

No. 71116-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DETENTION OF:

GARTH SNIVELY

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Garth Snively's civil commitment violates due process because the evidence was insufficient to allow any rational trier of fact to find that he would more likely than not commit a predatory act of sexual violence if released from confinement.

2. The trial court's admission of Mr. Snively's potential lack of a residence if released was reversible error.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Civil commitment based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment of the United States Constitution. Evidence is insufficient if no rational trier of fact could find all of the elements required for commitment beyond a reasonable doubt. Was there insufficient evidence to support the required finding that Mr. Snively's mental abnormality made him currently dangerous (i.e., likely to engage in predatory acts of sexual violence if not confined in a secure facility)?

2. The fact finder in a RCW 71.09 civil commitment trial must find a causal connection between a mental abnormality and the dangerousness required for confinement. In determining whether a person would be likely to engage in predatory acts of sexual violence if

not confined, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released. Did the trial court's admission of evidence that Mr. Snively would be homeless upon release violate his due process rights? Did admission of this evidence contravene RCW 71.09.060(1), applicable case law, and the Rules of Evidence?

C. STATEMENT OF THE CASE

Four different doctors, including two who were employed by the Special Commitment Center (SCC), testified at Mr. Snively's unconditional release trial that he is not currently dangerous and thus does not meet the criteria for civil commitment. 10/21/13 RP 98-99; 10/22/13 RP 140; 10/23/13 RP 64, 115. Regardless, the jury returned a verdict that Mr. Snively should continue to be confined under RCW 71.09. CP 21.

Mr. Snively has been detained at the SCC for over 20 years. CP 235. He was initially committed under RCW 71.09 in 2006. *Id.* Dr. Marquez, the forensic manager at the SCC, evaluated Mr. Snively in 2012 and determined that he no longer met the definition of a sexually violent predator. 10/21/13 RP 80, 98-99. The SCC senior clinical team reviewed Dr. Marquez's report and agreed with his forensic opinion.

10/23/13 RP 64. As a result, the SCC senior clinical team authorized Mr. Snively to petition for unconditional release. CP 233.

In light of the SCC's determination, the State paid a private psychologist, Dr. Amy Phenix, to evaluate Mr. Snively and testify at trial in opposition to his release. CP 235; 10/18/13 RP 77-78. There was no dispute at trial that Mr. Snively continued to have at least two mental abnormalities: pedophilia and fetishism.¹ The contested issue at trial was whether Mr. Snively's mental abnormality made him more than 50 percent likely to reoffend if released. 10/24/13 RP 13, 56.

The following doctors testified that Mr. Snively was not currently dangerous as required by RCW 71.09.020: (1) Dr. Packard, who has previously worked with the State on over 80 civil commitment cases; (2) Dr. Marquez, the forensic manager at the SCC who determined that Mr. Snively was no longer dangerous and presented his forensic opinion to the SCC senior clinical team; (3) Dr. Duthie, a member of that senior clinical team who reviewed Dr. Marquez's evaluation and agreed with his findings concerning Mr. Snively's lack

¹ Dr. Phenix also diagnosed Mr. Snively with urophilia. 10/17/13 RP 124. Other psychologists who testified, however, did not make this diagnosis and agreed that the fetishism diagnosis sufficiently addressed Mr. Snively's pathology. 10/21/13 RP 88; 10/22/13 RP 38. Regardless of this area of dispute, all experts agreed that Mr. Snively continues to have a mental abnormality as statutorily defined and thus met the first prong for commitment under RCW 71.09.020.

of dangerousness; and (4) Dr. Hawkins, a psychologist who had been providing treatment to Mr. Snively while he was housed at the Secure Community Transfer Facility (SCTF). 10/21/13 RP 80, 98-99; 10/23/13 RP 25, 58, 64, 103.

Dr. Phenix, the State's hired expert, testified that Mr. Snively's score of zero on the Static-99R resulted in an estimated risk of re-offense of 4.1 percent within five years and 5.7 percent within ten years. 10/18/13 RP 67. Nevertheless, she opined that Mr. Snively would more likely than not reoffend if released. *Id.* Dr. Phenix supposed that Mr. Snively was at greater risk than the Static-99R estimated because of the number of his paraphilias (three) and the number of victims. *See* 10/18/13 RP 78-79.

Dr. Phenix acknowledged that research has established that actuarial instruments are more accurate in predicting re-offense than clinical judgment, which was the method she used to determine that Mr. Snively was currently dangerous. 10/18/13 RP 93-94, 116. Dr. Phenix also admitted that reasonable evaluators could disagree with her conclusions. 10/21/13 RP 43-44. As previously mentioned, at least four doctors did disagree with Dr. Phenix.

D. ARGUMENT

1. Mr. Snively’s confinement violates due process because there was insufficient evidence for any rational trier of fact to find beyond a reasonable doubt that he is currently dangerous.

Freedom from bodily restraint has always been the core of the liberty interest protected by the due process clause of the Fourteenth Amendment of the United States Constitution. *In re Det. of Thorell*, 149 Wn.2d 724, 731, 72 P.3d 708 (2003). Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. *Id.* (citing *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). In the context of RCW 71.09 civil commitments, “when viewed in the light most favorable to the State, there must be sufficient evidence in the finding of mental illness to allow a rational trier of fact to conclude the person facing commitment has serious difficulty controlling behavior.” *Id.* at 744-45.

Due process requires that the State prove both that the individual is mentally ill and currently dangerous. *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009) (citing *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). To find that a person is a sexually violent predator, the jury must determine three elements: (1) that the person has been convicted of or charged with a

crime of sexual violence; (2) that the person suffers from a mental abnormality or personality disorder; and (3) that such abnormality or disorder makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18); *In re Det. of Post*, 170 Wn.2d 302, 309-10, 241 P.3d 1234 (2010). The third element is a compound determination that requires finding both causation (i.e., the abnormality or disorder causes the likelihood of future acts) and that the probability of the defendant's reoffending exceeds 50 percent. *Post*, 170 Wn.2d at 310.

During Mr. Snively's trial, the experts all agreed that Mr. Snively continues to have a mental abnormality. 10/17/13 RP 124; 10/21/13 RP 88; 10/22/13 RP 38. The only contested element was whether this mental abnormality caused him to be more than 50 percent likely to commit a predatory act of sexual violence if released. 10/24/13 RP 13, 56. Four doctors testified that Mr. Snively was not sufficiently dangerous to warrant confinement. 10/21/13 RP 98-99; 10/22/13 RP 140; 10/23/13 RP 64, 115.

Dr. Marquez is the forensic manager at the SCC who evaluated Mr. Snively in 2011 and 2012. 10/21/13 RP 83. Dr. Marquez testified that when he applied the Static-99R actuarial assessment instrument to

Mr. Snively, it resulted in an estimated seven to 12 percent risk of re-offense. 10/21/13 RP 90. Dr. Marquez first asserted his opinion that Mr. Snively was not likely to reoffend if released to the senior clinical team at the SCC. 10/21/13 RP 98-99. He also testified accordingly as an expert witness at Mr. Snively's trial. *Id.*

Dr. Duthie also testified at Mr. Snively's trial. 10/23/13 RP 57-69. Dr. Duthie had been employed at the SCC as a forensic services manager for eight years, where he supervised psychologists doing independent evaluations of individuals previously committed to the SCC. 10/23/13 RP 58. Dr. Duthie was a member of the SCC senior clinical team that reviewed Dr. Marquez's evaluation and report regarding Mr. Snively's lack of current dangerousness. *Id.* Dr. Duthie testified at trial that he agreed with Dr. Marquez's opinion that Mr. Snively no longer met the criteria for confinement. *Id.*

Dr. Packard similarly testified as an expert witness that Mr. Snively was not sufficiently dangerous to warrant confinement under RCW 71.09. 10/22/13 RP 140. Dr. Packard estimated that he had worked with the State on approximately 80 different RCW 71.09 civil commitment cases. 10/23/13 RP 25. Dr. Packard utilized 12 different actuarial instruments to measure Mr. Snively's predicted risk of re-

offense. 10/23/13 RP 24. These instruments generally produced a recidivism risk of less than 10 percent for Mr. Snively. 10/22/13 RP 77.

Dr. Hawkins likewise testified that Mr. Snively was not sufficiently dangerous to justify civil commitment. *See* 10/23/13 RP 115. Dr. Hawkins provided sex offender treatment to Mr. Snively while he resided at the SCTF. 10/23/13 RP 103. Dr. Hawkins stated that Mr. Snively is prepared to deal with his deviancy in a community setting. 10/23/13 RP 115. Dr. Hawkins conveyed to the jury that Mr. Snively had completed the necessary work, incorporated the principles of healthy sexuality, and understood his deviancy history in way that would allow him to manage his risk. *Id.* Dr. Hawkins agreed with Dr. Packard, Dr. Marquez, and Dr. Duthie: Mr. Snively was no longer more than 50 percent likely to engage in predatory acts of sexual violence if released. *See* 10/23/13 RP 115-16.

Dr. Phenix disagreed with these doctors regarding Mr. Snively's risk of re-offense. 10/17/13 RP 115. Dr. Phenix testified that she administered the Hare Psychopathy Checklist - Revised (PCL-R). 10/18/13 RP 60. The PCL-R resulted in a "relatively low score on this instrument in regard to measuring risk of future violence or future sexual violence," which caused Dr. Phenix to conclude that Mr. Snively

is *not* a psychopath. *Id.* Dr. Phenix also reported that Mr. Snively's risk of re-offense based on her application of the Static-99R was four percent within five years and under six percent within ten years.

10/18/13 RP 67. Despite these actuarial figures, Dr. Phenix concluded her direct examination by stating her opinion that Mr. Snively was more than 50 percent likely to reoffend if released. 10/18/13 RP 79.

Upon being confronted with research from her scientific community, Dr. Phenix acknowledged that actuarial risk assessment tools, such as the Static-99R, are more accurate in predicting recidivism than clinical opinions, which was how she reached her conclusion that Mr. Snively continued to require confinement. 10/18/13 RP 93-94. Dr. Phenix also conceded that clinically adjusted risk assessments are less accurate than applying the pure actuarial measure. 10/18/13 RP 116. Finally, Dr. Phenix admitted that reasonable evaluators could disagree with her and find that Mr. Snively was not likely to reoffend. 10/21/13 RP 76-77.

Dr. Packard pointed out other flaws with Dr. Phenix's methods. 10/22/13 RP 78, 84. He cited research that shows that the presence of more than one paraphilia in an individual does not lead to an increased risk of re-offense. 10/22/13 RP 78. This research wholly discredited

one of the reasons (i.e., number of paraphilias) Dr. Phenix used to justify her opinion. *See* 10/18/13 RP 78-79. Dr. Packard also discussed research that established that the number of victims is an unreliable variable and thus this consideration reduces predictive validity. 10/22/13 RP 84. This research invalidated the other reason (i.e., number of victims) that Dr. Phenix provided for finding Mr. Snively dangerous. *See id.*; 10/22/13 RP 78-79. Dr. Packard reiterated that taking into account the applicable research and science, Mr. Snively is not sufficiently dangerous to warrant continued confinement. 10/22/13 RP 140.

Here, viewing the evidence in the light most favorable to the State, no reasonable trier of fact could conclude that Mr. Snively was more than 50 percent likely to reoffend. Dr. Phenix admitted that her application of the actuarial risk assessment tool placed Mr. Snively's risk of re-offense between four and six percent. 10/18/13 RP 67. While she testified that he still met the criteria for confinement, she admitted that research has shown that the methods she employed to reach this conclusion were less accurate than those methods employed by the doctors who testified that Mr. Snively was not dangerous. 10/18/13 RP 116. Lastly, she recognized that other evaluators could

reasonably find that Mr. Snively was not more than 50 percent likely to reoffend. 10/21/13 RP 76-77.

This testimony, even when viewed in a favorable light, is insufficient to establish dangerousness. Four doctors testified that Mr. Snively was no longer sufficiently dangerous to merit confinement. No witness estimated Mr. Snively's risk of re-offense at more than 12 percent based on actuarial assessment tools. *See* 10/21/13 RP 90. Because there was insufficient evidence for any rational trier of fact to conclude that Mr. Snively was more than 50 percent likely commit a violent offense if released, his current confinement violates due process.

2. The trial court's admission of evidence regarding Mr. Snively's possible lack of housing if released was reversible error on several independent grounds.

Over defense objection, the trial court allowed the jury to hear testimony that Mr. Snively would not have housing if he was released. 10/14/13 RP 60, 74. During motions in limine, Mr. Snively objected to this evidence and asked the trial court to prohibit the State from arguing that his homelessness would make him dangerous. 10/14/13 RP 60. Mr. Snively argued that the applicable statute permits the State to discredit a plan put forth by the respondent, but not the lack thereof. 10/14/13 RP 61. Mr. Snively emphasized that the State must prove that

his *mental abnormality* causes him to be more than 50 percent likely to reoffend, not his inability to secure housing. 10/14/13 RP 63. Lastly, Mr. Snively discussed the prejudicial effect of this evidence, which would evoke the negative stereotype of a homeless sex offender in the minds of the jurors. 10/14/13 RP 90.

The State responded that Mr. Snively's potential homelessness was relevant because "it goes to the risk of reoffending, and at present he has no available housing and that's relevant to his risk to reoffend, the lack of a release plan and a release residence." 10/14/13 RP 75. The trial court ruled that the lack of a residence was relevant, concluding that "it would be a strange rule of evidence that allowed the defense to introduce it but not the State." 10/14/13 RP 74.

In closing argument, the State emphasized this evidence:

And where is he going to live? The information is that this week there's a place in Everett. Before it was maybe Shelton or it was Chehalis, and then we heard from Dr. Hawkins maybe Tacoma. And the plan is just murky. What's he going to do? Is he going to raise guinea pigs? What's the real plan?

10/24/13 RP 26-27. As discussed below, the trial court committed reversible error when it allowed the jury to hear evidence regarding Mr. Snively's potential homelessness and then permitted the State to

encourage the jury to infer that his lack of a residence increased his risk to reoffend.

- a. The admission of testimony and argument that Mr. Snively was more likely to reoffend because he lacked a residence violates due process.

As previously discussed, commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. *Foucha*, 504 U.S. at 80. Due process requires that confinement is limited to individuals whose mental illness impairs them to a level rendering them dangerous beyond their control. *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). The fact finder at a RCW 71.09 civil commitment trial must find this causal connection between the mental abnormality and the dangerousness required for commitment. *Post*, 170 Wn.2d at 310.

The trial court's admission of Mr. Snively's lack of a residence upon release violated his due process rights because it permitted the State to argue that Mr. Snively is dangerous because he will be homeless. The State encouraged the jury to infer that Mr. Snively's homelessness caused him to be dangerous, resulting in confinement that is not predicated on his mental abnormality as required. The trial court consequently undermined the causal connection that the jury was

required to make (i.e., that Mr. Snively's mental abnormality caused him to be more than 50 percent likely to commit a predatory act of sexual violence).

As a result of the admission of this evidence and improper argument, the jury was directed to infer that Mr. Snively was dangerous because his whereabouts would be unknown. Thus, Mr. Snively's commitment lacks the requisite causal connection between his mental abnormality and dangerousness, resulting in a violation of due process that requires reversal.

- b. The admission of evidence regarding Mr. Snively's potential homelessness was not permitted by statute.

In addition to violating Mr. Snively's constitutional due process rights, admission of this evidence was not statutorily authorized. RCW 71.09.060 dictates what evidence a fact finder may consider when determining whether or not a person is likely to engage in predatory acts of sexual violence if not confined. The statute states:

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*^[2] and *voluntary treatment options* that would exist for the person if unconditionally released from detention on the sexually violent predator petition.

RCW 71.09.060(1) (emphasis added). This statute does not authorize the State to put forth evidence of a lack of a release plan for the purpose of arguing that an individual is dangerous. *See id.*

When interpreting a statute, the court first looks at the statute's plain language. *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. *Id.*; *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). Statutory interpretation is reviewed de novo. *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003).

In those instances where the statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. *Wash. State Human Rights Comm'n v. Cheney Sch.*

² "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). 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.

Dist. No. 30, 97 Wn.2d 118, 121, 641 P.2d 163 (1982). To determine the plain meaning of the language, the court should examine the statute in which the language in question appears as well as related statutes or other provisions of the same act in which the provision is found.

Homestreet, Inc. v. State Dept. of Revenue, 166 Wn.2d 444, 457-58, 210 P.3d 297 (2009).

In determining dangerousness, the fact finder may consider only “placement conditions and voluntary treatment options that would exist for the person if unconditionally released from the detention on the sexually violent predatory petition.” RCW 71.09.060(1). 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 choose not 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 legislature has specifically delineated several issues as being proper for jury consideration in RCW 71.09 civil commitment

trials. *In re Det. of Post*, 145 Wn. App. 728, 743, 187 P.3d 803 (2008).

“In addition to the elements the State must prove in order to meet its burden of proving that a person meets the definition of a sexually violent predator, the legislature has also provided that respondents in such proceedings have a right to present evidence of proposed voluntary treatment options in order to attempt to counter the State’s contention that they are likely to reoffend if not committed to a secure facility.” *Id.* (citing RCW 71.09.060(1); *Thorell*, 149 Wn.2d at 751).

The plain language of the statute indicates that *the respondent* may put forth treatment options in which he or she 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 housing plan.

- c. Admission of Mr. Snively’s homelessness contravened applicable case law addressing the admissibility of evidence in RCW 71.09 proceedings.

In *In re Det. of Thorell*, the Supreme Court recognized that RCW 71.09.060(1) limits the fact finder to the consideration of

placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention. 149 Wn.2d at 751. The court held that the statute allows the fact finder to consider “evidence that voluntary treatment on *unconditional* release is appropriate.” *Id.* “Because this goes to whether the definition of SVP is met, the *individual* may bring this evidence in *defense* of commitment.” *Id.* (emphasis added). The Supreme Court’s interpretation of the language contained in RCW 71.09.060(1) does not permit admission of Mr. Snively’s lack of housing for the purpose of establishing dangerousness.

The Supreme Court also addressed the admissibility of evidence at RCW 71.09 civil commitment trials in *In re Det. of Post*. 170 Wn.2d 302. At trial, Post presented his plan for unconditional release to the jury, which included individual treatment, marital counseling, group therapy, and his planned residence. *Id.* at 313. The court held that the evidence of Post’s voluntary treatment plan was “relevant to the likelihood that Post would reoffend as it has a tendency, if believed, to show that Post is less likely to do so.” *Id.* If a respondent presents a voluntary treatment plan, the State is free “to attempt to discredit the efficacy of the proposed program and the true level of [the respondent’s]

commitment to successful treatment thereof.” *Id.* at 313-14. However, nothing allows the State to present such evidence in the first instance.

Lastly, in *In re Pers. Restraint of Duncan*, the Supreme Court allowed the State to elicit testimony that Duncan intended to live with a former sex offender if released. 167 Wn.2d 398, 401, 219 P.3d 666 (2009). However, this testimony was elicited during cross examination of Duncan’s expert and was permitted to discredit the release plan and residence put forth by Duncan. *See id.* Mr. Snively’s facts are distinguishable from *Duncan* because Mr. Snively had no residence to present as mitigation of his dangerousness.³ The State should not have been permitted to discredit a plan that Mr. Snively did not present.

These cases establish that if the individual subject to civil commitment puts forth a voluntary plan that he will comply with if released, the State is permitted to discredit the efficacy of that plan and argue that it does not sufficiently mitigate the dangerousness caused by the mental abnormality. Thus, Mr. Snively was free to put forth information about his residence to show mitigation of dangerousness as

³ Moreover, the *Duncan* court noted that trial counsel failed to make an ER 403 objection to this line of testimony. *Duncan*, 167 Wn.2d at 408. Mr. Snively did object to evidence of his homelessness under ER 401, ER 402, and ER 403 as discussed herein below.

contemplated in *Post*, *Thorell*, and *Duncan*. However, since he did not present information regarding a residence to the jury, the State could not then argue that his lack of residence and potential homelessness increased his dangerousness.⁴ The trial court's admission of this evidence runs afoul of the Supreme Court's prior decisions addressing admissibility of mitigation evidence in RCW 71.09 proceedings.

- d. Washington Pattern Jury Instruction 365.14 further demonstrates that only the respondent may initially put forth evidence of a release plan in support of unconditional release.

The pattern jury instructions further compel the conclusion that evidence of Mr. Snively's lack of residential plan was improperly admitted. The language in WPI 365.14 is similar to that in RCW 71.09.060(1). The following language may or may not be included in the jury instruction defining "likely to engage":

In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue. In considering [placement conditions or] voluntary treatment options, however, you may consider only [placement conditions or] voluntary treatment options that would exist if the respondent is unconditionally released from detention in this proceeding.

⁴ Mr. Snively did present mitigation evidence that he would continue to engage in sex offender treatment with Dr. Hawkins if released. 10/23/13 RP 113. However, as previously discussed, he did not present a proposed residence for purposes of mitigation.

WPI 365.14. The entirety of this language is bracketed in the pattern jury instruction, signifying that the language may not be appropriate for some cases. WPI 0.10. The fact that this language may not be appropriate for some cases directly contradicts the State's argument below that a lack of a release plan is always relevant to show dangerousness. If the State's argument was correct, this language would not be considered optional in the pattern jury instruction because it would be applicable in every case, regardless of whether the respondent put forth a release plan.

The bracketed portion of WPI 365.14 allows consideration of "respondent's voluntary measures to reduce his or her risk to the community and consideration of court ordered conditions that would exist if the civil commitment petition were dismissed." WPI 365.14 cmt. (6th ed. 2013). Voluntary measures include things such as the respondent's promise to engage in community treatment regardless of his or her commitment status. *Id.* "Conditions that would exist" are preexisting community supervision conditions placed on the respondent in connection with a prior criminal conviction. *Id.* The bracketed phrase "placement conditions" should be used only if evidence

indicates that the respondent will be subject to court ordered supervision even if released on the RCW 71.09 petition. *Id.*

This optional language is only appropriate when the respondent puts forth voluntary treatment options available if released or if the respondent is subject to court ordered supervision regardless of the jury's verdict on civil commitment. The application of WPI 365.14 further illustrates that the trial court erred by admitting evidence of Mr. Snively's homelessness.

When a respondent puts forth voluntary measures, such as a promise to maintain a certain residence that would tend to mitigate dangerousness, then the State may challenge the adequacy of these voluntary measures. The State cannot, however, argue that the lack of *voluntary* measures makes an individual facing civil commitment sufficiently dangerousness for purposes of confinement.

- e. The admission of Mr. Snively's potential homelessness violated the Rules of Evidence because it was not relevant and highly prejudicial.

In addition to his constitutional and statutory objections, Mr. Snively objected to the admission of this evidence based on ER 401, ER 402, and ER 403. 10/14/13 RP 90. A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Swan*, 114 Wn.2d

613, 658, 790 P.2d 610 (1990). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Failure to adhere to the requirements of an evidentiary rule can be an abuse of discretion. *State v. Foxhaven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

i. *This evidence was not probative of whether Mr. Snively had a mental abnormality that made him sufficiently dangerous to warrant confinement.*

Evidence that is not relevant is not admissible. ER 402. To be relevant, evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case. *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). This definition includes facts which offer direct or circumstantial evidence of any element or defense. *Id.*

The consequences of a fact finder's determination of whether a person meets the criteria of confinement are not relevant to making that determination. *In re Det. of Post*, 170 Wn.2d at 312. Mr. Snively's lack of a residence if released was not probative to whether he had a mental abnormality that caused him to be more than 50 percent likely to commit a predatory act of sexual violence. Thus, this evidence should have been excluded under ER 401 and ER 402.

ii. The prejudicial effect of this evidence outweighed any minimal probative value.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. ER 403. In doubtful cases the scale should be tipped in favor of exclusion of evidence. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (2003) (citing *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision and which creates an undue tendency to suggest a decision on an improper basis. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

Even if the lack of a residence had some minimal probative value, it was greatly outweighed by the evidence's prejudicial effect and thus should have been excluded under ER 403. Admitting this evidence allowed the State to conjure the stereotype of a homeless sex offender to appeal to the passions and prejudices of the jury. Its admission encouraged the jury to make a finding based on an improper emotional response rather than a rational basis.

Moreover, admission of this evidence confused the causal connection that the jury was required to make between Mr. Snively's mental abnormality and whether he was more than 50 percent likely to

commit a predatory crime of sexual violence. While the jury was required to find that a mental abnormality was the cause of Mr. Snively's dangerousness, the emphasis on Mr. Snively's lack of a residence invited the jury to erroneously conclude that his homelessness would cause him to commit a predatory crime of sexual violence. This evidence was more prejudicial than probative and confused the causal connection that the jury was tasked with deciding. Therefore, it should have been excluded under ER 403.

iii. The admission of Mr. Snively's lack of a residence was prejudicial error and requires reversal.

Error is prejudicial if there is a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

Here, this evidence improperly encouraged the fact finder to conclude that Mr. Snively was dangerous because he would be homeless if released. The other evidence presented at trial establishing that Mr. Snively was more than 50 percent likely to reoffend was

insignificant, if not nearly non-existent. Even the State's expert estimated that Mr. Snively's risk of re-offense was between four and six percent based on application of the Static-99R. 10/18/13 RP 67. With the paucity of evidence admitted during trial to actually establish dangerousness caused by his mental abnormality, the influence of this prejudicial evidence was substantial and merits reversal.

E. CONCLUSION

This Court should reverse Mr. Snively's commitment because there was insufficient evidence for any reasonable fact finder to conclude beyond a reasonable doubt that Mr. Snively was more than 50 percent likely to reoffend if released. Alternatively, this Court should reverse because of the improper admission of evidence concerning Mr. Snively's homelessness and remand for a new trial.

DATED this 23rd day of June, 2014.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 23RD DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING 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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