

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

IN RE THE DETENTION OF F. J.

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

The Honorable Beverly G. Grant

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. DUE PROCESS REQUIRED PROOF BEYOND A REASONABLE DOUBT MR. JOHNNY WAS INCARCERATED FOR AN OFFENSE THAT WAS COMPARABLE TO A "RECENT OVERT ACT."

The State may not involuntarily commit a person pursuant to the Sexually Violent Predator Act (SVPA) in the absence of proof beyond a reasonable doubt the person is a sexually violent predator. RCW 71.09.060(1). A person is a sexually violent predator when he or she "suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(8). "Mental abnormality" is "tied directly to present dangerousness." In re Detention of Henrickson, 140 Wn.2d 686, 693, 695, 2 P.3d 473 (2000) (citing In re Detention of Young, 122 Wn.2d 1, 27, 857 P.2d 989 (1993)). "This tie to present dangerousness is constitutionally required ... because due process requires that an individual must be both mentally ill and presently dangerous before he or she may be indefinitely committed." In re Detention of Marshall, 156 Wn.2d 150, 157, 125 P.3d 111 (2006) (citing Young, 122 Wn.2d at 27, and In re Detention of Albrecht, 147 Wn.2d 1, 7-8, 51 P.3d 73 (2005)).

To establish present dangerousness of a person who is incarcerated when the petition for civil commitment is filed, the State must prove either the person is in custody for a sexually violent offense or the person is in custody for an offense the is comparable to a "recent overt act," as defined in RCW 71.09.020(10).

Henrickson, 140 Wn.2d at 693. Therefore, when the State elects to establish present dangerousness by incarceration for an offense that is comparable to a recent overt act, comparability must be proven beyond a reasonable doubt.

In Marshall, the Washington Supreme Court held that the determination of comparability is to be made by the court, not a jury. 156 Wn.2d at 158. The Marshall Court did not address whether the determination of comparability may be based upon less than proof beyond a reasonable doubt. The State's assertion that Marshall "unequivocally" relieved the State of its burden to prove comparability beyond a reasonable doubt, Br. of Resp. at 11, is simply wrong.

Additionally, the State misconstrues Marshall as finding the determination is merely a "preliminary legal issue for the court to determine." Br. of Resp. at 10. Rather, the Marshall Court adopted the analysis in State v. McNutt, 124 Wn. App. 344, 101 P.3d 422

(2004), which found the determination as one of mixed law and fact.

156 Wn.2d at 158. In McNutt, this Court stated:

A factual inquiry is necessary ... but because it is a mixed question of law and fact, ... that inquiry is for the court and not the jury. The factual inquiry determines the factual circumstances of [the respondent's] history and mental condition, and the legal inquiry determines whether an objective person knowing those factual circumstances would have a reasonable apprehension of harm of a sexually violent nature resulting from the act in question.

124 Wn. App. at 350 (quoted with approval by this Court in In re Detention of Hovinga, 132 Wn. App. 16, 23-24, 130 P.3d 830 (2006)).

It may be noted the State recognized the determination is a mixed question of law and fact in a subsequent section of its brief. See Br. of Resp. at 12.

The State acknowledges its burden to prove present dangerousness beyond a reasonable doubt. Br. of Resp. at 10. Yet, the State seems to argue it is relieved of its burden whenever it chooses to establish present dangerousness by evidence of incarceration for an offense that is comparable to a recent overt act. This novel interpretation of the State's burden of proof is contrary to the most fundamental principles of justice. For example, by analogy, where a criminal statute sets forth alternative means of committing

an offense, e.g., rape by use of a deadly weapon or by kidnapping,¹ the State is still required to prove the specific means beyond a reasonable doubt to sustain a conviction for that offense. See, e.g., State v. Whitney, 108 Wn.2d 506, 511-12, 739 P.2d 1150 (1987). So, too, the SVPA provides alternative means of establishing an offender is presently dangerous. When the State elects to establish present dangerous by proof the offender is incarcerated for an offense that is comparable to a recent overt act, the State is still required to prove comparability beyond a reasonable doubt.

Contrary to the State's characterization, Mr. Johnny is not arguing for a particular standard of proof for "the preliminary determination of whether [present dangerousness] need by proven by a particular type of evidence, a recent overt act." Br. of Resp. at 6. Nor is Mr. Johnny's "true argument" an attempt to reverse the holding in Marshall. Br. of Resp. at 11. Rather, Mr. Johnny is arguing that State must be held to its constitutional and statutory obligation to prove beyond a reasonable doubt that he is both mentally ill and presently dangerous prior to committing him as a sexually violent predator, regardless of the means or "particular type of evidence" the State elects to rely upon for its proof. Br. of App. at

¹RCW 9A.40.020.

5-15. Neither due process nor the SVPA allow the State to avoid its burden of proof present dangerousness beyond a reasonable doubt by alleging the person is incarcerated for an offense that is comparable to a recent overt act.

Mr. Johnny was incarcerated for the offenses of indecent exposure and residential burglary. CP 1-2, 33-34. Because neither offense is a sexually violent offense, as defined in RCW 71.09.020(15), the State was required to prove beyond a reasonable doubt the offenses were comparable to a "recent overt act." In the absence of such proof, the State failed to prove Mr. Johnny was presently dangerous. The finding that he is a sexually violent predator must be reversed.

2. A UNANIMITY INSTRUCTION WAS
REQUIRED IN LIGHT OF THE SUBSTANTIAL
CONFLICTING EVIDENCE REGARDING HIS
DIAGNOSIS.

A person subject to a SVPA civil commitment proceeding has the right to a unanimous verdict as to the basis for confinement. In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006). When the State presents alternative bases for the commitment, either the State must elect the basis upon which it is relying or the jury must be instructed it must be unanimous as to which means was the basis for its finding. Id.; State v. Petrich, 101 Wn.2d 566, 572,

683 P.2d 173 (1984). An election or unanimity instruction is not required only where substantial evidence supports each of the means alleged. Halgren, 156 Wn.2d at 809; State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976). Because jury unanimity is an issue of constitutional magnitude, this issue properly may be raised for the first time on appeal. RAP 13.4(b)(3); State v. Camarillo, 115 Wn.2d 60, 63 n.4, 794 P.2d 850 (1990); State v. Love, 80 Wn. App. 357, 360 n.2, 908 P.2d 395 (1996).

On behalf of the State, Dr. Packard acknowledged that, of the six doctors who had evaluated Mr. Johnny on at least nine separate occasions, he was the only doctor to conclude Mr. Johnny suffered from disorders that could classify him as a sexually violent predator. 4RP 287-88; 5RP 387-90. Specifically, Dr. Packard testified Mr. Johnny suffered from paraphilia not otherwise specified (nonconsent), exhibitionism, substance abuse, and antisocial personality disorder. 4RP 260-61. Significantly, Dr. Packard did not indicate whether his conclusion that Mr. Johnny was a sexually violent predator was supported by each of his diagnoses separately or by a combination of the four diagnoses. In fact, Dr. Packard's written report notes, "The combination of these [diagnoses] is particularly troublesome." CP 77. Therefore, if the jury was not

unanimous as to each of the diagnoses, Mr. Johnny's constitutional right to a unanimous verdict was violated.

Here, there was considerable conflicting evidence as to a diagnosis. On behalf of the defense, Dr. Wollert testified Mr. Johnny suffered from substance abuse and some depression, but not paraphilia not otherwise specified (nonconsent), exhibitionism or antisocial personality disorder. 6RP 501-04, 514-15, 530-34, 538, 545-47; 7RP 573-74; 8RP 627, 632. He also testified Mr. Johnny was statistically less likely than not to reoffend due to his offender history, psychological profile, and age. 7RP 590, 592-93; 8RP 673-74. Dr. Wollert further testified paraphilia not otherwise specified (nonconsent) is not reliably diagnosed and, therefore, has been specifically rejected from inclusion in the DSM on two separate occasions. 6RP 522-26. Accordingly, he, too, rejected the diagnosis of paraphilia not otherwise specified (nonconsent) even though he used the diagnosis in the past. 7RP 627-29.

The State attempts to discredit Dr. Wollert's conclusions by pointing to his unfamiliarity with several statements made by Mr. Johnny during treatment. Br. of Resp. at 19. The State does not, however, articulate how his unfamiliarity with the statements impacts his conclusion that Mr. Johnny is not a sexually violent predator.

The State further attempts to discredit Dr. Wollert by asserting he did not refute the diagnosis of antisocial personality disorder. Br. of Resp. at 19. This assertion is unsupported by the record. 6RP 514-15.

In light of the conflicting evidence, the rational trier of fact could have found the State presented substantial evidence to support beyond a reasonable each alternative basis for confinement. Reversal is required.

B. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Johnny respectfully requests this Court reverse and vacate the order of confinement.

DATED this 10 day of August 2007.

Respectfully submitted,


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RESPONDENT,)
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v.)
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APPELLANT.)

NO. 35363-6-II

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AUG 14 2007

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 10TH DAY OF AUGUST, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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