No. 45000-3

COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

IN RE DETENTION OF JOHN C. ANDERSON

STATE OF WASHINGTON, Respondent

v.

JOHN C. ANDERSON, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE JOHN MCCARTHY

Corrected
REPLY BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

The Assignments of Error and Issues Related To Assignments of Error are presented in Appellant's Opening Brief.

II. STATEMENT OF FACTS

Appellant rests on the Statement of Facts presented in Appellant's Opening Brief and includes the following. The rulings from the Washington Supreme Court in *Anderson,* regarding the issue of recent overt acts:

> "Whether or not Anderson's conduct amounted to a recent overt act, according to former RCW 71.09.020(10(2006), *recodified as* RCW 71.09.020(12) *will also be determined on remand* but the acts as found do satisfy that requirement"

and again,

> "Anderson claims that his acts are neither recent or overt. The State agrees it must establish this element beyond a reasonable doubt. Because Anderson does not challenge the trial court's findings in this regard, we treat those findings as true. *In re Estate of Jones,* 152 Wn.2d 1, 8, 93 P>3d 147 (2004). *Note, however, that Anderson will receive a new trial, at which he may challenge all findings.* Anderson's sexual activities at WSH *could* constitute overt acts." (Emphasis added).

In re Detention of Anderson, 166 Wn.2d 543, 546, 549, 550, 211 P.2d 543 (2009).

In other words, the Court found for purposes of the review it was conducting at that time, that Mr. Anderson had not challenged certain findings. However, on remand, he could challenge all findings. Simply put, the Court did not preclude the possibility that a new trial could or would raise the issue of whether any of his acts were recent and overt.

III. ARGUMENT

A. The Trial Court Did Not Have Subject Matter Jurisdiction

Mr. Anderson incorporates by reference the arguments presented in appellant's opening brief and adds the following.

RCW 71.09.030(1) draws a distinction, referring to conviction for an adult sexually violent offense and *commission* of a sexually violent offense by a juvenile. The language is unambiguous; statutes that involve a deprivation of liberty must be strictly construed. *In re Det. of Hawkins,* 169 Wn.2d 796, 801, 238 P.3d 1175 (2010).

The State has argued, in its response brief, that despite the lack of ambiguity in RCW 71.09 distinguishing between adults who

have been convicted and juveniles who have committed a sexually violent offense, the legislature intended to include juveniles in section (e) of the statute, which provides, "A person who at any time previously has been *convicted* of a sexually violent offense and has since been released from confinement and committed a recent overt act." (Br. of Resp. at 11-13). (Emphasis added).

The legislature has explicitly stated under RCW 13.04.240 "an adjudication under the provisions of Title 13 shall in no case be deemed a conviction of a crime." If the legislature intended under RCW 71.09 to include juvenile offenders who had been released from total confinement and committed a recent overt act, as individuals upon whom a petition for commitment could be filed, it could have done so with the addition of the word "committed" rather than the explicit word "convicted." [1]

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[1] RCW 71.09.025 provides in pertinent part:
When it appears that a person may meet the criteria of a sexually violent predator as defined in RCW 71.09.020(16), the agency with jurisdiction shall refer the person in writing to the prosecuting attorney of the county in which an action under this chapter may be filed pursuant to RCW 7109.030, and the attorney general three months prior to:...(ii) the **anticipated release from total confinement** of a person found to have **committed a sexually violent offense as a juvenile**. (Emphasis added) and again "A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that: ...(b) a person found to have **committed** a sexually violent offense **as a juvenile is about to be released from total confinement**." (Emphasis added) RCW 71.09.030(1).

The State's argument is framed in terms of the Court's reasoning in *State v. Michaelson*, 124 Wn.2d 364, 878 P.2d 1206 (1994). *Michaelson* was concerned with the issue of whether the juvenile court that made a diversion agreement with a teen was required to forward the information to the Department of Licensing. The Title 13 law regarding the forwarding of such information instructed the court to the procedural steps found in RCW 46.20.270(4). The problem at hand there was that the charged offense, *taking* of a motor vehicle without permission, did not fall within the statutory category of *operating* a motor vehicle; one was a criminal violation and the other was a traffic violation. *Michaelson,* at 367. The Court pointed out that the statute simply did not apply to the facts.

The State's argument in *Michaelson*, however, was that the juvenile statute defining adjudication of a juvenile for an offense which if committed by an adult would be a crime as not a conviction, meant that RCW 46.20.270(4) only applied to convictions and therefore made no sense. *Id.* at 366-67. Using the language of the statute itself, the Court gave a rather narrow interpretation, stating, "While a juvenile cannot be convicted of a

felony, he or she can be convicted of an offense *as contemplated by RCW 46.20.270(4)"*. (Emphasis added). The plain language of the juvenile statute in question, RCW 13.50.200 directly referred to RCW 46.20.270(4).

The *Michaelson* court also cited to JuR 7.12. *Michaelson* at 367. JuR 7.12 is concerned with criminal history at disposition hearings, the equivalent of an adult sentencing hearing. Section (d) is as follows:

> Criminal History – Multiple Charges. If the juvenile has been convicted of two or more charges arising out of the same course of conduct, then only the highest charge is counted as criminal history. If the juvenile has been convicted or two or more charges that did not arise out of the same course of conduct, then all of the charges count as criminal history, even thought he charges may have consolidated into a single disposition order.

The above rule is entirely consistent with RCW 13.04.011(1), which treats "adjudication" as having the same meaning as "conviction" but only for the purposes of sentencing under RCW 9.94A. RCW 13.04.240 is not rendered meaningless merely because the legislature has intended to consider juvenile offenses as "convictions" in sentencing.

The closest case on point that is instructive for how courts should view juvenile adjudications in the context of commitment

proceedings is *In re Weaver,* 84 Wn.App. 290, 929 P.2d 445 (1996). Weaver was charged as a juvenile with two counts of first-degree child rape. He successfully pled not guilty by reason of insanity and the juvenile court ordered him hospitalized until age 21. *Id.* at 291. He was transferred to Western State Hospital's ward for adult mentally ill offenders at age 18. He filed a personal restraint petition, arguing that he was not subject to commitment under RCW 10.77[2]. He was correct.

The concern addressed through RCW 10.77.110 is dangerousness: an individual who committed a felony and has

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[2] RCW 10.77.110 states in part:
(1) If a defendant is acquitted of a felony by reason of insanity, and it is found that he or she is not a substantial danger to other persons, and does not present a substantial likelihood of committing felonious acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions, the court shall direct the defendant's final discharge. If it is found that such defendant is a substantial danger to other persons, or presents a substantial likelihood of committing felonious acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions, the court shall order his or her hospitalization, or any appropriate alternative treatment less restrictive than detention in a state mental hospital, pursuant to the terms of this chapter.
RCW 10.77 does not authorize commitment after a defendant has been acquitted by reason of insanity of a crime that is not a felony. RCW 10.77.110(3) provides in part:
If the defendant is acquitted by reason of insanity of a crime which is not a felony, the court shall order the defendant's release or order the defendant's continued custody only for a reasonable time to allow the county-designated mental-health professional ***447*** to evaluate the individual and to proceed with civil commitment pursuant to chapter 71.05 RCW, if considered appropriate.

been acquitted by reason of insanity may be so dangerous that confinement is necessary. Commitment is not authorized under RCW 10.77 if the defendant was acquitted by reason of insanity for a crime that is not a felony. There is a different process for assessing dangerousness in a non-felony scenario: the court must order the defendant's release or continued custody only long enough to allow a mental health professional to conduct an evaluation for possible commitment under RCW 71.05.

In *Weaver,* this Court reasoned that the juvenile statutes indicate that an act, which would be a crime if committed by an adult, is not a crime, and thus not a felony if committed by a juvenile. *Weaver,* 84 Wn.App. at 293-294; *See* RCW 13.04.240; RCW 13.40.020(19); RCW 13.40.020(15) and RCW 13.40.020(1). Thus, despite the fact that as a juvenile Weaver had been found not guilty by reason of insanity of first-degree child rape, because the act was not a felony, he was not properly detained under RCW 10.77.

Reviewing Courts recognize the clear distinction between juvenile and adult offenses and the intended legislative repercussions for those offenses. Where the legislature defined the conditions under which an individual could be held under RCW

10.77 it specifically used the word "felony", which could not apply to a juvenile.

In the class of persons subject to RCW 71.09, the legislature specifically indicated a petition could be filed on a juvenile who had previously committed a sexually violent offense and was about to be released from total incarceration. It also further specified that an individual who had been *convicted* of a sexually violent offense and had been released from total incarceration and committed a recent overt act was among those classes of persons on whom a petition could be filed.

As discussed above, juvenile justice statutes specifically state that a juvenile cannot be convicted of a crime. And like RCW 10.77, the reviewing Court should find the language of RCW 71.09(e) does not extend to juveniles who have previously committed a sexually violent offense, but have since been released from total confinement.

B. The State Failed To Prove Beyond A Reasonable Doubt That Mr. Anderson Committed A Recent Overt Act, An Essential Element.

The State has argued that whether or not Mr. Anderson and his partners engaged in consensual activity was "immaterial" because "it was the predatory behavior against vulnerable, child-like individuals that demonstrated his continuing dangerousness " (Br. of Resp. at 25). Case law and the record do not support this argument. There was no evidence that any of those individuals were incapable of consent, and were either forced or coerced into any activity. In fact, the testimony was that the individuals had been sexually active with others on the same unit. Although the State's expert described the other parties as "child-like, simplistic and vulnerable like children can be" (RP 629), there was no testimony, other than vague references to IQ scores, to establish the expert's assertion.

The State relies on two cases to substantiate that the sexual acts between consenting adults, one partner having developmental disabilities, amounts to predatory behavior of vulnerable adults. (Br. of Respondent at 26). The cases are distinguishable from Mr. Anderson's case.

In *Froats,* the State was required to prove a recent overt act. The facts of the case detail a long history of incarceration and release for predatory sexual behavior against children by a

schizophrenic who suffered from pedophilia. *Froats v. State,* 134 Wn.App. 420, 140 P.3d 622 (2006). While on work release, Froats made unwanted sexual overtures to a fellow resident. He repeatedly exposed himself, invited the resident to have sex and masturbated in his presence. The resident reported him and Froats's parole was revoked. *Id.* at 424. There was nothing in the record indicating this resident was developmentally disabled.

After serving his parole revocation sentence of five years, the State filed a petition for an order committing Froats as a sexually violent predator. *Id.* At trial, the State's expert testified that while on work release Froats was unable to express a particular symptom or urge, [pedohilia] so he picked the next closest thing, the fellow inmate, as a sort of "symptom substitution". The Court concluded that sufficient evidence supported the trial court's finding that Froats committed a recent overt act while at the work release facility. *Id.* at 437.

The State correctly points out that the Court affirmed the trial court's finding that Froats also engaged in unwanted touching of a developmentally-delayed fellow inmate, which was found to be a recent overt act. However, the Court found the consistency between the diagnosed pedophilia and the unwanted touching was

based not on the developmental age of his selected victim, but rather:

> "Froats used the same words that he uses when discussing his prior sexual offenses against children. A reasonable person familiar with Froats's history and mental condition could conclude, as the State's expert did, that Froats's conduct was a form of symptom substitution that portends future harm of a sexually violent nature if he were released from confinement. *Id.* at 439.

The unwanted advances of a "normal" adult male work release resident and the unwanted advances on the developmentally delayed inmate were both defined as "symptom" substitution. The defining issue for considering the acts as recent overt acts appears not to be the developmental disability of a potential victim, but Froats's continued advances for unwelcome sexual activity, his inability to manage his urges, and the similarlity of the words he used when offending against children and adults. His possession hundreds of pictures of children, used for fantasy and masturbation along with his lengthy history contributed to the Court's conclusion Froats was better confined because of his dangerousness.

By contrast, no such connection exists in the current case. The activity between Mr. Anderson and his partners was welcomed, encouraged, and consensual on the part of all parties. While some of the individuals may have had IQ scores lower than Mr. Anderson, that in and of itself does not automatically preclude them from being a consenting, willing partner to anyone, including Mr. Anderson. Each individual at Western State Hospital maintained his civil rights and no evidence was presented at trial that any of the individuals had been determined incompetent or incapable of consent under RCW 10.77 or RCW 11.88.

The State also cites to *In re Marshall,* 156 Wn.2d 150, 125 P.3d 111 (2005). There, the trial court concluded that the act for which Marshall was convicted, third degree rape, was a recent overt act based on the nature of the rape, and Marshall's history of offenses and mental condition. *Id.* at 159. The Court in *Marshall* did not explicitly draw the nexus it later footnoted in *In re Det. of Anderson*, 166 Wn.2d 543, fn.6, 211 P.3d 994 (2006). Rather, the *Marshall* Court reasoned:

> Marshall's history includes numerous incidents of seeking out and molesting young children. He was diagnosed as suffering from pedophilia, sexual sadism, and unspecified paraphilia. His diagnosis of sexual sadism resulted in part

> from Marshall's fantasies of molesting and hurting or killing young girls. In light of Marshall's history and mental condition, the third degree rape, which involved nonconsensual sex with a developmentally disabled woman who functioned at the level of a 10-or 12-year-old, would create a reasonable apprehension of a sexually violent nature in the mind of an objective person. *Marshall,* 156 Wn.2d at 159.

The Court appears to be conclude that because of the long history of pedophilia and sexual sadism and the third degree rape of a developmentally disabled woman, there was a reasonable apprehension of sexual violence in the future. Rape by definition is a crime of sexual violence.

Again, by contrast, in this case, the State presented no evidence that any of Mr. Anderson's partners were anything but consenting. Moreover, testimony established that each of the individuals in question had been sexually active with numerous other residents. As stated in appellant's opening brief and in the above argument, developmental delay or disability does not preclude individuals from legally consenting to sexual relations.

The State did not prove beyond a reasonable doubt that Mr. Anderson committed a recent overt act, an essential element for commitment under RCW 71.09.

Mr. Anderson rests on the remaining arguments in appellant's opening brief.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Anderson respectfully asks this Court to order a dismissal.

Dated this 3rd day of April 2014.

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for John C. Anderson, do hereby certify under penalty of perjury under the laws of the United States and the state of Washington, that on April 3, 2014, a true and correct copy of the Reply brief of appellant was mailed by USPS, first class, postage prepaid to

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And by electronic service, per prior agreement between the parties to:

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