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Court of Appeals
Division II
State of Washington
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NO. 53965-9-II

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

IN RE THE DETENTION OF:

A.M.,

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

Commissioner David Johnson
(fact finding)

Judge K.A. van Doorninck
(denied revision of Commissioner Johnson's ruling)

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
1. The trial court erred in committing A.M. to a secure mental health facility for 180 days as the court heard no evidence establishing A.M. committed felony harassment, a prerequisite to the 180-day commitment.....	1
2. The trial court erred in committing A.M. to a secure mental health facility for 180 days as the court heard no evidence establishing A.M. was gravely disabled.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
1. Whether the facts at A.M.'s trial seeking a 180-day commitment to a mental health facility failed to satisfy the requirement that A.M. committed acts constituting a felony when no evidence submitted to the court established the person threatened reasonably believed A.M.'s threat to kill her, a mandatory element of felony harassment?.....	1
2. Whether the trial court erred in committing A.M. to a secure mental health facility for 180 days when the state failed to establish that A.M. was gravely disabled?.....	1
C. STATEMENT OF THE CASE.....	2

D. ARGUMENT.....4

Issue 1: The trial evidence failed to prove A.M. committed felony harassment. Without the proof, the court erred in committing A.M. for a 180 day mental health commitment.....4

a. Because of the continuing adverse collateral consequences to A.M. this appeal is not moot.....4

b. A.M. did not commit an act constituting a felony.....5

c. The commitment order must be reversed.....10

Issue 2: A.M. is not gravely disabled.10

a. The state did not meet its burden under (a) of the grave disability prong.....10

b. The state did not meet the burden under prong (b) of grave disability.....12

E. CONCLUSION.....17

CERTIFICATE OF SERVICE.....18

TABLE OF AUTHORITIES

	Page
Washington Supreme Court Cases	
<i>In re LaBelle</i> , 107 Wn.2d 196, 204, 728 P.2d 138 (1986). 11, 12, 13, 14, 15,	16
<i>In re Pawling</i> , 101 Wn.2d 392, 679 P.2d 916 (1984)	7
<i>State v. C.G.</i> , 150 Wn.2d 604, 80 P.3d 594 (2003).....	6
<i>State v. J.M.</i> , 144 Wn.2d 472, 28 P.3d 720 (2001).....	6
Washington Court of Appeals Cases	
<i>In re Detention of M.K.</i> , 168 Wn. App. 621, 279 P.3d 897 (2012)	4
Federal Cases	
<i>O'Connor v. Donaldson</i> , 422 US 563, 45 L.Ed.2d 396, 95 S.Ct. 2486 (1975)	12
Other Authorities	
RCW 71.05.010	13
RCW 71.05.012	4
RCW 71.05.020	10, 11, 12, 16
RCW 71.05.240	5
RCW 71.05.280	7
RCW 71.05.320	5
RCW 9.41.010	5
RCW 9A.04.110	6
RCW 9A.46.020	5, 6

A. ASSIGNMENTS OF ERROR

1. The trial court erred in committing A.M. to a secure mental health facility for 180 days as the court heard no evidence establishing A.M. committed felony harassment, a prerequisite to the 180-day commitment.

2. The trial court erred in committing A.M. to a secure mental health facility for 180 days as the court heard no evidence establishing A.M. was gravely disabled.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the facts at A.M.'s trial seeking a 180-day commitment to a mental health facility failed to satisfy the requirement that A.M. committed acts constituting a felony when no evidence submitted to the court established the person threatened reasonably believed A.M.'s threat to kill her, a mandatory element of felony harassment?

2. Whether the trial court erred in committing A.M. to a secure mental health facility for 180 days when the evidence failed to establish that A.M. was gravely disabled?

C. STATEMENT OF THE CASE

The state petitioned to have A.M. committed to a secure mental health facility for 180 days. CP 1-3. Under the state's petition, A.M. could only be committed to the facility if evidence established he was gravely disabled or committed a felony. CP 2.

Pierce County Commissioner David Johnson held a hearing to determine if A.M. could legally be committed to Western State Hospital for 180 days. RP1¹ 1-33.

Bellingham Haggen Food checker Courtney Kiehn-Sanford testified about A.M. coming through her checkout station. RP1 6. As Kiehn-Sanford rang up A.M.'s items, she asked A.M. for his phone number. RP1 6. She intended to input the number so A.M. would benefit from any in-store discount. RP1 7. A.M. declined to give Kiehn-Sanford the number saying that she "did not deserve to know it." RP1 6. A.M. leaned over Kiehn-Sanford's monitor and told her he would shoot her in the face. RP1 6. A customer behind A.M. heard him make the statement. RP1 8. Kiehn-Sanford felt "moderately scared." RP1 7.

¹ There are two volumes of verbatim report of proceedings for this appeal, "RP1" is the verbatim for the July 15, 2019, 180-day commitment hearing, and "RP2" is the August 9, 2019, motion to revise the commissioner's July 15 ruling.

Kiehn-Sanford called for her manager. RP1 9. The manager came to the checkout station where he talked to A.M. RP1 9. A.M. left the store without incident. RP1 9.

A.M.'s interaction with Kiehn-Sanford prompted the Whatcom County prosecutor to charge A.M. with felony harassment. CP 4. The state dismissed the charge after Western State Hospital forensic services found A.M. not competent to stand trial. CP 5.

Western State Hospital Psychiatric Doctor Jenna Tomei testified A.M. was schizophrenic, and the schizophrenia interfered with A.M.'s ability to provide for his basic health and safety. RP1 13.

These facts convinced the court to enter an order committing A.M. to Western State for 180 days. CP 22-25.

A.M. sought revision of Commissioner Johnson's ruling. RP2 3-6. Pierce County Superior Court Judge VanDoornick reviewed the transcript of the hearing and declined to revise Commissioner Johnson's ruling. CP 80-81.

A.M. appealed the trial court's order. CP 84-86.

D. ARGUMENT

Issue 1: The trial evidence failed to prove A.M. committed felony harassment. Without proof, the court erred in committing A.M. for a 180-day mental health commitment.

- a. *Because of the continuing adverse collateral consequences to A.M. this appeal is not moot.*

The 180 days of involuntary treatment on A.M. has passed and this court will no longer provide effective relief from confinement. However, an individual's release from detention does not render an appeal moot where collateral consequences flow from the determination authorizing the detention. *In re Detention of M.K.*, 168 Wn. App. 621, 626, 279 P.3d 897 (2012).

By statute, a trial court is directed to consider up to a three-year history of prior civil commitments, which becomes part of the evidence against a person seeking denial of a petition for commitment. RCW 71.05.012. "Accordingly, each commitment order has a collateral consequence in subsequent petitions and hearings, allowing us [appellate court] to render relief if we hold that the detention under a civil commitment order was not warranted." *In re Detention of M.K.*, 168 Wn. App. at 626.

Furthermore, the court's ruling interferes with A.M.'s constitutionally protected right to possess a firearm: "Firearm Possession Prohibited: Respondent has been detained pursuant to RCW 71.05.240 and 71.05.320 and is prohibited from possessing, in any manner, a firearm, as defined in RCW 9.41.010." CP 25. Thus, the trial court's order creates adverse consequences beyond the 180-day detention A.M. has completed.

b. A.M. did not commit an act constituting a felony.

The state alleged, and ostensibly proved, A.M. committed the offense of felony harassment. RCW 9A.46.020(2)(b)(ii); CP 23. The court noted in its written findings and conclusions: "Respondent committed the following acts threatened to shoot victim in the face, which constitute a threat to kill, which constitutes the felony/felonies of felony harassment pursuant to RCW 9A.46.020(2)(b)(ii)." CP 23.

A person is guilty of felony harassment, per RCW 9A.46.020(1), (2), only when "[w]ithout lawful authority, the person knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person," and "[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1). CP 1. To "threaten" is "to communicate, directly or indirectly the intent . . . [t]o cause bodily injury

in the future to the person threatened or to any other person.” RCW 9A.04.110(28)(a). The crime is elevated to a felony if the threat to cause bodily injury is a threat “to kill the person threatened or any other person.” RCW 9A.46.020(2)(b).

To prove the elements of harassment, the state must show the defendant’s words or conduct placed the person threatened in reasonable fear the threat would be carried out. *State v. J.M.*, 144 Wn.2d 472, 482, 28 P.3d 720 (2001); RCW 9A.46.020(1). The state must show the person threatened was placed in reasonable fear of the actual threat made. *State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003) (“the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out.”). Because felony harassment requires proof that the threat made was a threat to kill, the state must show the person threatened was placed in reasonable fear the threat to kill would be carried out. *Id.* at 609-10, 612. It is not enough for the state to show the threat caused the victim to fear generalized lesser harm, such as the threat of injury. *Id.* And it is certainly not enough to prove felony harassment because a person’s words caused a grocery checker to call her manager and for the manager to tell the person to leave the store.

To determine whether sufficient evidence supports a conviction in a civil commitment proceeding, the court determines whether any rational fact finder could have found the elements of the crime by clear, cogent, and convincing evidence. *In re Pawling*, 101 Wn.2d 392, 679 P.2d 916 (1984). CP 23.

The Whatcom County prosecutor charged A.M. with felony harassment, but the court dismissed the charge after finding A.M. not competent for prosecution. CP 2; RP1 23. To detain A.M. for 180 days as an incompetent person after the dismissal of a felony charge, evidence at trial must prove A.M. committed acts constituting a felony. RCW 71.05.280(3). But the facts presented at trial failed to prove A.M. committed a felony.

The state presented no evidence Hagen checker Kiehn-Sanford interpreted A.M.'s words as a threat actually to kill her. Hagen appeared in-person to give her trial testimony. RP1 4-10. She told the story of A.M.'s statement about shooting her in the face. RP1 5-10. But her testimony included no information that she reasonably believed A.M. would carry out the threat to shoot her. RP1 5-10. Nothing in her testimony supports a finding that Kiehn-Sanford reasonably believed A.M.'s statement that he would shoot her in the face and thereby kill her. RP1 5-10.

Kiehn-Sanford's demeanor during the encounter is contrary to a person believing she is about to die. It was early in her shift, around 7:45 p.m. at the Bellingham Hagen Grocery Store, when A.M. came through her checkout station. RP1 5-6. After ringing up A.M.'s few items, she asked A.M. him for his access code or phone number. RP1 6. She planned to put his number into the register and save A.M. some money through an in-store discount. RP1 6. A.M. replied to Kiehn-Sanford that she did not deserve to know his phone number. RP1 6. Kiehn-Sanford shrugged off his statement. RP1 6. As she bagged up A.M.'s items, A.M. leaned "all the way over the monitor" and told her, "I'm" going to get a gun and shoot you in the face." RP1 6. Kiehn-Sanford felt "taken aback" and "then moderately scared." RP1 6. She calmly asked A.M. if he had just threatened her with "physical violence," and he answered "yes." RP1 8.

The store manager told A.M. to leave, and A.M. left. RP1 9.

Even though the offense of felony harassment requires proof the person threatened reasonably believed the threat would be carried out, the state did not ask Kiehn-Sanford what she thought of A.M.'s words. RP1 5-10. Kiehn-Sanford did not volunteer that she thought A.M. meant to kill her. RP1 5-10. Neither defense counsel nor the state asked Kiehn-Sanford how she felt about or interpreted A.M.'s statement. RP1 5-10.

With no proof Kiehn-Sanford believed A.M.'s words were an actual threat to kill her, proof of felony harassment fails. The state's failure to inquire is telling that the state had no such evidence.

Of note, too, is that no evidence suggested a strong, frightened physical reaction one might suspect from a person who feared for their life. No evidence had Kiehn-Sanford ducking under her station for protection, screaming for help, or bolting from her station to save herself. RP1 5-10. One would expect some such action on Kiehn-Sanford's part if she reasonably believed the threat was a threat to kill her.

Instead, Kiehn-Sanford turned to her intercom, summoned her manager, and stood near A.M. while waiting for the store manager to arrive. RP1 9. The manager did come, told A.M. to leave the store immediately, and A.M. left without incident. RP1 9.

Kiehn-Sanford did testify she later felt "shaky" and opted to go home early rather than staying on until the 3 a.m. end of her shift. RP1 7. But no one followed up with Kiehn-Sanford about the reason for the source of her shakiness. RP1 7-9. No one asked her.

Nothing in Hagen's testimony provided the court with an inference that Hagen believed the threat.

c. *The commitment order must be reversed.*

The commitment order required proof of a felony. CP 23. With no evidence A.M. committed the felony crime of felony harassment, the entry of the 180-day commitment order was an error. The order must be reversed.

Issue 2: A.M. is not gravely disabled.

Contrary to the trial court's finding, the evidence failed to prove A.M. is gravely disabled.

Gravely disabled" means a condition in which a person, as a result of a mental disorder, or as a result of the use of alcohol or other psychoactive chemicals: (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).

a. *The state did not meet its burden under (a) of the grave disability prong.*

The state supreme court has construed the gravely disabled standard of RCW 71.05.020(22) to require a showing of a *substantial* risk of danger of serious physical harm resulting from failure to provide for

essential health and safety needs. *In re LaBelle*, 107 Wn.2d 196, 204, 728 P.2d 138 (1986).

LaBelle illustrates what constitutes sufficient evidence to sustain a finding of grave disability under prong (a). *LaBelle* included the appeal of four different respondents challenging their commitments and the courts' findings that they were gravely disabled. *LaBelle*, 107 Wn. 2d at 199. Appellant Richardson appealed from an order for 90 days of involuntary treatment based on grave disability. *Id.* The evidence produced at the hearing was that when Richardson was initially detained he was suffering from a severe case of impetigo for which he would not get treatment, he experienced intermittent pain in a tooth and had not been to the dentist in 12 years, and he was not eating well, and he was unwilling to consider the possible consequences of that or seek medical help. *Id.* at 213-14.

The court in *LaBelle* reversed the finding of grave disability stating, "Under these circumstances, the risk of physical harm from Richardson's tendency to neglect his health was too speculative and insubstantial to justify continued commitment for 90 days under the grave disability standard of RCW 71.05.020(1)(a)." *Id.* at 214.

Here, there was no evidence produced that A.M. was not meeting his essential needs in the community. “A state cannot constitutionally confine, without more, a non-dangerous individual who is capable of surviving safely in freedom by himself and without the help of willing and responsible family members or friends.” *Labelle*, 107 Wn.2d at 201; *O’Connor v. Donaldson*, 422 US 563, 576, 45 L.Ed.2d 396, 95 S.Ct. 2486 (1975).

There has been no showing that A.M.’s essential needs of health and safety were not being met in the community. He was shopping for groceries at the time of his arrest. RP1 6. There was no testimony that he was not addressing his hygiene or medical needs or not getting proper nutrition.

b. The state did not meet the burden under prong (b) of grave disability.

The second definition of gravely disabled contained in RCW 71.05.020(22)(b) was added by the legislature in 1979 to broaden the scope of the involuntary commitment standards.² By incorporating the

² Before this section was added, the State did not involuntarily treat those discharged patients who, after a period of time in the community, dropped out of therapy or stopped taking their prescribed medication, exhibiting rapid deterioration in their ability to function independently. *Labelle*, 107 Wn.2d at 205. Involuntary treatment was precluded until a

definition of “decompensation,” the progressive deterioration of routine functioning supported by evidence of repeated or escalating loss of cognitive or volitional control of actions, subsection (b) now permits the state to intervene before a mentally ill person’s condition reaches crisis proportions. *Labelle*, 107 Wn.2d at 206. The goal is to break the cycle commonly known as “revolving door syndrome” where a patient is prematurely released, then decompensates in the community, and is soon hospitalized. *Id.* at 206. Such intervention is consistent with the express legislative intent that the hospital provide patients with “continuity of care.” RCW 71.05.010(1)(e).

The *Labelle* court reversed the 180-commitment of respondent Trueblood. Trueblood stipulated to an order of up to 90 days of involuntary treatment at a less restrictive placement. The state sought a 180 day LRA order after the 90 day stipulated order. *Id.* at 200.

At the hearing on the petition, the state’s evidence consisted of two witnesses. *Id.* at 215. The first witness was a social worker who testified that during the 90 day LRA period, Trueblood had started missing appointments with him, his doctor, and the medical clinic. He

person had decompensated to the point that the person was in danger of serious harm from that person’s inability to care for his needs. *Id.*

testified that Trueblood told him that he felt persecuted, threatened and unsafe in his apartment. Trueblood had told him he spent several nights outside in a park where he felt safer, and he wanted to discontinue treatment and expressed his desire to live in a tent on Snoqualmie Pass. *LaBelle*, at 215-16.

The other witness was a psychiatry resident who treated Trueblood early in his 90 day less restrictive alternative. *LaBelle*, at 215. She testified Trueblood had chronic schizophrenia and was unkempt and losing weight. It was her opinion that, given his history, he was in a decompensated state, which placed him in danger of serious harm and that his paranoid thinking caused him to seek out places that were not safe. *Id.* at 216.

The court reversed the grave disability finding. “Under either definition the state’s evidence was not sufficiently clear, cogent, and convincing to support a finding of gravely disabled.” *Id.* at 217. The court rejected the finding under prong (a) as “there was no evidence of recent weight loss or any other evidence suggesting that Trueblood was neglecting his essential needs of food, clothing, and shelter.” *Id.*

Likewise, prong (b) was rejected because “although Dr. Wothers’ testimony suggests that Trueblood may have been decompensating when

she last saw him, her opinion is based upon observations and interviews from 2 to 3 months prior to the hearing. Her only opinion as to recent observations suggests that Trueblood was cognitively oriented and intact as of the time of the hearing.” *Id.* at 217-18.

Here, A.M. had limited contact with the mental health system. A.M. had one prior hospitalization at Western State Hospital. RP1 19-20. The hospital did not meet its burden in showing that A.M.’s mental state was decompensating.

For a finding under prong (a), there must be evidence that as a result of a mental disorder, A.M. is in danger of physical harm resulting from the failure to provide for his essential needs and safety. But A.M. testified to a specific plan of staying at the Bread of Life shelter in Seattle, and he could afford the \$5 per night cost as he received \$1,333 monthly from Medicaid. RP1 24. He also had a bus pass and knew how to get around. RP1 27.

For a finding under prong (b), there must be evidence of severe decompensation in A.M.’s routine functioning, and it must be evidenced by repeated and escalating loss of cognitive or volitional control over his actions and there must be evidence, not just an opinion for the doctor. Also, there must be evidence that A.M. would not receive such care as is

essential for his health or safety. The Supreme Court in *LaBelle* was particularly concerned that too much deference would be given to the opinions of the mental health professionals, thereby effectively insulating their commitment recommendations from judicial review. *Id.* at 207.

The court in *LaBelle* further warned:

[W]hen the state is proceeding under the gravely disabled standard of RCW 71.05.020(1)(b), it is particularly important that the evidence provide a factual basis for concluding that an individual “manifests severe [mental] deterioration in routine functioning.” Such evidence must include recent proof of significant loss of cognitive or volitional control. In addition, the evidence 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. It is not enough to show that care and treatment of an individual’s mental illness would be preferred or beneficial or even in his best interests. To justify commitment, such care must be shown to be essential to an individual’s health or safety and the evidence should indicate the harmful consequences likely to follow if involuntary treatment is not ordered.

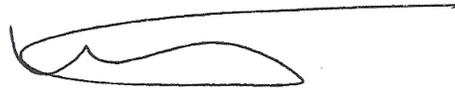
LaBelle, 107 Wn. 2d at 208.

There was no such evidence produced here. A.M. was taking care of his own needs of health and safety in the community. RP1 25-27.

E. CONCLUSION

The evidence failed to prove A.M. committed a felony. The evidence similarly failed to establish that A.M. was gravely disabled. The trial court erred in finding to the contrary. A.M.'s 180-day commitment order should be reversed and stricken.

Respectfully submitted May 27, 2020.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', written over a horizontal line.

LISA E. TABBUT/WSBA 21344
Attorney for A.M.

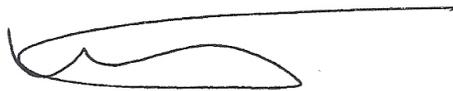
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Office of the Attorney General, at shsappealnotification@atg.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to A.M., c/o Western State Hospital, 9601 Steilacoom Blvd S.W., Lakewood, WA 98498.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 27, 2020, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344
Attorney for A.M., Appellant

LAW OFFICE OF LISA E TABBUT

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