

No. 71116-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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IN RE THE DETENTION OF:

GARTH SNIVELY

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT

In his opening brief, Mr. Snively assigns error the admission of evidence of his lack of housing, which was admitted for the purpose of establishing his dangerousness. The admission of this evidence violated Mr. Snively's due process rights because it allowed the State to argue Mr. Snively was dangerous because he would be homeless, resulting in confinement that is not predicated on his mental abnormality as required. The admission of this evidence was not authorized by the plain language of RCW 71.09.060(1) and violated the Rules of Evidence.

**1. This Court should review the admission of homelessness evidence de novo because it involves a constitutional challenge and requires statutory interpretation.**

The State asserts that evidence concerning Mr. Snively's homelessness was relevant and therefore the trial court did not abuse its discretion. Resp. Br. at 30. However, Mr. Snively also challenges the admission of this evidence as a violation of his due process rights under the Fourteenth Amendment. Br. of App. at 13. Because the admission of this evidence permitted the State to argue that Mr. Snively will be dangerous because he will be homeless, it relieved the fact finder from determining whether a causal connection existed between his mental

abnormality and the dangerousness required for commitment. *Id.* Constitutional challenges are questions of law that are reviewed de novo. *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998).

The admissibility of evidence regarding Mr. Snively's homelessness is also a question of statutory interpretation of RCW 71.09.060(1). Statutory interpretation is reviewed de novo. *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003). Therefore, de novo review is the appropriate standard for reviewing the admission of this evidence.<sup>1</sup>

**2. The plain language of RCW 71.09.060(1) is unambiguous and therefore this Court does not need to consider its legislative history.**

The State contends in its response brief that Mr. Snively's argument fails to explain the history of the language in RCW

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<sup>1</sup> Mr. Snively argues in his opening brief that the admission of homelessness evidence was reversible error on several independent grounds. Br. of App. at 11. One of these arguments is that the evidence should not have been admitted because it was not relevant and highly prejudicial. *Id.* at 22. This ground for reversal is subject to an abuse of discretion standard of review as indicated in Mr. Snively's opening brief. *Id.* However, the State's brief addressing the admissibility of this evidence does not address the due process argument and discusses the admissibility of this evidence as though it were subject only to an abuse of discretion standard of review. Resp. Br. at 30.

71.09.060(1) and misinterprets the legislature's intent. Resp. Br. at 26.

The State also asserts that because Mr. Snively's opening brief was silent about the legislative history, he consequently misinterprets the statute. *Id.* at 29.

However, the language of RCW 71.09.060(1) is unambiguous because the plain language is subject to only one interpretation.

Therefore, it is not subject to judicial construction. RCW 71.09.060(1) provides:

The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider *only placement conditions<sup>2</sup> and voluntary treatment options* that would exist for the person if unconditionally released from detention on the sexually violent predator petition.

(emphasis added).

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<sup>2</sup> "Placement conditions" is not statutorily defined. The term "placement conditions" should be used in the corresponding jury instruction "only if the evidence indicates that the respondent will be subject to court ordered supervision, even if released on the predator petition." WPI 365.14 notes on use (6th ed. 2013). "'Conditions that would exist' are typically pre-existing community supervision conditions placed on respondent in connection with a prior criminal conviction." *Id.* The jury heard evidence of Mr. Snively's placement conditions when they were informed that he would be supervised by the Department of Corrections for five months and 10 days after his release. 10/24/13 RP 25.

The courts first look at the statute's plain language when interpreting a statute. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language is subject to only one interpretation, the inquiry ends because the language does not require construction. *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). The statute's meaning must be derived from the wording of the statute itself. *Wash. State Human Rights Comm'n v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982).

In his opening brief, Mr. Snively argues that the plain language of RCW 71.09.060(1) is unambiguous and subject to only one interpretation. Br. of App. at 15. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *J.P.*, 149 Wn.2d at 450 (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)). The use of the term "voluntary" in RCW 71.09.060 clearly indicates that the individual who is facing commitment is the one who may present evidence of a treatment plan in support of release.

Voluntary means "done by design or intention" or "unconstrained by interference; not impelled by outside influence." Black's Law Dictionary (9th ed. 2009). Treatment options in which the

individual would not choose to voluntarily participate are not relevant because they would in no way mitigate the risk of whether or not the individual was likely to reoffend.

The plain language of the statute indicates that *the respondent* may put forth treatment options in which he would voluntarily engage if released. The statute in no way signals that *the State* may argue that the lack of treatment options increases the respondent's dangerousness, since the only treatment options that may be considered by the jury are those which the respondent voluntarily agrees to undertake. Thus, the plain language of RCW 71.09.060 does not support admission of evidence of Mr. Snively's lack of a housing plan.

Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself. *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451-52, 210 P.3d 297 (2009) (citing *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005)). "A statute that is clear on its face is not subject to judicial construction." *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

The State argues that Mr. Snively's interpretation is incorrect because of the legislative history of the statute. Resp. Br. at 26, 30.

However, the State's brief does not address Mr. Snively's argument that the plain and unambiguous language within RCW 71.09.060(1), specifically the use of the term "voluntary," causes the statute's meaning to be unambiguous and therefore is not subject to judicial construction.

The State does not argue in its brief that RCW 71.09.060(1) is subject to more than one reasonable interpretation and therefore ambiguous. Courts apply the principles of statutory construction, including consideration of legislative history, only when a statute is ambiguous. *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002). Consequently, this Court does not need to consider the legislative history of RCW 71.06.060(1) to determine its plain meaning.

**3. The State's argument that failing to assign error to the trial court's ruling on a motion in limine makes it a verity on appeal is without legal authority.**

The State argues that because Mr. Snively did not assign error to the trial court's ruling that evidence of an inadequate release plan was admissible, "it is therefore a verity on appeal that evidence about deficiencies in Snively's release plan was properly admitted." Resp. Br. at 24. There is no legal authority cited in the Respondent's Brief for this proposition. *See id.*

There were no findings of fact and conclusions of law entered as part of the trial court's rulings on motions in limine. Findings of fact entered by a trial court which are unchallenged are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). However, there were no findings of fact made by the trial court during Mr. Snively's trial and thus the law designating findings as verities if unchallenged is not applicable.

Mr. Snively assigned error to the trial court's admission of his lack of a residence. Br. of App. at 1. The crux of Mr. Snively's constitutional and statutory argument is that the State may not offer evidence of homelessness to establish dangerousness, which must be causally connected to his mental abnormality. Mr. Snively acknowledges, however, that once a respondent presents a voluntary treatment plan, the State is free to offer evidence discrediting the efficacy of the proposed program. Br. of App. at 18-19 (citing *In re Det. of Post*, 170 Wn.2d 302, 313-14, 241 P.3d 1234 (2010)).

**4. Mr. Snively's objection to the admission of homelessness evidence under ER 403 was properly preserved.**

The State argues that Mr. Snively's objection to the admission of this evidence based on ER 403 violates the preservation of error doctrine. Resp. Br. at 30. However, Mr. Snively properly preserved the ER 403 objection both in writing as part of his trial brief and orally during pretrial motions in limine. CP 264-66; 10/14/13 RP 60-69, 72-73, 90. The motion in limine maintained that the State should be precluded from introducing evidence and arguing about Mr. Snively's release plan. CP 264. Mr. Snively argued:

Such evidence is not relevant and can only inflame the jurors with fears of having another "homeless sexual offender wandering the streets" or an offender who "refuses treatment."

...

The fallout of society's hatred of sexual offenders should not be used as a reason to put them back behind bars after they have completed their criminal sentences.

CP 265.

Because the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, the losing party is deemed to have a standing objection where a judge has made a final ruling on the motion, unless the trial

court indicates that further objections at trial are required when making its ruling. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

The language contained within the motion in limine clearly establishes that Mr. Snively objected to the admission of this evidence because, among other reasons, its prejudicial nature outweighs any probative value. *See* CP 265. The fact that Mr. Snively specifically pointed out his objection to the lack of housing evidence in Motion in Limine 14(a), as part of his general objection to the admission of any evidence of a “release plan” under Motion in Limine 14, does not mean that the arguments made in Motion in Limine 14 do not apply to Motion in Limine 14(a). Mr. Snively thus properly preserved his objection to the evidence of homelessness as being more prejudicial than probative.

The State also asserts that Mr. Snively’s subsequent objection to the admission of a portion of a videotaped deposition containing a discussion regarding his housing is insufficient to preserve any ER 403 objection to evidence of homelessness. *Resp. Br.* at 30. This contention is not supported by the record.

The discussion regarding redacting the video deposition is clearly a continuation of the prior argument regarding the admissibility

of evidence of homelessness, as evidenced by comments made by the State and the trial court during this hearing. When asked to respond to Mr. Snively's motion to redact the video, the State replied, "Your honor, as to the housing, I think the court has already ruled on that." 10/14/13 RP 87. The trial court then stated that "the part about housing is in, according to the court's ruling on the motion in limine." *Id.* at 88. Both the State and the trial court are plainly referencing the prior ruling on the motion to exclude evidence of homelessness.

Mr. Snively then renewed his objection to this evidence:

It is unfairly prejudicial to Mr. Snively who's not in a situation right now really to secure housing seeing as he can't go anywhere at this moment. He's detained by the State in a secure facility. And it's awfully hard to obtain housing when you're in that situation and you don't know if you are going to be released.

10/14/13 RP 90. While this argument is made in the context of redacting the videotaped deposition, it is the same issue that was addressed in the previous motion: whether Mr. Snively's homelessness is admissible and whether its prejudicial nature outweighs its probative value. This Court should reject the State's argument that Mr. Snively did not preserve his objection under ER 403.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Snively respectfully requests this Court reverse his commitment and remand for further proceedings.

DATED this 8th day of October, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Whitney Rivera', written over a horizontal line.

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IN RE THE DETENTION OF	)	
	)	
GARTH SNIVELY,	)	NO. 71116-4-I
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 8<sup>TH</sup> DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 8<sup>TH</sup> DAY OF OCTOBER, 2014.

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