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No. 54361-3-II

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

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In re the Detention of:

M.S.

---

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

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BRIEF OF APPELLANT

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**A. INTRODUCTION**

M.S. is a 40-year-old man diagnosed with schizoaffective disorder and involuntarily detained at Western State Hospital following dismissal of his nonviolent felony charge. He appeared at trial in shackles prior to any judicial determination of the necessity of such measures, and although the court conducted an inquiry regarding the need to shackle, there were no compelling circumstances requiring M.S. be physically restrained. His involuntary commitment hearing was irreparably marred by this unnecessary measure, denying him a fair proceeding.

Additionally, the evidence was insufficient to find M.S. was gravely disabled or at risk of committing similar criminal offenses. For both these reasons, reversal is required.

**B. ASSIGNMENTS OF ERROR**

1. The trial court erred in ordering M.S. shackled during his involuntary treatment hearing.

2. The trial court improperly ordered M.S. be involuntarily detained absent evidence that, as a result of a mental disorder, he was gravely disabled. CP 16-19.

3. The court erred in finding M.S. “as a result of a mental disorder is in danger of serious physical harm resulting from the failure to provide for his/her essential needs of health or safety.” CP 18.

4. The court erred in finding M.S. “manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over actions, is not receiving such care as is essential for health and safety.” CP 18.

5. The court erred in finding M.S. presents a substantial likelihood of repeating acts similar to a third degree assault. CP 17.

6. The revising court erred in denying M.S.’s motion to revise. CP 77-79.

7. The revising court erred in entering findings of fact 1. CP 77-78.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A judge may only order a respondent in an involuntary commitment hearing shackled if it explicitly finds the person is an imminent risk of harm, escape, or disorder in the courtroom. Did the court improperly order M.S. physically restrained during his commitment hearing absent evidence of these compelling circumstances justifying the restraints?

2. Due process prohibits involuntary commitment solely because a person suffers from a mental illness, and a person's constitutional rights are violated if he is confined despite evidence he is not dangerous and can live safely in the community. To detain a person involuntarily for grave disability, there must be recent evidence of a severe deterioration in routine functioning and proof the person is at risk of serious physical harm because he is not receiving essential health and safety care in the community. Did the court err in committing M.S. absent any evidence establishing the requisite severe deterioration or his risk of physical harm due to an inability to meet his basic health and safety needs?

3. Where the petitioner seeks to commit a person under RCW 10.77.086(4), the court must find the respondent presents a substantial risk of committing similar offenses. Did the court err in committing M.S. absent clear, cogent, and convincing evidence he posed a risk of committing acts similar to an assault in the third degree?

**D. STATEMENT OF THE CASE**

M.S. was trespassed from a CVS on December 2, 2018. CP 4. When he returned to the store, police were called, and officers and emergency personnel were in the process of restraining him and

transporting him to a mental health facility. 11/12/19 VRP 22-23.

During the detention, M.S. spat on Deputy Earl Seratt. *Id.* at 25. M.S.

was speaking in a loud, deep voice and was nonsensical. *Id.* at 23, 24.

Deputy Seratt believed M.S. was in the midst of a mental health crisis.

*Id.* at 27.

M.S. was charged with third degree assault of Deputy Seratt. CP

4. A series of competency evaluations and unsuccessful restoration

attempts ensued, leading the court to dismiss the charge on October 16,

2019. CP 4-5. He was committed to Western State Hospital pending

filing of a civil commitment petition, which occurred October 28. CP

27.

Dr. Mary Cason was the only member of M.S.'s treatment team to testify at the commitment trial. She identified M.S.'s symptoms and expressed concern he did not acknowledge his mental illness and would not consistently take medications. 11/12/19 VRP 34-38. She opined he would have difficulty caring for himself if discharged before he was medication compliant, and he was at risk of harm because he is "provocative." *Id.* at 40. She believed he was likely to repeat the behaviors that led to his hospitalization because he has negative reactions when limits are placed on his behavior. *Id.*

However, M.S. was independently meeting all his activities of daily living, and he ate and drank consistently. *Id.* at 42. He was oriented to himself, and had tangible plans for discharge. *Id.* at 43, 45. M.S. identified several potential living arrangements, including with family members or at family-owned property. *Id.* at 50. He testified he had cash savings and could reinstate his social security benefits. *Id.* at 50-51. He knew the process for reinstating these benefits or submitting a new application, and indicated he had already contacted the agency to advise them of his situation. *Id.* at 50.

He also identified several caseworkers at different mental health and community assistance programs, indicating a willingness to work with Sound Mental Health for counseling, medication, and clothing. *Id.* at 52. He was willing to take medications outside of the hospital setting. *Id.* at 53-55, 56.

Despite this evidence, the trial court found M.S. was gravely disabled under both prongs of the definition, and also found he was at risk of committing similar acts as a result of his mental illness. CP 16-19. The superior court denied his motion to revise. CP 77-79.

## E. ARGUMENT

### **1. The court's order requiring M.S. to remain unnecessarily shackled during trial on a petition for involuntary mental health treatment denied him his right to a fundamentally fair proceedings, entitling him to a new trial.**

*a. Courts have long recognized a person's right to appear in court unfettered by physical restraints, including during involuntary commitment proceedings.*

The right to appear in court free of shackles or other physical restraints is longstanding and well enforced. While no Washington court has addressed this right in the context of involuntary treatment hearings, as early as 1897, our state Supreme Court recognized “the ancient rule at common law” that persons charged with crimes are “entitled to appear free of all manner of shackles or bonds” while in court. *State v. Williams*, 18 Wash. 47, 49, 50 P. 580 (1897). Only evidence of “impelling necessity” to secure the safety of others or “evident danger” of escape forfeits the right to appear unshackled. *Id.* at 49, 51. This right requires a person’s “mental” and “physical faculties [are] unfettered” in court unless there is a specific necessity. *Id.* at 51.

The United States Supreme Court has found this right extends to involuntary treatment proceedings:

Indeed, “[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from

arbitrary governmental action.” *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18, 99 S.Ct. 2100, 2109, 60 L.Ed.2d 668 (1979) (POWELL, J., concurring in part and dissenting in part). **This interest survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment.**

*Youngberg v. Romeo*, 457 U.S. 307, 316, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (emphasis added).

The *Youngberg* Court also recognized “[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” 457 U.S. at 321-22 (cf. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)).

Forcing a mentally ill patient to appear in court shackled against his will undermines the “fairness of the factfinding process.” *Deck v. Missouri*, 544 U.S. 622, 630, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2007). Physical restraints also interfere with a respondent’s right to counsel and right to present a defense, limiting the ability to communicate with counsel and negatively impacting the decision to testify on one’s own behalf. *Id.* at 631. Moreover, they undermine the “dignity and decorum of judicial proceedings that the judge is seeking

to uphold.” *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)).

Similarly, the Illinois Supreme Court, citing *Deck*, has extended the right to appear unshackled in criminal matters to involuntary commitment hearings. *In re Benny M.*, 104 N.E.3d 313, 422 Ill.Dec. 746 (2017). In *Benny M.*, the court found:

A review of the case law, therefore, establishes that routine imposition of restraints is prohibited because it diminishes a defendant's or respondent's ability to assist counsel, undermines the presumption of innocence, and demeans both the defendant or respondent and the judicial process. *Deck*, 544 U.S. at 630–31, 125 S.Ct. 2007; *Allen*, 222 Ill. 2d at 346, 305 Ill.Dec. 544, 856 N.E.2d 349; *Boose*, 66 Ill. 2d at 265, 5 Ill.Dec. 832, 362 N.E.2d 303. While involuntary treatment proceedings do not involve a presumption of innocence, the other concerns weighing against unnecessary use of restraints in criminal and juvenile delinquency proceedings also apply here. **A respondent's ability to assist counsel and the dignity of the court proceedings are important concerns in involuntary treatment proceedings, and those interests may be impacted by unnecessary restraints the same as in criminal and juvenile delinquency proceedings.**

104 N.E.3d at 322 (Ill. 2017).

As in criminal cases, the routine use of shackles in involuntary commitment hearings is unconstitutional. *See State v. Hartzog*, 96

Wn.2d 383, 399, 635 P.2d 694 (1981). Rather, courts must engage in an individualized hearing to determine the necessity of restraining a respondent before he appears before the court. *Id.* at 400-01; *State v. Lundstrom*, 6 Wn. App. 2d 388, 394-95, 429 P.3d 1116 (2018) (holding trial court committed constitutional error by failing to conduct individualized inquiry prior to allowing defendant to appear restrained at pretrial hearing).

There must be a “factual basis justifying restraints specific” to the defendant or respondent. *State v. Jaquez*, 105 Wn. App. 699, 709, 20 P.3d 1035 (2001). The record must explicitly set forth this factual basis. *Id.* The factual predicate requires “compelling circumstances” of the need for restraints predicated on an imminent risk of escape, the accused’s present intent to injure someone in the courtroom, or the inability to behave in an orderly manner while in the courtroom. *State v. Finch*, 137 Wn.2d 792, 850, 975 P.2d 967 (1999) (plurality opinion).

*b. Unnecessary shackling of mentally ill patients is presumptively and inherently prejudicial, even where the court acts as the factfinder.*

As in criminal proceedings, shackling a mentally ill person during trial or substantive court hearings is strongly discouraged because it prejudices the factfinder against the respondent by creating

the perception the respondent is dangerous. *See Finch*, 137 Wn.2d at 845 (“Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial.” (internal citations omitted); *Williams*, 18 Wash. at 51 (when a defendant is brought before the jury in restraints, the “jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers”). Unnecessary shackling of the mentally ill during involuntary treatment hearings raises significant due process concerns because shackling is not “a deprivation of liberty generally authorized” by confinement for mental health treatment. *See DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 n. 8, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

While concerns about prejudicing a jury are well-recognized, these concerns extend to trials where the court is asked to assess a person’s present dangerousness. However, as the New York Court of Appeals recently observed, “[J]udges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder.” *People v. Best*, 19 N.Y. 3d 739, 744, 955 N.Y.S. 2d 860, 979 N.E. 2d 1187 (2012). Empirical literature suggests judges are as

susceptible to bias as juries. This is particularly concerning where, as in involuntary commitment hearings, the court both determines whether shackles are necessary after hearing all of a respondent's purported risk factors, and then attempts to act as a neutral factfinder.

Studies show that judges are generally subject to the same implicit biases as jurors. Although judges may sometimes avoid common errors that intuition can produce, judges also “rely on misleading intuitive reactions, even when doing so leads to erroneous or otherwise indefensible judgments.” Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making*, in *Enhancing Justice: Reducing Bias* 92 (Sarah E. Redfield ed., 2017); *see also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 *Cornell L. Rev.* 777 (2001) (reporting on five empirical studies of judges' biases and finding that judges are affected by the same biases and cognitive illusions as lay people).

Although sufficient research has not been conducted into whether or to what extent courts are biased by the sight of a shackled defendant or respondent, *see* Fatma, E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 *Baylor L. Rev.* 214, 277

(2015), empirical research in related areas strongly suggests implicit bias operates in this context as well.

For example, in a study testing whether judges are able to ignore inadmissible evidence, researchers found they struggled to do so, relying on irrelevant or overly prejudicial information, such as a defendant's criminal history or privileged information, when making factual determinations. Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1324 (2005); *see also* Marouf, *supra*, at 273-75 (reviewing studies indicating that judges are susceptible to implicit consideration of irrelevant facts and inadmissible evidence when making decisions). It is possible judges may similarly be unable to disregard a mentally ill patient appearing in shackles. Where research confirms judges are largely unable to exclude extraneous facts and circumstances when making decisions, *Implicit Bias in Judicial Decision Making, supra*, at 96, it is unreasonable to presume a judge will be able to render decisions unaffected by viewing a respondent in restraints.

Additionally, a meta-analysis of negativity bias studies supports the conclusion that the initial negative image of a shackled mentally ill

patient may remain with the judge and impact his or her decision-making.<sup>1</sup> See Roy F. Baumeister et al., *Bad Is Stronger Than Good*, 5 Rev. Gen. Psychol. 323, 345 (2001). This meta-analysis found that nearly twenty studies confirmed negative information about another person is retained longer and has a greater impact on overall impressions than positive information. *Id.* The implications of this negativity bias likely weigh heavily on judges who view mentally ill patients in shackles during commitment hearings, particularly where it is alleged the patient is untreated, unmedicated, and difficult to redirect. When a respondent appears in restraints before a judge, this negative image, and the inference of unpredictable dangerousness, may attach and impact the judge's view of the respondent.

These studies suggest that forcing a mentally ill patient to appear before the court shackled may have a long-lasting, negative impact on a judge and, consequently, on the court's decisions.

Unnecessary physical restraints during involuntary commitment hearings are thus presumptively and inherently prejudicial.

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<sup>1</sup> Negativity bias is the theory that “[a]dults spend more time looking at negative than at positive stimuli, perceive negative stimuli to be more complex than positive ones, and form more complex cognitive representations of negative than of positive stimuli.” Amrisha Vaish et al., *Not All Emotions Are Created Equal: The Negativity Bias in Social-Emotional Development*, 134 Psychol. Bull. 383, 383 (2002).

*c. The court erroneously ordered M.S. be placed in shackles absent a showing of “impelling” safety concerns or “evident danger” of escape.*

Here, M.S. appeared in two-point shackles, restraining both hands to his waist, before any judicial determination of the necessity of the restraints. 11/21/19 VRP 3. The court conducted an inquiry after the fact and, at the agreement of the State, ordered M.S. to have his writing hand unrestrained to allow attorney-client communication. *Id.* at 17-18. The court determined the witnesses were fearful of M.S., thus justifying the restraints, and failed to fully consider the potential prejudice to M.S., stating only, “I have made the decision that the restraints should in part remain, but I’m the one that has to decide the case and I feel that I can do that fairly even given this decision.” *Id.* at 18. The evidence does not show any “impelling” safety concerns or “evident danger” of escape. *Williams*, 18 Wash. at 49, 51.

There was no evident danger of M.S. escaping from the courtroom. M.S. appeared at trial accompanied by multiple security staff, mitigating concerns he might escape. 11/21/19 VRP 4. He had not made any statements indicating he might be violent or attempt to flee.

*Id.* at 11-12. He had not assaulted or threatened anyone while hospitalized over the many months he was detained since the incident occurred. *Id.* at 12. There was no evidence he had been or would be disruptive in the courtroom.

Likewise, there was minimal, purely speculative evidence of safety concerns. Notably, he is a tall man at 6'2" and 207 pounds. CP 1. He speaks in a "very loud, deep tone." 11/21/19 VRP 23. Witnesses said he was "imposing," could become "angry," and would "step in front of your face." *Id.* at 10. They worried he could "become very hostile when we are discussing medications" and might blame Dr. Cason. *Id.* at 11. Dr. Cason described one incident where M.S. was "borderline assaultive" with a competency evaluator and state he had, "an angry risk of assaultiveness [sic] when he doesn't hear something he likes." *Id.* at 13, 15. Indeed, the court justified its decision to maintain M.S. in shackles primarily by his providers' fear of him, specifically finding the witnesses were fearful. *Id.* at 18.

This evidence does not show any specific "impelling necessity" to secure the safety of others; rather, it demonstrates the hospital staff were generally fearful of M.S.. Evidence the witnesses are afraid of someone cannot justify shackling a mentally ill patient absent a

showing of an imminent risk of escape, a respondent's present intent to injure someone in the courtroom, or an inability to behave appropriately in the courtroom. *Finch*, 137 Wn.2d at 850. Because the court did not find any compelling circumstances requiring M.S. to be shackled, this Court should reverse and remand for a new hearing.

**2. The State failed to show by clear, cogent, and convincing evidence that M.S. was gravely disabled such that involuntary detention was necessary.**

Involuntary commitment involves a “massive curtailment of liberty” which the State cannot accomplish without due process of law. *In re Detention of LaBelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986) (citing *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)). “[M]ental illness alone is not a constitutionally adequate basis for involuntary commitment.” *LaBelle*, 107 Wn.2d at 201 (citing *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975)).

Under RCW 71.05, a person may be involuntarily committed for treatment of a mental disorder if they are “gravely disabled.” *LaBelle* at 201-202. “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).<sup>2</sup>

*LaBelle* found section (a) requires the potential for harm be “great enough to justify such a massive curtailment of liberty.” *LaBelle*, 107 Wn.2d at 204 (quoting *In re Harris*, 98 Wn.2d 276, 283, 654 P.2d 109 (1982)). “The State must prove a substantial risk of danger of serious physical harm resulting from failure to provide for essential health and safety needs.” *Id.*

To prove grave disability under this prong, the State must establish a person’s inability to provide for his essential health and safety needs places him at risk of substantial harm. RCW 71.05.020(22)(a). This requires the State to show “recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment.” *LaBelle*, 107 Wn.2d at 205-06.

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<sup>2</sup> The definition of “gravely disabled” to which the Supreme Court referred in *LaBelle* was then codified as RCW 71.05.020(1). This is identical to the definition of “gravely disabled” later codified in RCW 71.05.020(22).

*LaBelle* also noted section (b) was a “broadened commitment standard” that raises “serious constitutional concerns as to its application” because of the danger that persons could be involuntarily committed solely because they suffer from mental illness and may benefit from treatment. *LaBelle* at 207; CP 20. To save it from constitutional overbreadth, *LaBelle* highlighted the legislative intent that emphasized its application to “chronically ill” persons:

by incorporating the definition of ‘decompensation,’ which is the progressive deterioration of routine functioning supported by evidence of repeated or escalating loss of cognitive or volitional control of actions, RCW 71.05.020 (1) (b) permits the State to treat involuntarily those discharged patients who, after a period of time in the community, drop out of therapy or stop taking their prescribed medication and exhibit **rapid deterioration** in their ability to function independently.

*LaBelle*, 107 Wn.2d at 206 (emphasis added) (citing Durham & LaFond, 3 Yale L. & Pol’y Rev. 395, 410 (1985)).

Critically, the *LaBelle* Court recognized the danger of “imposing majoritarian values on a person’s chosen lifestyle which, although not sufficiently harmful to justify commitment, may be perceived by most of society as eccentric, substandard, or otherwise offensive.” *Id.* at 204. Again, the State must show “recent, tangible

evidence of failure to provide for such essential human needs as food, clothing, shelter, and medical treatment.” *Id.* at 205-06.

*LaBelle* also noted that section (b) of the gravely disabled statute provided a broad criteria that was intended to prevent the “‘revolving door’ syndrome, in which patients often move from the hospital to dilapidated hotels or residences or even alleys, parks, vacant lots, and abandoned buildings, relapse, and are then rehospitalized, only to begin the cycle over again.” *LaBelle*, 107 Wn.2d at 206. *LaBelle* thus reasoned that this broader criteria enables the State to provide “continuous care and treatment that could break the cycle and restore the individual to satisfactory functioning.” *LaBelle*, 107 Wn.2d at 206.

On appeal, trial court’s findings of “grave disability” must be supported by substantial evidence which the lower court could reasonably have found to be clear, cogent and convincing. *LaBelle*, 107 Wn.2d at 209 (citing *In re Pawling*, 101 Wn.2d 392, 399, 679 P.2d 916 (1984)).

While prong (a) requires the State prove a risk of serious physical harm resulting from failure to provide for one’s basic needs, prong (b) requires proof of both severe deterioration in routine functioning *and* that a person is not receiving such care as is essential

for his health and safety. RCW 71.05.020(22). Both prongs require “recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment.” *LaBelle*, 107 Wn.2d at 205-06. Here, the court found K.C. was gravely disabled under both prongs of RCW 71.05.020(22). CP 35-36. The evidence fails to support these findings.

Here, the record lacks any evidence M.S. is at risk of serious physical harm resulting from a failure to provide for his essential human needs. Rather, the record shows he was readily able to identify resources for shelter, clothing, healthcare, and financial assistance. 11/12/19 VRP 50-56. He testified he could live with family members or in property owned by his relatives; he named several mental health providers and case workers who could assist him with meeting his basic needs; and he identified sources of financial support through his own savings as well as social security benefits. *Id.* He also testified he was willing to seek mental health treatment, including taking medication, in the community. *Id.* at 56.

There was no evidence M.S. was not meeting his needs while at Western; on the contrary, the evidence shows he was caring for himself independently while hospitalized. *Id.* at 42. Likewise, there is no

evidence he was not meeting his basic needs while living in the community, and no evidence he had come to any physical harm as a result of not meeting those needs. Any symptoms of his mental illness did not appear to interfere with his ability to care for himself as required under prong (a).

Additionally, the evidence was insufficient to show how any alleged loss of cognitive or volitional control had interfered, or would interfere, with M.S.'s ability to care for his own health and safety needs. M.S. was able to articulate a plan to care for himself that included provisions for shelter, physical and financial resources, and healthcare. There is no evidence this plan for his release was negatively impacted by his mental illness symptoms. As with prong (a), there is insufficient evidence to show M.S. had not been meeting his health and safety needs prior to his hospitalization.

Contrary to the court's findings, the State failed to meet the standard set forth in *LaBelle* requiring "recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment." 107 Wn.2d at 205-06. Absent this necessary proof, Dr. Cason's conclusory opinion M.S. might have difficulty meeting basic needs is insufficient to find he was gravely

disabled and at risk of substantial physical harm under RCW 71.05.020(22)(a). For the same reasons, it is insufficient to show he was not receiving such care as is essential for his health and safety under RCW 71.05.020(22)(b). Because the State failed to show M.S. had failed, or was unable, to provide for his essential human needs, the court's finding that he was gravely disabled under both prongs of the definition is unsupported by clear, cogent, and convincing evidence. This Court should reverse.

**3. The State failed to prove M.S. presents a substantial likelihood of repeating similar acts to the crime charged.**

Petitioners also alleged M.S. had committed an act constituting a felony and, as a result of his mental illness, was at risk of repeating similar acts. CP 2. Thus, in addition to proving M.S. committed assault in the third degree, the State had prove M.S. "present[ed] a substantial likelihood of repeating similar acts." RCW 71.05.280(3).

Here, the court made limited written and oral findings regarding this issue, but nevertheless checked the box finding substantial likelihood. CP 17. The court stated, "I have to think a lot about the likelihood of repeating similar acts. It is more based on the totality of the circumstances, the upset and confrontational manner that respondent deals with things." 11/12/19 VRP 63-64. However, even

considering the totality of the circumstances, the evidence was insufficient to prove a substantial likelihood of repeating similar acts.

Dr. Cason testified M.S. responded negatively when limits were placed on his behavior, such as cursing, yelling, or threatening people, which she opined indicated he was likely to repeat the behaviors that brought him to the hospital. *Id.* at 40. However, she also testified he presented similarly while hospitalized, but yet had not assaulted anyone. *Id.* at 47. Moreover, Dr. Cason was concerned M.S. was “provocative” of other peers, but this behavior did not result in any new assaultive behavior. *Id.* at 40. Rather, the evidence shows M.S. was assaulted by another peer on the ward with no evidence he retaliated. *Id.*

This evidence is insufficient to prove M.S. presents a substantial likelihood of committing similar acts to the charged offense. Indeed, it appears that even where he has maintained his underlying behavior and symptoms, and has been assaulted himself, he has not committed another assault. The State failed to show by clear, cogent, and convincing evidence M.S. is likely to repeat similar acts, and this Court should reverse.

**E. CONCLUSION**

For the reasons stated above, M.S. asks this Court to reverse his order of commitment.

DATED this 27<sup>th</sup> day of May 2020.

Respectfully submitted,

/s Tiffinie B. Ma  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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IN RE THE DETENTION OF )

M.S., )

APPELLANT. )

NO. 54361-3-II

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

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