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COURT OF APPEALS
DIVISION II

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NO. 37430-7-II

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of:

JOEL LAWSON

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

STATE RESPONDENT'S OPENING BRIEF

ROBERT M. MCKENNA
Attorney General

SARAH B. SAPPINGTON
Senior Counsel
WSBA #14514
Attorney General's Office
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2019

ORIGINAL

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I. ISSUES PRESENTED

- A. **The trial court's final order of commitment recites that it considered an un-redacted version of a deposition rather than the version agreed upon by the parties in which 13 lines of the deposition had been redacted. Where the redacted material consisted simply of an objection by counsel, where the testimony to which there had been an objection was subsequently introduced without objection into the record, and where there is no indication that the trial court in any way actually relied upon this redacted material, should this Court affirm the trial court's Order of Commitment?**

II. STATEMENT OF THE CASE

Respondent accepts Appellant Lawson's statement of the case except as otherwise noted below.

III. ARGUMENT

- A. **The Trial Court's Recitation That It Considered Information Previously Redacted Does Not Merit Reversal**

Appellant was committed as a sexually violent predator (SVP) following a bench trial in February of 2008. Lawson argues that the order committing him must be reversed because the trial court, sitting as the finding of fact, "relied upon" evidence the parties had agreed would not be submitted to the court. Appellant's Brief at 1. He argues that this fact "vitiates the court's decision" in that the trial court improperly "relied" upon "excluded extrinsic evidence." *Id.*

This argument is without merit. First, the disputed information—13 lines of one deposition—consists simply of an objection by defense

counsel and is utterly inconsequential. Secondly, the question to which defense counsel had objected was subsequently re-phrased and the question answered without objection. Finally, the redacted information cannot plausibly be said to have had any affect whatsoever on the decision of the trial court, or have otherwise prejudiced Lawson. Lawson's argument must be rejected and the commitment affirmed.

The disputed "evidence" relates to a deposition of Richard Peregrin, a polygrapher identified as one of the State's trial witnesses. Following various revelations regarding Lawson's behavior while on community supervision, Lawson was interviewed by Mr. Peregrin. In that interview, Lawson made a number of disclosures relating to his behavior in the community and his sexual fantasies about children. Ex. 34, 45.¹ Lawson was subsequently arrested, sanctioned to 120 days of confinement (5RP at 406-07, 419, 437, Ex. 9) and eventually detained pursuant to the State's filing of a petition pursuant to RCW 71.09, the Sexually Violent Predator Act. CP at 1-2, 52-53.

The SVP case was initially tried to a jury in December of 2006. 1-8RP. Prior to this initial jury trial, the State had indicated that it intended to present the testimony of Mr. Peregrin by video. Lawson

¹ Exhibit 34 was the un-redacted, original version of the Peregrin deposition; Exhibit 45 was the redacted version of the Peregrin deposition.

moved in limine to preclude any reference to his having been subjected to a polygraph. 1RP at 22. In the context of argument relating to those motions, the trial court ruled that, in presenting Mr. Peregrin's video deposition, the State would be required to redact any testimony in that deposition that 1) disclosed that the information given in Lawson's pre-test interview related to the administration of a polygraph; or 2) was cumulative as to substantive evidence that the State was otherwise presenting. 1RP at 35, 39.

After the court's ruling, the State went through the deposition in an attempt to comply with the court's directive. 2RP at 90-92. The following day, the parties again discussed the video deposition of Mr. Peregrin. 2RP at 90-101. Arguing for redaction of a section relating to Lawson's behaviors in the community beginning on page 13, line 22, and continuing through page 14, line 20 (2RP at 95), Lawson's counsel argued that disclosures made to Mr. Peregrin relating to "high risk situations" should be deleted because that information was "going to be well-covered in the probation violation hearing [and] by testimony from CCO DeVorss and even testimony from Mr. Lawson." 2RP at 95. There was, she argued, "nothing new contained within this information that won't already be brought out at trial." *Id.* at 96. Moreover, she continued, "it is absolutely abundantly clear throughout the records that Mr. Lawson

has reported that he's able to—he was distorting his thinking, that he has placed himself in high-risk situations and that he was in an offense cycle.”
Id. at 97.

The trial court ruled that the information would be allowed in, in that it was neither enough information to constitute a significant waste of time, nor did it appear to be inflammatory. *Id.* at 97. It was only after that ruling, and in an apparent attempt to simply clean up the record, counsel for the State asked a question relating to the redaction of an objection immediately following and relating to that information:

MS. ANDERSON: I'm sorry, your honor, can we just ask—clarify, if the edits that were made starting on line [sic] 14—page [sic] 21, line [sic] through page 15, line 8—to sort of edit out the objections that were made if those are acceptable?

MS. MUTH: *That's fine.*

MS. ANDERSON: Thank you.

2RP at 98 (emphasis added).² It appears, then, that Ms. Anderson, in requesting redaction of the 13 lines in question, sought simply to remove from the record objections by Lawson's counsel that did not appear to serve any purpose, a proposal to which Lawson's attorney had no

² Counsel for the State appears to have inadvertently mis-identified the portions of the deposition to be redacted, referring to edits “starting on line 14—page 21, line 14 through page 15, line 8.” Judging from Exhibit 45, it appears that the portion edited out actually began on page 14, line 21, not page 21, line 14.

objection. Accordingly, the parties then redacted the following from the Peregrin deposition:

[MS. ANDERSON]: Okay. So when you said distort his thinking, you were using a treatment term that—

[MR. PEREGRIN]: He did.

Q: He did use that term.

A: He used that term, yeah.

Q: Okay. What else did he tell you?

A: He—

MS. MUTH: Then I'm going to object to the witness explaining the meaning of the term "distort his thinking" if the witness was not the individual who provided that information to Mr. Lawson. And I'd move to strike the prior testimony.

MS. ANDERSON: Let me rephrase, please.

Exhibit 34, 45 (Deposition of Richard Peregrin) at 14, line 21 through 15, line 8.

After this deleted portion, the deposition resumed:

Q: (by Ms. Anderson) So the term "distort his thinking," was that something that Mr. Lawson used, or was that something that you used, a term that you used?

A: That was something that he would have used, and that's why I reported it as such.

Q: Okay, and what else did he tell you?

A: He reported he was also alone with a child at a bus stop the day prior to the interview, and he reports the child asked him for the time, and he showed him his watch.

Id. at 15, lines 9-24.

After a six-day trial, the jury was unable to reach a unanimous verdict. CP 180-85, 189. The parties then agreed to try the case to the bench, agreeing upon those portions of the record that would be submitted for consideration. CP at 189-94. The written stipulation provided that the court would consider, *inter alia*, Ex. 34, the un-redacted version of the Peregrin deposition. CP at 191-92. When the parties convened on February 4, 2008, to present their stipulation to the court, however, they indicated that the written stipulation was inaccurate and that, in fact, the parties had agreed that the court would consider the *redacted* version of the Peregrin deposition, that is, Ex. 45, rather than the complete, or unedited version. 8RP at 924-25.

The parties convened again on February 11, 2008, for closing arguments, after which the court issued its decision, and signed a written order of commitment. 9RP 933-991. CP at 210-11. The State then prepared written Findings of Fact, Conclusions of Law, and Order, which were entered roughly a month later. CP at 215-21. The preamble to the

Findings prepared by the State recites that the court considered, *inter alia*, Ex. 34, the un-redacted version of the Peregrin deposition, and makes no reference to Ex. 45, the redacted version the parties had orally agreed should be considered by the court. There is nothing in the record that indicates that any portion of this Order was contested, and it was filed by the trial court on March 7, 2008. CP at 215-21.

Lawson now argues that, because the court's final Order recites that the court considered (un-redacted) Ex. 34 and makes no reference to (redacted) Ex. 45, Lawson's commitment must be reversed and Lawson given a new trial. This argument is without merit. Although Lawson asserts that "there is reasonable ground to believe Lawson was prejudiced by the extrinsic evidence the court mistakenly relied on," he fails to demonstrate, or even suggest, how the trial court might conceivably have been influenced by consideration of the redacted 13-line portion of the Peregrin deposition. The 13 lines, as indicated above, related merely to an objection by Lawson's counsel to information that was immediately reiterated and, in any event, contained absolutely no information that did not otherwise permeate the case. Indeed, it is clear from the record 1) that the State, not Lawson, sought redaction of those 13 lines; and 2) that the purpose of the redaction was based on a desire to remove extraneous objections rather than objectionable content. Nor is there any indication

whatsoever that the court considered this (inconsequential) information in forming its opinion: In its oral decision, the court made no reference to the redacted language (9RP at 978-91), which is to be expected in light of its utter irrelevance to the case as a whole. Likewise, in its written Order, no reference to that excluded information was made. CP at 215-21.

In support of his assertion that reversal is required, Lawson cites to several cases involving consideration of extrinsic evidence by juries, arguing that consideration of such evidence, “whether by judge or jury” is improper and requires reversal. App. Br. at 23. The cases cited, however, do not support Lawson’s claim that reversal of a civil commitment is the remedy when a final order references irrelevant and inconsequential information that was technically redacted, particularly in the absence of any demonstrated prejudice. This argument must be rejected.

B. Appellant’s Argument Relating To Finding Of Fact 17 Is Without Citation To Facts In The Record Or Legal Authority And Should Not Be Considered By This Court

Lawson also assigns error to Finding of Fact 17, asserting that it is “not supported by substantial evidence in the record and is inconsistent with other findings by the court.” App. Br. at 1.³

³ Finding of Fact 17 provides that “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.” CP at 217.

Lawson, after this initial assignment of error, makes no further mention of this issue, and appears to have abandoned it. The Court is not required to consider arguments unsupported by facts or legal authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm the decision of the trial court committing Lawson as a Sexually Violent Predator.

RESPECTFULLY SUBMITTED this 16th day of March, 2009.

ROBERT M. MCKENNA
Attorney General



SARAH B. SAPPINGTON, WSBA #14514
Senior Counsel
Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2019

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DECLARATION OF
SERVICE

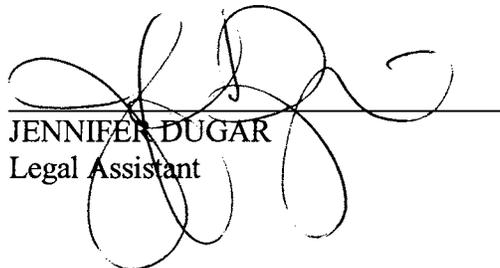
I, Jennifer Dugar, declare as follows:

On this 16th day of March, 2009, I deposited in the United States mail true and correct cop(ies) of State Respondent's Opening Brief and Declaration Of Service, postage affixed, addressed as follows:

Eric Nielsen and Jennifer Winkler
Law Offices of Nielsen, Broman & Koch, PLLC
1908 E Madison Street
Seattle, Washington 98122-2842

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

DATED this 16th day of March, 2009, at Seattle, Washington.


JENNIFER DUGAR
Legal Assistant

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