

FILED
Court of Appeals
Division II
State of Washington
8/14/2020 4:33 PM

NO. 54144-1-II

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

In re the Detention of:

J.M.,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

J.M. is a 23-year old man with a diagnosis of unspecified schizophrenia spectrum and other psychotic disorder. In November 2019, J.M. was ordered to be detained at Western State Hospital for up to 180 days of involuntary treatment. He was detained on the grounds that (1) he committed the crimes of felony harassment and theft with intent to resell and, as a result of a mental disorder, presents a substantial likelihood of committing similar acts, and that (2) he was gravely disabled as a result of his mental disorder. The commissioner also found that a less restrictive alternative to hospitalization was not in the best interests of J.M. or others.

J.M. now challenges his commitment, arguing the commissioner erroneously denied his motion to suppress admissions he made to law enforcement, violating his statutory right to remain silent and his right against self-incrimination under the federal and state constitutions; that the admission of testimony about his threats violated the best evidence rule; and that the commissioner failed to make sufficiently specific written findings.

Because the right against self-incrimination in the state and federal constitutions does not apply in civil commitment cases, and the statutory right only applies to the civil commitment proceedings; because the petitioners' failure to prove all the elements of felony harassment does not negate the finding that J.M. committed theft with intent to resell; and

because the written and oral findings together are sufficiently specific to provide a meaningful review, the civil commitment order should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

- A. Should this Court find that the right against self-incrimination in the Fifth and Fourteenth Amendments to the United States Constitution does not apply in civil commitment proceedings, and therefore the denial of J.M.'s motion to suppress was proper?**
- B. Should J.M.'s claim concerning an alleged violation of his Wash. Const. art. 1, § 3 right against self-incrimination be rejected for failure to perform a meaningful *Gunwall* analysis?**
- C. Should this Court affirm its previous ruling that the right to remain silent in former RCW 71.05.360¹ does not apply to out-of-court statements?**
- D. Does the petitioners' failure to submit an electronic copy or photocopy of the threatening Facebook Messenger posts to support acts constituting felony harassment require dismissal of the 180-day commitment in light of the fact that the petitioners also proved the felony of theft with intent to resell in the second degree?**
- E. Were the commissioner's oral and written findings of fact sufficiently specific to provide a meaningful review?**

III. COUNTERSTATEMENT OF THE FACTS

In October 2019, J.M. was found incompetent to stand trial for theft with intent to resell in the second degree, and three counts of felony

¹RCW 71.05.360 was repealed by Laws of 2020, ch. 302, § 31 (2E2SSB 5720), effective June 11, 2020. The right to remain silent provisions were incorporated into RCW 71.05.217(5)(b).

harassment – threats to kill, all class C felonies. CP 16-17. He was ordered to Western State Hospital for an evaluation for the purpose of filing a civil commitment petition. CP 16-17. A petition and two amended petitions were subsequently filed alleging that J.M. suffered from a mental disorder, that he committed acts constituting a felony, and that as a result of the mental disorder he presented a substantial likelihood of committing similar acts and was gravely disabled. CP 1-15, 18-41, 42-56.

The following evidence was presented at J.M.'s 180-day civil commitment hearing. On December 12, 2018, Brandon Melvin, working as an asset protection manager in the Burlington Fred Meyer store, observed J.M., whom he had previously seen in the store, selecting multiple items of Seahawks apparel. VRP 31. He saw J.M. take the items to a secluded part of the home department section and conceal them in a plastic bag. VRP 31. J.M. then made a purchase at the Starbucks in the store, purchased a Redbull at the self-checkout, grabbed some lighters and concealed them, and walked out the door. VRP 31.

After J.M. left the store, Mr. Melvin approached J.M. and asked him to go back to Mr. Melvin's office to discuss the unpurchased merchandise. VRP 32. J.M. willingly went with Mr. Melvin to the asset protection office. VRP 32. Mr. Melvin asked J.M. if he was going through hard times, and J.M. replied that he was. VRP 33. J.M. also said that he planned on pawning

the items to purchase a gun to shoot his ex-girlfriend's boyfriend. VRP 33, 39. Assistant store manager John Ranney also heard J.M. admit that he stole the items and planned to pawn them to purchase a firearm. VRP 45.

Officer Stacy Wilson of the City of Burlington Police Department, who was familiar with J.M. from a previous shoplifting incident, was dispatched to the Fred Meyer store. VRP 25, 39-40. Upon arriving there, she found J.M. in the loss prevention office with Mr. Melvin and Mr. Ranney. VRP 25. Officer Wilson read J.M. his rights, and J.M. indicated that he understood his rights and waived them. VRP 26. Under questioning, J.M. admitted to Officer Wilson that he stole items from the store with the intent to get enough money to purchase a handgun to kill his ex-girlfriend's boyfriend. VRP 26. The items that J.M. admitted stealing were Seahawks jerseys worth \$150.00, a set of Bluetooth speakers worth \$119 and change, and other assorted items worth \$74.28, for a total of a little more than \$343.28. VRP 38.

Taylor Hornbeck, who used to be friends with J.M.'s sister, testified that she has known J.M. for about six years. VRP 50. She testified that on December 2, 2018, J.M. texted her through Facebook Messenger, as he had previously done, and told her that anyone who stood in the way of him and Lindsay, his former girlfriend, would be fatally shot or dreadfully murdered,

which Ms. Hornbeck took as a threat to her personally because she was “kind of standing in the way of them.” VRP 50-54. Ms. Hornbeck testified that the threat frightened her to the extent that she did not want to leave her house. VRP 53-54. She also testified that she knew that the threat came from J.M. because his Facebook profile came up with the message. VRP 51.

Detective Matthu Brooks of the Burlington Police Department interviewed J.M. on video on December 12, 2018. Prior to doing so, he read J.M. his Miranda rights, and J.M. agreed to be interviewed. VRP 59. J.M. told Detective Brooks that he stole three Seahawks jerseys, two scarves, two pairs of socks and two Seahawks shirts, and put them in his backpack. VRP 59, 61-63, 70-72. J.M. said he was going to attempt to sell the clothes in order to purchase a hi-tech handgun from a pawn shop in Mt. Vernon. VRP 62-63. J.M. also talked about his mental health medications, and how he had discontinued them and was consuming alcohol. VRP 73-74, 76-78.

Petitioner Dr. Jacqueline Means, a supervising forensic evaluator, testified that she attempted to interview J.M. for purposes of evaluation, and reviewed J.M.’s available mental health records, available discovery and current observations of his treatment at Western State Hospital. VRP 81. Based on her review, Dr. Means testified that J.M. meets the criteria for unspecified schizophrenia spectrum and other psychotic disorder. VRP 81. J.M.’s specific symptoms related to his diagnosis are thought

disorganization, delusional thoughts, and repetitive thoughts where he could not process new information. VRP 81-82. Additionally, J.M.'s mood is dysregulated, as evidenced by displaying suicidality and self-harming behaviors such as not eating, which J.M. himself discussed in his interview with Detective Brooks, and thoughts of wanting to die or death. VRP 73-74, 82-83. J.M. also has persecutory delusions of a romantic nature. VRP 82. J.M. has expressed delusional ideation regarding demons, and said that he would like to eat his own feces to punish himself. VRP 83.

Dr. Means testified why, as a result of his mental disorder, J.M. was likely to commit acts similar to those that formed the basis of the acts constituting the felonies. VRP 84-85. She also testified why, as a result of his mental disorder, J.M. would not be able to meet his basic needs of health and safety if he were released from the hospital. VRP 84-87. Finally, Dr. Means testified that J.M. currently needs the structure of Western State Hospital, and was not ready for a less restrictive placement due to his continuing delusions and his expressions of wishing to harm the boyfriend of his ex-girlfriend. VRP 87-88.

J.M.'s mother testified that if J.M. were released, he could live with her, and she would make sure he ate properly, went to his mental health appointments, and took his medications. VRP 92-94. She also testified that J.M. had been living with her in December 2018. VRP 97. J.M. also testified

that if released he would take his medications and attend therapy. VRP 99-102.

Commissioner David Johnson found that the petitioners proved by clear, cogent and convincing evidence that J.M. committed acts constituting a felony, to wit: theft with intent to resell in the second degree and felony harassment – threats to kill, both of which are class C felonies. VRP 110; CP 58. He also found that as a result of a mental disorder, J.M. presented a substantial likelihood of committing similar acts. VRP 110; CP 59. Additionally, Commissioner Johnson found that J.M. was gravely disabled, and that a less restrictive placement was not in the best interest of J.M. or others. VRP 110-111; CP 59. He did so through his written findings of fact and conclusions of law, as well as his oral findings of fact and conclusions of law, which he incorporated by reference into his written order. CP 57.

J.M.'s Notice of Appeal was filed on December 12, 2019. CP 63.

IV. ARGUMENT

A. Standards of Review

On appeal from a denial of a motion to suppress evidence, the appellate court reviews the trial court's conclusions of law de novo. *State v. Scherf*, 192 Wn.2d 350, 370, 429 P.3d 776 (2018). Interpretation of a statute is a matter of law subject to de novo review on appeal. *Jametsky v. Olsen*, 179 Wn.2d 756, 761-762, 317 P.3d 1003 (2014).

Questions of mixed law and fact are also reviewed de novo. *State v. Linville*, 191 Wn.2d 513, 518, 423 P.3d 842 (2018).

B. Because the Right Against Self Incrimination in the Fifth and Fourteenth Amendments to the United States Constitution Does Not Apply in Civil Commitment Cases, the Commissioner Properly Denied J.M.’s Motion to Suppress Admissions Made to Law Enforcement

At the commitment hearing, J.M. moved to suppress inculpatory statements that he made to law enforcement officers after being advised of his right to remain silent, arguing that the Fifth Amendment protections against self-incrimination required the commissioner to exclude these admissions. VRP 20-21, 60-61. J.M. equates his civil commitment proceeding with a criminal proceeding, assuming that a deprivation of liberty for treatment under RCW 71.05 is the same as a deprivation of liberty that a criminal sentence confers. Because the constitutional right against self-incrimination does not apply to civil commitment proceedings as a matter of law, the commissioner properly denied the motion.

1. Involuntary commitment proceedings for mental health treatment are civil, not criminal

The full panoply of rights conferred on a criminal defendant are not available to a respondent in a civil commitment proceeding. Civil commitment for mental health treatment is fundamentally different than criminal prosecutions. *See Addington v. Texas*, 441 U.S. 418, 425-432, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (civil commitment proceedings only

require a “clear and convincing” standard of proof rather than the “beyond a reasonable doubt” standard of proof, as requiring the latter may “erect an unreasonable barrier to needed medical treatment”); *Matter of McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984); *see also State v. M.R.C.*, 98 Wn. App. 52, 56-57, 989 P.2d 93 (1999) (holding the doctrine of corpus delicti in criminal proceedings does not apply in civil commitment proceedings). As the United States Supreme Court noted upholding a sexually violent predator commitment law in *Kansas v. Hendricks*, an involuntary civil commitment for mental health treatment “...is not retributive because it does not affix culpability for prior criminal conduct.” 521 U.S. 346, 362, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

In *Hendricks*, the United States Supreme Court noted that in a previous case upholding the Illinois Sexually Dangerous Persons Act, also a civil commitment law, it found the statute was not punitive “even though it was triggered by the commission of a sexual assault, explaining that evidence of the prior criminal conduct was ‘received not to punish past misdeeds, but primarily to show the accused’s mental condition and to predict future behavior.’” *Hendricks*, 521 U.S. at 362 (citing *Allen v. Illinois*, 478 U.S. 364, 371, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986)). “Thus, the fact that [a civil commitment proceeding] may be ‘tied to criminal activity’ is ‘insufficient to render the statut[e] punitive.’”

Hendricks, 521 U.S. at 362 (citing *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996)).

Persons subject to civil commitment under RCW 71.05.280(3) are no longer criminal defendants; rather, they have been excused from the criminal proceedings due to a mental illness rendering them incompetent to stand trial. RCW 71.05.280(3) provides a commitment ground when a person has been found incompetent to stand trial on felony charges, and is sent to a state hospital for evaluation for civil commitment. RCW 10.77.086(4). As such, this Court has previously found that an involuntary commitment proceeding under RCW 71.05.280(3) “is not analogous to a criminal proceeding” and declined to import criminal procedures into the civil commitment scheme. *State v. M.R.C.*, 98 Wn. App. at 57-58.²

2. The Fifth and Fourteen Amendment protections against self-incrimination do not apply to civil commitment proceedings

The Fifth Amendment to the United States Constitution provides in relevant part that, “No person ... shall be compelled *in any criminal case* to be a witness against himself ... without due process of law...”

² Similarly, Washington courts have repeatedly refused to confer upon sexually violent predator respondents the same rights as criminal defendants. See *In re Detention of Stout*, 159 Wn.2d 357, 369-71, 150 P.3d 86 (2007); *In re Detention of Turay*, 139 Wn.2d 379, 422, 986 P.2d 790 (1999); *In re Detention of Ticeson*, 159 Wn. App. 374, 381, 246 P.3d 550 (2011); *In re Aqui*, 84 Wn. App. 88, 101, 929 P.2d 436 (1996).

U.S. Const. amend. V. As previously noted, J.M. equates felony civil commitment proceedings with criminal proceedings, concluding that the right against self-incrimination applies to his statements to the police officers after he received Miranda warnings. However, because the United States Supreme Court has explicitly held that the right against self-incrimination does not apply in civil commitment proceedings, J.M.'s argument fails.

In *Allen v. Illinois*, cited above, the United States Supreme Court analyzed the application of the Fifth Amendment to a commitment proceeding under the Illinois Sexually Dangerous Persons Act. The Court acknowledged that it "...has long held that the privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." 478 U.S. at 368 (citing *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984)) (internal quotations omitted). However, the *Allen* Court concluded that because the Illinois Sexually Dangerous Persons Act was civil in nature for the reasons previously stated, the Fifth Amendment right against self-incrimination does not apply. *Allen*, 478 U.S. at 375.

J.M. contends that the Miranda safeguards apply whenever a person is subjected to questioning or subjected to words or actions reasonably likely to elicit an incriminating response from law enforcement, and those incriminating statements cannot be admitted as evidence in a civil commitment proceeding because a civil commitment is a deprivation of liberty that requires Fifth Amendment protection. That conclusion was roundly rejected by the *Allen* Court:

[The] sweeping statement [in *In re Gault*, 387 U.S. 1, 50, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)] that “our Constitution guarantees that no person shall be ‘compelled’ to be a witness against himself when he is threatened with deprivation of his liberty,” ... *is plainly not good law*. Although the fact that incarceration may result is relevant to the question whether the privilege against self-incrimination applies, *Addington* demonstrates that involuntary commitment does not itself trigger the entire range of criminal procedural protections. Indeed, petitioner apparently concedes that traditional civil commitment does not require application of the privilege.

Allen v. Illinois, 478 U.S. at 372 (emphasis added). Accordingly, the application of the right to remain silent in civil commitment cases fails.

J.M. also claims that the due process clause of the Fourteenth Amendment imports the Fifth Amendment right against self-incrimination into civil commitment proceedings. In support of this claim, J.M. cites to *In re Detention of Law*, 146 Wn. App. 28, 204 P.3d 230 (2008), which in part concerned admissions that *Law* made to a polygraph examiner as part of the sexually violent predator commitment process. In *Law*, the Court of

Appeals, Division I, stated that, “While the State is correct that the Fifth Amendment right against self-incrimination does not apply to SVP civil proceedings, those facing SVP commitment are entitled to due process protections because civil commitment is a significant deprivation of liberty.” The Court further stated:

To determine what process is due in a given context, courts apply the test enunciated in *Mathews v. Eldridge* [424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)], which balances (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures.

Law, 146 Wn. App. at 43. The court then said that *Law* did not properly preserve his argument that a voluntariness hearing was required, and in any case, “The voluntariness inquiry required by due process is derived from the Fifth and Fourteenth Amendments and appears to relate only to confessions of criminal suspects obtained by custodial interrogation *for use in criminal prosecutions*,” and thus did not raise a manifest constitutional error. *Law*, 146 Wn. App. at 44 (emphasis added).

The Court of Appeals’ statement that the Fourteenth Amendment would likely require a *Mathews v. Eldridge* analysis if it were properly preserved is directly contradicted by the United States Supreme Court in *Allen*, and in a more recent unpublished decision from this Court. The

United States Supreme Court explained that *Mathews v. Eldridge* pertained to the Fifth Amendment’s protection against depriving one of property without due process, not protection against self-incrimination. *Allen*, 478 U.S. at 376. The Supreme Court further explained that the Fifth Amendment right against self-incrimination has nothing to do with the reliability of the statements; rather, it exists because the criminal system “is an accusatorial and not an inquisitorial system.” Finally, the Supreme Court said that, “the privilege [against self-incrimination] has no place among the procedural safeguards discussed in *Mathews v. Eldridge*...” *Allen*, 478 U.S. at 375.

This Court adopted the same reasoning in *In re Detention of Robinson*, No. 44575-1-II, 2014 WL 7172289 (Wash. Dec. 16, 2014) (unpublished), *review denied*, 182 Wn.2d 1026, 347 P.3d 458 (2015).³ *Robinson*, a sexually violent predator, argued that due process required the “a procedural safeguard before the deprivation of a protected interest requires the assertion of the right to remain silent in SVP proceedings.” *Robinson*, 2014 WL 7172289, at *6. This Court disagreed, citing to *Allen*, saying, “The right to remain silent, therefore, ‘has no place among the procedural safeguards discussed in *Mathews v. Eldridge*,’ and

³ While this case is unpublished and cannot be used as precedent, it “may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.” GR 14.1(a).

Robinson's due process argument lacks merit. *Allen*, 478 U.S. at 375.” *Id.* Accordingly, the right against self-incrimination in the Fifth and Fourteenth Amendments to the United States Constitution has no applicability in civil commitment proceedings.⁴ The commissioner properly denied J.M.’s motion to suppress.⁵

C. J.M.’s Claim Concerning an Alleged Violation of His Wash. Const. art. 1, § 3 Right Against Self-Incrimination Should be Rejected for Failure to Perform a Meaningful *Gunwall* Analysis

J.M. fleetingly alleged that his statements to the police should be suppressed due to a violation of his rights under article 1, section 3 of the Washington Constitution, which provides that, “No person shall be deprived of life, liberty, or property, without due process of law.” Courts are to determine whether the Washington Constitution provides greater protection than the federal constitution by examining six nonexclusive neutral criteria, called the *Gunwall* factors. *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Claims that the state constitution provides greater

⁴ In any case, J.M. presented no evidence that on December 12, 2018, he could not have voluntarily, knowingly or intelligently waived his right to remain silent. J.M. referenced a forensic report prepared for the criminal proceedings, but neither offered the report into evidence nor called the report writer to testify about the report in this proceeding. VRP 21, 60.

⁵ Even if this Court were to determine that the commissioner improperly denied J.M.’s motion to suppress statements to law enforcement, J.M. has not challenged the admission of the testimony of Brandon Melvin or John Ranney, both of whom heard J.M. admit to the theft of several items, and that he planned to sell them to obtain enough money to purchase a handgun.

protection than the federal constitution will not be considered when the *Gunwall* factors are not thoroughly briefed. *State v. Olivas*, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993) (“While [appellants] cite both federal and state constitutional provisions and cases, they do not analyze their separate development or structure. Nor do they explain why this court should make a distinction between federal and state constitutional rights. We therefore decline to consider independent state constitutional grounds.”) As J.M. provides no meaningful *Gunwall* analysis, or any analysis of this provision at all, his claim should be rejected.

D. The Right to Remain Silent in Former RCW 71.05.360 Does Not Apply to Out of Court Statements

J.M. contends that the statutory right to remain silent affords the same protections as the Fifth Amendment right to remain silent in the criminal context, and asserts that this is an issue of first impression. Neither is correct. The statutory right to remain silent in former RCW 71.05.360 only applies in the limited context of therapy or in civil commitment proceedings.

J.M. infers that the Legislature intended to import the protections of the Fifth Amendment into civil commitment proceedings. Once detained in a mental health facility, “[t]he person has the right to remain silent and that any statement he or she makes may be used against him or her.” Former

RCW 71.05.360(5)(c). A respondent also has the right to remain silent at his or her civil commitment hearing. Former RCW 71.05.360(8)(d). These provisions, however, are statutory provisions that provide protections in the limited context of therapy or testifying in a civil commitment proceeding, and do not apply to admissions made to law enforcement that form part of the basis of the commitment proceeding. In *State v. M.R.C.*, in response to M.R.C.'s assertion that his waiver of his right to remain silent was not made knowingly and voluntarily,⁶ this Court ruled:

This argument is meritless. The involuntary commitment act provides that the detainee in an involuntary commitment proceeding has the right to remain silent at the probable cause hearing. RCW 71.05.250.⁷ M.R.C. exercised that right. The statute does not apply to out-of-court statements.

State v. M.R.C., 98 Wn. App. at 58. Similar to J.M.'s claim here, M.R.C. also raised the claim that "he did not knowingly and voluntarily waive his constitutional right to remain silent." *Id.* However, as it was raised for the first time on appeal and the record was inadequate, the Court refused to address the issue.

⁶ M.R.C. admitted to police that he had kissed an 11-year-old child, touched the child's genitals and rubbed his bottom on the child's genitals. *State v. M.R.C.*, 98 Wn. App. at 54.

⁷ In 2005, the right to remain silent provisions were transferred from RCW 71.05.250 to RCW 71.05.360. Laws of 2005, ch. 504, § 107. As previously noted, the 2020 Legislature repealed RCW 71.05.360, and incorporated the right to remain silent provisions into RCW 71.05.217(5)(b), effective June 11, 2020. Laws of 2020, ch. 302, § 31 (2E2SSB 5720).

The right to remain silent in former RCW 71.05.360 is a statutory right that does not implicate Fifth Amendment protections. Moreover, former RCW 71.05.360 does not support a separate Fourteenth Amendment right to import the Fifth Amendment into civil commitment proceedings. For these reasons, J.M.'s argument fails.

E. The Commitment Should Be Upheld Because the Petitioners Proved J.M. Committed Acts Constituting the Felony of Theft with Intent to Resell in the Second Degree

In the civil commitment hearing on November 25, 2019, the petitioners presented evidence to support their contention that J.M. committed acts constituting the felony of theft with intent to resell in the second degree and the felony of felony harassment – threats to kill. Both are class C felonies, and either one can support the element of “acts constituting a felony” under RCW 71.05.280(3). If the State can prove the elements of commitment for either felony under RCW 71.05.280(3), J.M. can be committed for up to 180 days under RCW 71.05.290(3).

In this case, Taylor Hornbeck testified that she used to be friends with J.M.'s sister, and that on December 2, 2019, J.M. texted her through Facebook Messenger, telling her that anyone who stood in the way of him and Lindsay, his former girlfriend, would be fatally shot or dreadfully murdered, which Ms. Hornbeck took as a threat to her personally. Neither an electronic version of the text messages nor a photocopy of a screenshot

was offered into evidence; moreover, there was no testimony about whether this evidence was available.

ER 1002 provides that in order to “prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute.” A duplicate is acceptable unless there is a genuine issue regarding the authenticity of the duplicate or if it would be unfair to the other party to admit the duplicate in lieu of the original. ER 1003. Testimony describing the writing in lieu of the document writing itself can be permitted if a foundation is laid that the writing is unavailable. ER 1004; *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979).

Petitioners concede that the Facebook Messenger posts were not provided, either electronically or through a photocopy, and no foundation was laid to establish that this evidence was not available. As a result, there is insufficient evidence to support the finding that J.M. committed the act of felony harassment – threats to kill.

However, this does not invalidate the 180-day commitment order because the Petitioners still proved the acts constituting the felony of theft with the intent to resell in the second degree, which is a class C felony. A person “is guilty of theft with the intent to resell in the second degree if the

property has a value of at least two hundred fifty dollars, but less than one thousand five hundred dollars.” RCW 9A.56.340(3). Brandon Melvin, John Ranney, Officer Stacy Wilson and Detective Matthu Brooks all heard J.M. admit that he stole the Seahawks apparel and Bluetooth speakers with the intent to resell the items to raise money to buy a handgun. VRP 26, 33, 39, 45, 59, 61-63, 70-72. Additionally, Mr. Melvin testified to the value of the items that J.M. admitted stealing with the intent to resell, which totaled a little more than \$343.28, and Dr. Means testified about why, as a result of a mental disorder, J.M. presents a substantial likelihood of committing similar acts. VRP 38, 84-87.

The petitioners proved that J.M. committed acts constituting the felony of theft with the intent to resell in the second degree, a class C felony. The fact that the petitioners did not present the writing containing the threat to kill or present evidence as to why the writing was not available, and therefore did not prove felony harassment – threat to kill, does not change the ultimate outcome of the hearing – an order for J.M. to receive up to 180 days of involuntary treatment at Western State Hospital under RCW 71.05.280(3). The commissioner’s order should be upheld, although it should be amended to reflect that the elements of felony harassment were not proven.

F. The Commissioner’s Written and Oral Findings of Fact Are Sufficiently Specific to Provide a Meaningful Review

J.M. contends that the commissioner’s findings of fact in the written order of commitment are insufficient to allow for a meaningful review. The commissioner issued written findings, and also made oral statements and findings at the conclusion of the hearing that he incorporated into his written findings. Because the commissioner’s written and oral findings are sufficiently specific, this Court would be able to determine whether the findings are supported by substantial evidence if J.M. had taken exception to the factual findings, which he has not.

Mental Health Proceeding Rule 3.4(b) requires that courts in involuntary treatment proceedings must “make and enter findings of fact and conclusions of law.” These findings must be “sufficiently specific to permit meaningful review.” *In re LaBelle*, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). “Findings of fact which closely follow and which may to a certain extent parrot the requirements of [a statute] are not rendered invalid if they are sufficiently specific to permit meaningful review.” *Dependency of K.R.* 128 Wn.2d 129, 143, 904 P.2d 1132 (1995), referencing *LaBelle*, 107 Wn.2d at 218. “While the degree of particularity required in findings of fact depends on the circumstances of the particular

case, they should at least be sufficient to indicate the factual bases for the ultimate conclusions.” *Id.*

The commissioner “is not required to make findings of fact on all matters about which there is evidence in the record; only those which establish the existence or nonexistence of determinative factual matters need be made.” *Labelle*, 107 Wn.2d at 219. In cases in which the appellant has not taken any exceptions to the factual findings, this Court will “give them a liberal construction rather than overturn the judgment based thereon.” *Id.*; see also *Matter of Dependency of W.W.S.*, 12 Wn. App. 2d 859, 879-880, 460 P.3d 651 (2020).

Even if the commissioner’s findings are considered to be inadequate, “written findings may be supplemented by the trial court's oral decision or statements in the record.” *Labelle*, 107 Wn.2d at 219; see also *Detention of W.T.*, 197 Wn. App. 1035 (2017) (unpublished) (while the preprinted form did not indicate the factual basis underlying the court’s conclusion, the court’s oral ruling and review of the record was sufficient for meaningful review).⁸ In this case, the commissioner made oral findings and statements that supplement the written findings, and in their totality are sufficiently specific to allow a meaningful review.

⁸ While this case is unpublished and cannot be used as precedent, it “may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.” GR 14.1(a).

With regard to this case, because J.M. did not take exception to any of the findings of fact, this Court can give the commissioner’s findings “a liberal construction rather than overturn the judgment...” *LaBelle*, 107 Wn.2d at 219. The commissioner found in his written order that J.M. suffered from a mental disorder, as evidenced by, “[d]elusional thought disorganization, mood lability, self harm, limited insight, currently needs the supervised setting of the hospital. Poor insight.” CP 59. The findings also state that the commissioner found that J.M. committed acts constituting the felonies of theft with intent to resell and felony harassment – threats to kill.⁹ CP 59.

The commissioner then checked the boxes on the form indicating that he found J.M. “continues to present a substantial likelihood of repeating acts similar to the charged criminal behavior,” and that J.M. is gravely disabled because “as a result of a mental disorder [he] is in danger of serious physical harm resulting from the failure to provide for his/her essential needs of health or safety.” CP 58-59. Finally, the commissioner found that less restrictive placement is not in J.M.’s or others’ best interest. CP 59.

⁹ As noted above, the petitioners rely on the felony of theft with intent to resell in the second degree as the basis for the 180-day commitment, not felony harassment.

The commissioner also made oral findings. With regard to the felony of theft with intent to resell in the second degree, the commissioner said:

...as the evidence came in, quite frankly, I had some real concerns about what was going on here. There's -- but as far as the actual felony charges, I think there's certainly sufficient evidence to make findings on both felony harassment and the felony of possession of items that exceeded the sum of two hundred and fifty dollars. And, there's no question that I believe that what was going on at that that time. In fact, it is what you indicated, is that you were trying to get some money to get this gun and that's a very serious situation and I have some real concerns about that.

So, regarding the -- the findings that I'm going to make, I have made a finding on both felony charges ... [emphasis added].

VRP 110. As noted above, the commissioner referred above several times to his continuing concerns with J.M.'s actions. With regard to grave disability, the commissioner said,

I also, I've -- given the diagnosis and some the things that have been going on for you, I'm also making a finding that you're gravely disabled. And as far as you're concerned, I think that's kind of the bad news that I got -- that I got out of this is that this was very serious situation that was going on and that you were mentally ill at the time and it created a real situation.

The good news, at least for me as far as seeing you here today, it looks to me like you have made some improvements since you've been here in the hospital at least from the testimony. It does appear that you're back on medicine that was -- there was testimony that you weren't on medicine at the time of these events going on. Who knows whether that's true or false, but it looks to me like your presentation in court here, I think you have a realistic plan.

VRP 110-111. This ties in with the commissioner’s written findings about J.M.’s *current* mental status that J.M. is “disorganized,” that he has “limited insight” and “poor insight,” and was currently suffering from “delusional thoughts” and “mood lability,” as well as “self harm.” CP 59. These symptoms render J.M. gravely disabled; as the commissioner stated, “...currently needs the supervised setting of the hospital.” CP 59.

The commissioner’s finding that J.M. needs the “supervised setting of the hospital” also supports his finding that J.M. is not ready for a less restrictive placement. CP 59. The commissioner also noted that a less restrictive placement was not in the best interest of J.M. and others in his oral ruling, saying:

I don’t think you’re ready, at this point, to leave the hospital. I don’t think you’re ready to -- to go and return with your family. It does appear that you have a family that will give you some family support. I hope that you will take this matter seriously as well and work with the staff here at the hospital, including the plan for you. But cause this was a very serious event in my opinion and I’m happy to see that things seem to be turning around. So, I hope I’m correct.

In any event, I will sign an order including what we’ve talked about here.

Emphasis added. VRP 111.

J.M. relies on *In the Matter of the Detention of G.D.*, 11 Wn. App. 2d 67, 450 P.3d 668 (2019), for the proposition that these findings are inadequate to permit meaningful review. In that case, Division I of the Court of Appeals held that the trial court’s findings, which had not

been properly reduced to writing at all, and consisted solely of a boilerplate check-the-box finding reciting the statutory criteria for commitment, were inadequate to permit meaningful review. *Matter of Det. of G.D.*, 11 Wn. App. 2d. at 70 (noting the requirements under both *LaBelle* and MPR 2.4(3) that the court enter written findings, and rejecting late filing of findings due to failure to comply with court rules).

This case is distinguishable from *G.D.* Here, the commissioner entered written findings beyond mere check-the-box boilerplate findings, and also incorporated his oral findings into the written findings by reference. Nor was there an attempt to amend the findings in violation of court rules.¹⁰

All together, the written and oral findings are sufficiently specific to enable this Court to meaningfully review them. Because J.M. has not taken exception to any of the commissioner's factual findings, this Court can view them more liberally, and need not review the record for sufficiency of the evidence. For this reason, J.M.'s argument that the findings are insufficient fails.

¹⁰ The Court in *G.D.* mentions that the oral ruling "offered more details," but does not indicate that they were incorporated into the written findings, as they are in this case. CP 57, at 3. Nor does the decision address case law concerning incorporation by reference. Accordingly, either the oral findings were not incorporated, or they were but were still insufficient. Without more, the decision in *LaBelle* that "written findings may be supplemented by the trial court's oral decision or statements in the record," should apply here where the oral findings were explicitly incorporated into the written findings. *Labelle*, 107 Wn.2d at 219.

V. CONCLUSION

Because the right to remain silent and the right against self-incrimination in the federal constitution does not apply in civil commitment cases, the commissioner properly denied the motion to suppress. J.M.'s failure to do the requisite *Gunwall* analysis precludes consideration of his argument concerning Wash. Const. art. 1, § 3. The statutory right to remain silent in former RCW 71.05.360 only applies to civil commitment proceedings, not to out-of-court statements to law enforcement. The petitioners' failure to admit the Facebook Messenger posts to support its contention that J.M. committed acts constituting felony harassment does not require the 180-day commitment be overturned because the petitioners

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proved that J.M. committed acts constituting another felony. Finally, the written and oral findings together are sufficiently specific to provide a meaningful review. For all of these reasons, the civil commitment order should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of August 2020.

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PROOF OF SERVICE

I, *Holly McClure*, state and declare 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. On August 14, 2020, I served a true and correct copy of this **BRIEF OF RESPONDENT** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

Counsel for Appellant

Jessica Wolfe
Washington Appellate Project
1511 3rd Avenue, Suite 610
Seattle, WA 98101

PDF Via COA Portal – jessica@washapp.org;
wapofficemail@washapp.org

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

Dated this 14th day of August 2020, at Tumwater, Washington.



HOLLY MCCLURE
Legal Assistant

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

August 14, 2020 - 4:33 PM

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