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

In re the Detention of A.O.,

Appellant,

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUE1

 A. Does sufficient evidence support the trial court’s
 conclusion that A.O. is gravely disabled?.....1

III. COUNTERSTATEMENT OF THE FACTS2

IV. ARGUMENT8

 A. Sufficient Evidence Supports the Trial Court’s
 Determination That A.O. Is Gravely Disabled8

 1. A.O. did not challenge any of the trial court’s
 findings of fact; therefore the trial court’s findings
 are verities on appeal.8

 2. The trial court’s conclusion that A.O. is gravely
 disabled is supported by its findings of fact and the
 evidence presented at trial.9

 B. In The Event the State Substantially Prevails on Appeal,
 the State Takes No Position on the Award of Costs12

V. CONCLUSION13

TABLE OF AUTHORITIES

Cases

Davis v. Dep't of Labor & Indus.,
94 Wn.2d 119, 615 P.2d 1279 (1980)..... 8

In re the Det. of LaBelle,
107 Wn.2d 196, 728 P.2d 138 (1986)..... 8, 9, 10

In re the Detention of J.S.,
124 Wn.2d 689, 880 P.2d 976 (1994)..... 10

O'Connor v. Donaldson,
422 U.S. 563 (1975)..... 11

Statutes

RCW 10.77.086(4)..... 2

RCW 71.05.020(17)..... 9

RCW 71.05.020(22)..... 9

RCW 71.05.020(22)(a) 9

RCW 71.05.020(22)(b) 10

RCW 71.05.280(4)..... 10

RCW 71.05.320(2)..... 10

I. INTRODUCTION

A.O. is a 41-year-old woman who did not have a documented history of psychiatric treatment before she was charged with second degree criminal mistreatment of a child and found incompetent to stand trial. In December 2017, an evaluating psychologist and an evaluating psychiatrist petitioned the Pierce County Superior Court for an order allowing them to involuntarily treat A.O. at Western State Hospital. A Pierce County commissioner granted the petition on the ground that A.O. is “gravely disabled” and found that a less restrictive alternative placement was “acceptable if can [sic] find placement with level of care to provide structured care for her including in home placement if can be structured with other assistance as appropriate.”

A.O. now challenges the sufficiency of the evidence supporting the trial court’s determination that she is gravely disabled. But A.O. did not challenge any of the trial court’s findings of fact, which are verities on appeal, and the findings support the legal conclusion that A.O. is gravely disabled. Therefore, the civil commitment order should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUE

- A. Does sufficient evidence support the trial court’s conclusion that A.O. is gravely disabled?

III. COUNTERSTATEMENT OF THE FACTS

In November 2017, the Pierce County Superior Court found that A.O. was incompetent to proceed to trial on felony charges of Criminal Mistreatment of a Child in the Second Degree. CP at 22–23. The Court dismissed the charges without prejudice, and ordered that A.O. be transported to the state hospital for evaluation for civil commitment. CP 22–23.

On December 6, 2017, Dr. Janene Dorio, Psy.D., and Dr. Glenn Morrison, D.O., filed a Petition For 180 Day Involuntary Treatment on the grounds that A.O.: (1) is gravely disabled; and (2) has been determined to be incompetent and criminal charges have been dismissed pursuant to RCW 10.77.086(4), has committed acts constituting a felony, and as a result of a mental disorder, presents a substantial likelihood of repeating similar acts. CP at 2. At the commitment hearing on December 19, 2017, the State elected to proceed only on the ground of grave disability, and not the felony ground. Accordingly, the State requested that A.O. be committed for up to 90 days rather than 180 days. RP at 2. Dr. Dorio testified at the hearing, as well as A.O.'s brother-in-law and husband. The commissioner found that A.O. is gravely disabled because she “manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not

receiving such care as is essential for his or her health or safety.” CP at 30. He also found that a less restrictive alternative placement was “acceptable if can [sic] find placement with level of care to provide structured care for her including in home placement if can be structured with other assistance as appropriate.” CP at 31.

On December 28, 2018, A.O. filed a Motion to Revise the trial court’s ruling, arguing that the evidence was insufficient to establish that she was gravely disabled. CP at 32–48. The motion was denied “with exceptions” on January 18, 2018. Specifically, the Pierce County Superior Court Judge ruled that he interpreted the commissioner’s ruling finding that A.O. was “not receiving such care as is essential for his or her health or safety” to mean that the care described by A.O.’s husband and brother-in-law, family friends, and various available social services “would provide the requisite care to allow [A.O.] to go home, if those services were indeed in place.” CP at 84. Therefore, if the Commissioner were satisfied at a review hearing also set for January 18, 2018 that those needed services were in place, A.O. could go home. *Id.* The judge also ruled that “[i]f, for any reason, the Commissioner finds that the needed services are not yet in place or in process, [A.O.] can subsequently move, with proper notice, for another hearing” *Id.* On January 29, 2018, A.O. moved for reconsideration, which was denied. CP at 85–92, 105.

At the review hearing on January 18, 2018, another review hearing was set in February 2018. At that review hearing, the commissioner found that several matters needed to be completed before A.O. could be safely released to her home, and ordered that A.O. could not be released until those matters were completed. CP at 102–04. Another review hearing was scheduled in March 2018; however, the commissioner ruled that if the matters were completed prior to the hearing, A.O. could be released, and the matter stricken. CP at 103. A.O. filed a Notice of Appeal that same day, and was released from the medical and legal custody of Western State Hospital on March 7, 2018, prior to the next scheduled review hearing. CP at 93–95, 158.

At the civil commitment hearing on December 19, 2017, Dr. Janene Dorio testified that in evaluating A.O. for civil commitment, she relied on recent competency evaluation reports, conversations with A.O.’s husband and a nurse practitioner from St. Clare Hospital, consultation with A.O.’s treatment providers in the forensics unit of Western State Hospital, A.O.’s records, and a face-to-face evaluation. RP at 3. Based on this information, Drs. Dorio and Morrison diagnosed A.O. with an unspecified neurocognitive disorder, with a history of a cerebral vascular accident. RP at 4.

Dr. Dorio testified that A.O. displayed a number of cognitive deficits, such as memory impairments and thought disorganization. RP at 4. A.O.'s thoughts and speech were disjointed, and she displayed an inappropriate affect characterized by laughing and smiling at inappropriate times. RP at 4. Dr. Dorio also testified that A.O. had poor insight and poor judgment, as well as a history of impulsive behavior. RP at 4.

In gathering information about A.O., Dr. Dorio spoke with the nurse practitioner at St. Clare Hospital, who had last seen A.O. in October 2016. The nurse practitioner related that at that time, while A.O. was displaying some involuntary movements, she appeared to be functioning at least in the low average range. RP at 4. Cognitively, A.O. was able to form full ideas and full sentences, and was able to share her history "fluidly"; for example, that she was married and had a child. RP at 6. Moreover, in October 2016, A.O. was ambulatory and even able to drive. RP at 8.

By contrast, at the time of the December 19, 2017 hearing, Dr. Dorio testified that A.O. was cognitively functioning at a much lower level than low average. RP at 5. A.O. was on one-to-one monitoring at Western State Hospital, and the staff monitoring A.O. had to be within an arm's reach of A.O. at all times because A.O. had trouble ambulating and performing her activities of daily living, such as showering and changing clothes. RP at 7. Staff were concerned about A.O.'s history of strokes, but without

neurocognitive testing, Dr. Dorio testified that it would be difficult to ascertain the cause of the rapid and sharp decline in her condition, and to be able to plan accordingly for her release. RP at 9, 12. In Dr. Dorio's professional opinion, given A.O.'s very high level of care in the highly structured milieu of Western State Hospital, and the fact that there were no supports set up in the community, she needed a far higher level of care than her husband could provide at that time. RP at 11–12.

Morton Perry, A.O.'s brother-in-law, testified that A.O. suffered a stroke a couple of years previously, after which she was able to continue working part time. RP at 25. He then testified that A.O. had a bad fall on the ice the previous year, and deteriorated significantly after that event. RP at 26–27. Mr. Perry characterized A.O. after the fall as "very disabled." RP at 27. Mr. Perry said that retired women in their church would be available to come over to be within arm's length of A.O. twenty-four hours a day, if needed. RP at 30–32.

A.O.'s husband testified that when she was living at home, he was able to care for her and their young child. RP at 34–36. He also acknowledged that it would be helpful if supports were set up before she came home. RP at 37.

The commissioner ordered A.O. to be detained for up to 90 days of involuntary treatment at Western State Hospital. CP at 31. He also

found that a less restrictive alternative placement was “acceptable if can [sic] find placement with level of care to provide structured care for her including in home placement if can be structured with other assistance as appropriate.” CP at 31. In support of his decision, the commissioner made the following findings of fact:

- A.O. has cognitive deficits, including memory deficits, disjointed thoughts, an inappropriate affect, poor insight and judgment, and a history of impulsive behavior.
- The nurse practitioner for A.O. indicated that A.O. was exhibiting some involuntary movements and was in the low average range (now at a much lower level). A.O. could previously share her history (I am married, have a child, etc.), and appeared very disjointed and confused and could not really share her history-very jumpy and not linear in how she shares history.
- If released into the community A.O. could not care for herself (she was on 1:1 in Western State Hospital and had to have her monitor within arms-reach). A.O. had trouble ambulating, doing activities of daily living like showering, changing clothes, etc. She had a series of strokes that impaired her cognitive ability.
- Western State Hospital had not done all of the needed analysis to deal with her progressive decline, such as a Home and Community Services assessment. A.O. has Medicare and is eligible for services.
- A.O. has a need of professional level of care beyond what family members can provide.

CP at 30.

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IV. ARGUMENT

A. Sufficient Evidence Supports the Trial Court's Determination That A.O. Is Gravely Disabled

1. A.O. did not challenge any of the trial court's findings of fact; therefore the trial court's findings are verities on appeal.

A.O. contends that the trial court erred when it found that A.O. is gravely disabled. In cases where the trial court has weighed the evidence, the appellate court's review is generally "limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment." *In re the Det. of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986).

A trial court's findings of fact are not to be disturbed on appeal if they are supported by substantial evidence. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980). However, as a corollary to this rule, unchallenged findings of fact become verities on appeal. *Id.* at 123. If findings of fact are not challenged, "it is unnecessary for [the appellate court] to search the record to determine whether there is substantial evidence to support them." *Id.* at 123. Accordingly, the trial court's "unchallenged findings of fact may not be reweighed on appeal. Rather, ... they may be challenged only as not supporting the conclusions

of law made by the court.” *Id.* at 124. In this case, A.O. is only challenging the sufficiency of the evidence to support the trial court’s legal conclusion of law that A.O. is gravely disabled.

2. The trial court’s conclusion that A.O. is gravely disabled is supported by its findings of fact and the evidence presented at trial.

The evidence produced at the commitment hearing on December 19, 2017 hearing and the unchallenged findings of fact by the trial court support its conclusion of law that A.O. is gravely disabled. “Gravely disabled” is defined as:

[A] condition in which a person, as a result of a mental disorder: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.

RCW 71.05.020(22).¹ The statute sets forth two alternative definitions of gravely disabled, either of which provides a basis for involuntary commitment. *LaBelle*, 107 Wn.2d at 202. To establish grave disability under RCW 71.05.020(22)(a), the evidence is required to show “a substantial risk of serious physical harm resulting from failure to provide

¹ A.O. cites to former RCW 71.05.020(17) for the definition of grave disability in her brief. The current version of the statute (effective April 1, 2018) moves the definition to RCW 71.05.020(22). The definition remains unchanged.

for essential health and safety needs.” *Labelle*, 107 Wn.2d at 204. In order to establish grave disability under RCW 71.05.020(22)(b), which is what the trial court ruled was the basis of its decision in this case, the evidence “must include recent proof of significant loss of cognitive or volitional control [and] must reveal a factual basis for concluding that the individual is not receiving or would not receive, if released, such care as is essential for his or her health or safety.” *Labelle*, 107 Wn.2d at 208. If the court orders 90 days of commitment under RCW 71.05.280(4), the commitment can take place in a less restrictive alternative community, or in a more restrictive setting if the court finds that the best interests of the person or others will not be served by less restrictive treatment. RCW 71.05.320(2); see *In re the Detention of J.S.*, 124 Wn.2d 689, 698, 880 P.2d 976 (1994).

In this case, the evidence and the findings support the conclusion that A.O. is gravely disabled. A.O. argues that she cannot be found “gravely disabled” under *LaBelle*, which held that, “[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” *LaBelle*, 107 Wn.2d at 201 (citing *O’Connor v. Donaldson*, 422 U.S. 563, 576 (1975)). “Of course, even if

there is no foreseeable risk of self-injury or suicide, a person is literally ‘dangerous to himself’ if for physical or other reasons he is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends.” *O’Connor v. Donaldson*, 422 U.S. 563, 574 n.9 (1975). In support of her argument, A.O. states that she is not gravely disabled given Dr. Dorio’s testimony that she willingly took her medication in the hospital and was well-nourished, that she was cooperative and pleasant and participated in classes, that she helped clean her room and make her bed, and that when she was living at home prior to her commitment to Western State Hospital, she did not have medical problems that could not be handled there. Brief of Appellant (Br. Appellant) at 12.

At the time of the December 19, 2017 hearing, however, A.O.’s condition had significantly deteriorated. As the trial court in the December 19, 2017 Order noted, because of A.O.’s cognitive deficits, including memory deficits, disjointed thoughts, inappropriate affect, poor insight, poor judgment, and a history of impulsive behavior, A.O. could not care for herself if released into the community. CP at 30. Finally, A.O.’s assertion that her family’s willingness to assume immediate care for her indicates that she is not gravely disabled under *O’Connor*, 422 U.S. at 576, is directly contradicted by the unchallenged finding by the trial court that A.O. needed a professional level of care beyond what family members could

provide. CP at 30. Accordingly, sufficient evidence supports the trial court's conclusion that A.O. suffered a severe deterioration in her routine functioning as evidenced by repeated and escalating loss of cognitive or volitional control over her actions, and would not receive from her family and friends the care that would be essential for her health and safety. The trial court's conclusion that A.O. is gravely disabled as a result of a mental disorder should thus be affirmed.

B. In The Event the State Substantially Prevails on Appeal, the State Takes No Position on the Award of Costs

A.O. asks this Court to exercise its discretion under RAP 14 and not award costs to the State if it prevails in this appeal. A.O. is correct that the trial court found that she is indigent. CP at 100–01. The State agrees that this Court has the discretion whether to award costs, and takes no position on the matter in this appeal.

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V. CONCLUSION

This Court should affirm the trial court's order committing A.O. for up to 90 days of involuntary treatment at Western State Hospital because the facts are sufficient to support the trial court's conclusion that A.O. is gravely disabled as a result of her mental disorder. The State takes no position regarding the award of costs should it prevail.

RESPECTFULLY SUBMITTED this 7th day of November, 2018.

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PROOF OF SERVICE

I, *Beverly Cox*, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on November 7, 2018, I caused to be served a true and correct copy of this **RESPONDENT'S BRIEF** and this **PROOF OF SERVICE** on the following individuals, in the manner indicated below:

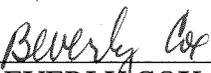
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of November 2018, at Tumwater, Washington.



BEVERLY COX
Legal Assistant

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

November 14, 2018 - 9:32 AM

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