

NO. 38257-1-II

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

In re Detention of Darnell McGary

STATE OF WASHINGTON,

Respondent,

v.

DARNELL MCGARY,

Appellant.

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

The Honorable Ronald E. Culpepper, Judge

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STATE OF WASHINGTON
2009 AUG 11 AM 10:27

REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE ERRORS RAISED IN MCGARY’S OPENING BRIEF ARE REVIEWABLE ON APPEAL BECAUSE THEY GO TO THE VERY BASIS FOR HIS COMMITMENT.

Under RAP 2.5(a), this court may decline to review errors not raised in the trial court. However, “the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority.” Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 291, 840 P.2d 860 (1992) (citing Bennett v. Hardy, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990)). Additionally, a “manifest error affecting a constitutional right” may be raised for the first time on appeal. RAP 2.5(a)(3). “[T]he question of substantial evidence may be raised for the first time on appeal as a manifest constitutional error.” State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999) (citing RAP 2.5 (a) (3); State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983)).

At the show cause hearing, McGary presented evidence of changed circumstances such that he no longer met commitment criteria. As required by statute, the trial court ruled on whether this evidence merited a new trial. CP 496-98; RCW 71.09.090(2)(a). Therefore, the purpose of RAP 2.5(a) has been met, and this Court may review the issue. See Washburn, 120 Wn.2d at 291.

Continued commitment in the face of evidence the person does not meet the criteria is manifest constitutional error under RAP 2.5(a)(3) for the same reasons discussed in section C.3 of the Brief of Appellant. Moreover, when evidence of relevant changed circumstances exists, there is insufficient evidence to support indefinite commitment without a new trial. Like a claim of insufficient evidence of guilt in a criminal proceeding, the probable cause determination should be reviewable for the first time on appeal. McNeal, 98 Wn. App. at 592.

2. MCGARY DID NOT INVITE THE TRIAL COURT TO IMPROPERLY WEIGH THE EVIDENCE MERELY BY REQUESTING THAT THE COURT COMMIT ITS ORAL RULING TO WRITING.

A party invites an error when that party “sets up” the error or misleads the court, such as by requesting an erroneous jury instruction. State v. Henderson, 114 Wn.2d 867, 868, 870, 792 P.2d 514 (1990) (citing State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). A party may even invite an error if the party “materially contribute[s]” to the error. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). McGary neither set up nor materially contributed to the trial court’s improper weighing of evidence at his show cause hearing. The court had already stated several times that McGary had presented some evidence, but that the court found it was not enough or was unpersuasive. RP 26-27, 29. In

discussing the written findings, McGary then requested the court make specific findings about the evidence he presented. RP 34. The court stated that the only additional finding it would make was that Dr. Donaldson's reports were "unpersuasive." RP 35. McGary did not invite the error by subsequently requesting that the court commit this finding to writing to better permit appellate review. RP 35-36.

3. MCGARY'S PARAPHILIA DIAGNOSIS MATTERS
PRECISELY BECAUSE IT WAS NOT PART OF
MCGARY'S STIPULATED COMMITMENT.

The State argues both that paraphilia is irrelevant because it was not part of McGary's stipulation to commitment and that his challenge to the paraphilia diagnosis is an impermissible collateral attack on his original commitment. Brief of Respondent at 17-18. These cannot both be true. McGary stipulated to commitment based schizophrenia and antisocial personality disorder. CP 91. Since his commitment, his schizophrenia has improved with medication and he has been diagnosed with paraphilia, which is relied on as an additional basis for his commitment. CP 145, 149. Essentially, the original basis for commitment, schizophrenia and antisocial personality disorder, has been replaced with a new basis, *paraphilia* and antisocial personality disorder. The State cites no authority for its assertion, Brief of Respondent at 28, that by stipulating to commitment on one basis, McGary has waived his right to trial on a new basis never stipulated to.

The State also appears to misunderstand McGary's argument regarding antisocial personality disorder. McGary does not argue that this disorder cannot be the basis for commitment, merely that it *was not*, standing alone, the basis for *his* commitment. No jury decided, and McGary did not stipulate, that, standing alone, his antisocial personality disorder justified commitment. The other potential grounds for commitment, schizophrenia and paraphilia, are also insufficient in McGary's case for the reasons discussed in the Brief of Appellant.

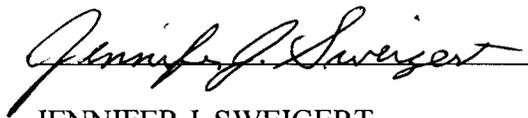
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the Brief of Appellant, Motion for Discretionary Review and Motion to Modify, this Court should reverse the orders affirming McGary's commitment and remand for a new commitment trial.

DATED this 6th day of August, 2009.

Respectfully submitted,

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

In re the Detention of:)
DARNELL McGARY,)
Appellant.)

COA NO. 38257-1-II

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BY: [Signature]

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF AUGUST, 2009.

x Patrick Mayovsky