances of this case. The court erred in concluding otherwise. CP 22 (FF 2.1); CP 40 (FF 6); CP 41 (CL 2).

c. The Appeal Is Not Moot.

The State might assert the appeal should be dismissed because the 14-day commitment has run its course. A case is moot when it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief. Westerman v. Cary, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994).

M.P.'s appeal is not moot. An involuntary commitment order may have adverse consequences on future involuntary commitment determinations. In re Detention of M.K., 168 Wn. App. 621, 625, 279 P.3d 897 (2012). Each commitment order has a collateral consequence in

subsequent petitions and hearings, allowing the reviewing court to render relief if the detention under a civil commitment order is determined to be unwarranted. M.K., 168 Wn. App. at 626. For this reason, reversal of the order would grant effective relief and M.P.'s challenge to the 14-day commitment order is not moot.

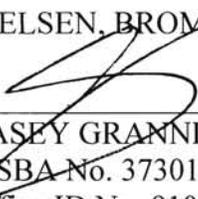
D. CONCLUSION

For the reasons set forth, M.P. respectfully requests that this Court vacate the 14-day commitment order.

DATED this 31<sup>st</sup> day of December 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

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

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|---------------------|---|-------------------|
| STATE OF WASHINGTON | ) |                   |
|                     | ) |                   |
| Respondent,         | ) |                   |
|                     | ) |                   |
| v.                  | ) | COA NO. 70421-4-I |
|                     | ) |                   |
| MICHAEL PACE,       | ) |                   |
|                     | ) |                   |
| Appellant.          | ) |                   |

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL PACE  
10507 AURORA AVENUE N.  
APT. 323  
SEATTLE, WA 98133

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF DECEMBER 2013.

X *Patrick Mayovsky*