RECEIVED
MAR 04 2011
ATTORNEY GENERAL OFFICE
SEATTLE

FILED
MAR 07 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 29385-8-III

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

In re Detention of Gary Cameron,

STATE OF WASHINGTON,

Respondent,

v.

GARY CAMERON,

Appellant.

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

The Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

RECEIVED
MAR 03 2011
ATTORNEY GENERAL OFFICE
SEATTLE

FILED
MAR 07 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 29385-8-III

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

In re Detention of Gary Cameron,

STATE OF WASHINGTON,

Respondent,

v.

GARY CAMERON,

Appellant.

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

The Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issue Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 1

1. Procedural Facts 1

2. Trial testimony 2

a. Probation officer's testimony and Cameron's deposition... 2

b. Experts' testimony 2

b. Court's oral ruling and order of commitment 9

C. ARGUMENT 11

THE STATE FAILED TO PROVE CAMERON SUFFERS FROM A "MENTAL ABNORMALITY" UNDER CHAPTER 71.09 RCW. 11

1. To commit an offender under chapter 71.09 RCW, the State must establish a mental abnormality through expert testimony. 11

2. The court disregarded most of Dr. Phenix's testimony, and improperly fashioned its own lay theory for Cameron's mental abnormality. 14

3. Because it is based on insufficient evidence, the commitment order should be reversed. 15

D. CONCLUSION 16

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Berger v. Sonneland
144 Wn.2d 91, 26 P.3d 257 (2001) 12

Car Wash Enters., Inc. v. Kampanos
74 Wn. App. 537, 874 P.2d 868 (1994) 14

Detention of Thorell
149 Wn.2d 724, 72 P. 3d 708 (2003). 12, 13, 15

Harris v. Robert C. Groth, M.D., Inc.,
99 Wn.2d 438, 663 P.2d 113 (1983) 13

In re Bedker
134 Wn. App. 775, 146 P.3d 442 (2006) 13, 16

In re Detention of A.S.
138 Wn.2d 898, 982 P.2d 1156 (1999) 13, 16

In re Detention of Halgren
156 Wn.2d 795, 132 P.3d 714 (2006) 12

In re Detention of Pouncy
168 Wn.2d 382, 229 P.3d 678 (2010) 13

In re Detention of Twining
77 Wn. App. 882, 894 P.2d 1331 (1995) 13

In re Personal Restraint of Young
122 Wn.2d 1, 857 P.2d 989 (1993) 13

Prentice Packing & Storage Co. v. United Pac. Ins. Co.
5 Wn.2d 144, 106 P.2d 314 (1940) 16

State v. Armenta
134 Wn.2d 1, 948 P.2d 1280 (1997) 14

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

ER 702 13

RCW 71.05 14

RCW 71.09 ..... 1, 2, 6, 11, 13, 14, 16

RCW 71.09.020 ..... 4, 10, 11, 12

RCW 71.09.060 12

A. ASSIGNMENTS OF ERROR

1. The State failed to prove appellant suffered a "mental abnormality"[1] as required for commitment under chapter 71.09 RCW.

2. The court erred in entering findings of fact 1, 3, 4, and 5 and conclusion of law 2 in support of its commitment order.

Issue Pertaining to Assignments of Error

Where expert testimony is necessary to establish a "mental abnormality" under chapter 71.09 RCW, but the court created its own theory to find the appellant suffered from a mental abnormality, did insufficient evidence support the commitment order?

B. STATEMENT OF THE CASE

1. Procedural Facts

On July 14, 2006, the Attorney General filed a petition alleging Gary Cameron should be committed under chapter 71.09 RCW. CP 1-2. Cameron had been incarcerated for 13 years following a conviction for first degree rape of a child. The complainant was Cameron's son. CP 4.

---

[1] "Mental abnormality" means "a . . . condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

Four years later, a judge found Cameron met the statutory commitment criteria and ordered Cameron committed to the Special Commitment Center (SCC). CP 63-64, 88-90.

2. Trial testimony

a. Probation officer's testimony and Cameron's deposition

Cameron admitted to a probation officer following his guilty plea in 1993 that he repeatedly raped his eight-year-old son for about five months. RP 35. Cameron also said he molested "quite a few"' kids, and although he knew it was wrong, he didn't know what to do about it. RP 35. Cameron also acknowledged he could not stop himself from molesting his son because he enjoyed it. RP 35. In Cameron's deposition,[2] which was played in court, Cameron admitted having sex with four other children. Ex. 17 at 67-68.

b. Experts' testimony

The State's expert, psychologist Dr. Amy Phenix, opined Cameron met each of the commitment criteria under chapter 71.09 RCW. Phenix found Cameron suffered from three or four conditions which, considered

[2] The court considered the portions of Cameron's deposition corresponding to page 6, line 7 through page 55, line 5 and page 55, line 18 through page 77, line 7 of the deposition transcript. Ex. 17.

together, made him "likely" to engage in predatory acts of sexual violence.[3] RP 67, 110-13, 120-21.

The first condition was "pedophilia, sexually attracted to males and females, nonexclusive type,"[4] a mental disorder listed in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). RP 67. Phenix based her diagnosis on Cameron's long history of sexual contact with children, as well as his 2005 admission to a history of daily sexual fantasies regarding prepubescent children. RP 68-69, 80-82, 173-74, 229-30. Cameron also told Phenix, however, that as of 2005 he was no longer attracted to children, only adults, and denied continuing fantasies. RP 173; see also Ex. 17 at 69 (deposition).

Phenix also testified Cameron suffered from mild mental retardation, antisocial personality disorder (ASPD), and alcohol abuse as defined by the DSM-IV-TR. RP 67. Phenix based her first diagnosis on Cameron's low-60s IQ and problems with daily living skills. RP 83-84. This condition, according to Phenix, likely stemmed from a childhood

---

[3] A sexually violent predator (SVP) is defined as an individual "who has been convicted of or charged with a crime of sexual violence and who 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(18).

[4] While most of Cameron's offenses involved males, in 1984, he was convicted of indecent liberties for having sexual contact with an 11-year-old girl. RP 72-73, 174-75, 407; Exs. 10, 12.

head injury. RP 86. Phenix said Cameron displayed ASPD, as shown by childhood misbehavior and criminality, minimization of sexual offenses, and a history of committing sex offenses without regard to whether he would be caught. RP 67, 88-91, 96-102. Finally, Phenix noted that Cameron admitted he sometimes drank alcohol, but at trial she acknowledged she was uncertain whether alcohol abuse contributed to Cameron's sexual offenses. RP 110, 115, 220-21.

Phenix testified "to a reasonable degree of psychological certainty" that Cameron's pedophilia, ASPD, and mild mental retardation collectively "predisposed" Cameron to sexual offending. RP 112-13, 116-17, 120-21; RCW 71.09.020(8) (requiring that mental condition "predispose" offender to commission of criminal sexual acts). Phenix testified that while Cameron's pedophilia was the "driving force" behind his behavior, ASPD made him willing to violate the rights of others and his mental retardation inhibited his ability to consider the consequences of his actions. RP 112-14, 117, 120-21, 202-03.

To predict if Cameron was likely to engage in predatory acts of sexual violence, Phenix relied on three actuarial instruments: the Static-99 Revised (Static-99R), the Static-2002 Revised (Static-2002R), and the Minnesota Sex Offender Screening Tool – Revised (MnSOST-R). RP 133. Based on Cameron's Static-99R score, which placed him in the

"high risk" category, 31.2 percent of similar-scoring sexual offenders were rearrested for sexual offenses after five years, and 41.9 per cent were rearrested after 10 years. RP 141. The figures were slightly lower under the Static-2002R. RP 141. Phenix acknowledged improperly assigning a higher risk than Cameron warranted when scoring the MnSOST-R in her original report. RP 146-48. With the proper score, however, comparable offenders had a reoffense rate of 25 per cent after six years. RP 226-27.

While none of the instruments placed Cameron in the "more likely than not" to reoffend category, Phenix opined the measures underestimated Cameron's risk because they failed to consider all pertinent risk factors. RP 149. To that end, Phenix co-authored an article compiling risk factors for mentally retarded offenders. RP 149-50. The checklist was not an actuarial, however, and it was necessary to employ professional judgment to weigh each factor. RP 157, 194-95. Phenix opined Cameron's risk was elevated by his pedophilia and ASPD, the lack of a structured release plan,[5] a history of alcohol abuse and poor impulse control, and other factors. RP 160-68. In addition, Phenix adjusted her risk estimate upward because in general, sexual offenses often go

[5] See Ex. 17 at 75-76 (discussing Cameron's planned living situation following release from the SCC).

unreported, and actuarial risk estimates count only detected crimes. RP 259-60.

As for potential mitigating factors, Phenix did not consider Cameron's age, 55, because the actuarial tests considered age. RP 170. At the same time, Phenix conceded her checklist of "risk factors" included many items already assessed by the actuarials. RP 192-93. And while Cameron showed no signs of pedophilic interest during his 17-year incarceration, Phenix opined that the condition would not just go away. RP 182, 234, 266. Based on the additional risk factors, therefore, Phenix opined Cameron would more likely than not commit predatory acts of sexual violence if not confined. RP 184-85.

The defense expert, psychologist Dr. Brian Abbot, concluded Cameron was not likely to reoffend. RP 277. Abbott diagnosed Cameron with dementia due to head trauma suffered as a child. RP 288-89, 430. The dementia did not qualify as a mental abnormality under chapter 71.09 RCW, however, because it would not predispose an offender to engage in predatory sexual behavior. RP 289. Despite Cameron's low IQ, moreover, Abbott did not find mild mental retardation because there was insufficient proof Cameron suffered from impaired ability to function, one of the DSM-IV-TR requirements. RP 291-93, 421.

Abbott also opined there was insufficient evidence to diagnose pedophilia; instead, Cameron's sexual offending was better explained by general impulsivity, as Cameron had also engaged in unwanted sexual activity with adolescents and adults.[6] RP 295. Cameron's brain injury led to his impulsive, aggressive behavior. RP 295.

Abbott disagreed with Phenix's ASPD diagnosis, and instead attributed any ASPD-like traits to his head injury, as was proper under the DSM-IV-TR. RP 304-06, 453. For example, Cameron's minimization of his sexual offending resulted from cognitive impairment and memory deficits rather than intentional deception. RP 303, 440. Likewise, Abbott opined Cameron's impaired ability to express himself verbally led to the appearance of a lack of remorse. RP 303.

Abbott found that, despite statements he could not control his sexual offending, Cameron had shown improved control of sexual impulsivity and aggression during his incarceration. RP 297-300, 455. Abbott attributed this in part to a diminishing sex drive caused by Cameron's age. RP 300-01. Abbott also noted that, while incarcerated, Cameron had not demonstrated pedophilic interest, such as by possessing sexually explicit drawings of children or other means commonly employed by inmates. RP 299, 302, 404-06, 478-79.

---

[6] Ex. 17 at 53-54; RP 209-12.

Like Phenix, Abbott used the Static-99R to estimate Cameron's risk of reoffending sexually. Abbott scored Cameron the same as Dr. Phenix. RP 309, 362-63. Abbott estimated, however, that Cameron's risk of re-arrest was 13 to 28 percent over 5 years. RP 342. Risk prediction based on the "high risk" pool led to the 28 percent figure. RP 343. Abbott derived the 13 percent estimate based on the "routine corrections" offender pool. RP 343. According to Abbott, risk prediction based on recidivism rates for the "high risk" pool led to an unacceptably high number of "false positives" and was of little use to an expert. RP 316-20, 335-37. It was preferable to consider the rates of the more general "routine corrections" group – which included a large proportion of the "high risk" offenders – because that group more accurately represented the actual risk. RP 336-38, 379.

Abbott also explained the 10-year reoffense rate should not be considered because research showed Cameron's risk would decrease once he turned 60 in five years. In contrast, the 10-year rate incorrectly reflected an increase in risk. RP 343, 367-69.

Abbott relied on the Static-99R alone because studies showed it was the best tool for predicting recidivism and the research did not support using multiple actuarials to improve an expert's predictive abilities. RP 311, 389. Abbott did not use the MnSOST-R, moreover, because research

showed scores vary significantly depending on who administers the test, as illustrated by Dr. Phenix's acknowledgement at trial that she miscalculated Cameron's score by four points. RP 345-47, 359.

Unlike Phenix, Abbott advocated a "strict actuarial approach" to risk assessment and testified there was no reliable way to combine risk factors with actuarial instruments. RP 311, 391-92, 459. Abbott also pointed out – as Phenix acknowledged – that a number of factors listed in Phenix's article and relied on by her at trial duplicated factors considered in the actuarials. RP 395.

c. Court's oral ruling and order of commitment[7]

The court found the State met its burden to have Cameron committed. But it did not do so without reservation; the court found the decision difficult because Phenix acknowledged a number of mistakes in her risk calculations. CP 77-78. The court explained it also had little confidence in the actuarial instruments. CP 78. Instead, the court based its risk determination on Cameron's criminal history. CP 78. The court noted that Cameron committed various property crimes and threatened a teacher as a juvenile. CP 79-80. Cameron's sexual offenses occurred

[7] The oral ruling is attached as Appendix A and the written ruling is attached as Appendix B.

from the mid-1970s to the 1990s, culminating in the 1993 crime against Cameron's son. CP 80-83.

The court ruled that the State "established . . . beyond a reasonable doubt that [Cameron] suffers from a mental abnormality or personality disorder, which is pedophilia, which makes him likely to engage in sexual violence if not confined in a secure facility." CP 84-85. The court stated it found the 1993 crime "disturbing" and that the crime "significantly affected" its decision to commit Cameron. CP 83-84. The court acknowledged it was not permitted to commit Cameron based on the severity of his past crimes, but rather based on the risk that he would commit. CP 84. Based on the nature of the 1993 crime, however, the Court found Cameron was predisposed to commit a "sexual act []which constitutes a menace to the health and safety of others, [and] that he's likely to engage in predatory acts in the future." CP 84.[8]

The court also entered the following findings of fact:

> 1. All of the foregoing facts . . . [were] proven beyond a reasonable doubt. . . .
>
> 2. [Cameron] has previously been convicted of two sexually violent offenses as that term is defined by RCW 71.09.020(17). Specifically, [Cameron] has been convicted of Indecent Liberties Against a Child Under Age 14 and Rape of a Child in the First Degree.

---

[8] The court also stated it considered Cameron's age and its decision might have been different if Cameron were 10 years older. CP 84.

> 3. [Cameron] suffers from pedophilia, a mental abnormality as that term is defined by RCW 71.09.020(8).
>
> 4. [Cameron's] mental abnormality causes him serious difficulty controlling his sexually violent behavior.
>
> 5. [Cameron's] mental abnormality makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility. These terms are defined in RCW 71.09.020.

CP 89.

C. ARGUMENT

THE STATE FAILED TO PROVE CAMERON SUFFERS FROM A "MENTAL ABNORMALITY" UNDER CHAPTER 71.09 RCW.

Expert testimony is required to establish the existence of a mental abnormality as defined under chapter 71.09 RCW. The court adopted one aspect of the State's expert's theory of Cameron's mental abnormality. But it rejected others, essentially creating its own lay theory of mental abnormality. Because expert testimony is necessary to support a mental abnormality finding, however, the order of commitment should be reversed.

1. To commit an offender under chapter 71.09 RCW, the State must establish a mental abnormality through expert testimony.

A sexually violent predator (SVP) is an individual (1) who has been convicted of or charged with a crime of sexual violence, (2) who

suffers from a mental abnormality or personality disorder,[9] and (3) such mental abnormality or personality 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); Detention of Thorell, 149 Wn.2d 724, 742, 72 P. 3d 708 (2003).

Due process, as well as statutory mandate, require the trier of fact to find a "mental abnormality" or "personality disorder" beyond a reasonable doubt. RCW 71.09.020(18); RCW 71.09.060(1); In re Detention of Halgren, 156 Wn.2d 795, 809, 812, 132 P.3d 714 (2006). To satisfy the statute and due process, moreover, such mental abnormality must affect the offender's ability to control his behavior. Thorell, 149 Wn.2d at 736.

The State must prove a mental abnormality or personality disorder, or the combination thereof, by expert testimony. When an essential element in the case is best established by an opinion that is beyond the expertise of a layperson, expert testimony is required. Berger v. Sonneland, 144 Wn.2d 91, 110, 26 P.3d 257 (2001); Harris v. Robert C.

---

[9] Under the statute, a "personality disorder" is defined as "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment." Evidence of such a disorder must be supported by the testimony of a licensed forensic psychologist or psychiatrist. RCW 71.09.020(9).

Groth, M.D., Inc., 99 Wn.2d 438, 449, 663 P.2d 113 (1983); see also ER 702 (purpose of expert testimony on matters requiring "scientific, technical or other specialized knowledge" is to "assist the trier of fact to understand the evidence or to determine a fact in issue").

Unless observable by a layperson, medical facts in particular must be proven by expert testimony. Harris, 99 Wn.2d at 449. Whether an individual possesses a mental abnormality is "based upon the complicated science of human psychology" and is generally beyond the comprehension of the trier of fact. In re Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006). In a chapter 71.09 RCW proceeding, therefore, "psychiatric testimony is central to the ultimate question of whether a person suffers from a mental abnormality." In re Personal Restraint of Young, 122 Wn.2d 1, 58, 857 P.2d 989 (1993); In re Detention of Twining, 77 Wn. App. 882, 890, 894 P.2d 1331 (1995), abrogated on other grounds, In re Detention of Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010); see also Thorell, 149 Wn.2d at 761-62 (by providing diagnosis of mental abnormality and linking abnormality to serious lack of control, State's experts provided sufficient evidence to commit person as SVP); In re Detention of A.S., 138 Wn.2d 898, 915 n.7, 982 P.2d 1156 (1999) (doctor's testimony necessary to diagnose person with "mental

abnormality" in involuntary commitment proceeding under chapter 71.05 RCW).

2. The court disregarded most of Dr. Phenix's testimony, and improperly fashioned its own lay theory for Cameron's mental abnormality.

Phenix testified "to a reasonable degree of psychological certainty" that the combination of pedophilia, ASPD, and mild mental retardation "predisposed" Cameron to sexual offending as defined under chapter 71.09 RCW. RP 116-17, 120-21. While Cameron's pedophilia was the "driving force" behind his behavior, the other two conditions were essential to Phenix's "mental abnormality" finding – ASPD because it made Cameron more willing to violate the rights of others and mental retardation because it inhibited Cameron's ability to consider the consequences of his actions. RP 112-14, 116-17, 120-21, 202-03.

The judge, however, did not find Cameron suffered from ASPD or mild mental retardation. This Court must interpret the absence of such findings as a finding that the State did not prove Cameron suffered from those conditions. See, e.g., State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (absent factual finding, reviewing court "must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue"); Car Wash Enters., Inc. v. Kampanos, 74 Wn. App. 537, 546, 874 P.2d 868 (1994) ("The absence of a finding of fact in favor

of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue."); see also RP 92-96 (examination by trial court conveying apparent skepticism regarding foundation for Phenix's ASPD diagnosis).

The trial court rejected portions of Phenix's testimony and apparently developed its own theory of Cameron's mental abnormality, i.e., he was predisposed to the commission of criminal sexual acts based on pedophilia alone. The court found the State "established . . . beyond a reasonable doubt that [Cameron] suffers from a mental abnormality or personality disorder, which is pedophilia, which makes him likely to engage in sexual violence if not confined in a secure facility." CP 84-85; CP 89 (findings 1, 3, 4, 5). The expert testimony, however, did not support such a finding.

3. Because it is based on insufficient evidence, the commitment order should be reversed.

There is no dispute Cameron committed sexually violent offenses. But to commit an individual indefinitely as a sexual predator, the State must prove – through expert testimony – that the individual has a specific mental abnormality linked to the offender's lack of self-control. Thorell, 149 Wn2d at 742, 761-62. That was not the evidence here.

The court essentially rejected the State's expert's theory and relied on its own to find Cameron's mental abnormality. The court, however, lacked the expertise to do so. Bedker, 134 Wn. App. at 779; see also Prentice Packing & Storage Co. v. United Pac. Ins. Co., 5 Wn.2d 144, 164, 106 P.2d 314 (1940) ("The law demands that verdicts rest upon testimony, and not upon conjecture and speculation.").

Insufficient evidence therefore supported the finding that Cameron suffered from a mental abnormality as defined by statute. A.S., 138 Wn.2d at 915 n.7. Because such a finding was a prerequisite to commitment under chapter 71.09 RCW, this Court should reverse the trial court's order of commitment.

D. CONCLUSION

For the foregoing reasons, this Court should reverse the order of commitment and remand for a new commitment trial.

DATED this 3rd day of March, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

APPENDIX A

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF GRANT
3 ---
4
5 In re the Detention of:)
6 GARY LEE CAMERON,) No. 06-2-00813-4
7 Respondent.)
8
9 ---

FILED
JUL 16 2010
KIMBERLY A. ALLEN
Grant County Clerk
ORIGINAL
07-278891

10 ORAL DECISION
11 OF
12 THE HONORABLE JOHN M. ANTOSZ
13 ---
14
15 4:01 p.m.
16 July 9, 2010
17 Grant County Courthouse
18 Ephrata, Washington
19
20 A P P E A R A N C E S
21 FOR THE STATE: JAMES BUDER
22 ANDREA JARMON
23 Assistant Attorney Generals
24 FOR THE DEFENDANT: BRETT W. HILL
25 Attorney at Law

76

P R O C E E D I N G S

THE COURT: Okay. Who is on the line right now?

MR. BUDER: James Buder for the state, your Honor.

THE COURT: Okay. Mr. Buder, thank you.

MR. HILL: And Brett Hill is here.

THE COURT: Okay. Is Mr. Cameron here?

THE OPERATOR: Mr. Cameron?

(Indistinguishable speaking.)

THE COURT: Could you speak up, Mr. Cameron?

THE CAMERON: Okay. Can you hear me?

THE COURT: Yes. Can you hear me, Mr. Cameron?

THE CAMERON: Yeah.

THE COURT: Okay. Before we start, we're in judge's chambers, I do have a court reporter here. The court reporter can hear me a lot better and can hear you folks better on this phone that I have in my office than the phone system that we use in the courtroom.

We do have a local rule relating to telephone hearings and I'm going to review that. It has to do with the making of our record on the phone. We're not recording this. We're using a court reporter. And because I have a speakerphone that cuts out, if you start talking while I'm talking or it doesn't allow me

1 to allow you to hear me if you're talking out.
2 I do have a special stipulation I'm going to ask
3 the parties to agree to with regards to our record.
4 I'm trying to find that right now. This is from our
5 Local Rule No. 11. And it reads as follows: This
6 conference call is being reported by the official
7 court reporter. Each party stipulates that any
8 portion of the proceedings which is inaudible to the
9 reporter will be noted as such in the record without
10 jeopardy to the reporter or to any transcript being
11 deemed accurate and complete.
12 Now, that's not so much a problem here, because
13 I'll be doing most of the talking, since I need to
14 make a ruling. But to the extent that any of you need
15 to add anything to the record, we've accommodated you
16 by allowing you to appear by telephone. I just wanted
17 to make sure you stipulate to what I've just read.
18 Could -- Mr. Hill, do you agree to that?
19 MR. HILL: I do.
20 THE COURT: Mr. Buder, do you agree to that?
21 MR. BUDER: I do, your Honor.
22 And also, if I just may, just so we're perfectly
23 clear who is on the line, I also have my co-counsel,
24 Andrea Jarmon, on the line with us, as well. Just so
25 everyone's aware.

THE COURT: Oh, good. That's great. And hello, Miss Jarmon, too. Okay.

MS. JARMON: I didn't want to interrupt. Thank you.

THE COURT: Yes, okay.

All right. Well, thank you for your patience in waiting for my ruling. I've tried the best I could to get some free time and that hasn't been during the day, I've been in court every day all day since the time we've had our hearing until now. Except for today I've had a little bit more time to finish up my work that I started on the -- on some evenings and on weekends to get this done.

And so I know there was a phone call placed to Miss Finke yesterday about where I was at on that and I completely understood the nature of that inquiry, wondering what's taking me here on this, and I was almost done, I told Miss Finke what I need to do is if I can get some free time today, I could finish up my review of my notes and all the records, and that was provided to me, I was given a few more hours today to help me finish that up. Because I'm gone the next two weeks and I was hoping to be able to make this ruling before I left. So I appreciate everyone's patience.

And I'll make my ruling here in just a moment.

1 Counsel, I appreciate the excellent work that you
2 both did for your respective sides. Mr. Hill, I've
3 heard a few of these sexual violent predator actions
4 now with you as counsel and, as usual, you've
5 presented an excellent case on behalf of your client.
6 And the state did its usual job of helping the court
7 through a significant decision that has to be made,
8 also besides being difficult, it's fairly complex, and
9 it's not a set of statutes that we work with every
10 day. So I felt like I was rightfully spoon fed
11 certain things, certain exhibits included statutes,
12 and I really appreciated that, because I don't work
13 with these statutes all the time.
14 So I did find this decision to be difficult. I
15 think, in part, because Mr. Hill was able to establish
16 certain mistakes that were made in the actuarial
17 instruments by the expert that testified for the
18 state, Dr. Phenix. And which resulted in lower
19 scoring than Dr. Phenix originally thought applied. I
20 learned from that, as I've always thought, there's
21 much interpretation and discretion involved in these,
22 you know, supposed scientific actuarial instruments.
23 There's much involved in interpretation, how to even
24 score it. One would think initially that it's just a
25 matter of filling out some numbers.

1 And I'm reminded of a court commissioner that
2 applied for a position here years ago, and I asked if
3 she had any experience with child support, and in her
4 interview she said, well, I can work a calculator.
5 And I thought, well, besides being a little
6 disrespectful, I mean it showed a lack of
7 understanding of how child support worksheets can
8 work, and there's a lot of interpretation as to what
9 is income and what is an expense.
10 And I guess I'm reminded of that when my initial
11 impression of what an actuarial instrument was, I
12 thought it was just sort of plug in numbers and out it
13 comes. But there's a lot of interpretation involved.
14 And even those that don't involve much interpretation,
15 human error can enter into that.
16 And Mr. Hill had certainly caught that with
17 Dr. Phenix. And in the end, I, quite honestly, didn't
18 have much confidence with the actuarial instruments,
19 and to be honest, one way or the other in determining
20 this. And what I had to turn to in this case, quite
21 honestly, was the criminal record that Mr. Cameron has
22 and the nature of these offenses and his prior history
23 in determining whether or not the state has proven
24 beyond a reasonable doubt that he is a sexually
25 violent predator, as that's defined in RCW 71.09.020.

1 And basically that test comes down to whether or
2 not is a person likely to engage in predatory acts of
3 sexual violence if not confined in a secure facility?
4 And predatory acts are defined in Exhibit 22 as an act
5 directed towards a stranger or individual with whom a
6 relationship has been established for the purpose of
7 victimization, or person of casual acquaintance with
8 no substantial personal relationship with the
9 defendant.
10 Also a sexually violent predator requires a prior
11 conviction which was established, a prior conviction
12 of sexual violence, and that the person suffers from a
13 mental abnormality or personality disorder, as that
14 term is defined in Exhibit No. 20.
15 And what I noted here, in the defendant's
16 history, is going back to 1973, per the defendant's
17 own self-reporting, he took a friend's car for a joy
18 ride when he was I think 18 at that time, in 1973, and
19 he indicated he spent some time in what he calls
20 juvie, juvenile detention. And then again in 1973 he
21 was apparently charged with burglary and grand
22 larceny. And for that he had stolen some tools from a
23 farmer and went to jail for that. Now, none of these
24 are sexually violent acts or predatory acts, but just
25 part of the mosaic that I have to look at.

1 And then I'm not sure what year, but it appeared
2 to be in the early to mid '70s, he pulled a knife on a
3 teacher at school. According to Mr. Cameron, he was
4 kicked out of high school. As I understand it, he was
5 for that eventually sent to Eastern State Hospital for
6 a period of time.
7 But in February of 1976 he was arrested and
8 charged for indecent liberties for children that were
9 eight, ten and twelve, and their names were Casey,
10 Paul and Don. And I believe he was found not guilty
11 by reason of insanity or he was allowed to enter that
12 plea, I believe, because he was committed to Eastern
13 State Hospital in 1976 and discharged in 1979. And
14 those crimes were serious and they involved forced
15 oral copulation and sodomy on each of these young
16 boys. And I believe the defendant was about 21 years
17 old at that time.
18 In 1980, so just after he's released, he had
19 stolen a car. He had been drinking. He has a history
20 of alcohol abuse and was sentenced to jail or work
21 release.
22 In 1984 he was charged for a probation violation
23 involving a boy named Brandon. I don't know his age.
24 It might have been a young adult. But it couldn't be
25 be proved. And so instead he went to jail for 45 days

1 as a probation violation for changing his address. As
2 I understand it, he was also charged -- or this was
3 charged in Grays Harbor, Washington, and this is
4 Exhibit No. 1, and those charges were dismissed in
5 early 1985, which is Exhibit 2. So there's no
6 substantiation of that contact with this person named
7 Brandon.
8 But a year later, in 1985, he was arrested for
9 indecent liberties for a prepubescent girl, an
10 11-year-old named Tami, in Grays Harbor County, and
11 spent 20 months in prison for that. Although in
12 questions and answers, he didn't recall going to
13 prison in 1986 for that. But this Tami was an
14 11-year-old daughter of Diana Osburn, who was a friend
15 or roommate of Marlene, who he had a child with.
16 And the defendant's version is that Tami pulled
17 his -- in his words, his penis out when they were in a
18 bedroom and took her clothes off, and that's when he
19 explains why he did this. This is an 11-year-old
20 girl, which, of course, is an inappropriate
21 explanation. But he does admit to what he says was
22 putting it between her legs for not very long and he
23 admits he was watching kids. And he pled guilty to
24 indecent liberties with a person under the age of 14
25 and was sentenced in December of '85 to 20 months in

1 prison.

2 And then it couldn't have been much after he was
3 released that he sodomized an 11-year-old boy named
4 Ken. He, Mr. Cameron, says he had sex with Ken or
5 Kenneth once. Dr. Phenix indicates that the evidence
6 shows that it was on a daily basis, and, of course, I
7 can't consider what an expert testifies to in that
8 regard, that's hearsay. But apparently he did
9 sodomize Kenneth on a fairly regular basis.

10 And it wasn't clear to me if it was at age 11 or
11 if this started when he was 13. I think it was
12 actually at age 13. There was some initial evidence
13 at age 11. And Dr. Abbott also testified that this
14 was a basis for a probation violation. Dr. Abbott
15 thought it was age 16.

16 But Exhibit 8 shows that the defendant stipulated
17 to communicating with a Kenneth DeLamater,
18 D-E-L-A-M-A-T-E-R, age 16, for immoral purposes, and
19 living with a minor contrary to probation conditions,
20 and that was a probation violation for six months.

21 As I indicated, the defendant did in his
22 deposition admit to at least one time having sexual
23 contacts with him.

24 Now, in 1987, there was contact between the
25 defendant and I guess these men with the last name of

1 Winkleback (phonetic), and Mr. Hill was able to
2 establish in cross-examination that Dr. Phenix had her
3 facts wrong and that these were not minors, but
4 instead 26, 27 years old, and Leroy was 29, Andrew was
5 26 or 27, and not 16 as Dr. Phenix originally thought.
6 And the defendant was 32 himself at that time.
7 Do we have a dog barking?
8 MR. BUDER: I'm sorry, that was me sneezing, your
9 Honor. I was trying to cover it.
10 THE COURT: Oh. I am embarrassed. I thought it
11 was a dog. See? I'm sorry. Okay. No, and that's
12 fine. I was just curious and I wasn't going to
13 admonish anybody.
14 And then we have perhaps what I consider the most
15 extreme crime here or the most disturbing crime. Of
16 course, that's in 1993, when Mr. Cameron had
17 repeatedly sodomized his own son Aaron, and there was
18 evidence that his son cried during these episodes and
19 that he was eight years old, and this was happening
20 twice a week, and that this went on for possibly five
21 years. And the defendant pled guilty on July 6th of
22 1993 and was sentenced on August the 9th of 1993 to
23 153 months.
24 And I will be straight out that this has
25 significantly affected my decision. That when I see

1 the extremity of this crime, I can't base my decision
2 as to whether he's a predator on a concern that he's
3 going to commit a serious crime, but rather it has to
4 be based upon what are the chances of committing a
5 predatory act?
6 And that's something I really had to watch myself
7 over, because the statute doesn't allow me to create a
8 lower burden of proof for a more serious predatory
9 act. The burden of proof is the same no matter where
10 that predatory act might fit within the spectrum of
11 culpability.
12 But it just struck me that the nature of this act
13 also shows a serious likelihood of predisposition to
14 commit a sexual act, which constitutes a menace to the
15 health and safety of others, that he's likely to
16 engage in predatory acts in the future. I did factor
17 in his intelligence and his age and I think he's still
18 young enough where this, it's likely he's going to
19 commit this act again. That might change in ten
20 years.
21 But right now I'm convinced that the state has
22 established with evidence beyond a reasonable doubt
23 that he suffers from a mental abnormality or
24 personality disorder, which is pedophilia, which makes
25 him likely to engage in sexual violence if not

1 confined in a secure facility. So the state's request
2 is granted.
3 Although I will acknowledge that this has been a
4 difficult process. It's serious acts that he's
5 committed, but as I said, Mr. Hill has done much with
6 cross-examination on those actuarial instruments.
7 Okay. Counsel, was there anything you wanted to
8 add for our record? One at a time, if need be, so
9 that Tom, our court reporter, can pick it up.
10 MR. BUDER: Your Honor, this is James Buder for
11 the state, and I just had one question. And in the
12 Thorell case, T-H-O-R-E-L-L, our State Supreme Court
13 indicated that this is -- that this standard is pretty
14 much included within our statutory framework, but I
15 sometimes ask for a specific finding of when, during a
16 bench trial, related to the Crane decision, C-R-A-N-E,
17 which is the U.S. Supreme Court, which made a finding
18 that there needs to be a finding that the person's
19 mental abnormality causes them serious difficulty in
20 controlling their sexually violent behavior and thus
21 makes them likely to commit future acts of predatory
22 violence.
23 THE COURT: What's the difference between that
24 and the statutory standard of a mental abnormality
25 being something which predisposes the person?

1 MR. BUDER: You know, and I don't think there is
2 much of a difference, your Honor. In fact, I think
3 the court in Thorell would agree with you that they
4 are substantially the same thing. So I'd just like to
5 inquire about it because it is from the U.S. Supreme
6 Court, and so I just like to inquire about it just for
7 the record.
8 THE COURT: Well, I -- as it hits me, as you
9 bring the question to me, it sounds like it's much the
10 same and that it's -- he has difficulty in controlling
11 his behavior to a degree which constitutes a menace to
12 the health and safety of others, that he's unable to
13 control himself. Which I see as much the same as
14 being predisposed to that.
15 Do you want to be heard on that, Mr. Hill?
16 MR. HILL: No, that's fine.
17 THE COURT: Okay. Counsel on either side, is
18 there anything else?
19 MR. BUDER: Nothing from the state, your Honor.
20 THE COURT: Okay. All right, then. Anything else?
21 All right. We'll conclude this call, then.
22 Thank you, Counsel.
23 MR. HILL: Thank you, Judge.
24 MR. BUDER: Thank you, your Honor.
25 (Proceedings adjourned at 4:22 p.m.)

STATE OF WASHINGTON)
) ss.
COUNTY OF GRANT)

C E R T I F I C A T E

I, TOM R. BARTUNEK, Court Reporter and Notary Public, in and for the County of Grant, State of Washington, do hereby certify that the foregoing and attached 14 pages is a true, correct and complete transcript of my stenographic notes, taken of the foregoing hearing, and taken at the time and place hereinbefore stated, and was transcribed under my direction and supervision, and completed on the 13th day of July, 2010.

Tom R. Bartunek

Certified Court Reporter #BARTUTR419M9
Notary Public
My Commission Expires: 9/13/2012

APPENDIX B

FILED

AUG 18 2010

KIMBERLY A. ALLEN
Grant County Clerk

07-377401

STATE OF WASHINGTON
GRANT COUNTY SUPERIOR COURT

In re the Detention of: GARY LEE CAMERON, Respondent.	NO. 06-2-00813-4 FINDINGS OF FACT, CONCLUSTIONS OF LAW, AND ORDER OF COMMITMENT

A trial was held in this matter pursuant to RCW 71.09.060 during the week of June 21, 2010. Throughout the course of trial, the Petitioner, State of Washington, was represented by Assistant Attorneys General JAMES BUDER and ANDREA JARMON. The Respondent was present in person during the trial in this matter and was represented throughout trial in this case by his attorney, BRETT HILL. The parties waived their respective rights to a jury trial and elected to have the matter tried to the Court. The Court heard the testimony presented by the following witnesses: Robin Van Allen, Amy Phenix, PhD, Brian Abbott, PhD, and Gary Cameron. The Court also considered the documentary exhibits that were admitted into evidence.

The Court, having heard the evidence presented and the argument of counsel, issued an oral decision on July 9, 2010, finding that the State has proven beyond a reasonable doubt that the Respondent is a sexually violent predator. That oral decision forms the basis of these findings of fact, conclusions of law, and order of civil commitment and is incorporated herein by reference.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

77

88

I. FINDINGS OF FACT

1. All of the foregoing facts contained in these findings of fact where proven beyond a reasonable doubt at trial in this matter.

2. The Respondent has previously been convicted of two sexually violent offenses as that term is defined by RCW 71.09.020(17). Specifically, Respondent has been convicted of Indecent Liberties Against a Child Under Age 14 and Rape of a Child in the First Degree

3. The Respondent suffers from pedophilia, a mental abnormality as that term is defined by RCW 71.09.020(8).

4. Respondent's mental abnormality causes him serious difficulty controlling his sexually violent behavior.

5. The Respondent's mental abnormality makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility. These terms are defined in RCW 71.09.020.

II. CONCLUSION OF LAW

1. This Court has proper jurisdiction over this matter.

2. The Respondent is a sexually violent predator as that term is defined by RCW 71.09.020(18).

Upon the Finding of this Court on July 9, 2010, that the Respondent, Gary Lee Cameron is a sexually violent predator, pursuant to RCW 71.09.060, the Court hereby enters the following:

////

////

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

89

ORDER OF COMMITMENT

The Respondent, Gary Lee Cameron, shall be transported and committed to the Special Commitment Center in Steilacoom, Washington, to the custody of the Department of Social and Health Services, for control, care, and treatment until such time as the Respondent's mental abnormality and/or personality disorder has so changed that the Respondent is safe to be conditionally released to a less restrictive alternative or unconditionally discharged.

IT IS SO ORDERED

DATED this 18 day of August, 2010.

THE HONORABLE JOHN ANTOSZ
Judge of the Superior Court

Presented by:

ROBERT M. MCKENNA
Attorney General

JAMES BUDER, WSBA #36659
ANDREA JARMON, WSBA #36277
Assistant Attorneys General
Attorneys for Petitioner

Copy received; Approved as to Form:

BRETT HILL, WSBA #21510
Attorney for Respondent

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

90

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

In re the Detention of Gary Cameron,	)	
	)	
STATE OF WASHINGTON/DSHS	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 29385-8-III
	)	
GARY CAMERON,	)	
	)	
Appellant.	)	

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 3RD DAY OF MARCH 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GARY CAMERON
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF MARCH 2011.

x Patrick Mayovsky