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COA NO. 37423-8-III

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

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IN RE DETENTION OF MICHAEL A. MCHATTON:

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL A. MCHATTON,

Appellant.

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

The Honorable James Orlando, Judge

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REPLY BRIEF OF APPELLANT (CORRECTED)

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CASEY GRANNIS  
Attorney for Appellant  
NIELSEN KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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**A. ARGUMENT IN REPLY**

**1. AT THE SHOW CAUSE STAGE, THE STATE FAILED TO MAKE A PRIMA FACIE SHOWING THAT A LESS RESTRICTIVE ALTERNATIVE IS INAPPROPRIATE, REQUIRING THE COURT TO ORDER A CONDITIONAL RELEASE TRIAL.**

**a. The court used the wrong legal standard in focusing on the inappropriateness of the revoked LRA, as the State has the prima facie burden of showing a future LRA would be inappropriate.**

The trial court concluded the State met its burden of proof at the show cause hearing by establishing that the ordered less restrictive alternative (LRA) was not in McHatton's best interest and did not contain conditions that would protect the community. CP 637 (Conclusion of Law 9). The State concedes the trial court used the wrong legal standard. Brief of Respondent (BR) at 16.

**b. The State does not satisfy its prima facie burden of proof simply by showing the committed person did not present an LRA plan satisfying the specific requirements of RCW 71.09.092 at the show cause stage.**

The State also concedes the trial court erred in relying on the fact that McHatton had not proposed a new LRA plan as a basis to find the State met its prima facie burden of proof. BR at 22. The State has appropriately abandoned its argument that it meets its burden when the detainee does not propose an LRA plan that meets the requirements of RCW 71.09.092 at the show cause stage.

**c. The evidence did not satisfy the State's prima facie burden to show an LRA is inappropriate.**

The State says the question of whether the State is able to meet its burden in the absence of expert testimony is not an issue on review because Commissioner Bearse denied review of that question. BR at 25-26. Some clarification is in order. The commissioner ruled discretionary review was not warranted on "the issue of whether the State had to present a specific type of evidence to satisfy its burden of proof," as the State is not required "to rely only on either the annual report or other expert reports." Commissioner Ruling at 8.

The commissioner did grant review of whether the State established its prima facie burden of proof, wondering how it did so when "The State did not present a witness — expert or otherwise — to counter Dr. Blasingame's testimony." Commissioner Ruling at 15-16. McHatton's argument is properly geared toward this issue. The State did not meet its burden of proof because it did not present a witness, expert or otherwise, that addressed whether a future LRA was in McHatton's best interest and was capable of protecting the community. The only witness that did opine on the issue — Dr. Blasingame — opined an LRA with proper conditions in place would be appropriate. RP 44-45; CP 540. The State can rely on

evidence beyond an expert report in an attempt to meet its burden but, on the facts of this case, it failed to meet its burden.

To answer the question of whether the State met its burden in this case, it is necessary to examine how the lack of any expert or non-expert witness opinion on the issue impacts the determination. The appellate court has the power to take any action as "the merits of the case and the interest of justice may require." RAP 12.2. To that end, this Court has "inherent authority to consider all issues necessary to reach a proper decision." Buchanan v. Buchanan, 150 Wn. App. 730, 738, 207 P.3d 478, 482 (2009) (citing Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't, 120 Wn.2d 394, 402, 842 P.2d 938 (1992)).

To reach a proper decision here, it is necessary to consider whether the State's failure to present an expert or nonexpert witness in support of its case left it without the ability to meet its prima facie burden. Part of this analysis involves comparison to other cases where the State did or did not meet its burden of proof, all of which invariably address expert opinion. In re Detention of Marcum, 189 Wn.2d 1, 5-6, 403 P.3d 16 (2017); In re Detention of Reimer, 146 Wn. App. 179, 192-93, 190 P.3d 74 (2008).

The State must be able to explain how it met its burden of proof despite not presenting any witness to support its case. The State attempts to do so, but its argument carries the seed of its own demise.

According to the State, the prima facie evidence that an LRA was not in McHatton's best interest and would not protect the community consists of the following: McHatton intentionally violated previous LRA release conditions, was dishonest when confronted with the violation, and had relapsed into his offense cycle. BR at 27. The conclusion drawn by the State — that an LRA would be inappropriate — is reached only by a process of weighing the significance of the evidence. This is a judgment call. If an expert had looked at this evidence and opined an LRA would be inappropriate, then the State would have met its burden. If a non-expert witness had looked at this evidence and was somehow able to competently conclude that an LRA would be inappropriate, then the State would have met its burden. But neither of those things happened.

The trial court, in effect, played the role of a State's witness in independently assessing the significance of the evidence before it to find the State met its prima facie case. This is improper because the trial court's role is circumscribed. Its role is limited to determining "whether the asserted evidence, if believed, is sufficient to establish the proposition its proponent intends to prove." State v. McCuiston, 174 Wn.2d 369, 382,

275 P.3d 1092 (2012). In performing that gate-keeping function, the court cannot weigh the evidence. Id. at 383. Here, in the absence of witness testimony than an LRA was inappropriate, the trial court needed to weigh the evidence for itself to reach that conclusion. Not allowed.

Part of the problem here is the revocation and show cause hearings were conflated. The court revoked the LRA after finding the State met its burden by a preponderance of the evidence and considering a host of balancing factors. CP 634-36; RP 61-62; RCW 71.09.098(5). The court explicitly weighed those factors and found they favored revocation, despite Dr. Blasingame's testimony. CP 636 (CL 5).

The revocation decision requires the court to weigh the competing evidence before it. The show cause determination, however, permits no such weighing. In re Detention of Petersen, 145 Wn.2d 789, 797, 42 P.3d 952 (2002) (trial standards of proof, including the preponderance of the evidence standard, are inapplicable to the probable cause determination).

The court, though, relied on the evidence presented at the revocation hearing, where it most definitely needed to weigh the competing evidence in deciding whether to revoke the LRA, and then used that same evidence and reasoning to decide whether the State met its burden of proof at the show cause stage. RP 61-63, 67. It thus concluded: *"The evidence before the Court as part of the revocation hearing, along*

*with the Court's decision at that hearing, provide prima facie evidence that the ordered LRA is not in the Respondent's best interest and conditions cannot be ordered to adequately protect the community."* CP 637 (CL 9) (emphasis added).

The court, in assessing whether the State has met its burden of proof, cannot weigh the significance of competing evidence for itself. It cannot look at the raw data and come up with its own opinion about whether an LRA is not in the detainee's best interest and would not adequately protect the community. At the show cause stage, that is the role of a witness, not a judge.

The State recognizes the trial court incorporated Dr. Blasingame's testimony into its findings of fact. BR at 31; CP 635 (FF 10). The court is "entitled to consider all of [the evidence]." In re Pers. Restraint of Meirhofer, 182 Wn.2d 632, 638, 343 P.3d 731 (2015). Contrary to the State's characterization, however, the court did not neatly compartmentalize Dr. Blasingame's testimony into the box reserved for whether McHatton met his independent burden of proof. There were competing facts here. The court considered all of them and resolved the evidentiary dispute in the State's favor. The court cannot resolve evidentiary disputes at the show cause stage. In re Detention of Elmore, 162 Wn.2d 27, 37, 168 P.3d 1285 (2007). A witness can do so. A witness

can survey competing evidence and offer a conclusion about whether an LRA is appropriate. The State's failure to produce such a witness means the State did not meet its burden of proof.

**d. Remedy: order the trial.**

The State argues a conditional release trial that is ordered due to the State's failure of proof should not be scheduled until the detainee submits an LRA proposal to the court. BR at 33. According to the State, "[o]rdering, but not scheduling, a conditional release trial until there is a conditional release plan before the court is a reasonable interpretation of the RCW 71.09.090 scheme." BR at 36. It urges this Court to adopt the reading of the statute articulated in Commissioner Bearse's ruling: "if the State fails to meet its burden, the superior court should enter a finding to that effect and the detainee is then eligible for a conditional release trial under RCW 71.09.090(2)(b)(ii)(B); but [] the trial cannot proceed until the detainee presents a proposed LRA plan." BR at 37-38 (quoting commissioner's ruling).

McHatton agrees the conditional release trial cannot proceed until there is a proposed LRA plan. This is so because if there is no proposed plan by the time the case goes to trial, then McHatton cannot prevail and the trial would be a waste of time.

What McHatton seeks in this appeal is a court order for a conditional release trial because the State failed to meet its prima facie burden of proof at the show cause stage. The procedure on remand giving effect to that court order, including when a trial date is actually scheduled, can be worked out below. Whether McHatton currently has a proposed LRA plan at his disposal is unknown to appellate counsel and would be outside the record on appeal anyway. But it would not be surprising if McHatton needed time to formulate a proposal, given that it has been over a year and a half since the trial court entered its erroneous order denying McHatton a conditional release trial. Times moves on. The current availability of a suitable treatment provider and suitable housing will need to be explored on remand.

To the extent the State is asking that a conditional release trial be ordered but not scheduled until there is an LRA proposal in place, McHatton views that as a reasonable position. But the State takes it too far, abruptly and incongruously stating this Court should "affirm the trial court's order denying a conditional release trial." BR at 38. The State's position in this respect is incoherent, as it had just argued "[o]rdering, but not scheduling, a conditional release trial until there is a conditional release plan before the court is a reasonable interpretation of the RCW 71.09.090 scheme." BR at 36. If the trial court must order a conditional

release trial because the State failed to meet its prima facie burden of proof, then the trial court's order denying a conditional release trial cannot be affirmed. It must be reversed. And Commissioner Bears's reading of the statute, which the State asks this court to adopt and which is consistent with McHatton's argument, recognizes "if the State fails to meet its burden, the superior court should enter a finding to that effect and the detainee is then eligible for a conditional release trial[.]" BR at 37 (quoting Commissioner's Ruling at 9).

Affirming the court order denying a conditional release trial on the basis that McHatton has not proposed an LRA plan would represent an impermissible shifting of the burden of proof onto McHatton at the show cause stage. McHatton has no burden to show anything when it comes to whether the State has met its threshold burden of proof on the LRA issue. McHatton's opening brief thoroughly addresses the burden shifting problem.

Although unnecessary to resolve the appeal in McHatton's favor, McHatton will respond to the State's argument that he was not prevented from presenting an LRA to the trial court. The State claims McHatton "did not attempt to present an LRA plan at the show cause hearing, which is the relevant hearing for purposes of this argument." BR at 32. This is disingenuous, as it was the State that requested the court to rule on the

show cause issue by relying on the evidence produced at the immediately preceding revocation hearing. RP 61, 64. And at that revocation hearing, McHatton tried to give evidence of an LRA plan, but the trial court did not permit him to do so based on the State's relevancy objection. RP 32-33, 45-46. It may be that such evidence was irrelevant to the issue in the revocation hearing, but it was certainly relevant to the show cause hearing to the precise extent to which the State argues McHatton needed to present such evidence to obtain a conditional release trial.

At the trial level, the State successfully prevented McHatton from presenting evidence of an LRA plan at the revocation hearing. It then convinced the trial court to deny a conditional release trial based on the evidentiary record produced at the revocation hearing. The State should not be allowed to manipulate the proceedings below in this manner and then claim advantage on appeal. See Sdorra v. Dickinson, 80 Wn. App. 695, 700-03, 910 P.2d 1328 (1996) (in reversing trial court's grant of new trial, holding respondent could not set up error at trial level and then rely on that error as basis to uphold lower court order for new trial). But in the end, it shouldn't matter because the State failed to meet its prima facie burden of proof, regardless of whether or for what reason McHatton did not propose an LRA at the show cause stage.

**B. CONCLUSION**

For the reasons stated above and in the opening brief, McHatton requests that this Court reverse the trial court's determination that the State failed to prove its prima facie case regarding the LRA and remand for a conditional release trial.

DATED this 30<sup>th</sup> day of March 2020.

Respectfully submitted

  
~~NIELSEN KOCH, PLLC~~

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CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

**NIELSEN KOCH P.L.L.C.**

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