

No. 35363-6-II

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

STATE OF WASHINGTON  
BY SM  
ATTORNEY

07 JUN -7 PM 1:34

PIERCE  
COURT OF APPEALS  
CLERK'S OFFICE

IN RE THE DETENTION OF FRANK D. JOHNNY

2007 JUN -9 PM 4:47

PIERCE  
COURT OF APPEALS  
CLERK'S OFFICE

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

The Honorable Beverly G. Grant

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Johnny's constitutional right to due process when it did not find he had committed a "recent overt act" beyond a reasonable doubt.

2. The Sexually Violent Predator Act violates a respondent's constitutional right to due process for failure to require the State to prove the respondent committed a "recent overt act" beyond a reasonable doubt.

3. The trial court erred in failing to give a unanimity instruction where there was substantial conflicting evidence as to whether Mr. Johnny had a mental abnormality or personality disorder.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person may not be committed pursuant to the Sexually Violent Predators Act (SVPA), chapter 71.09 RCW, in the absence of proof beyond a reasonable doubt the person is presently dangerous. One means of establishing present dangerousness is proof the person was currently incarcerated for an offense that was comparable to a "recent overt act." Did the trial court violate Mr. Johnny's constitutional right to due process where, rather than requiring the State to prove beyond a reasonable doubt that he was

currently incarcerated for an offense that was comparable to a “recent overt act,” the trial court determined comparability by a lesser standard of proof? (Assignments of Error 1, 2)

2. A person may not be committed pursuant to the SVPA in the absence of a unanimous jury verdict that the person suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence. When the State presents evidence of alternative means of suffering from a mental abnormality or personality disorder, either the jury must be unanimous as to which means was proven beyond a reasonable doubt or substantial evidence must support each alternative means. Did the trial court improperly fail to give a unanimity instruction where there was substantially conflicting evidence as to whether Mr. Johnny suffered from a mental abnormality or personality disorder which made him likely to engage in predatory acts of sexual violence? (Assignment of Error 3)

C. STATEMENT OF THE CASE

On August 11, 2003, shortly before Mr. Johnny was scheduled to be released from incarceration for a 2001 conviction for residential burglary and indecent exposure, the State filed a petition alleging Mr. Johnny was a sexually violent predator, pursuant to

chapter 71.09 RCW. CP 1-2.<sup>1</sup> After numerous continuances, pretrial motions were heard on July 28, 2006. The court granted the State's motion for an order determining the prior conviction for residential burglary and indecent exposure qualified as a "recent overt act" as a matter of law. CP 41-80, 81-82; 1RP 3-5.<sup>2</sup>

A jury trial commenced on July 31, 2006. Dr. Richard Packard testified on behalf of the State. According to Dr. Packard, Mr. Johnny suffered from the mental disorders of paraphilia not otherwise specified (nonconsent), exhibitionism, antisocial personality disorder, and substance abuse. 4RP 260-61. He further testified the disorders made Mr. Johnny more likely than not to reoffend. 5RP 368-69. Dr. Richard Wollert testified on behalf of the defense. According to Dr. Wollert, Mr. Johnny suffered from substance abuse and some depression, but he did not suffer from

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<sup>1</sup>The State filed an amended petition on July 29, 2005. CP 33-34.

<sup>2</sup>The Verbatim Report of Proceedings consists of ten volumes which will be referred to as follows:

- 1RP July 28, 2006
- 2RP July 31, 2006
- 3RP August 1, 2006
- 4RP August 2, 2006 morning session
- 5RP August 2, 2006 afternoon session
- 6RP August 3, 2006
- 7RP August 7, 2006 morning session
- 8RP August 7, 2006 afternoon session
- 9RP August 8, 2006
- 10RP August 9, 2006

paraphilia not otherwise specified (nonconsent), exhibitionism, or antisocial personality disorder. 6RP 501-02, 506, 514-15, 538-42. He also testified Mr. Johnny's likelihood to re-offend was statistically less than fifty percent, based on Mr. Johnny's offender history, psychological profile, and age. 7RP 590, 592-93; 8RP 673-74.

Although there was substantial conflicting evident regarding Mr. Johnny's mental status, the court did not instruct the jury that, if it found Mr. Johnny suffered from a mental abnormality or personality disorder, it must be unanimous as to which abnormality or disorder. Following deliberation, the jury determined Mr. Johnny was a sexually violent predator. CP 220. The jury was not provided a special verdict form with which to indicate the basis for its determination. This appeal timely follows. CP 221.

D. ARGUMENT

1. MR. JOHNNY'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE STATE FAILED TO ESTABLISH HE WAS PRESENTLY DANGEROUS BY PROOF BEYOND A REASONABLE DOUBT.

a. Due process requires the State to prove beyond a reasonable doubt a person is presently dangerous before the person can be committed indefinitely as a sexually violent predator. To involuntarily and indefinitely commit a person pursuant to the SVPA, the State must prove beyond a reasonable doubt the person is a sexually violent predator. RCW 71.09.060(1). A "sexually violent predator" is defined as:

any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

RCW 71.09.020(16).

A civil commitment based on mental illness necessarily is premised on the concept of present dangerousness. In re Detention of Henrickson, 140 Wn.2d 686, 692, 2 P.3d 473 (2000); In re Harris, 98 Wn.2d 276, 279-85, 654 P.2d 109(1982). "This tie to present dangerousness is constitutionally required ... because due process requires that an individual must be both mentally ill and presently

dangerous before he or she may be indefinitely committed.” In re Detention of Marshall, 156 Wn.2d 150, 157, 125 P.3d 111 (2006).

Due process concerns are ... satisfied because the sexually violent predator statute requires dangerousness as a condition for civil commitment. ...[M]ental illness is insufficient, standing alone, to justify confinement. Instead, there must be a showing that the person is dangerous to the community. ... [T]his Court has often said that “the only basis for involuntary commitment is dangerousness.”

In re Detention of Young, 122 Wn.2d 1, 31-32, 857 P.2d 989 (1993)  
(citations omitted).

To establish present dangerousness of a person who is incarcerated at the time the petition is filed, the State must prove either the person was in custody for a sexually violent offense as defined in RCW 71.09.020(15), or the person was in custody for an offense that was comparable to a “recent overt act” as defined in RCW 71.09.020(10). Henrickson, 140 Wn.2d at 693, 695. *See also* In re Detention of Albrecht, 147 Wn.2d 1, 8, 9 P.3d 73 (2002); Marshall, 156 Wn.2d at 157. “Recent overt act” is defined as “any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.” RCW 71.09.020(10).

In the present case, the State filed the petition seeking to commit Mr. Johnny when he was already incarcerated following his conviction for the offenses of indecent exposure and residential burglary, neither of which constituted a “sexually violent offense,” as defined in RCW 71.09.020(15). CP 1-2, 33-34. Therefore, the State was required to establish the offenses were comparable to a “recent overt act.” Accordingly, the State filed a Motion for Ruling on Recent Overt Act and Memorandum of Authorities, requesting the court to find the offenses for which Mr. Johnny was incarcerated at the time the SVPA petition was filed, residential burglary and indecent exposure, constituted a “recent overt act” as a matter of law. CP 41-80. The court granted the motion and signed an order to that effect. CP 81-82; 1RP 3-5. Neither the State’s motion nor the court’s order referred to any requisite standard of proof necessary to support the court’s finding.

A review of the relevant Washington Supreme Court cases demonstrates that a “recent overt act” is an element of the SVPA civil commitment proceeding that the State must prove beyond a reasonable doubt. First, in Young, *supra*, the Washington Supreme Court found that due process required the State to plead and prove a person had committed a recent overt act when it petitioned to

confine a person as a sexually violent predator and that that person was not already incarcerated for a sexually violent offense. 122 Wn.2d at 27. Young limited the requirement only to those persons who were not “confine[d] on a sex offense (as referenced in [former] RCW 71.09.030).” Id. at 41. The Court reasoned that when a person has been released from confinement since the commission of the predicate offense but before the filing of the petition, the State must be required to prove the person had again committed harm of a sexual nature. Accordingly, the Court ruled due process required the State to prove the person is both mentally ill and “presently dangerous” before it could commit that person as a sexually violent predator. Id. at 41 (*citing Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979)).

In response to Young, the Washington Legislature amended RCW 71.09.030 to require proof of a “recent overt act” when the person “has previously been convicted of a sexually violent offense [and] has since been released from total confinement,” but not when the person “has been convicted of a sexually violent offense [and] is about to be released from total confinement” at the time the petition is filed. Law of 1995, ch. 216, § 3.

Subsequently, the Washington Supreme Court decided Henrickson, *supra*, in two consolidated cases. In one case, the respondent was convicted of attempted kidnapping and communication with a minor for immoral purposes, released under strict supervision for three years pending appeal, and then resentenced and incarcerated at the time the State filed a petition to commit him pursuant to the SVPA. 140 Wn.2d at 474-75. In the other case, the respondent was released for three months pending sentencing on a conviction for unlawful imprisonment, and then sentenced and incarcerated at the time State filed a petition to commit him pursuant to the SVPA. *Id.* at 475-76. The Court found, in accord with Young, that the State was not required to prove a recent overt act in either of the cases because the individuals were incarcerated for a predicate sexually violent offense at the time the State filed the petition for commitment.

We simply hold that when, at the time the petition is filed, an individual is incarcerated for a sexually violent offense, or for an act that itself would have constituted a recent overt act, due process does not require the State to prove a further overt act occurred between arrest and release from incarceration.

*Id.* at 679.

Henrickson made clear that the question of whether the offense for which the person is incarcerated is a qualifying offense

or a recent overt act is one of two alternative means of establishing present dangerousness. If the person is incarcerated at the time of filing the petition, a recent overt act in the community cannot be practically demonstrated. 140 Wn.2d at 695-96. But if the offense for which the person was incarcerated at the time of filing was either a predicate offense itself or comparable to a recent overt act, the offense itself may demonstrate the person's present dangerousness. *Id.* at 697-98. Yet Young clearly states the person's present dangerousness must be proven to a jury beyond a reasonable doubt. 122 Wn.2d at 41. Therefore, to satisfy this constitutionally required present dangerousness standard, the State must still prove beyond a reasonable doubt that the facts leading to the person's present confinement satisfy the definition of a recent overt act. To hold otherwise would be akin to permitting a summary judgment ruling or a directed verdict based on a lesser standard of proof to replace the constitutional standard of proof beyond a reasonable doubt.

This holding was further clarified in Albrecht, *supra*, in which the respondent pleaded guilty to child molestation, served the term of confinement, was released but violated the terms of community placement and was incarcerated for that violation at the time the

State filed a petition to commit him pursuant to the SVPA. 147 Wn.2d at 4-6. The Court concluded the State is relieved of proving a recent overt act only if, at the time the petition is filed, the person is serving the original sentence imposed upon conviction for a predicate offense. 147 Wn.2d at 10-11.

To relieve the State of the burden of proving a recent overt act because an offender is in jail for a violation of the conditions of community placement would subvert due process. An individual who has recently been free in the community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be currently dangerous.

Id. at 11. The Albrecht Court expressly stated Henrickson remained good law. 147 Wn.2d at 11 n.11. See also In re Pers. Restraint of Turay, 150 Wn.2d 71, 85, 74 P.3d 1194 (2003) ("As to Albrecht itself, it did not alter the holding in Henrickson, as this court expressly noted when it decided Albrecht. Rather than altering the rule of law that proof of a recent overt act is not required when the individual is in total confinement on the violent sex offense itself, the court simply held that when the individual is instead in total confinement for violating conditions of community placement *after* completing his or her period of incarceration on the violent sex offense and being released, the State must allege and prove a recent overt act in order

to meet due process concerns.” (citation omitted, emphasis in original)).

Most recently, in Marshall, *supra*, the State filed a petition to commit the respondent pursuant to the SVPA but did not plead and prove he had committed a recent overt act because he was incarcerated for rape at the time the petition was filed. 156 Wn.2d at 156. The Court concluded that the State not need plead and prove at trial a recent overt act when, at the time the petition is filed, the respondent is incarcerated for an offense that is comparable to a recent overt act. *Id.* at 158. Rather, the court must make the determination of comparability.

[T]he inquiry whether an individual is incarcerated for an act that qualifies as a recent overt act is for the court, not a jury. The court must either determine from the materials relating to the individual's conviction whether the individual is incarcerated for an act that actually caused harm of a sexually violent nature, or it must determine whether the individual was incarcerated for an act that qualifies as a recent overt act under a two step analysis described by the Court of Appeals in *McNutt* [124 Wn. App. 344, 350, 101 P.3d 422 (2004)]: first, an inquiry must be made into the factual circumstances of the individual's history and mental condition; second, a legal inquiry must be made as to whether an objective person knowing the factual circumstances of the individual's history and mental condition would have a reasonable apprehension that the individual's act would cause harm of a sexually violent nature.

Id. Significantly, although the Marshall Court concluded the determination of comparability rests with the trial court, it did not address whether the determination may be based upon less than proof beyond a reasonable doubt.

Probable cause is a term borrowed from criminal law. In the criminal context, probable cause of crime arises when there is sufficient evidence from which to reasonably believe a person has committed a crime. "Probable cause" means:

Reasonable cause; having more evidence for than against. A reasonable ground for belief in certain alleged facts. A set of probabilities grounded in the factual and practical considerations which govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required for conviction. An apparent state of facts found to exist upon reasonable inquiry . . . , which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or, in a civil case, that a cause of action existed.

In re Detention of Peterson, 145 Wn.2d 789, 813, 42 P.3d 952 (2002), *quoting* Black's Law Dictionary 1201 (6<sup>th</sup> ed. 1990). Where the allegations set forth in the charging documents fail to establish the crime charged, even if true, a court may summarily dismiss the prosecution. State v. Knapstad, 107 Wn.2d 346, 356, 729 P.2d 48 (1986). In the criminal arena, the State is never excused from

proving an element of an offense beyond a reasonable doubt, regardless of whether it can establish probable cause for each element.

So, too, with a petition alleging a person is a sexually violent predator. Such a petition must “alleg[e] that the person is a ‘sexually violent predator’ and stating sufficient facts to support such allegation.” RCW 71.09.030. A court must then “determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator.” RCW 71.09.040. As in the criminal context, to require a specific allegation to establish probable cause, but not to require proof of that allegation beyond a reasonable doubt renders the allegation a useless formality and mere surplusage.

b. Because the court did not find beyond a reasonable doubt that Mr. Johnny was incarcerated for an offense that was comparable to a “recent overt act,” the finding that he is a sexually violent predator must be reversed. The procedure utilized by the trial court to determine that Mr. Johnny was incarcerated for an offense that was comparable to a “recent overt act” was in violation of his constitutional right to due process. Present dangerousness must be established beyond a reasonable doubt.

Proof that the person committed a “recent overt act” or was incarcerated for an offense that was comparable to a “recent overt act” are two means of establishing present dangerousness. Therefore, when the State relies on evidence of a “recent overt act” or a comparable offense act to establish present dangerousness, the “recent overt act” or the comparable act must itself be proven beyond a reasonable doubt. Absent such proof beyond a reasonable doubt, the finding that Mr. Johnny is a sexually violent predator cannot stand. Reversal is required.

2. MR. JOHNNY’S CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT WAS VIOLATED WHEN THE TRIAL COURT FAILED TO GIVE A UNANIMITY INSTRUCTION REGARDING WHETHER HE SUFFERED A MENTAL ABNORMALITY OF A PERSONALITY DISORDER, DESPITE SUBSTANTIAL CONFLICTING EVIDENCE AS TO A DIAGNOSIS.

- a. A respondent in a SVPA civil commitment proceeding has the constitutional and statutory right to a unanimous finding as to the basis of commitment. RCW 71.09.060(1) provides, in pertinent part, “When the [SVP] determination is made by a jury, the verdict must be unanimous.” The statutory requirement of unanimity demonstrates the legislative intent to afford fundamental due process protections to a SVPA civil commitment proceeding

equivalent to those governing criminal cases. In re Detention of Thorell, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). Where the SVPA provides due process protections equivalent to those governing criminal proceedings, criminal law standards apply. Young, 122 Wn.2d at 48. See also Schad v. Arizona, 501 U.S. 624, 635 n.5, 111 S. Ct. 2491, 115 L.Ed.2d 555 (1991) (unanimity is required by principles of due process). Accordingly, a respondent in a SVPA civil commitment proceeding has the right to a unanimous verdict as to the basis for confinement.

While differences exist in terms of proving underlying acts versus the defendant's mental status, in both criminal and SVP cases the jury is asked to find the existence of some fact as a component of placing the defendant in confinement. Moreover, in both cases the jury is operating under a constitutionally prescribed unanimity requirement. Given that the ultimate due process concern is in ensuring that the jury unanimously agrees on the basis for confinement, we hold that unanimity rules are applicable in SVP cases.

In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006). Accord Young, 112 Wn.2d at 48.

“[W]hen alternative means of committing a single crime are charged, and there is substantial evidence presented to support each of the alternative means, and the alternative means are not repugnant to one another, unanimity of the jury as to the mode of commission is not required.” State v. Arndt, 87 Wn.2d 374, 376, 553

P.2d 1328 (1976). Accord State v. Smith, 159 Wn.2d 778, 783, 155 P.3d 873 (2005); State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). State v. Bland, 71 Wn. App. 345, 353, 355, 860 P.2d 1046 (1993). In this context,

[t]he substantial evidence test is satisfied if this court is convinced that "a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt." State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). In reviewing a record for substantial evidence, this court will not second guess the credibility determinations of the jury. *E.g.*, State v. Jeannotte, 133 Wn.2d 847, 947 P.2d 1192 (1997).

Halgren, 156 Wn.2d at 811.

b. The State did not present substantial evidence to support the various mental abnormalities or personality disorders ascribed to Mr. Johnny. By statute, to commit a person as a sexually violent predator, the State must prove the respondent suffers from a "mental abnormality or personality disorder." RCW 71.09.020(16) provides:

"Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

"Mental abnormality" is defined as:

a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the

commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

RCW 71.09.020(8). The term “mental abnormality” reaches conduct that meets the statutory criteria regardless of whether the conduct qualifies as a “mental disorder” in the Diagnostic and Statistical Manual of Mental Disorders (DSM).<sup>3</sup> Young, 122 Wn.2d at 29. “Personality disorder” is not defined in the SVPA.

Here, Dr. Packard testified Mr. Johnny suffered from several mental abnormalities and at least one personality disorder. Specifically, he diagnosed Mr. Johnny as suffering from paraphilia not otherwise specified (nonconsent), exhibitionism, substance abuse, and antisocial personality disorder. 4RP 260-61. Dr. Packard also used three actuarial risk assessment tools to conclude Mr. Johnny was more likely than not to reoffend. 5RP 343, 368-69. Dr. Packard acknowledged that at least four doctors had previously evaluated Mr. Johnny on at least nine different occasion, none of whom concluded Mr. Johnny suffered from paraphilia or that he was likely to reoffend. 5RP 387-90; 4RP 287-88.

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<sup>3</sup>The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) includes all currently recognized mental health disorders and is frequently relied upon by courts in determining the acceptance of a psychiatric diagnosis. See Marshall, 156 Wn.2d at 155; Young, 122 Wn.2d at 28 n.4.

Dr. Wollert disagreed with Dr. Packard's diagnoses, and testified Mr. Johnny suffered from substance abuse and some depression but was able to control his behavior and did not suffer from a mental abnormality. 6RP 501-04, 545-47; 7RP 573-74. Further, according to Dr. Wollert, Mr. Johnny was statistically less likely than not to reoffend, based on his offender history, psychological profile, and age. 7RP 590, 592-93; 8RP 673-74. He disputed the diagnoses of paraphilia not otherwise specified (nonconsent), exhibitionism, and antisocial personality disorder, and again noted that Mr. Johnny had been previously evaluated on numerous occasions by four other doctors, none of whom diagnosed Mr. Johnny as suffering from the disorders diagnosed by Dr. Packard or any other disorders that would classify him as a sexually violent predator. 6RP 514-15, 530-34, 538; 8RP 627, 632. Moreover, Dr. Wollert testified paraphilia not otherwise specified (nonconsent) is not reliably diagnosed and, therefore, it has been specifically rejected from inclusion in the DSM on two separate occasions. 6RP 522-26.

In light of the conflicting evidence as to a diagnosis, and the uncontested evidence that of the six doctors who evaluated Mr. Johnny, only Dr. Packard diagnosed disorders that would classify

him as a sexually violent predator, no rational trier of fact could have found each basis for confinement was proven beyond a reasonable doubt.

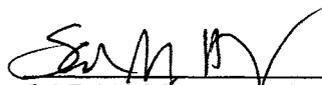
c. The proper remedy is reversal and remand for dismissal of the order of commitment. Where the State fails to present substantial evidence to support each alternative means of committing the offense charged, the proper remedy is reversal. State v. Green, 94 Wn.2d 216, 235, 616 P.2d 628 (1980) (Green II); State v. Kinchen, 92 Wn. App. 442, 451-52, 963 P.2d 928 (1998). Here, although the State failed to produce sufficient credible evidence to support each of the mental illnesses diagnosed by Dr. Packard, the court did not give the jury a unanimity instruction or a special verdict form. Therefore, the record does not establish that the jury unanimously agreed on the basis for confinement. Reversal is required.

E. CONCLUSION

Mr. Johnny's constitutional right to due process was violated when the State failed to prove beyond a reasonable doubt he was presently dangerous. His constitutional right to a unanimous verdict was violated by the court's failure to give the jury either a unanimity instruction or a special verdict form to assure unanimity as to the basis for confinement. For the foregoing reasons, Mr. Johnny respectfully requests this Court reverse and vacate the order of confinement.

DATED this 5<sup>th</sup> day of June, 2007.

Respectfully submitted,



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