COURT OF APPEALS
DIVISION II
08 DEC 23 AM 9:59
STATE OF WASHINGTON
BY
DEPUTY

NO. 37430-7-II

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

In re Detention of Joel Lawson,

STATE OF WASHINGTON,

Respondent,

v.

JOEL LAWSON,

Appellant.

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

The Honorable Thomas J. Felnagle, Judge

OPENING BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

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

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issue Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 2

1. Procedural Facts 2

2. December 2006 Trial 4

a. Testimony Of State's Witnesses 4

b. Lawson's Deposition And Trial Witnesses 13

3. Court's February 2008 Decision 18

C. ARGUMENT. 21

THE TRIAL COURT'S IMPROPER CONSIDERATION OF EXTRINSIC EVIDENCE VITIATES THE COURT'S DECISION AND REQUIRES A NEW TRIAL. .....

1. General Legal Principles In 71.09 RCW Commitment Proceedings 21

2. The Trial Court Improperly Relied On Excluded Evidence In Finding Appellant Met Commitment Criteria Under 71.09 RCW. 22

D. CONCLUSION 24

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Det. of Albrecht, 106 Wn. App. 163, P.3d 1094 (2001), aff'd, 147 Wn.2d 1, 3d 73 (2002) 22

In re Personal Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993) 10,21

Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 796 P.2d 737 (1990) 23

State v. Boggs, 33 Wn.2d 921, 207 P.2d 743 (1949) 22

State v. Pete, 152 Wn.2d 546, 98 P.3d 803 (2004) 22

State v. Rinkes, 70 Wn.2d 854, 425 P.2d 658 (1967)) 23

OTHER JURISDICTIONS

State v. Lindeman, 64 N. D. 518, 254 N.W. 276 (1934)) 22

RULES, STATUES & OTHERS

RCW 71.09 ..... 1, 3, 10, 16, 18, 20, 21, 22, 23

RCW 71.09.020 ..... 2, 10, 17, 20, 21

RCW 71.09.030 ..... 2, 21

RCW 71.09.060 ..... 21, 22

A. ASSIGNMENTS OF ERROR

1. The trial court improperly relied on excluded evidence in finding appellant met commitment criteria under 71.09 RCW.

2. The court erred in entering Finding of Fact 17 because it is not supported by substantial evidence in the record and is inconsistent with other findings by the court.

Issue Pertaining to Assignments of Error

The parties agreed the court was only permitted to consider the edited version of a polygrapher's deposition. In its findings and conclusions, however, the court indicates it relied on the unredacted deposition in finding appellant met the 71.09 RCW commitment criteria. Does the court's consideration of the excluded extrinsic evidence vitiate the court's decision?

B. STATEMENT OF THE CASE

1. Procedural Facts

On September 26, 2005, the Pierce County Prosecutor filed a petition alleging that appellant Joel Lawson is a sexually violent predator (SVP). CP 1-2, 52-53; RCW 71.09.030(5).[1] Lawson has one prior qualifying predicate offense, a 1997 Pierce County conviction for first degree rape of a child. CP 1. He was released from incarceration for that charge on July 27, 2005 but jailed again eight days later after the state alleged community placement violations. CP 1-2. The petition alleged Law committed a recent overt act based on visits to Game Matrix, a store specializing in role-playing games, "taken together with his admissions and behavior while released." CP 52-53 (amended petition).

On July 14, 2006, the court found probable cause to detain Lawson and ordered his transfer to the Special Commitment Center (SCC). RP (7/14/06)[2] at 65-66. Lawson's jury trial took place December 6-18, 2006.

---

[1] Under RCW 71.09.030(5), the state may file petition if the person has at any time previously been convicted of a sexually violent offense, has been released from total confinement, and has committed a recent overt act. A "recent overt act" is defined as any act or threat that has either created harm of a sexually violent nature or "creates a reasonable apprehension of harm in the mind of an objective person who knows the history and mental condition of the person engaging in the act." RCW 71.09.020(10).

[2] This brief refers to the verbatim report of proceedings as follows: RP (7/14/06) – probable cause hearing; and consecutively paginated volumes

CP 189. The jury was unable to reach a unanimous decision and the court dismissed the jury. CP 180-85, 189.

In February 2008, the parties agreed to try the case to the bench and stipulated the court could consider the verbatim reports of the December 2006 trial and various exhibits. CP 189-94; 1-7RP; Exs. 1, 2, 3, 7, 9, 10, 12, 15, 16, 18, 22, 23, 26, 28, 29-37, 39-43, 45, 52, 55-60, 66. The parties agreed the court would consider only the edited versions of the transcripts of two depositions: Exhibit 45 instead of 34 (deposition of polygrapher Richard Peregrin) and Exhibit 30 instead of 29 (Lawson deposition). 8RP 924-25. The court also agreed it would only consider that portion of the Lawson deposition corresponding to the first 112 pages of the transcript because only that portion of the deposition was played at the first trial. 3RP 156; 8RP 927-28.

After considering the exhibits and the trial transcripts, the court ruled Lawson met the 71.09 RCW commitment criteria beyond a reasonable doubt and ordered him committed to the SCC. 9RP 933-91; CP 210-11, 215-21.[3] Lawson timely appeals. CP 212-14.

1RP – 12/6/06, 2RP – 12/7/06, 3RP – 12/11/06, 4RP – 12/12/06, 5RP – 12/13/06, 6RP – 12/14/06, 7RP – 12/18/06, 8RP – 2/4/08, and 9RP – 2/11/08.

[3] The court's written findings and conclusions are attached as an Appendix.

2. December 2006 Trial

a. Testimony Of State's Witnesses

In 1996, when Lawson was 24 years old, he worked through Catholic Community Services as the childcare provider for C.J., an autistic nine-year-old boy. 4RP 181, 189, 191. Lawson admitted to police that while tickling C.J., C.J.'s penis became erect, which aroused Lawson. 4RP 189. Lawson fondled and put his mouth on C.J.'s penis. 4RP 189. Lawson pleaded guilty to first degree rape of a child. Exs. 1, 2, 3.

In 1997 Lawson was interviewed to determine if he was eligible for a Special Sex Offender Treatment Alternative (SSOSA), which the sentencing court ultimately denied. 4RP 335. At that time, Lawson disclosed 33 minor, mostly male, victims of offenses that included exposure, mutual fondling, and oral sex. 4RP 339, 345.

Lawson was incarcerated following his 1997 conviction. Ex. 3. While incarcerated, Lawson chose to engage in treatment. 4RP 200, 292. Sex offender treatment specialist Jill Ferger worked with Lawson between August 2003 and December 2004. 4RP 203, 305.

According to Ferger, the goal of treatment is to learn to manage risk, not eliminate it. 4RP 289. Thus, one goal of Lawson's treatment was to "manage" his arousal to deviant images, which involved training

Lawson to increase healthy sexual fantasies and reduce deviant fantasies. 4RP 208, 219, 288, 306-07. Lawson reported masturbating to deviant fantasies and then switching to appropriate fantasies. 4RP 227. According to Ferger, this was an appropriate technique. 4RP 227, 231.

Another component of treatment was identifying outward signs Lawson was succumbing to high-risk situations. 4RP 254-59. Lawson was attracted to 4-16 year old boys and unsupervised contact with children that age was risky for him. 4RP 255-56. Lawson also identified feeling boredom, emotional attachment to children, and "thought distortions" as risks. 4RP 257-58. Ferger believed pornography and stress were also risks for Lawson. 4RP 281-82. Part of treatment was developing "interventions" or tools to counteract risky behaviors and thoughts. 4RP 254-59.

A related component of Lawson's treatment was identifying his offense cycle. 4RP 291. Lawson estimated 34 victims and 200 total offenses since he was 14. 4RP 269. But Lawson had two different offense cycles throughout his life. Lawson's short cycle emerged in his early teens and involved offending quickly and impulsively in his neighborhood. 4RP 244-47, 280, 285. A long cycle developed in Lawson's late teens and adulthood and sometimes took months to build. 4RP 244-47, 285. In the preliminary stages of his offense cycle Lawson

masturbated more, increased his use of pornography, and spent money on items he did not need. 4RP 249.

Lawson told Ferger he enjoyed playing Dungeons and Dragons, a fantasy role-playing game. 4RP 208. Ferger speculated the activity might be inappropriate because it might prevent Lawson from facing reality. 4RP 207. Ferger was, however, unaware if the game was associated with Lawson's offense cycle. 4RP 318.

Lawson's participation in treatment was inconsistent at times because he procrastinated on assignments and occasionally missed sessions. 4RP 234, 310-11. By the end of the treatment program, Lawson was more consistent and demonstrated increased responsibility for his actions. 4RP 234-36, 311, 325. But Ferger believed Lawson inconsistently used his interventions and she was uncertain Lawson was fully capable of self-regulation. 4RP 278-79. On the other hand, Lawson disclosed his past victims fairly early in the treatment process and Ferger acknowledged Lawson demonstrated insight into the harm he caused. 4RP 292-93, 320-21.

Department of Corrections (DOC) Community Corrections Officer Greg DeVorss supervised Lawson following his July 2005 release. 5RP 382. CCO DeVorss met Lawson the day of his release to review community placement requirements. 5RP 389-90; Ex. 55. Lawson was

prohibited from frequenting locations where minors congregated, such as playgrounds, parks, shopping malls, and video arcades. 5RP 395-96; Ex. 55. DeVorss advised Lawson that if he found himself in such a location, he should leave immediately, and Lawson should report even chance contacts with minors. 5RP 395-97.

The following day, Lawson informed DeVorss he had a pornography channel in his motel room (housing the DOC arranged) but he requested the manager to remove it. 5RP 402. DeVorss could not explain why Lawson was placed in a motel room with access to pornography. 5RP 426-27.

On August 2, Lawson called DeVorss on the manager's advice and reported that on four or five occasions he went to Game Matrix, which was a retail store with a separate area where patrons played games.[4] 5RP 403, 442, 445; Finding 10; contra Finding 17 (Lawson did not disclose visiting the Game Matrix until *after* DeVorss asked him to submit to a polygraph). Alarmed, DeVorss required Lawson to report to the DOC office and arranged for a polygraph. 5RP 403-04. Lawson then disclosed

---

[4] State investigator Darrell Noble visited Game Matrix three times in November 2006. 5RP 471. The store consisted of a retail area (containing games, figurines, books, and magazines) and a gaming area with tables set up. During the day, mostly adults were present. 5RP 471. But more children were present when Noble visited on Wednesday and Thursday evenings, when the store advertised gaming for younger children. 5RP 471, 479.

contacts with minors at a bus stop and a store and that he went to a shopping center (which DeVorss considered a mall), a pet store, and a pawnshop. 5RP 403-04, 462. In addition, Lawson disclosed he fantasized about prior victims, masturbated to thoughts of sex with children, and failed to report this to his treatment provider. 5RP 404. Lawson also admitted he watched the pornography channel in his room for 45 minutes the day before it was to be removed. 5RP 404, 432.

The deposition of Richard Peregrin, the polygrapher who interviewed Lawson at the DOC office, was admitted into evidence. Ex. 34; Ex. 45 at 8. Lawson told Peregrin he watched pornography in his hotel room five times and that he was around minor children in public places. Ex. 45 at 10-11. Lawson told Peregrin during his release he engaged in "distorted thinking," i.e., rationalization of prohibited activity, when he permitted himself to go to places where children were present. Ex. 45 at 14-16. Lawson's counsel's objection to that line of questioning was redacted from Exhibit 45. Ex. 45 at 14-15.

Lawson was immediately arrested following the disclosures to Peregrin. At a hearing two weeks later, Lawson admitted he violated community placement conditions and he was sanctioned to 120 days of confinement. 5RP 406-07, 419, 437; Ex. 9.

Judy McCullough, a DOC "risk management specialist," planned to provide Lawson treatment and assistance transitioning to the community. 4RP 354, 357; 6RP 647. The day after Lawson's release, he informed McCullough about the pornography channel in his room. 4RP 359. The following day, Lawson told McCullough he went to a bookstore and children were present, but he avoided them.[5] 4RP 360. Lawson also reported a minor brushed against him at a pawnshop, but he left immediately. 4RP 362; 6RP 652. In addition, Lawson reported his father visited his motel and watched pornography for a few minutes before Lawson asked him to turn it off. 4RP 362. McCullough suggested Lawson keep track of contacts with minors in a journal and told Lawson to immediately report any contact with minors to her and DeVorss. 4RP 360. McCullough did not speak to Lawson again until August 2, when she learned Lawson visited a number of locations she considered inappropriate. 4RP 363, 366. McCullough was concerned Lawson did not report the incidents and that he did not start recording contacts with minors in his journal when she asked him to. 4RP 365, 368.

Psychologist Dr. Harry Goldberg, PhD, the state's expert witness, was the clinical director of an inpatient program for patients transitioning

[5] Lawson testified the bookstore was Game Matrix and McCullough told him to leave if children were present. 7RP 714-15, 717.

from the California state psychiatric hospital in to a "less restrictive" setting. 5RP 488; 6RP 612. In addition, Goldberg had performed approximately 10 Washington SVP evaluations and many similar evaluations in California. 5RP 489-90.

Goldberg interviewed Lawson in September 2005 and reviewed a number of records. 5RP 494-97. Based on this information, Goldberg opined to a reasonable degree of psychological certainty that Lawson met the four commitment criteria under 71.09 RCW.[6] 5RP 492-500, 511, 565-66.

---

[6] A sexually violent predator (SVP) is defined as an individual

> 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). "Mental abnormality" means "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). "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means "the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7). When the individual has already been released from confinement, proof of a "recent overt act" is necessary to satisfy due process. Id.; In re Personal Restraint of Young, 122 Wn.2d 1, 41-42, 857 P.2d 989 (1993).

Lawson met the first two criteria in that he was convicted of a crime of sexual violence, first degree rape of a child, and suffered from a mental abnormality, pedophilia. 5RP 499-500, 502, 507-10.

Lawson met the third criterion in that Lawson's mental abnormality made him "more likely than not" to reoffend if not confined to a secure facility. 5RP 511. Goldberg testified he used various actuarial instruments in to determine whether Lawson's likelihood of reoffense could be considered low, medium, or high. 5RP 512. But he also considered factors the actuarial instruments did not take into account. 5RP 512, 515. In Goldberg's opinion, it was necessary to adjust actuarial estimates because they failed to consider offenses that did not result in arrest or conviction. 5RP 516. Goldberg acknowledged, however, that risk predictions based on actuarial instruments are superior to "clinical judgment," which frequently over-predicts the risk of reoffense. 5RP 513.

Goldberg relied was the Static-99, which measured "static" or unchanging factors statistically linked to recidivism. 5RP 517-18. Goldberg calculated Lawson's score as "4", corresponding to a medium risk, or a 26 percent chance of reoffending over five years, 31 percent over 10 years, and 36 percent over 15 years. 5RP 527, 601-02. According to a 2003 study by Static-99 developer Dr. Hanson, the "actual" risk of

reoffense might be 10-15 percent higher than the observed risk. 5RP 528, 589-90; 6RP 589, 637-38.

Goldberg acknowledged Hanson did not recommend adding the 10-15 percent to the predicted risk of reoffense. 6RP 590, 604. In Lawson's case, however, it was appropriate to adjust the Static-99 results upward because Lawson had offended against a large number of victims. 5RP 528; 6RP 639-40. Based on to Lawson's relative youth, the pertinent time period was longer than 15 years. 5RP 530. Moreover, Goldberg opined the Static-99 did not take into account "sexual deviancy," another pertinent factor. 6RP 607.

Goldberg also assessed Lawson suing the Stable-2000, a relatively new tool that considers "dynamic" factors (those that change over time, yet are relatively stable) related to recidivism. 6RP 550, 552. While not an actuarial instrument, the developers of the instrument, Drs. Harris and Hanson, recommended using the Stable-2000 to adjust actuarial scores where appropriate. 6RP 550-51. Because Lawson's Stable-2000 score of "10" corresponded to a high risk of reoffense, Goldberg believed this too supported upward adjustment of Lawson's risk level. 6RP 564. Moreover, it was unclear whether treatment reduced the risk of reoffense; in any event, Lawson did not complete the community-based portion of

treatment and performed poorly during his weeklong release. 6RP 571-74, 596, 609-10, 634.

As for the fourth factor, Goldberg opined Lawson committed a "recent overt act" by repeatedly returning to Game Matrix despite seeing children there. 6RP 577-79, 617-19. Goldberg was also concerned that Lawson viewed pornography for 45 minutes, masturbated to deviant images, failed to timely report his contacts with minors, visited a shopping center, and behaved secretively, among other things. 6RP 580. Goldberg believed Lawson should have disclosed the visits to DeVorss or McCullough sooner. 6RP 622-23.

b. Lawson's Deposition And Trial Witnesses

Lawson's father was in the army and his family moved around frequently before settling in Washington when Lawson was about 16. Ex. 30 at 6, 59-61. Lawson entered the Air Force after high school but later returned to Washington, where he began working for Catholic Community Services as a child care provider for developmentally disabled children, including C.J. Ex. 30 at 12-13, 80.[7]

Lawson began offending when he was 13 or 14 while living at an army base in South Carolina. He talked his first two victims, younger boys, into exposing themselves, which led to Lawson masturbating and

[7] The court considered the deposition of another such victim, C.D. Ex. 32.

performing oral sex on the boys. Ex. 30 at 16-18. Lawson had similar contact with a number of other children, mostly boys he met at a playground near the woods where most of the sexual contacts occurred. Ex. 30 at 18-34. Lawson also offended against his brother and his brother's friend. Ex. 30 at 34-35.

When Lawson was 15 and still lived in South Carolina, a boy he babysat told his parents Lawson molested him and Lawson's mother made him apologize to the boy. Ex. 30 at 41-42. After that incident, Lawson began to understand he might be harming his victims and he attempted to control his sexual urges, although he was not always successful. Ex. 30 at 42-45, 55-57. After moving to Washington, Lawson developed a new offense pattern in which he attempted to establish relationships with children before attempting sexual contact with them. Ex. 30 at 55-69. This pattern continued after Lawson entered the Air Force. While home on leave, he had sexual contact with two thirteen-year-old boys with whom he had developed friendships. Ex. 30 at 71-77.

Lawson eventually realized that despite not using violence or physical harm, he was nonetheless causing long-term harm to his victims. Ex. 30 at 70-71, 101. Lawson regretted this and voluntarily engaged in treatment during his incarceration. 6RP 656-63; 7RP 704-07; Ex. 30 at 100-01. While in treatment, Lawson learned about methods to manage his

offense cycle and a number of techniques for dealing with his attraction to children. 6RP 663-64; 7RP 708-12.

Lawson enjoyed role-playing games, including Dungeons and Dragons, since he was 12 years old. 6RP 666, 690. He went to Game Matrix because after seven years of incarceration he was interested in learning about new role playing games and investigating new fantasy novels. 6RP 666, 690. Lawson did not venture beyond the retail area and the only children he saw were toddlers accompanied by adults. 6RP 666-67. Lawson avoided the store on nights the store hosted children's games. 6RP 667. The last time Lawson went to the store, he decided not to go in because more children than normal were present. 6RP 672. After that, Lawson told the motel manager he had been to Game Matrix, and he called DeVorss at her suggestion. 6RP 672.

Upon arrival at the DOC office, Lawson was immediately subjected to a polygraph and did not have an opportunity to talk to DeVorss. 6RP 673-74. Lawson testified that if not for the polygraph, he might not have revealed he watched pornography, but he would have revealed everything else to DeVorss. 6RP 674-75.

Lawson did not consider any of the stores he visited to be prohibited by his community placement conditions. 6RP 670, 677. Lawson relied on the advice of another sex offender who lived in his

motel in deciding whether he was permitted to visit certain stores because he did not want to pester McCullough and DeVorss. 6RP 668-69. Lawson began journaling soon after his second contact with a minor (he called McCullough to report the first contact) and thought it was acceptable to wait until his next treatment session to discuss the incident. 6RP 671; 7RP 719-20. On the other hand, he acknowledged his rationale for permitting himself to watch pornography was flawed. 6RP 670; 7RP 722.

Psychologist Dr. Jeffrey Abracen, PhD, had extensive experience treating and evaluating sex offenders in institutional and community settings. 7RP 727-737. Based on the same materials Goldberg considered and a lengthy interview with Lawson, Abracen opined Lawson did not meet 71.09 RCW commitment criteria because Lawson's reoffense risk did not rise to the level of "more likely than not." 7RP 738, 744, 764, 784, 805. Similarly, Abracen not consider any Lawson's actions during his weeklong release a "recent overt act." 7RP 830.[8]

Based on various actuarial instruments, Lawson fell into the category of low or moderate risk. 7RP 772; Ex. 66. Abracen obtained the same score as Goldberg on the Static-99 but a score of "8," not "10," on

[8] Abracen did not dispute Goldberg's conclusions on the first two 71.09 RCW factors. 7RP 805, 837.

the Stable-2000. 7RP 770, 776-83. Lawson's Static-99 score corresponded to a 33-36 chance of reconviction over 15 years, and adjusting that figure upward was inappropriate. 7RP 840, 847-48.

For example, Lawson's Stable-2000 score did not merit upward adjustment of Lawson's baseline risk level. 7RP 784. In addition, Abracen disputed Goldberg's conclusions regarding Lawson's unadjudicated victims. While it is generally accepted in the scientific community that many sex offenses go unreported, no one knows the average number of unadjudicated victims per offender. 7RP 797-98, 840-42. It is therefore improper to assume Lawson's 33 unadjudicated victims render him exceptional. 7RP 797-98, 840-42, 896-97. Moreover, Abracen opined the actuarials already consider the relevant factors, including sexual deviancy. 7RP 800, 841, 889-90. Finally, Lawson's lengthy participation in treatment weighed in his favor because studies showed actuarials over-predicted the risk posed by sex offenders who participated in treatment. 7RP 791-95.

In regard to the state's "recent overt act" allegation, Abracen found some of Lawson's acts during his week in the community concerning. 7RP 873, 876. In Abracen's opinion, however, shopping at Game Matrix did not "create[] a reasonable apprehension of harm." 7RP 826-30, 873, 876; RCW 71.09.020(10). When Lawson offended in the past, he sought

unsupervised contact with children, which did not occur at Game Matrix. 7RP 829-31. Moreover, Lawson was legitimately interested in role playing games and fantasy novels. 7RP 829-31. Abracen acknowledged Lawson admitted he was in his offense cycle, but opined reoffense was not imminent. 7RP 874.

3. Court's February 2008 Decision

The court concluded Lawson met the commitment criteria under 71.09 RCW and entered written findings and conclusions. In reaching its decision, it considered December 2006 trial testimony and Exhibits 1-3, 7, 9, 10, 12, 15, 16, 18, 22, 28, 30, 31, 32, 34, 55, and all illustrative exhibits introduced at the first trial. CP 215.

The court found Lawson committed first degree rape of a child in 1996 and engaged in 17 months of treatment while incarcerated. CP 216 (Finding 1, 2). While in treatment, Lawson identified 34 previous victims, mostly strangers, and estimated he offended against minor children approximately 200 times. CP 216 (Finding 3). The longest Lawson ever abstained from offending was one year. CP 216 (Finding 3).

Lawson was released from incarceration in July 2005 and was subject to community placement conditions, including that he not go to places where children congregate. CP 216 (Findings 4-6). But Lawson went to Game Matrix, a location likely to attract children, at least five

times when children were present. CP 216 (Finding 7-9). Lawson reported his trips to Game Matrix to the CCO at the suggestion of his motel manager. CP 217 (Finding 10). Based Lawson's treatment, however, Lawson should have known going to Game Matrix was prohibited. CP 217 (Finding 10).

Lawson disclosed the pornography channel in his motel room but failed to disclose he watched it for 45 minutes until his CCO asked him to submit to a polygraph. CP 217 (Findings 11-13, 17). Lawson did not fully satisfy his journaling requirement while in the community and had frequent thoughts of minors and masturbated to the thoughts at least twice. CP 217 (Findings 14-15). Moreover, Lawson did not disclose visiting Game Matrix and that he had entered his offense cycle until his CCO asked him to submit to a polygraph. CP 217 (Findings 14-17). From this, the court concluded Lawson's behavior "coupled with his background and offense profile" caused reasonable apprehension Lawson would cause harm of a sexually violent nature. CP 218-19 (Findings 18, 30).

Based on the Static-99, the most reliable and studied actuarial instrument, Lawson obtained a score of "4," corresponding to a 36 percent chance of reoffense over 15 years. CP 218 (Finding 20). But the instruments do not take into account certain factors unique to individual offenders. CP 218 (Finding 20). The court found "there is no actuarial or

empirically derived method for factoring in unadjudicated victims" or the effect of treatment. CP 218 (finding 21). However, "it seems unlikely . . . Mr. Lawson's 33 unadjudicated victims is representative of the average offender in the actuarial samples." CP 218 (Findings 20-22). The court also found treatment might lower risk of recidivism, but in Lawson's case treatment had only a "modest" effect on overall risk. CP 218 (finding 23.1).[9]

The court concluded Lawson's pedophilia made it "more proababl[e] than not" he would engaged in predatory acts of sexual violence if not confined to a secure setting. CP 219-20 (Findings 20, 23.2, 24, 25, 26, 27, 28, 29, 31; Conclusion 8). The court also concluded "Lawson's actions during the eight days he was in the community, specifically that he repeatedly went to Game Matrix, an establishment where children are likely to congregate, constitute a recent overt act" under RCW 71.09.020(1). CP 220 (Conclusion 9). From this, the court concluded the state proved beyond a reasonable doubt Lawson met the 71.09 RCW commitment criteria. CP 220 (Conclusion 10).

---

[9] There are two findings "23" listed in the court's findings and conclusions. This brief refers to the first as 23.1 and the second as 23.2.

C. ARGUMENT

THE TRIAL COURT'S IMPROPER CONSIDERATION OF EXTRINSIC EVIDENCE VITIATES THE COURT'S DECISION AND REQUIRES A NEW TRIAL.

The parties stipulated the court was permitted to consider only the edited version of polygrapher Richard Peregrin's deposition, Exhibit 45, and not the unedited version, Exhibit 34. 8RP 925; see also 2RP 90-91 (discussion of edits before trial). Accordingly, the redacted portions of the deposition were not part of the record. But the court's findings and conclusions indicate the court erroneously relied on the unredacted deposition. Because the trial court improperly considered evidence not before it, the order of commitment should be reversed.

1. General Legal Principles In 71.09 RCW Commitment Proceedings

A sexually violent predator (SVP) is defined as an

> individual 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). Under RCW 71.09.030(1), the State may file a petition to involuntarily commit an individual if the individual was previously convicted of a "sexually violent offense and is about to be released from total confinement." In re Personal Restraint of Young, 122

Wn.2d 1, 41-42, 857 P.2d 989 (1993); RCW 71.09.060(1). When the individual has already been released from confinement, however, proof of a recent overt act is necessary to satisfy due process. Young, 122 Wn.2d at 41-42. This requirement limits deprivations of liberty to circumstances in which the state can demonstrate present dangerousness. In re Det. of Albrecht, 106 Wn. App. 163, 168, 23 P.3d 1094 (2001), aff'd, 147 Wn.2d 1, 51 P.3d 73 (2002). To civilly commit an individual under chapter 71.09 RCW, the State must prove beyond a reasonable doubt the individual meets the criteria for commitment. RCW 71.09.060(1); Young, 122 Wn.2d at 47-48.

2. The Trial Court Improperly Relied On Excluded Evidence In Finding Appellant Met Commitment Criteria Under 71.09 RCW.

"'[O]nly evidence admitted by the trial judge . . . is evidence in the case . . . and evidence ruled out by the trial judge is out of the case and out of the court.'" State v. Boggs, 33 Wn.2d 921, 930, 207 P.2d 743 (1949) (quoting State v. Lindeman, 64 N. D. 518, 254 N.W. 276 (1934)).

It appears, however, the court considered the excluded evidence in determining Lawson met the 71.09 RCW commitment criteria. This was error. "'[C]onsideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'" State v. Pete, 152 Wn.2d

546, 555, 98 P.3d 803 (2004) (quoting State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967)). Although this was a bench trial, the rationale underlying the rule applies with equal force here. Consideration of extrinsic evidence – whether by judge or jury – is improper because it is not subject to objection, cross-examination, explanation or rebuttal. Pete, 152 Wn.2d at 553; Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990).

There is reasonable ground to believe Lawson was prejudiced by the extrinsic evidence the court mistakenly relied on. This was a close case based on a "battle of the experts," as evidenced by the prior inability of the jury to reach a verdict. The court's reliance on this evidence therefore vitiates the court's adjudication of guilt. Accordingly, the court's order of commitment under 71.09 RCW should be reversed.

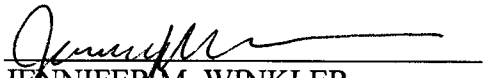
D. CONCLUSION

For the foregoing reasons, the order of commitment should be reversed and the case remanded for a new trial.

DATED this 19TH day of December, 2008.

Respectfully submitted,

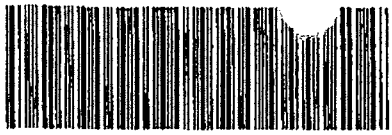
NIELSEN, BROMAN & KOCH, PLLC



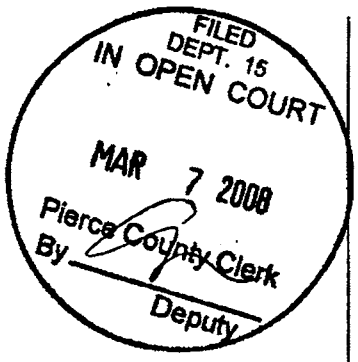
JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

APPENDIX



05-2-12161-6 29344503 OR 03-12-08



STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

In re the Detention of: JOEL VANCE LAWSON, Respondent.	NO. 05-2-12161-6 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COMMITMENT

This matter was submitted to the Court on February 4, 2008, according to the terms of the Stipulations of the Parties for Civil Commitment Bench Trial (Stipulations) entered on November 9, 2007, and pursuant to RCW Chapter 71.09, to determine whether the Respondent, Joel Lawson, should be involuntarily civilly committed as a sexually violent predator (SVP). The matter had previously been tried on December 11-19, 2006, resulting in a mistrial when the jury was unable to reach a verdict.

Pursuant to the Stipulations, the Court reviewed the testimonial transcripts of the jury trial and the exhibits admitted therein. The Court read the entire testimony of the following witnesses: Respondent Joel Lawson (both video deposition and in-court testimony), Christopher Dean (perpetuation deposition), Brent Bomkamp, Jill Ferger, Rick Minnich, Judy McCullough, Greg DeVorss, Richard Peregrin (perpetuation deposition), Darrell Noble, Dr. Harry Goldberg, Dr. Jeffrey Abracen, and Albert Neiro. In addition, the Court considered Exhibits 1-3, 7, 9, 10, 12, 15, 16, 18, 22, 28, 30, 31, 32, 34, and 55, as well as all illustrative exhibits. On February 11, 2008, the Court heard closing arguments.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

Having considered all of the foregoing, the Court now enters the following:

I. FINDINGS OF FACT

1. On or about July or August, 1996, Mr. Lawson committed an offense against nine-year-old C.J., an autistic/attention-deficit disordered boy, for which he later pled guilty to and was convicted of Rape of a Child in the First Degree in Pierce County Superior Court.

2. Mr. Lawson attended 17 months of Sex Offender Treatment while in prison. His performance in treatment was characterized as satisfactory.

3. While in treatment Mr. Lawson identified as many as 34 prior victims, most of whom were strangers to him. He also estimated that he had offended against minor children approximately 200 times. He stated that the longest period of time he was able to abstain from offending was one year and that he often offended a child within one hour of meeting them.

4. Mr. Lawson was released from confinement in July, 2005, and moved into a motel which was near the Department of Corrections' (DOC) office in Tacoma, Washington.

5. Mr. Lawson was placed on community supervision with the DOC and subject to specific conditions outlined in Exhibit 55.

6. One of the conditions of Mr. Lawson's community placement was that he not go to places where children congregate.

7. During the eight days Mr. Lawson was in the community, he went to an establishment called the "Game Matrix" on at least five occasions. Mr. Lawson indicated there were children present on each occasion.

8. The Game Matrix is an establishment where customers can buy and play fantasy games. The name of the establishment and its subject matter are likely to attract children.

9. During a DOC administrative hearing, Mr. Lawson stipulated that the Game Matrix was a place where children congregate.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

10. Mr. Lawson informed his Community Corrections Officer (CCO) that he had been frequenting the Game Matrix after it was recommended by his motel manager that he do so. A person who has completed as much treatment as Mr. Lawson should have known, without being told by a third party, that going to the Game Matrix was a prohibited activity.

11. The conditions of Mr. Lawson's community placement prohibited him from viewing pornography.

12. Mr. Lawson had access to a pornography channel in his motel room.

13. Mr. Lawson reported to his CCO that he had access this channel and asked the motel manager to remove it. However, he did not disclose to his CCO or RMS that he had viewed this channel on multiple occasions and for as long as 45 minutes on one occasion.

14. Mr. Lawson was instructed to make daily journal entries about his activities but failed to fully meet this requirement because he did not begin journaling until several days after he was instructed to do so.

15. Mr. Lawson reported that during the time he was in the community he had sexual thoughts of minors approximately 25 times per day, dwelled on those thoughts approximately 10 times per day, had thoughts of past victims 3-4 times per day, and masturbated to thoughts of minors at least twice.

16. Mr. Lawson stated during his DOC hearing that he was "close to midway into his offense cycle" while in the community. Mr. Lawson also stated that he did not have enough controls on himself to keep from going down the wrong path.

17. Mr. Lawson did not disclose that he had visited the Game Matrix, watched pornography, or had entered his offense cycle, until he was asked by his CCO to submit to a polygraph examination on August 2, 2005.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

18. Mr. Lawson's behaviors while in the community coupled with his background and offense profile, cause reasonable apprehension that Mr. Lawson would cause harm of a sexually violent nature.

19. The adjusted actuarial approach utilized by Dr. Goldberg provides an estimate of an individual's risk to re-offend.

20. Although Drs. Goldberg and Abracen relied on several actuarial instruments, they agreed that the Static-99 is the most analyzed and reliable actuarial instrument used by experts in this field. Mr. Lawson has a raw score of "4" on the Static-99, which gives him a risk of reoffense of 26% in the first five years, 31% in the first ten, and 36% in the first fifteen years following his release. However, the actuarial instruments used by both doctors cannot take into account factors unique to a particular person, such as the large number of unadjudicated victims in Mr. Lawson's case.

21. There is no actuarial or empirically derived method for factoring in unadjudicated victims or the affect of sex offender treatment on an individuals risk to re-offend..

22. It seems unlikely that Mr. Lawson's 33 unadjudicated victims is representative of the average offender in the actuarial samples.

23. Dr. Abracen's expert testimony that treatment lowers a person's recidivism risk is persuasive; but given Mr. Lawson's offense history, including the large number of prior victims and incidents of sexual abuse, as well as his behavior while in the community, the Court finds that treatment has but a modest effect on Mr. Lawson's overall risk assessment.

23. RCW 71.09 requires an assessment of lifetime risk, and the actuarial instruments can only offer risk estimates for up to fifteen years.

24. Mr. Lawson's history demonstrates that his problems with sexual deviancy are so engrained that he is very likely to re-offend.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

25. Mr. Lawson suffers from the mental disorder of Pedophilia, sexually attracted to males (exclusive type).

26. Mr. Lawson's Pedophilia is a congenital or acquired condition which affects his emotional or volitional capacity and predisposes him to commit criminal sexual acts to a degree that makes him a menace to the health and safety of others.

27. Mr. Lawson's Pedophilia causes him serious difficulty controlling his sexually violent behavior.

28. Mr. Lawson concedes that he suffers from a mental abnormality as defined by RCW 71.09.020(8) and that this mental abnormality causes him serious difficulty controlling his sexually violent behavior.

29. Mr. Lawson's Pedophilia makes him likely to engage in predatory acts of sexual violence if not confined to a secure facility.

30. Mr. Lawson's actions during the eight days he spent in the community in July and August of 2005, specifically his repeated visits to the Game Matrix store, when viewed in the context of the fact that he was viewing pornography and in his "offense cycle," creates a reasonable apprehension of sexually violent harm in the mind of an objective person who knows of Mr. Lawson's history and mental condition.

31. As a result of his Pedophilia, Mr. Lawson more probably than not will engage in predatory acts of sexual violence if released unconditionally from detention in this matter.

Based on the foregoing Findings of Fact, the Court hereby enters the following:

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and the Respondent in this cause.

2. The Findings of Fact enumerated herein have been proven beyond a reasonable doubt.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

3. Dr. Harry Goldberg and Dr. Jeffrey Abracen are qualified to provide expert forensic psychological testimony on all relevant issues in this case.

4. Mr. Lawson's conviction for Rape of a Child in the First Degree constitutes a sexually violent offense, as that term is defined in RCW 71.09.020(15).

5. All of Mr. Lawson's offenses, including his sexually violent offense, have been predatory, as that term is defined in RCW 71.09.020(9). Almost all of Mr. Lawson's offenses were committed against strangers.

6. The mental disorder of pedophilia from which Mr. Lawson currently suffers is a mental abnormality as that term is defined in RCW 71.09.020(8).

7. Mr. Lawson's pedophilia causes him serious difficulty controlling his sexually violent behavior.

8. Mr. Lawson's pedophilia makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility.

9. Mr. Lawson's actions during the eight days he was in the community, specifically that he repeatedly went to the Game Matrix, an establishment where children are likely to congregate, constitutes a recent overt act, as that term is defined in RCW 71.09.020(10).

10. The evidence presented at trial proves beyond a reasonable doubt that Mr. Lawson is a sexually violent predator, as that term is defined by RCW 71.09.020(16).

Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters the following:

///

///

///

///

///

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

///

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent, JOEL VANCE LAWSON, is a sexually violent predator as defined in RCW 71.09.020(16). Having so found the Court therefore ORDERS that the Respondent be committed to the custody of the Department of Social & Health Services for placement in a secure facility for control, care, and treatment until further order of this Court.

DATED this 7th day of march, 2008.

THE HONORABLE THOMAS FELNAGLE
Judge of the Superior Court

FILED
DEPT. 15
IN OPEN COURT
MAR 7 2008
Pierce County Clerk
By Deputy

Presented by:

ROBERT M. MCKENNA
Attorney General

ARLENE ANDERSON, WSBA #31494
Assistant Attorneys General
Attorneys for Petitioner

Approved as to form only:

THOMAS WEAVER, WSBA #22488
Attorney for Respondent

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State V. Joel Lawson

No. 37430-7-II

Certificate of Service by Mail

On December 19, 2008, I deposited in the mails of the United States of America, A properly stamped and addressed envelope directed to:

Todd Richard Bowers
Attorney General-CJD
800 5th Ave Ste 2000
Seattle WA 98104-3188

Joel Lawson
Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

Containing a copy of the opening brief, re Joel Lawson
Cause No. 37430-7-II, in the Court of Appeals, Division II, for the state of Washington.

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

John Sloane
Office Manager
Nielsen, Broman & Koch
Done in Seattle, Washington

12-19-08
Date

2008 DEC 19 PM 3:54
COURT OF APPEALS
STATE OF WASHINGTON
BY DEPUTY