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Division III
State of Washington
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No. 36153-5

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

IN RE THE DETENTION OF DONALD CURBOW
STATE OF WASHINGTON, Respondent

v.

DONALD CURBOW, Appellant

REPLY BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The State Presented Insufficient Evidence That Mr. Curbow Met The Requirements Under RCW 71.09 for Civil Commitment.

LEGAL ISSUE: Did the State prove beyond a reasonable doubt that Mr. Curbow met the requirements for civil commitment under RCW 71.09?

II. STATEMENT OF FACTS AND REPLY TO ARGUMENT

Mr. Curbow relies on the facts presented in his opening brief. In its response brief the State argues the evidence was sufficient to sustain the verdict that Mr. Curbow met the requirements of RCW 71.09. To be sufficient, “there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved.” *State v. Miller*, 60 Wn. App. 767, 772, 807 P.2d 893 (1991). Thus, on review, the Court does not attempt to determine whether it believes the State met the burden of proof, but rather, whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of RCW 71.09. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.3d.2d 560 (1979). Appellant relies on the arguments raised in the opening brief.

The State has questioned some of the citations in the appellant's brief. The following topics are found in the record:

- The Texas study which was published in government reports was discussed by the experts on RP 792-793; Referred to as Exhibit R-119.
- The issue of adversarial allegiance was discussed on RP 802; Referred to Exhibit R-120.
- Clinical adjustment resulting in a decreased predictive accuracy was discussed on RP 818, 1568.
- The age-related decrease in recidivism after 60 years old was discussed at RP 782, 1053, 1138, 1140, 1551, and 1553; Referred to Exhibit R-127 p.33.
- The use of tests which were not designed to measure sexually violent recidivism was discussed at RP 690.
- The *Hanson* study referred to in appellant's briefing was discussed at RP 1553.
- The 2015 paper: "What Sexual Recidivism Rates are Associated with the Static-99R on Static 2002-R" was discussed at RP 1695; Exhibit R-101 p. 49.

- Ranking and Relative Risk of recidivism rates was discussed at RP 1724 and 2135.
- Government and state studies were discussed at RP 1547-48.
- Zero recidivism for individuals over the age of 50 was discussed at: RP 1138, 1140, 1551-1553; Referred to Exhibit R-112.

The State complains that Brief of Appellant at 24 cited to the dissent portion of *In re Detention of Campbell*, 139 Wn.2d 341, 376, 986 P.2d 771 (1999) for the proposition that strictly clinical predictions of dangerousness and actuarial methods have in the past been found highly unreliable.

As noted in appellant's brief, the internal citations were omitted. They are as follows:

In literally hundreds of comparisons over many domains including the prediction of recidivism, clinical judgment has essentially never been found to be superior to actuarial methods, whereas the converse has most often been demonstrated (Grove & Meehl, 1996; Mossman, 1994). Some studies have shown better-than-chance (i.e., they outperformed blind guesswork) performance by clinicians, but many have not. No studies have demonstrated that clinicians' judgments are more accurate than those of laypersons, and there is at least one study showing that they are not (Quinsey & Ambtman, 1979). Grant T. Harris

et al., *Appraisal and Management of Risk in Sexual Aggressors: Implications for Criminal Justice Policy*, 4 Psychol., Pub. Pol'y, & L. 73, 88 (1998). Nor, for that matter, has the reliability and validity of the actuarial method been established either:

Although significant advances have been made in the ability to predict sex offender recidivism, the application of these schemes to individuals convicted under sexual predator laws is still problematic. Even though the actuarial prediction scheme significantly improved prediction over chance, there are still a number of false positives and negatives. Judith V. Becker & William D. Murphy, *What We Know and Do Not Know About Assessing and Treating Sex Offenders*, *377 4 Psychol., Pub. Pol'y, & L. 116, 126 (1998); see also Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 Psychol., Pub. Pol'y, & L. 33 (1997); Gary Gleb, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L.Rev. 213, 227 (1991). Even those who cautiously endorse the actuarial method acknowledge the theory has *not gained general acceptance*. See R. Karl Hanson, *supra*, 4 Psychol., Pub. Pol'y, & L. at 52; Grant T. Harris et al., *supra*, 4 Psychol., Pub. Pol'y, & L. at 90–91; Eric S. Janus & Paul E. Meehl, *supra*, 3 Psychol., Pub. Pol'y, & L. at 60–61; Gleb, *supra*, 39 UCLA L.Rev. at 246–47.

III. CONCLUSION

Based on the facts and argument presented in the opening brief of appellant, Mr. Curbow respectfully asks this Court to find the evidence was not sufficient to sustain the conclusion that Mr. Curbow met the requirements for commitment under RCW 71.09.

Respectfully submitted this 12th day of November 2019.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on November 12, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Reply Brief to: Office of the Attorney General at crjstvpef@atg.wa.gov and to Donald Curbow, Special Commitment Center, PO Box 88600, Steilacoom WA 98388-0647.



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MARIE TROMBLEY

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