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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28889-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

IN RE THE DETENTION OF CALVIN MINES

STATE OF WASHINGTON,

Respondent,

v.

CALVIN MINES,

Petitioner/Appellant.

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

The Honorable John W. Lohrmann

REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE STATE'S STATUTORY CONSTRUCTION IS CONTRARY TO THE PLAIN MEANING RULE AND FAILS TO TAKE INTO ACCOUNT MINES' CONSTITUTIONALLY-PROTECTED LIBERTY INTEREST.

The State contends that the plain meaning of RCW 71.09.030 permits the State to prove that a prior offense was sexually motivated at a commitment proceeding that lacks the due process protections attendant to a criminal trial. In so contending, however, the State fails to reconcile the Legislature's use of the word "previously" with its desired construction. Further, in claiming that its construction is consistent with the statutory aim of protecting the public, the State fails to balance or take into account Mines' liberty interest, which is protected by the Fourteenth Amendment and article I, section 3, and trumps any statutory goal.

a. The use of "previously" bars the State's interpretation or creates a statutory ambiguity. When a statute is susceptible of two or more reasonable interpretations, i.e., ambiguous, the court must utilize additional tools of statutory construction beyond the "plain meaning" rule. In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010).

In addition, statutes that involve a deprivation of liberty must be strictly construed. . . . Strict construction requires that, “given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, [the court] must choose the first option.”

Id. (citations omitted).

In relevant part, RCW 71.09.030 permits a prosecuting attorney to file a petition to civilly commit a person who “previously has been convicted of a sexually violent offense.” RCW 71.09.030. The definitional section of Chap. 71.09 RCW provides that a sexually violent offense includes:

an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030[.]

RCW 71.09.020(17).

The State refuses to admit that these two provisions of the statute create an ambiguity. But instead of supplying a logical basis for its argument that is supported by legal authority, the State resorts to an emotional appeal to consequences. See Br. Resp. at 17-19. The State threatens, “Mines’ interpretation would thwart legislative intent by preventing the civil commitment of highly

dangerous sexual predators merely because they pled guilty to crimes whose titles do not indicate their true sexual nature.” Br. Resp. at 18. The State then engages in a lengthy recitation of the alleged but unproven facts underlying Mines’ convictions. The State concludes, “[c]orrectly reading RCW 71.09.030(1) in conjunction with RCW 71.09.020(17)(c) gives effect to the legislature’s intent to protect the public from offenders like Mines.” Br. Resp. at 19.

As the above summary demonstrates, rather than engage substantively with the question of statutory ambiguity, the State engages in logical fallacy. An opposite argument can be imagined, however. It is equally likely when an offender pleads guilty to non-sexual offenses that the prosecuting attorney responsible for negotiating a plea bargain determined the State could not convince a jury beyond a reasonable doubt that a crime was sexual in nature. The prosecutor might believe that cross-examination of a complainant would reveal inconsistencies or other weaknesses in her testimony,¹ or that other facts discovered during an

¹ “[A]lthough SVP commitment proceedings include many of the same protections as a criminal trial, SVP commitment proceedings are not criminal proceedings.... It is well-settled that the Sixth Amendment right to confrontation is available only to criminal defendants.” In re Detention of Stout, 159 Wn.2d 357, 369, 150 P.3d 86 (2007).

investigation undermine the credibility of her allegations. Giving force to the word “previously” ensures that allegations supporting sexual motivation have been proven in proceedings that provide the due process protections against false conviction demanded by the Constitution.²

In the absence of a particular definition in a statutory provision, “words in a statute are given their common law or ordinary meaning” and “[a] nontechnical word may be given its dictionary definition.” State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). “Previously” is defined as “going before in time and order; prior.”³ The State’s proposed construction of “sexually violent offense” would require this Court to ignore the Legislature’s use of the word “previously” in RCW 71.09.030. However, it is reasonable to interpret the Legislature’s use of the word “previously” as requiring the sexual motivation for a crime to have been proven at the time of conviction. The statute is ambiguous.

² The State appears to limit its consideration of “due process” to procedural due process, i.e., the right to fair notice and overbreadth, rather than admitting a substantive due process right. See Br. Resp. at 29-30 (citing City of Redmond v. Moore, 151 Wn.2d 664, 669, 91 P.3d 875 (2004)). For this reason, the State’s claim that there is no due process problem with its proposed construction of the statute is of little help to this Court.

³ Merriam Webster’s Online Dictionary, available at <http://www.merriam-webster.com/dictionary/previously> (last accessed July 25, 2011).

b. A construction that disallows proof of sexual motivation for prior offenses at the civil SVP commitment proceeding appropriately respects Mines' liberty interest. The State claims that its interpretation of the statute fulfills the legislative goal of protecting the public from sexual predators. However, Mines' proposed construction also respects this goal, whilst at the same time ensuring that any deprivation of liberty is accompanied by the appropriate due process safeguards.

At a civil commitment proceeding initiated pursuant to Chap. 71.09 RCW, the State is permitted to introduce evidence of other similar acts, uncharged conduct, mental health diagnoses, and hearsay. Such evidence would either be inadmissible in a criminal proceeding or would only be admissible in rare instances because of its extreme potential for prejudicing the jury.

The Supreme Court has warned that “[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.” State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). A jury that hears evidence of other similar acts and a diagnosis of paraphilia will be more likely to shrug away doubts about the State’s proof of sexual motivation in a weak case. This

Court should hold that requiring the proof of sexual motivation to occur in the criminal proceeding gives the statute the strict construction appropriate to the substantial liberty interest at stake.

c. Boynton is not on point. The State suggests this Court take guidance from Division One's opinion in In re Detention of Boynton, 152 Wn. App. 442, 216 P.3d 1089 (2009). But Boynton is not on point, and the State's argument is a red herring. Boynton involved a specifically-enumerated "act" that qualified as a sexually violent offense for purposes of civil commitment pursuant to Chap. 71.09 RCW: "incest against a child under age fourteen." 152 Wn. App. at 450. The Court held that Boynton's prior conviction for incest involving his seven-year-old brother qualified as a sexually violent offense under the statute given its focus on "acts not crimes." Id. at 452-53.

Whether assault in the first degree with sexual motivation is a crime defined by Chap. 9A RCW and also an "act" under RCW 71.09.020(17) is not germane to Mines' argument, and Boynton does not resolve the questions presented in Mines' appeal. RCW 71.09.030 requires that a person subject to commitment proceedings have "previously been convicted" of a sexually violent offense. "Convicted" is a legal term of art with a precise and fixed

meaning, requiring a formal adjudication of guilt.⁴ Persons are convicted of crimes, not “acts.” Further, as discussed supra, “previously” requires antecedence. The “act”/“crime” distinction addressed by Boynton does not resolve the ambiguity created by the Legislature’s insistence that a person have “previously been convicted” of a sexually violent offense as a precursor for proceedings under Chap. 71.09 RCW. Boynton is not on point.

d. The State’s proposed construction violates equal protection. Pointing to the fact that the sexual motivation aggravator was not adopted until 1990, the State contends that Mines is similarly situated to other offenders whose crimes were committed after 1990. Br. Resp. at 26-28. But the State has failed to carefully read RCW 71.09.020(17)(b), which addresses this circumstance. That provision stipulates that the definition of “sexually violent offense” includes “a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection.”

⁴ See Merriam Webster’s Online Dictionary, available at <http://www.merriam-webster.com/dictionary/convicted>, last accessed July 25, 2011.

Thus, the Legislature sought to account for the absence of the sexual motivation aggravator by allowing the State to proceed if the pre-1990 crime is comparable to a sexually violent offense.

In sum, the State has not resolved the ambiguity presented by the Legislature's use of the words, "previously been convicted" with regard to the filing of a petition pursuant to Chap. 71.09 RCW, nor has the State shown that Mines' construction of the statute is unreasonable. This Court should hold that the statute is ambiguous, and the trial court should not have permitted the State to prove sexual motivation at the commitment proceeding.

2. THE TRIAL COURT COULD HAVE BIFURCATED THE PROCEEDINGS SOLELY WITH RESPECT TO PROOF OF THE ACT OR THREAT WITHOUT CREATING TWO "IDENTICAL LENGTHY TRIALS."

The State concedes that the trial court had discretion to bifurcate the recent overt act determination from the remainder of the proceedings. Br. Resp. at 31. The State contends, however, that "granting Mines' motion would have created two nearly identical lengthy trials that would have been an indefensible judicial extravagance." *Id.* This is a straw man argument.

The State's argument requires this Court to assume that the only way the trial court could have bifurcated the proceedings

would have been by requiring the jury in the “recent overt act” portion to consider the entire statutory definition of the term. But in fact it was within the court’s ample discretion to conduct a separate proceeding in which the jury would only have decided whether the State had proven any of the acts or threats alleged by Jeromy Brown beyond a reasonable doubt.⁵ At such a proceeding presumably only Brown and any other potential witnesses to the alleged acts would have been called to testify. In the SVP commitment trial, the Court could then have asked the jury to decide whether these acts or threats would create a reasonable apprehension of sexually violent harm in the mind of an objective person who was informed about Mines’ history and mental condition.

Thus, contrary to the State’s dramatic claim of “indefensible judicial extravagance,” the court could easily have conducted a bifurcated proceeding that would have ensured the jury that decided the credibility of Brown’s testimony was insulated from the

⁵ The State lists each of these acts and threats. Br. Resp. at 32-33. Resolution of the State’s contention that any of these acts would constitute an “act or threat” under the statute is unnecessary to the narrow issue presented by Mines’ argument, and Mines does not address that question. However, the facility with which the State enumerates each distinct act illustrates how, during a bifurcated proceeding, a jury could be asked to find whether any specific act had been proven beyond a reasonable doubt.

prejudicial evidence of Mines' other alleged conduct, without the State's evidence being needlessly duplicated. But the trial court did not consider this possibility, and instead refused to exercise its discretion on the basis that there was no "precedent" for bifurcation. CP 279-80.

The trial court acknowledged that "as soon as you start talking about . . . the mind of an objective person who knows of the history and mental condition of the person engaging in the act, you immediately have prejudiced him." 1RP 54. Given this prejudice, the State's concession that the court had discretion to bifurcate, and the fact that bifurcated proceedings could have been conducted with minimal burden upon judicial resources, this Court should conclude that the trial court's failure to exercise its discretion was an abuse of discretion.

3. THE ADMISSION OF CHARGING DOCUMENTS ALLEGING UNPROVEN CONDUCT PREVENTED MINES FROM RECEIVING A FAIR TRIAL, WHICH ERROR WAS COMPOUNDED BY THE TRIAL COURT'S FAILURE TO ISSUE MINES' PROPOSED LIMITING INSTRUCTION.

Mines argues that the admission of criminal informations charging him with sex offenses where he was never convicted of these offenses prevented him from receiving a fair trial. In

response, the State contends the informations were relevant to prove Mines' "pattern of entering into non-sexual plea agreements for sexual crimes" and that the evidence of the prior charges was somehow useful to the defense. Br. Resp. at 40-42. With regard to the limiting instruction, the State contends that the instruction was not a correct statement of the law, and so the court was not obliged to give it. In a footnote, the State also complains that the error was not of constitutional magnitude. The State's arguments are meritless.

a. The charging documents were not relevant for assessment of risk or for any other admissible purpose. The State contends the charging documents were pertinent because criminal charges may factor into actuarial testing. Br. Resp. at 39. The State notes that the Static-99 counts as one of the many factors considered in determining risk of recidivism "charges or convictions." Id. But even if the expert conducting an actuarial assessment considers the fact of a criminal charge in calculating risk, this does not justify the wholesale admission of the charging documents where the defendant has pleaded guilty to lesser charges – and it certainly does not authorize their admission without a limiting instruction.

The State alternatively contends that the charging documents were relevant to prove Mines' "pattern of entering into non-sexual plea agreements for sexual crimes." Br. Resp. at 40. This is a specious claim.

The State surely does not believe that Mines forced the State's hand or exerted improper influence in securing a plea offer. The only "pattern" that exists is that that several county prosecutors from different counties believed there was insufficient evidence to take charged sex offenses to trial (and in the circumstance of Jeromy Brown, insufficient evidence to initiate a criminal prosecution). But, not knowing the circumstances underlying the reduction of the charges, the jury might assume the existence of the bogus "pattern" described by the State in its appellate brief.

The State notes that evidence of criminal charges is often admitted in SVP proceedings, even if the defendant ultimately pleads guilty to a reduced charge. See Br. Resp. at 41 (citing cases). But in none of these cases was the question of the admissibility of charging documents litigated. Indeed, the only case that the State can cite is a Kansas Court of Appeals decision, which has no precedential value because the Kansas Supreme Court

accepted review of the case. See Br. Resp. at 40⁶ (citing In re Miller, 186 P.3d 201 (Kan. App. 2008)); Kan. Supreme/Appellate Court Rule 8.03(i) (providing in relevant part, “If a petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect...”).

Indeed, in addition to having no precedential value, the Court of Appeals opinion has been expressly repudiated by the Kansas Supreme Court on the very point for which it is cited by the State. In re Miller, 289 Kan. 218, 210 P.3d 625 (2009) (“[W]e agree that the State’s sponsorship of evidence of crimes with which a respondent has been charged but that have later been dismissed for lack of evidence or misidentification is playing with fire”).

The Kansas Supreme Court’s criticism of the lower court’s logic is well taken. The State’s contention is a thinly-disguised “no smoke without fire” argument which invites the jury to speculate that the fact of a criminal charge is in some way probative. As a matter of statutory and constitutional law, criminal charges expressly may not be considered as proof that the defendant engaged in the charged acts. U.S. Const. amends. VI; XIV; RCW

⁶ The State has cited the same case as “persuasive authority” with regard to Mines’ equal protection challenge to the proof of sexual motivation in the SVP proceeding. Br. Resp. at 21.

10.77.180. This Court should conclude that the charging documents were both irrelevant and prejudicial, and that their admission denied Mines a fair trial.

b. The evidence did not help Mines' defense. The State intimates that the evidence was "useful" to the defense. Br. Resp. at 42. But the fact that in his closing argument defense counsel sought to minimize the damaging impact of the evidence after having lost the motion to exclude it is no indication that the evidence was in any way "useful" to Mines. To the contrary, the charging documents suggested that the State believed the truth of the complainants' allegations, and thus indirectly vouched for their testimony. As noted in Mines' opening brief, these complainants' allegations were largely unproven.⁷ Thus, the charging documents helped bolster the State's shaky case, and were harmful to Mines.

c. If admitted for any legitimate purpose, Mines was entitled to a limiting instruction. The State contends that the limiting instruction proposed by Mines was incorrect because the charging documents were also relevant with regard to Mines' "history and mental condition" as pertinent to the recent overt act allegation. But

⁷ The State notes that Mines admitted some of the conduct in his mental health assessments. Except with regard to his first offense, in which Mines acknowledged he did not respect his ex-girlfriend's "no," Mines admitted to consensual sexual contact, not to sexual assaults.

since the charges were not proven, the State cannot show that the documents had any probative value whatsoever. The State's claim that the documents were probative in this regard is not well taken. Further, even assuming the contention that the instruction was a misstatement of the law, the State is wrong in claiming that the trial court properly exercised its discretion in refusing the instruction. The court did not take issue with the wording of the instruction but with whether an instruction was warranted at all. 7RP 14.

d. The error denied Mines a fair trial. An evidentiary error prejudices the right to a fair trial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected."⁸ State v. Asaeli, 150 Wn. App. 543, 580 n. 39, 208 P.3d 1136 (2009). As argued in Mines' opening brief, the admission of the charging documents prevented Mines from receiving a fair determination on the question whether he was a sexually violent predator. The commitment order should be reversed.

⁸ The State apparently fails to recognize that in such instances, it is the due process right to a fair trial that is violated by the erroneous admission of evidence. See Br. Resp. at 38 n. 8.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in Mines' opening brief, the order committing Mines as a sexually violent predator should be reversed.

DATED this 25th day of July, 2011.

Respectfully submitted:

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

IN RE THE DETENTION OF)

CALVIN MINES,)

APPELLANT.)

NO. 28889-7-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 25TH DAY OF JULY, 2011, 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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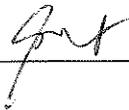
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