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DIVISION II

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STATE OF WASHINGTON

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NO. 39566-5-II

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

In re the Detention of:

ANTHONY JACKA,

Respondent,

v.

THE STATE OF WASHINGTON,

Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Anthony Jacka has a history of sexually violent offenses against adult women and teenage girls. He admitted having raped a 14-year-old girl at knifepoint and having attempted to rape a woman sleeping next to her child, for which the trial court sentenced him to prison in 1990.

In re Fox, 138 Wn. App. 374, 384, 158 P.3d 69 (2007).¹

At the end of Jacka's prison sentence, the State petitioned to commit him as a sexually violent predator (SVP) pursuant to RCW 71.09.² In 1999, the trial court found that Jacka met the SVP criteria and committed him to the Special Commitment Center (SCC), where he has remained since. *Id.*, 138 Wn. App. at 384.

In 2009, the trial court held a trial on the issue of Jacka's unconditional release to the community pursuant to RCW 71.09.090(3)(b). On June 22, 2009, following a jury trial, the trial court entered an order continuing to commit Jacka as a sexually violent predator. CP at 28. This appeal follows.

¹ The cases of Anthony Jacka and Robert Jones were consolidated with that of Harry Fox in the referenced appeal.

² A sexually violent predator is "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(18). A mental abnormality, in turn, 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).

II. ISSUES PRESENTED

- A. **Did the trial court abuse its discretion when, consistent with controlling case law, it refused to allow testimony that Jacka had agreed to submit to a polygraph examination where the State did not stipulate to the admission of such testimony?**
- B. **Did the trial court's refusal to allow Jacka to elicit testimony to the effect that he was angry at SCC staff because they would not agree to his placement in a Less Restrictive Alternative violate Jacka's constitutional rights?**
- C. **Was Jacka committed in the absence of a showing of current dangerousness, thereby violating his rights to due process?**

III. ARGUMENT

- A. **The Trial Court Did Not Abuse Its Discretion By Refusing To Permit Jacka To Introduce Evidence That He Agreed To Submit To A Polygraph Examination**

Jacka argues that the trial court abused its discretion by refusing to permit Jacka to introduce evidence to the effect that he had agreed to take a polygraph examination. App. Br. at 7-12. Jacka's argument fails, because there was no stipulation that such evidence should be presented, and because the prejudicial impact of such testimony would have outweighed any possible probative value.

Jacka argues that the fact that he was willing to submit to a polygraph was relevant to the issue of his "transparency." Possible relevance, however, does not resolve the issue. Relevant evidence may be excluded under ER 403 if the trial court concludes that its probative value

is substantially outweighed by the danger of unfair prejudice, if it is wasteful of time or cumulative, or if it is confusing or misleading to the jury. *State v. Reay*, 61 Wn. App. 141, 148, 810 P.2d 512(1991). The trial court has considerable discretion in balancing the probative value of evidence against its potential prejudicial impact, and its decision to admit relevant evidence will not be reversed absent a manifest abuse of discretion. *Id.* A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

The general rule in Washington is that polygraph examinations, especially the results therefrom, are inadmissible absent a stipulation of the parties. *State v. Rupe*, 101 Wn.2d 664, 690, 683 P.2d 571 (1984). Two reasons for the rule most often mentioned are that the test results tend to circumvent the jury's role in deciding credibility of a witness and that the reliability of the test is not firmly accepted by the scientific community. *State v. Anderson*, 41 Wn. App. 85, 702 P.2d 481(1985).

Jacka correctly notes that there are occasions upon which the courts of this state, or the federal courts, have permitted polygraph

evidence—whether the fact of the polygraph examination or the results thereof—to be admitted over the objection of a party. App. Br. at 10-11. None of these cases, however, supports Jacka’s contention that the trial court in this case was unreasonable in reaching the decision that it did.

Admission of such information would have been both highly prejudicial to the State and would have invited the jury to speculate. As noted by counsel for the State, “if the defense puts in that he took the polygraphs and nobody tells [the jury] what the results are, the jury’s going to infer that he passed or we would be countering it with, he failed. And that puts the State at a disadvantage.” 3A RP at 38. Hearing such limited information, the State correctly argued, would encourage the jury to speculate in violation of ER 403: “They would be asked to guess what his polygraph results were as soon as they hear that he took the test and nobody told them whether he passed or failed...” 3A RP at 38- 39. This would have been unfairly prejudicial to the State, putting the State in the position of choosing between introducing evidence of a sort the courts have repeatedly found unreliable, or encouraging the jury to speculate by its failure to introduce evidence of the test’s results. The trial court’s decision to avoid such unfair prejudice and confusion does not constitute an abuse of discretion.

Moreover, even if the trial court erred, there was no prejudice to Jacka. At trial, Jacka introduced other evidence to the effect that he was open and honest in his dealings with others. Kent Ruby, a therapist at the SCC, testified that Jacka had “good transparency” (6B RP at 778), that Jacka had always been straightforward with him (*Id.*) and that he had never felt manipulated or misused by Jacka in any way. *Id.* Even Dr. Holly Coryell, Ph.D., a member of the SCC staff, testified that Jacka “was demonstrating transparency” (6A RP at 709), and that he was “quite open” about even his sexual thoughts about some of the SCC staff:

He acknowledged being very concerned about reporting [sexual thoughts about staff] and being honest about that, about in terms of how it would be perceived and possibly pathologized by the evaluator.

It seemed to be a very difficult process for him to do that, but...through the course of two interviews with [his therapist at the SCC], despite his concerns, anxiety about what this would mean for him, he was reporting what we—what would constitute rather a normal, average sexual arousal patterns (*sic*) for an adult male, and he was letting his treatment providers know about that.

6A RP at 716.

Jacka has not demonstrated that the trial court abused its discretion in following applicable law, and his argument fails.

B. Exclusion Of Testimony To The Effect That Jacka Was Angry At SCC Staff Because They Would Not Agree To His Placement In A Less Restrictive Alternative Did Not Violate Jacka's Constitutional Rights

Jacka argues that the trial court's "refusal to let Mr. Jacka testify about why he was angry" at certain SCC staff violated his constitutional right to defend himself and to confront witnesses under the Sixth Amendment and [Washington State Constitution] Article 1, Sec. 22.³ App. Br. at 13. This argument is meritless. Jacka had no Sixth Amendment rights in this sex predator proceeding, and his rights to due process and a fair trial were protected where he was given a full and fair opportunity to present his theory of the case to the jury.

1. Statutory Provisions

RCW 71.09 provides for the indefinite civil commitment of persons determined beyond a reasonable doubt to be Sexually Violent Predators. Persons determined by the court to be SVPs are committed to the care and custody of the Department of Social and Health Services (DSHS) until such time as they can safely be released. Pursuant to RCW 71.09.070, DSHS is required to conduct a yearly evaluation of the person in order to determine whether he continues to meet the statutory requirements for commitment. If the person does not waive the right to a

³ Article 1, Sec. 22 of the Washington State Constitution provides in pertinent part that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel ...to meet the witnesses against him face to face..."

hearing, an annual review/show cause hearing is set. The purpose of the show cause hearing is to determine:

whether probable cause exists to warrant a hearing on whether: (i) The person's condition has so changed that he or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

RCW 71.09.090(2)(a). If DSHS fails to make a prima facie showing that the person continues to meet the statutory criteria, or if the offender demonstrates that his mental condition has "so changed" as a result of "positive response to continuing participation in treatment" such that the person can safely be unconditionally released from commitment, the trial court must set the matter for trial.

RCW 71.09.090(2)(c);71.09.090(4)(b)(ii). *See also In re Detention of Petersen v. State*, 145 Wn.2d 789, 798-99, 42 P.3d 952 (2002).

2. Jacka Has No Constitutional Right To Confrontation In This Sex Predator Case

Jacka asserts that his constitutional right to defend himself and to confront witnesses under the Sixth Amendment and Article 1, Sec. 22 was violated by the trial court's refusal to permit him to explain his anger at certain SCC staff by reference to the SCC's failure to place him in a less restrictive alternative placement. The Washington State Supreme Court

has noted, however, that “it is well-settled that the Sixth Amendment right to confrontation is available only to criminal defendants. ” *In re Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). Sex predator proceedings are not criminal proceedings. *Seling v. Young*, 531 U.S. 250, 260, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001); *In re Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993). As such, “the Sixth Amendment right to confrontation is not available to an individual challenging an SVP commitment.” *Stout*, 159 Wn.2d. at 369.

Jacka cites *State v. Ransleben*, 135 Wn. App. 535, 540, 144 P. 3d 397 (2006) for the proposition that in sex predator proceedings, “the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply.” App. Br. at 13. Jacka misapprehends both the court’s holding and the applicable language in *Ransleben*. The quoted language refers specifically to proceedings held pursuant to RCW 71.09.060(2), in which the offender has previously been found incompetent to stand trial. As such, his argument fails.

3. The Trial Court’s Exclusion Of Testimony Relating To Denial Of A Less Restrictive Alternative Placement Did Not Deny Jacka His Right To Due Process

In addition to his Sixth Amendment claim, Jacka attempts to

elevate the judge's ruling regarding placement in a less restrictive alternative (LRA) testimony to a constitutional claim. Beyond his bare assertion that he was "denied due process and a fair trial," (App. Br. at 13), Jacka makes no attempt to explain how a simple evidentiary ruling rises to a matter of constitutional significance, and makes no citation to authority. "Naked castings into the constitutional sea" are not sufficient to command judicial consideration and discussion. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

Moreover, Jacka's argument is meritless. When Jacka petitioned for release in 2005, he requested a "full evidentiary hearing" on the question of whether he continued to meet commitment criteria. *See Fox*, 138 Wn. App. at 381, 406. Jacka's trial was thus held pursuant to RCW 71.09.090(2)(a)(i) and RCW 71.09.090(3)(b); 4B RP at 399-400. The only question properly before the jury was whether he continued to suffer from a mental abnormality or personality disorder that made him likely to engage in predatory acts of sexual violence if not confined to a secure facility.

There is no dispute that the issue of LRA placement was not before the jury, and that the jury would not have been able to send him to an LRA in the context of this trial. Despite the fact that he was not requesting

release to a less restrictive alternative, however, Jacka sought to introduce testimony to the effect that “a lot of” his anger at certain SCC staff was based on the SCC’s failure to release him to an LRA. 4B RP at 397.⁴

While the State did not object to Jacka’s being asked if he was angry because he was still at the SCC (4B RP at 398), the State objected to specific testimony related to earlier recommendations by the SCC that he be transferred to a less restrictive alternative, arguing that the jury could not, in an unconditional release trial held pursuant to RCW 71.09.090(3)(b), consider placement in an LRA. To hear testimony about such placement, the State argued, would create enormous confusion for the jury. 4B RP at 310-321; 397-404. As noted by the State’s trial counsel, to inform the jury “that there’s some middle ground but it is not available to Mr. Jacka at this time and they cannot send him there because he’s requested an unconditional release trial” would both confuse the issues and constitute an undue waste of time. 4B RP at 313.

In addition, such testimony would have been prejudicial to the State and have invited speculation by the jury. As the State’s trial counsel pointed out, the State “would have put on a completely different case with different evidence and different witnesses if we were gonna be having an LRA trial.” 4B RP at 313. If the jury were to here testimony suggesting

⁴ This issue is argued, generally, at 4B RP at 310-321 and at 4B RP at 397-404.

that such an option is available when in fact it was not, “some of them are gonna want to send him there. Some of them are gonna want him potentially to remain committed. Some may want him to go to the [Secure Community Transition Facility].⁵ And some may want him unconditionally released.” 4B RP at 315. To permit such testimony, the State argued, invited speculation and created the potential for jury confusion as to the jury’s options, thereby increasing the likelihood of a hung jury. 4B RP at 315. In addition, such testimony would severely prejudice the State by forcing it, in the middle of trial, to put on evidence relating to LRA placement where the State was unprepared to do so and where such placement was not legally possible. 4B RP at 315.

Jacka provides lengthy excerpts from trial in support of his contention that his “anger toward certain staff at SCC was central to the State’s argument that Mr. Jacka’s untreated anger” places the community at risk. App. Br. at 13-19. The State concurs that Jacka’s longstanding and pervasive issues relating to anger were central to the State’s case. Jacka asserts, however, that his anger was “unexplained” (App. Br. at 18) and suggests that much of his anger might have been successfully explained by reference to the SCC’s recent refusal to place him in an LRA.

⁵ The Secure Community Transition Facility, or SCTF, is a less restrictive alternative placement owned and operated by DSHS. There are two such facilities: One on McNeil Island in Pierce County, and one in King County.

This contention is not supported by the evidence. Jacka's issues with anger were longstanding, deep-seated and entrenched. Jacka told the State's expert, Dr. Leslie Rawlings, that anger had been a "lifelong problem" for him. 4B RP at 318. This anger, Dr. Rawlings testified, "had caused him some problems, for example, as early back as junior high school." 4B RP at 331. In his own testimony, Jacka admitted that being "angry, like I got a raw deal from...the world" was an element in his offending. 3B RP at 174. This anger was "enhanced by my substance abuse ...[which] just enhanced all the negative emotions that I was feeling on a day-to-day basis. I mean, I'd, you know, wake up feeling crappy about my life and go to sleep feeling crappy about my life." *Id.* at 175.

Debra LaRowe-Prado, Jacka's former therapist at the SCC, also testified to the role of anger in Jacka's offending. She noted that, in the past, his anger had led him to make obscene phone calls, peep, break into homes, look for someone to assault, simply rape or rape at knife point. 3A RP at 68. "Unfortunately," she testified, "that's Mr. Jacka's history. 3A RP at 68.

Dr. Rawlings also had occasion to personally observe Jacka's anger. When he interviewed Jacka in 2009, Jacka's demeanor was "angry, irritable, hostile." 4B RP at 339. His demeanor was so "inconsiderate," Dr. Rawlings reported, that "his attorney took him out of the room to talk

to him, and the once he returned, he had calmed down somewhat and we were able to proceed.” 4B RP at 381-82.

Indeed, Jacka’s anger was simply part of his personality structure. Discussing his diagnosis of Personality Disorder Not Otherwise Specified with narcissistic and antisocial traits (4B RP at 325-26), Dr. Rawlings discussed Jacka’s longstanding issues of “irritability and aggressiveness.” 4B RP at 330. When asked about the relationship of anger to his sexual offending, Jacka told Dr. Rawlings that “it’s a permission giver,” and that, when he was offending, he “felt apart from society, angry at the world, didn’t know who to blame, had it in for anybody and everybody, and it made it easy for him to violate social norms.” 4A RP at 293. Jacka also commented to Dr. Rawlings, however, “that his anger was not limited to just sex offending.” 4A RP at 293. In addition, Jacka exhibited traits of “exaggerated or grandiose sense of self-importance, sense of entitlement, lack of empathy, and arrogance.” 4B RP at 332. Jacka’s “sense of entitlement” meant that he “felt that he deserved some somewhat special treatment...He felt that he should be able to dictate the terms of his treatment as opposed to the SCC determining what his needs and treatment program should be.” 4B RP at 333.

Jacka had ample opportunity to explain and defend his anger without reference to his failure to be placed in an LRA. Ms. Larowe-Prado

noted that Jacka's anger often covers up his "hurt and sadness" at the loss of important people in his life. 3A RP at 71-72. She testified that she had told an SCC evaluator, Dr. Dan Yanisch, that Jacka's anger was "more of a defense mechanism that he uses to cover up other feelings" such as those related to grief and loss of support people in his life who had died since he had been detained at the SCC. 3A RP at 94, 97. This testimony was repeated by Dr. Rawlings, who conceded that Ms. LaRowe-Prado had told him that Jacka uses anger "as a mask for his real feelings," that he sometimes responded to feelings of loss with anger, and that "his anger is the only way that he can express himself at times." 4B RP at 414-415. Likewise, Ms. LaRowe-Prado, on cross-examination, agreed that Jacka had had many therapists during his years at the SCC and that such an experience can be frustrating for a resident. 3A RP at 100.

C. Jacka Was Not Committed In The Absence Of A Determination Of "Currently Dangerousness"

Jacka next argues that his rights to due process were violated because the trial court's instructions did not require the jury to find that Jacka was "currently dangerous." App. Br. at 23. There is no evidence that Jacka submitted a jury instruction to this effect or excepted to the instructions given and as such he has waived this issue. 7B RP at 1063-64.

Even if this Court permits Jacka to raise this issue now, his

argument is without merit. As noted recently by the Washington State Supreme Court "[b]y properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact finder impliedly finds that the SVP is currently dangerous." *In re Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009). In what appears to be an attempt to distinguish his situation from that considered by the court in *Moore*, Jacka argues first that Moore was committed following a bench trial. This is a distinction without a difference; there is nothing in the *Moore* opinion that suggests that this fact is of any consequence for purposes of this argument.

Jacka also suggests that the jury in his case could have voted to commit him "even though he is not currently dangerous." App. Br. at 23, FN 2. In support of this argument, he postulates a situation in which there might be "expert testimony establishing that an individual has a 1% likelihood of reoffending over the course of a single year and that the overall likelihood or recidivism increases to 51% over the course of 51 years..." *Id.* Jacka does not, however, suggest that any such testimony or argument was offered in his trial, nor would the record support this contention. In fact, that actuarial testimony offered by the State's expert indicated that, on every actuarial tool, he was at high risk of reoffending: Dr. Rawlings scored Jacka on three actuarial tools: the Static-99, the

Minnesota Sex Offender Screening Tool, Revised (MnSOST-R)⁶ and the Sex Offender Risk Assessment Guide, or SORAG. Dr. Rawlings testified that Jacka's score on the Static-99 was a 7, placing him "in the highest risk category for reoffense." 4B RP at 358. The Static-99, which measures risk of reconviction (4B RP at 355), produced a number that is "likely an underestimate" of actual risk because, as Dr. Rawlings explained, "not everybody who commits an offense gets charged, or not everybody who commits an offense is reported." 4B RP at 362. The MnSOST-R put him in the group associated with a probability of rearrest for a sexual offense of 72%. 4B RP at 371. On the SORAG, Jacka had a raw score of 27, a score higher than 94% percent of the other people on whom the system was developed and identifying him as high risk. 4B RP at 368. 89% of persons with similar scores to Jacka's had reoffended (as measured by rearrest or return to an institution) within ten years of release from custody. 4B RP at 370.

Jacka's argument is both contrary to controlling law and to the facts of his case and must be rejected.

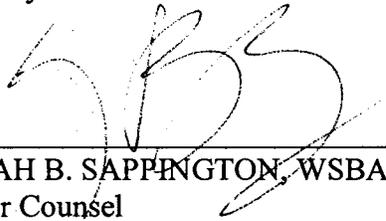
⁶ The MnSOST is (incorrectly) transcribed as the MINSOST throughout the trial transcript.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Jacka's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 20th day of May, 2010.

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NO. 39566-5-II

**COURT OF APPEALS, DIVISION II
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In re the Detention of:

ANTHONY JACKA,

Appellant.

DECLARATION OF
SERVICE

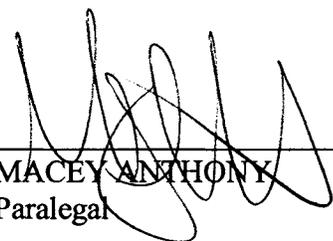
I, MACEY ANTHONY, declare as follows:

On the 20th day of May, 2010, I deposited in the United States
mail a true and correct copy of the Brief of Respondent and Declaration
Of Service, postage affixed, addressed as follows:

LISA TABBUT
P.O. BOX 1396
LONGVIEW, WA 98632-7822

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

DATED this 20th day of May, 2010, at Seattle, Washington.



MACEY ANTHONY
Paralegal

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DIVISION II
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BY: [Signature]