NO. 43153-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

JOE TODD,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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A. Procedural History

On May 17, 2010, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of Joe Todd pursuant to RCW 71.09. CP at 11, F of F No. 1. Because Todd had been in the community since his most recent sexual offense but before the SVP proceedings were initiated, the State was required to prove that he had committed a recent overt act. CP at 13; Finding of Fact No. 9; RCW 71.09.020(12); 71.09.060. Specifically, the State alleged that Todd, a pedophile with three convictions for sexually violent offenses against children, had committed a recent overt act by engaging in numerous sexual encounters with adult men, viewing pornography depicting adult men engaging in sexual acts with 11 and 12 year old children, and masturbating to fantasies of adult men engaging in sexual acts with 11 and 12 year old children between December 16, 2009 and January 10, 2010. CP at 2. Todd waived his right to a trial by jury (CP at 3) and the case was tried to the bench on October 25-28, and November 21, 2011. CP at 11. The trial court issued a memorandum decision, finding beyond a

reasonable doubt that Todd is an SVP. CP at 4-8. Written Findings, Conclusions and an Order of Commitment were entered on March 2, 2012. CP at 11-18.

B. Todd's Sexual History

1. Prior Sex Offenses

Joe Todd was born on February 14, 1975. Ex. 1. He has an extensive history of sexual offenses against children. Although Todd's first sexual experience with a child occurred when he was 12, Todd has told others that he attempted sex with dogs and horses when he was 11. RP 1B 10/25/2011 at 149. *Id.* His first conviction for sexual misconduct did not occur until 1990, when Todd was 15. The conviction was based on sexual assaults against a 4-year-old boy, whom he admitted to having molested more than 20 times over a three-month period. *Id.* Initially charged with Rape of a Child First Degree for this offense, Todd pleaded guilty to the reduced charge of Indecent Liberties. Ex. 1 and 2. Todd received a disposition of 30 days detention and 24 months of community supervision. Ex. 4. The court placed him on home detention with his parents from October 9-24, 1990. Ex. 5. Although he received treatment during this period of time (RP 1B 10/25/2011 at 160), Todd was charged seven months later with Rape of a Child in the First Degree. Ex. 7. He was found guilty and on July 24, 1991, received a disposition of 80 to 100

weeks. Ex. 8. He served 20 months at the Naselle Youth Camp. RP 1A 10/25/2011 at 90. He was also sentenced to 30 days for violating his prior dispositional order. Ex. 6. At the time he committed this offense he was in sexual deviancy treatment in Portland, Oregon. RP 1A 10/25/2011 at 82-83.

Todd was released from confinement in January 1994. RP 2A 10/26/2011 at 255-56. Following his release, during a 1994 pre-polygraph interview with Richard Peregrin, Todd admitted to having visited pornography stores, having had "a lot of" contact with children at his church, and admitted that he went to church in order to have access to children and be able to interact with them in a safe environment. *Id.* at 272. He admitted to having peeped on "fifty or sixty" children during the five months preceding the interview, and to having become sexually aroused when he had picked up a 16-month old baby at church before handing it back to its parents. *Id.* He admitted to having peeped in restrooms at rest areas, Fred Meyer's stores and Safeways, stating that he would sit in a stall for long periods of time while peeping through a hole in the stall. *Id.* at 273. He disclosed that he had had sexual contact with thirty males at rest areas and four at the Fred Meyer's bathroom. *Id.* He disclosed that he would also masturbate to fantasies of younger children he peeped on while the children were in the bathroom. *Id.*

Finally, in 1997, at age 22, he was charged with Child Molestation First Degree. Ex. 9. The assaults occurred on December 26, 1997. That day, Todd had stopped at a restroom on the way to visit his mother, and had become aroused. RP 1A 10/25/2011 at 97. He then began looking for an adult video store, hoping to find someone with whom to have sex. *Id.* Upon finding all the video stores he visited were closed, he became frustrated. *Id.* Later that same day, he assaulted three boys, one of whom was aged six, and two of whom were eight. Ex. 9. After an amended information was filed, (Ex. 10), Todd pled to Child Molestation First Degree and Assault Second Degree. Ex. 11. He was sentenced to 144 months in prison, and given 36 months community placement. Ex. 12. As part of his conditions of supervision, Todd was, *inter alia*, prohibited from being in areas "routinely used by minors as areas of play/recreation" or having contact with persons under the age of 18—whether supervised or unsupervised—without the express "prior written approval of his community corrections office, his therapist, and the court after an appropriate hearing." Ex. 12, Appendix A. He was required to successfully complete all phases of a sexual deviancy treatment program, including "accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity," to submit to periodic

polygraph and plethysmograph exams, and to refrain from use of any pornographic materials. Ex. 12.

While in prison, Todd participated in the Sex Offender Treatment Program at Monroe Correctional Complex, Twin Rivers Unit. RP 1B 10/25/2011 at 172. As part of his treatment, he developed a Relapse Prevention Plan, working to identify behaviors that placed him at risk to reoffend, and strategies to intervene in those behaviors. Ex. 13. In a document entitled "Risks and Interventions" (Ex. 14), Todd identified his "sexual lifestyle-past lifestyle" as one of his risk factors, identifying "a desire for anonymous sex, excitement, adrenaline" as an "internal cue," and "Secrecy, not being accountable for my time, spending a lot of time in high risk areas, like malls, Fred Meyers, parks after dusk or after dark" as an "external cue" for that risk. Ex. 14, Risk No. 2. This risk, he wrote,

> led me to sex in restrooms (a felony crime) and leads to de-personalizing sex, so that ***all males, especially minors*** are at even higher risk, I want sex now and I don't care how I get it attitude.

Id. (emphasis added). In order to avoid this risk, Todd wrote, he needed to "continue to admit I am still aroused to anonymous sex in public areas, avoid using them, [and] locate one person rest-rooms in area." *Id.* Todd also identified "excessive arousal" as a risk factor. The "internal cue" for this was the "desire to masturbate excessively, thinking or fantasizing of

sex constantly." *Id* The "external cue" was "looking at men's crotches, going to sexual themed places, watching porn magazines, online, etc."[1] *Id.* Todd wrote that "[m]y arousal, my focus on sex, the male genitals, in particular, have led me to objectify boys and men, wanting instant gratification." Ex. 14, Risk No. 7. He also identified one of his risks as "feeling entitled to sex." Ex. 14, Risk No. 8. "This has led me to seek sex in public places, despite the risk level and when age-appropriate is not available, children and young boys." *Id.* In addition, he identified being in a public restroom as a risk factor for him, writing "I have sexually offended in public restrooms. The casual, anonymous sex places me at higher risk for offending a child later."[2] Ex. 15, p 7, Risk No. 16.

Todd was released to community supervision on February 27, 2009. RP 2A 10/26/2011 at 255. Despite treatment while at Twin Rivers, Todd, once released, began what amounted to a white-knuckle ride through the community, ending in his incarceration for violations of his conditions of release and, finally, the filing of an SVP petition.

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[1] In his deposition, played to the trial court, Todd identified pornography as a risk factor, saying that "I don't think it would be too difficult to keep digging further and find real child pornography." RP 1B 10/25/2011 at 164. The danger of child pornography, he continued, was that "if I ever allow myself just to think that children can ever be appropriate sexual partners, then I run the risk of reoffending." *Id.*

[2] Todd had previously admitted to performing oral sex on as many as 12 men per hour in public restrooms. RP 1B 10/25/2011 at 150.

Upon release in 2009, Todd was assigned to work with Mark Chapman, an aftercare specialist for the DOC, as well as Tony Shaver, a Communications Correction Officer (CCO). RP 1B 10/25/2011 at 173. In addition to attending sex offender treatment groups with Chapman, Todd was told that he could call Chapman for support or assistance at any time. *Id.* at 175.

About six weeks after his release, on May 13, Todd called Chapman. RP 1B 10/25/2011 at 179. He told him that he had gone into a Target, had masturbated in the bathroom, and that he was hoping someone would come in so that he could have sexual contact with that person. *Id.* at 183. Although he had dropped his pants on the floor in an attempt to signal his interest, no sexual contact occurred. *Id.* at 179; *See also* Finding of Fact No. 14. Both Chapman and Shaver, upon hearing about this, recognized this behavior as was part of Todd's offense cycle, one step in a process that could eventually lead to offending against a child. *Id.* at 183-84; RP 2A 10/26/2011 at 346-47. On the basis of this behavior, Shaver imposed a condition prohibiting Todd from entering into any place where the public or minors could come in and use the restroom, and requiring that he use only locked bathrooms. RP 1B 10/25/2011 at 184.

The following day, when Todd again talked to Chapman, Todd reported suicidal thoughts and feelings of hopelessness. RP 1B 10/25/2011

at 186. The two discussed the fact that these feelings had been previously identified as risk factors for Todd, and the importance of Todd's communicating these feelings to those supervising him. *Id.* at 187. Several days later, Todd told Chapman that he had inadvertently encountered several minors in a store, had experienced a sort of "pre-sexual excitement," and left the store. *Id.* at 189-190. During this conversation, Todd disclosed that the only reason he would want to be around a minor "would be for sexual gratification or for sexual purposes." *Id.* at 190.

The white knuckle ride continued. On June 11, Todd told Chapman that he had seen a teenager on the bus who was wearing his pants so low that Todd could see the boy's underwear. *Id.* at 191; *See also* Finding of Fact No. 15. Seeing underwear, testified Chapman, "is an issue for immediate arousal" for Todd. *Id.* at 191. On July 8, Todd disclosed in group that he had fantasized that he was a minor "being molested or being sexual with an older male," and had masturbated to that fantasy. *Id.* at 193-94. On July 30, Todd became aroused when, while swimming under Highway 99, he heard the sounds of boys' voices in a bus passing by overhead. *Id.* at 194-95. When confronted and told by CCO Shaver that he could not swim there, Todd resisted, his face becoming red and tense. RP 2A 10/26/2011 at 352.

In early October, Todd revealed that he had been looking at sexually explicit materials on the internet. Although Todd was permitted to use computers to look for work and for school, he was prohibited from viewing sexually explicit material or pornography. RP 2A 10/26/2011 at 355. On October 11, however, he reported having looked at sexually explicit materials on the internet while doing research for a paper on gay marriage on computers at a local college. RP 1B 10/25/2011 at 197*; see also* CP at 15; Finding of Fact No. 16. Knowing that he should not expose himself to such material, he told Chapman that he would use other computers that contained filters to prevent such images from appearing. RP 1B 10/25/2011 at 198; CP at 15; Finding of Fact No. 16. Despite this plan, he reported on October 27 that he had again viewed sexually explicit materials on a gay website, and again said that he was not going to do that anymore. *Id.* at 199-200. He was violated and incarcerated for this behavior. CP at 15; Finding of Fact. No. 16.

Staying away from pornography, however, proved difficult for Todd. On November 27, Todd disclosed having gone to a site called "Hairy Bears," a cite involving older men, while at the college. RP 1B 10/25/2011 at 201; CP at 15; Finding of Fact No. 17.[3] At the same time,

[3] This is referred to elsewhere as "Bears in Underwear." RP 2A 10/26/2011 at 306.

he went to another site called "Barely Legal Boys," a site showing males over 18 who look like young teens. RP 1B 10/25/2011 at 202-04; CP at 15; Finding of Fact No. 17. Todd later stated that the boys on "Barely Legal" appeared to be between 11 and 14. *Id.* at 309; 317-18. By this point, the trial court found, Todd "was having extreme difficulty controlling his urges to access sexually explicit materials. For him, these are triggering events towards reoffending." CP at 15; Finding of Fact No. 17. During this time, Todd also reported having gone into a video store that contained an adults-only section in hopes of a sexual encounter. *Id.* at 196, 204, 206.

After CCO Shaver learned in late November about Todd's behavior in the community, he filed a violation report, but asked for only 20 days' sanction (rather than the 60 days that would have been permitted by law) hoping, in an effort to be "supportive" of Todd, to avoid Todd's losing his housing and his job due to a lengthy incarceration. RP 2A 10/26/2011 at 362-65. Todd was sanctioned for accessing pornography, and was sent to jail on November 30, 2009. *Id.* at 257-58.

2. Recent Overt Act

17 days later, Todd was again released back into the community. RP 2A 10/26/2011 at 257-58. When he spoke to Chapman two days later, he reported that he was finding it "very difficult to control his urge to

access sexually explicit material on the internet." RP 1B 10/25/2011 at 207. After Todd missed one of his group sessions with Chapman, Chapman asked him to come in to his office; Todd went in on January 5, 2010. After a lengthy discussion, Todd disclosed that he had gone to Taboo Video and that he had had sexual contact with several men while there. *Id.* at 210; RP 2A 10/26/2011 at 303, 307; CP at 15, Finding of Fact 18. He reported to Chapman that, when he returned to the video store, he knew that he was violating conditions of his release, and that "he was starting to cross his own boundaries and boundaries that were created for him." *Id.* at 206. Todd also reported that his own sexual arousal to minors was increasing. *Id.* He also indicated he had visited the "Barely Legal Boys" site again (*Id.* at 211) and admitted in his deposition that he was, at the time, masturbating to fantasies of men having sex with boys. RP 2A 10/26/2011 at 259.

Despite having numerous opportunities to do so, Todd did not disclose these behaviors to CCO Shaver until confronted by Shaver about them. CP at 15-16; Finding of Fact No. 18. Upon receiving this information, Shaver scheduled a polygraph examination for Todd. In the pre-polygraph interview, Todd disclosed that he had not told Shaver about his sexual contacts with men at Taboo or about having looked at child pornography that included depictions of juvenile males being masturbated

by and having sex with adult males. RP 2A 10/26/2011 at 259 at 309-11. After considering all available information, Shaver filed a violation report. A hearing took place, at which Shaver indicated that he believed Todd posed an immediate risk to the community, and asked that Todd be given the maximum allowable time for each violation. *Id.* at 369-70. It was at that point that Shaver made a referral for civil commitment as an SVP. *Id.* at 370.

At the trial on the SVP petition, the State presented the testimony of Todd, Sergeant Allen Cook, a police officer with the Washougal Police Department (RP Vol. 1B at 114-132); Ethel Michelle Pool, a Community Corrections Officer for the Mason County Department of Corrections (RP Vol. 1B at 133-165)[4]; Mark Chapman, a Community Corrections Specialist providing aftercare for the Sex Offender Treatment Program at Monroe Corrections Center (RP at 166-240); Anthony Shaver, Todd's Community Corrections Office during periods of Todd's release in 2009 and 2010(RP at 321-421); Polygrapher Richard Peregrin, who testified regarding interviews of Todd conducted in 1994 and 2009 (RP at 264-289); and Steven A. Norton (RP at 299-318), a polygraph examiner who conducted an interview of Todd in January of 2010. In addition, the State

[4] Ms. Pool is identified in the trial court's Findings as Michelle Bird, which was her maiden name. CP at 11; RP 1B 10/25/2011 at 134.

presented the testimony of Dr. Brian Judd, a psychologist with a specialization in the treatment and diagnosis of sex offenders who has treated sex offenders since 1993. RP 3A 10/27/2011 at 517.

III. ARGUMENT

Todd asserts that the evidence at trial was insufficient to prove that Todd committed a recent overt act, and that as such the State failed to prove beyond a reasonable doubt that he was a sexually violent predator. App. Br. at 2. He assigns error to Findings of Fact Nos. 8, 11, 12, 13, and 20, and Conclusions of Law Nos. 6, 7, 8 and 9, and argues that these are not supported by substantial evidence.. App. Br. at 1.

Todd's argument is without merit. First, although he identifies several findings and conclusions as erroneous, he fails to support these assertions with any citations to the record, instead merely making broad charges untethered to the evidence. Second, there was overwhelming evidence presented at trial that Todd's behavior in December of 2009 and January of 2010 while in the community constituted a recent overt act. This Court should affirm his commitment as an SVP.

A. Standard of Review

1. Sufficiency of the evidence

The criminal standard of review applies to sufficiency of the evidence challenges under the SVP statute. *In re the Detention of Thorell,*

149 Wn.2d 724, 744, 72 P.3d 708 (2003). "Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

In reviewing the sufficiency of the evidence, the reviewing court does not determine whether it believes the evidence at trial was proven beyond a reasonable doubt. *State v. Hughes,* 154 Wn.2d 118, 152, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco,* 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). This Court must look at the evidence in the light most favorable to the State and the commitment must be upheld if any rationale trier of fact could have found the essential elements beyond a reasonable doubt. *In re Detention of Audett,* 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006).

In this sufficiency challenge, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *See Audett,* 158 Wn.2d at 727. An appellate court should not second guess the credibility determinations of the fact-finder. *In re the Detention of Halgren,* 156 Wn.2d 795, 811, 132 P.3d 714 (2006); *see also In re Davis,* 152 Wn.2d 647, 680, 101 P.3d 1 (2004) ("A trial court's credibility determinations cannot be reviewed on appeal, even to the extent there may be other reasonable interpretations of the evidence.")

Appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Detention of Broten,* 130 Wn. App. 326, 335, 122 P.3d 942 (2005)(*Broten II*). "Determinations of credibility are for the fact finder and are not reviewable on appeal." *Hughes,* 154 Wn.2d at 152.

B. Todd's Assignments of Error Are Unsupported By The Record And Should Not Be Considered By The Court

Todd makes eight assignments of error, asserting that the trial court erred in entering Findings of Fact Nos. 8, 11, 12, 13, and 20, and Conclusions of Law Nos. 6, 7, 8 and 9 argues that these findings and conclusions are not supported by substantial evidence. *See* Brief of Appellant (App. Br.) at 1-2. All of the challenged findings relate to the trial court's determination that Todd's behavior in the community immediately prior to the filing of the SVP petition constitutes a recent overt act. He fails, however, to support any of those challenges with any citations to the record, instead merely alleging 1) that the trial court improperly relied upon *In Re Detention of Broten II,* supra, and *In Re Detention of Aston*, 161 Wn. App 824, 251 P.3d 917 (2011) because the facts of those cases are distinguishable from those of his case (App. Br. at 13-14); and 2) that, despite the fact that Todd "might" have been "inadvertently" aroused by minors "at times," he "did not act on his

arousal" and as such cannot be said to have committed a recent overt act. App. Br. at 14-15.

An appellate court may decline to consider a factual argument unsupported by citations to the record, or an argument that is not framed within an assignment of error. *Clausing v. State,* 90 Wn. App. 863, 877, P.2d 394 (1998). Such arguments are "merely speculative and without merit." *Id.* The court need not consider broad references to the record that would cause the court and opposing counsel to search for facts supporting a proposition. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 819, 828 P.2d 549 (1992) ("Such shotgun references to the record are of little assistance and ill serve a party"). Although Todd briefly goes through the record in the case, nowhere does he actually cite to specific portions of the record that either contradict the trial court's findings, or offer an alternative interpretation of the evidence offered at trial. As such, this Court should decline to consider his arguments.

C. The State Proved Beyond A Reasonable Doubt That Todd Was A Sexually Violent Predator

In the event that the Court does consider Todd's arguments, they should be rejected, because the overwhelming evidence at trial supports the trial courts Findings, Conclusions, and Order of Commitment.

In order to uphold Todd's commitment, this Court must find that the trial court had sufficient evidence to find the following elements:

1. That Todd had been convicted of or charged with a crime of sexual violence; and
2. That Todd suffers from a mental abnormality or personality disorder; and
3. That such mental abnormality or personality disorder makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility; and
4. That Todd committed a recent overt act (ROA) while in the community.

RCW 71.09.020(18). A recent overt act is defined as "any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors." RCW 71.09.020(12). Proof thereof is required where, as was the case of Todd, the person has been released to the community after serving the full sentence for the most recent sexually violent offense and is in custody on the day the SVP action is filed for violating the terms of post-release supervision. RCW 71.09.060(1); *In re Detention of Albrecht*, 147 Wn.2d 1, 10-11, 51 P.3d 73 (2002); *In re Detention of Broten*, 115 Wn. App. 252, 62 P.3d 514 (2003)(*Broten I); In re Detention of Davis*, 109 Wn. App. 734, 37 P.3d 325 (2002).

The trial court determined that Todd had committed three sexually violent offenses as defined by RCW 71.09.020(17). Findings of Fact Nos. 2, 3 and 4; Conclusion of Law No. 4. Likewise, the trial court determined that Todd suffers from a mental abnormality in the form of pedophilia. Finding of Fact Nos. 5 and 6; Conclusion of Law No. 5. Todd does not contest these Findings and Conclusion, and as such they are verities on appeal. *In re Estate of Jones,* 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Nor does Todd challenge those Findings that describe Todd's behavior while in the community between May of 2009 and January of 2010. *See* Findings of Fact Nos. 14-18.

What Todd appears to argue, however, is that despite the presence of a mental abnormality—a condition which, by definition, "affect[s] the emotional or volitional capacity" and "predisposes the person to the commission of criminal sexual acts,"[5] -- and despite Todd's behavior in the community, the State did not prove that Todd's mental condition results in serious difficulty controlling his sexually violent behavior, that those behaviors create a reasonable apprehension of harm of a sexually violent nature, or that Todd is likely to reoffend. These arguments are

[5] "Mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

without merit. Todd's commitment as a sexually violent predator is supported by both the law and the evidence submitted in this case.

1. This Court's Decisions In *Broten* And *Aston* Support The Trial Court's Conclusion That Todd Committed A Recent Overt Act

Todd challenges Findings of Fact Nos. 11-13, arguing that the trial court improperly relied upon *Broten II* and *Aston* because the facts of those cases are distinguishable from those in his case. App. Br. at 13-14. This argument must be rejected. Both *Broten II* and *Aston* stand for the proposition that a person engaging in acts or behaviors that form part of their "offense cycle" may be determined to have committed a recent overt act. As the evidence at trial clearly demonstrated that Todd was engaging in behaviors that were—by his own admission—established parts of his offense cycle, the court properly found that he had committed a recent overt act.

In *Broten II,* the recent overt act occurred when Broten – who, like Todd suffers from pedophilia and was under DOC supervision in the community – parked his car in a park near children, in violation of his conditions. This behavior was part of Broten's "offense cycle":

> In addition, Dr. Judd testified that Broten's mental disorders and antisocial personality disorder rendered him unable to control his sexual behavior and highly likely to reoffend. Dr. Judd further testified that Broten's behavior of frequenting locations where minors could reasonably be

> expected to congregate was part of Broten's "offense cycle," or a "buildup ... in anticipation of offending." . . . And Broten admitted to masturbating while thinking about "possible new victims" and young girls.

Broten II, 130 Wn. App. at 335-36. This Court concluded that Broten's act of being in his car in a public park near children, along with his history and mental condition, sufficiently established a recent overt act:

> During the incident relied upon by the State for the "recent overt act," Broten was arrested in Seward Park, where he was parked in a lot near a playground where children were playing. He admitted that he was not permitted to be in parks or other areas where children were likely to congregate without a chaperone and provided no legitimate reason for his presence at Seward Park. This act, taken together with Broten's mental history, numerous release violations, admission of fantasizing about molesting and raping young girls, and pattern of placing himself in high risk situations in anticipation of causing sexually violent harm, constituted a recent overt act. The record sufficiently supported a finding that Broten's behavior could cause a reasonable person apprehension that he would reoffend in a sexually violent manner.

Id.

Todd also attempts to distinguish *Aston* by noting that Todd, "unlike Aston ...never made any direct or unequivocal threat to engage in predatory acts of sexual violence." App. Br. at 14. The *Aston* Court, however, did not base its conclusion that Aston had committed a recent overt act solely on the Aston's remarks to the effect that, if he had an opportunity to reoffend, he would. 161 Wn. App. at 834. The court merely

concluded that such statements could reasonably constitute a "threat" under RCW 71.09.020(12). *Id.* The court also found that Aston, by "actively writing deviant sexual fantasies about children and masturbating to them" as well as "watching children's movies and masturbating to fantasies about the child actors," had committed an "act" under RCW 71.09.020(12).

Given the evidence of Todd's mental abnormality—pedophilia—and his escalating behavior in the community, including masturbating to pornography which appeared to depict adult males having sex with children, the trial court properly determined that the facts of these cases were "similar to" those of Todd's case. Finding of Fact No. 11.

2. The Evidence Presented At Trial Clearly Demonstrated That Todd Committed A Recent Overt Act

Todd argues that the State did not demonstrate that Todd had committed a recent overt act, urging that, despite the fact that Todd "might" have been "inadvertently" aroused by minors "at times," he "did not act on his arousal," and as such cannot be said to have committed a recent overt act. App. Br. at 14-15. This assertion both misapprehends the meaning of the recent overt act doctrine and minimizes the seriousness of Todd's behavior in the community. The evidence presented at trial clearly demonstrated that Todd was engaging in behaviors that both he and

experts with whom he had worked had identified as dangerous and related to reoffense. The evidence demonstrated beyond a reasonable doubt that these behaviors were known steps in Todd's offense cycle and created a reasonable apprehension that Todd would have re-offended had the State not intervened.

Dr. Judd, having both reviewed Todd's extensive records and interviewed him, testified that Todd suffers from pedophilia. RP 2B 10/26/2011 at 444. This condition is defined as follows:

> a) Over a period of at least six month, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
> b) The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.
> c) The person is at least age 16 years and at least 5 years older than the child or children referenced in the first criterion.

Id. at 445-446; CP at 12; Finding of Fact No 5. Todd's expert, Dr. Richard Wollert, agreed with this diagnosis. CP at 12; Finding of Fact No 5. Dr. Judd testified, and the trial court found beyond a reasonable doubt, that Todd's pedophilia constitutes a mental abnormality which causes him serious difficulty in controlling his sexually violent behavior RP 2B 10/26/2011 at at 463; CP atl 2; Finding of Fact No. 6.

As part of his assessment of Todd, Dr. Judd reviewed Todd's Relapse Prevention Plan (RP 3A 10/27/2011 at 519; Ex. 13), and a document entitled "Risks and Interventions" prepared by Todd while in sex offender treatment at Twin Rivers. RP 3A 10/27/2011 at 520-21; Exs. 14 and 15). He explained that the term "offense cycle" refers to the identification of a behavioral chain or factors leading up to an offense. RP 3A 10/27/2011 at 520-21. This provides the basis for treatment insofar as treatment will focus on disrupting that chain or intervening in those factors, which were associated with prior offending. *Id.* at 517-18. The development and understanding of the offense cycle, he explained, is "core to all treatment." *Id.* at 518. Indeed, Dr. Judd testified that, if he saw "an individual that was replicating their identified offense cycle, in terms of their conduct and behavior, I would have concerns about the eminency [sic] in terms of risk or recidivism." *Id.* at 543.

Dr. Judd discussed Todd's offense cycle with him during his evaluation. RP 3A 10/27/2011 at 521. Todd's offense cycle, he testified, is one initially triggered "by feelings of loneliness, isolation, boredom, maybe depression, anxiety." *Id.* at 522. Such emotions have, in the past, "led into a pattern of sexualized coping in some fashion or another. Either through anonymous sex, through peeping, through voyeurism [or] exhibitionism." *Id.* These experiences, Dr. Judd explained, "lea[d] into

this particular pattern of conduct and behavior, which can escalate into committing offenses against children or it can remain simply within a sexually compulsive pattern of behavior entailing non-criminal behavior with adult males." *Id.* at 522. After his release into the community on December 16, Todd reported experiencing pronounced emotional distress due to a combination of circumstances: a modification of his medications, a loss of access to certain social supports in the community, and the loss of his job. *Id.* at 526. This stress "clearly led Mr. Todd into a –into cycle and pattern behavior, initially looking at pornography and then, engaging in anonymous sex sex—sexual behavior with individuals at Taboo Video." *Id.* at 526-27.

Dr. Judd testified that the first evidence that Todd was entering into his offense cycle was the report that Todd was attempting to engage in an act of anonymous sex in a Target bathroom in May of 2009. RP 3A 10/27/2011 at 519. Todd indicated that, prior to this incident, he had experienced suicidal thoughts and "pronounced emotional distress" due to various factors, including impending homelessness. *Id.* at 523, 525. Likewise, Dr. Judd testified, Todd's viewing of websites such as "Barely Legal Boys" was an indicator that he was "in cycle." *Id.* at 526-27; 529-30. Viewing such sites "clearly reinforce[ed] Todd's deviant arousal and his cycle," a phenomenon to which Todd himself admitted to Dr. Judd. *Id.*

at 529-30. This was true, Dr. Judd asserted and Todd admitted, even in cases when the "kids" Todd was viewing were actually adult men who simply looked young. *Id.* at 588. "The images I was using was men that looked like kids. The arousal was there for someone younger..." *Id.* at 588. Todd, Judd testified, "was engaged in a pattern of conduct that he had identified consistently as being high risk." *Id.*:

> And, in point of fact, the conduct and behavior, the urges that he had identified that he was experiencing at that time were consistent with somebody who is having a difficulty in terms of managing their control. In addition...he acknowledged that he was having a hard time managing his impulses when he was in jail and when he was in the community during that early period of time...[A]t the time that he was engaging in these behaviors on 12/16 and 12/18, that yes, he subjectively felt that he was out of control.

Id. at 586.

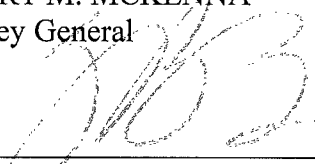
Dr. Judd's testimony, along with the extensive testimony regarding Todd's entrenched history of sexual deviancy and his inability to control that deviancy, provided a more-than-sufficient basis for the trial court's findings. When the State filed its petition, Joe Todd was a ticking time bomb. Viewing the evidence in the light most favorable to the State, with all reasonable inferences from the evidence drawn in favor of the State, a rational trier of fact would have found beyond a reasonable doubt that Todd, having committed a recent overt act, is a sexually violent predator.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Todd's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 11th day of January, 2013.

ROBERT M. MCKENNA
Attorney General



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NO. 45153-0

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: JOE TODD, Appellant	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On January 11, 2013, I deposited in the United States mail true and correct cop(ies) of Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

Lisa Tabbut
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Longview, WA 98632-7822
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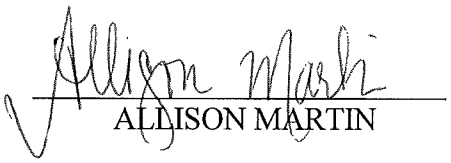
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of January, 2013, at Seattle, Washington.



ALLISON MARTIN

WASHINGTON STATE ATTORNEY GENERAL

January 11, 2013 - 12:15 PM

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Court of Appeals Case Number: 43153-0

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