IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Detention of JAMES LaBAUM, Appellant.	No. 37934-1-II ORDER AMENDING OPINION

The unpublished opinion previously filed in this case on January 12, 2010, is hereby amended as follows:

The designation of James LaBaum in the caption is changed from "Respondent" to "Appellant."

Accordingly, it is

SO ORDERED.

DATED this _____ day of _____, 2010.

_____
QUINN-BRINTNALL, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Detention of JAMES LaBAUM, Respondent.	No. 37934-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Following a bench trial, the Cowlitz County Superior Court found that James LaBaum was a sexually violent predator (SVP) and ordered that he be committed to a secure facility indefinitely. On appeal, LaBaum challenged his commitment, arguing that the State was required to prove a recent overt act and that the State violated his right to due process when it failed to provide sufficient proof that he had committed a recent overt act. During oral argument, LaBaum's counsel conceded that our Supreme Court resolved this issue when it affirmed our opinion in *Fair v. State*, 139 Wn. App. 532, 161 P.3d 466 (2007), *aff'd sub nom. In re Detention of Fair*, 167 Wn.2d 357, 219 P.3d 89 (2009). Accordingly, we affirm.

FACTS

On December 16, 1999, when he was about 13 years old, the Cowlitz County Juvenile Court found LaBaum guilty of indecent liberties with forcible compulsion for isolating and forcefully taking advantage of a wheelchair-bound fellow student in an elevator. On December

27, 2001, it found him guilty of attempted first degree rape of a child for attempting to rape his eight-year-old cousin. This attempt was unsuccessful only because his penis was too large to fit into her vagina.

After serving 175 weeks in a juvenile detention facility on the attempted rape of a child conviction, LaBaum was paroled to the Citizen Access Residential Resources (CARR) program in Olympia, Washington, for developmentally disabled young adults. Due to a concern that LaBaum would be unable to control himself around other residents, he was the only resident at the facility and he was under the constant supervision of at least two adults at all times.

LaBaum lived at the CARR facility from March 2005 through April 2006, when he physically assaulted a staff member. LaBaum was found guilty of fourth degree assault for this attack. His parole was revoked and he was sent to Maple Lane, a juvenile detention facility, where he remained until his 21st birthday. He was confined there on January 9, 2007, when the State filed a petition to have him declared an SVP as defined by former RCW 71.09.020(16) (2006), recodified as RCW 71.09.020(18).[1]

The trial court conducted a competency hearing and it concluded, based on essentially uncontroverted evidence, that LaBaum was presently incompetent to stand trial. But under former RCW 71.09.060 (2006) and *In re Detention of Greenwood*, 130 Wn. App. 277, 122 P.3d 747 (2005), *review denied*, 158 Wn.2d 1010 (2006), SVP proceedings may occur regardless of the respondent's competence. The trial court appointed an experienced attorney to serve as

[1] Former RCW 71.09.020(16) states:

> "Sexually violent predator" means any person 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.

LaBaum's guardian ad litem.

Following a bench trial, the trial court entered findings of fact and conclusions of law. The trial court found that LaBaum was an SVP as defined in former RCW 71.09.020(16) and ordered that he be committed to the custody of the Department of Social and Health Services for placement in a secure facility for control, care, and treatment until further order of the court. LaBaum appeals.

ANALYSIS

This appeal presents two issues: first, whether, despite being incarcerated on a 2001 conviction for attempted first degree rape of a child following a violent but nonsexual violation of his parole conditions, the State was required to prove that LaBaum had committed a recent over act; and second, whether evidence that LaBaum masturbated to deviant themes including sexual activity with children and nonconsenting persons five to seven times daily and that he believed himself likely to reoffend against a minor male if released was sufficient proof of any required overt act.

LaBaum, who is now 23 years old, is developmentally disabled and has not been released "into the community" as that term is generally understood. But he was paroled from a juvenile facility where he was serving time for attempted first degree rape of a child to a secure community facility. The issues presented hinge on whether LaBaum's parole released him from total confinement into the community prior to his current period of incarceration. If it did, the State was required to prove a recent overt act. If LaBaum was not released to the community, it was not required to prove a recent overt act. Former RCW 71.09.020(10), recodified as RCW 71.09.020(12); former RCW 71.09.030(5) (1995); former RCW 71.09.060(1).

After the Supreme Court granted review of *Fair*, the State amended LaBaum's petition to allege a recent overt act:

> Respondent has committed a recent overt act, as that term is defined in [former] RCW 71.09.020(10). On or about December 20, 2006, during a forensic interview with Dr. Brian Judd, Respondent reported masturbating five to seven times per day to paraphilic themes involving coerced oral and anal intercourse with both minor and adult males and females. Respondent was engaging in these paraphilic behaviors just prior to the State filing its initial petition in this case on January 9, 2007.

Clerk's Papers (CP) at 63.

LaBaum does not assign error to the trial court's findings of fact and they are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (citing *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). He does assign error to the trial court's conclusions of law 10 and 11, which read as follows:

> Although the Petitioner pled a recent overt act, pursuant to [former] RCW 71.09.030(2) the Petitioner was not required to prove a recent overt act because Respondent was in total confinement on the day the petition initiating this matter was filed.

CP at 84.

> [T]his Court concludes that the Petitioner proved Respondent committed a recent overt act, as defined in [former] RCW 71.09.020(10), with evidence that Respondent was masturbating to deviant themes including sexual activity with children and nonconsenting persons five to seven time[s] daily, and also with evidence of Respondent's admission that he was going to reoffend against a minor male if released into the community.

CP at 84.

To civilly commit a person as an SVP, chapter 71.09 RCW, the State must prove that the person is an SVP beyond a reasonable doubt. An SVP is a person "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." Former RCW 71.09.020(16). Under former RCW 71.09.030(1), the State may file a petition to involuntarily commit a person as an SVP if that person was previously convicted of a "sexually violent offense [and] is about to be released from total confinement." Total confinement means confinement inside the physical boundaries of a facility or institution operated or used under contract by the State or any other unit of government for 24 hours a day, or pursuant to RCW 72.64.050 or .060. RCW 9.94A.030(47); *In re Det. of Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002).

When a person is not incarcerated at the time the State files the commitment petition, due process requires that the State also "prove present dangerousness with evidence of a recent overt act." *In re Det. of Lewis*, 163 Wn.2d 188, 194, 177 P.3d 708 (2008) (citing *In re Pers. Restraint of Young*, 122 Wn.2d 1, 41, 857 P.2d 989 (1993)). But when a person has remained in total confinement, the law does not require that the State prove an "impossibility," a recent overt act:

> "[W]here an alleged sexually violent predator has not been released into the community since the offender's last conviction, the only way the State could prove a recent overt act would be to go back to the last offense for which the offender has been convicted. After the offender has been *released into the community*, proof of a recent overt act is no longer an impossible burden for the State to meet."

In re Lewis, 163 Wn.2d at 200 (alterations in original) (quoting *In re Albrecht*, 147 Wn.2d at 10).

Here, LaBaum does not dispute that he was in "total confinement" at Maple Lane following revocation of his parole on his 2001 attempted first degree rape of a child conviction. Rather, he initially argued in his briefing that because he was released to CARR and revoked based on a violent but nonsexual misdemeanor assault, the State was required to prove a recent

overt act justifying his commitment as an SVP. But at oral argument, LaBaum conceded that, under *Fair*, the State was not required to plead and prove a recent overt act.

In *Fair*, at the time the State filed its SVP petition, the offender had been held in continuous custody on a robbery conviction following expiration of his sentence for second degree child molestation. 139 Wn. App. at 541. We held that the expiration of one sentence, without an intervening release to the community, does not prevent the State from filing an SVP petition while a defendant is still incarcerated, so long as one of the offenses leading to the incarceration satisfies the SVP statutory definitions. *Fair*, 139 Wn. App. at 542. We noted that it would lead to absurd results if we interpreted the SVP statute to require the State to plead and prove a recent overt act for continuously incarcerated offenders who serve concurrent sentences and the nonsexual offense sentence exceeds the sentence for the sexually violent offense. *Fair*, 139 Wn. App. at 541-42.

Our Supreme Court agreed and affirmed Fair's SVP commitment. *In re Fair*, 167 Wn.2d at 359. It likewise noted the absurd outcome that would result from Fair's interpretation of the SVP statute:

> Requiring proof of a recent overt act by an incarcerated person is just as absurd in Fair's case as it was in [*In re Detention of Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000)]. Both were continuously confined after being incarcerated for a sexually violent offense or an act that by itself would have qualified as a recent overt act. The fact that Fair continued to be incarcerated after serving his (shorter) child molestation sentence does not require the State to prove that a recent overt act occurred during his incarceration.

In re Fair, 167 Wn.2d at 368.

LaBaum conceded at oral argument that *Fair* controls. He further conceded that, under *In re Fair*, the State was not obliged to plead and prove a recent overt act under the facts of his

case. We accept LaBaum's concession and we hold that the State was not required to plead and prove a recent overt act because LaBaum was continuously confined after being incarcerated for a sexually violent offense or act that by itself would have qualified as a recent overt act, in this case, attempted rape of a child. *In re Fair*, 167 Wn.2d at 368.

Nevertheless, even if the State was required to prove a recent overt act, the record establishes that it did so out of an abundance of caution. A recent overt act is "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." Former RCW 71.09.020(10). In some circumstances, the due process requirement to prove dangerousness may be satisfied by the person's prior conviction when the petition is filed while the offender is incarcerated for a prior act that would itself qualify as a recent overt act. *See In re Henrickson*, 140 Wn.2d at 695. Whether the act resulting in a conviction underlying the alleged SVP's confinement is a recent overt act as defined in former RCW 71.09.020(10) is a question of law for the trial court. *In re Det. of Marshall*, 156 Wn.2d 150, 158, 125 P.3d 111 (2005); *State v. McNutt*, 124 Wn. App. 344, 350, 101 P.3d 422 (2004), *review denied*, 156 Wn.2d 1017 (2006).

When the act resulting in confinement has not caused harm of a sexually violent nature, here the assault on the CARR worker, an adjudication of the recent overt act question requires both a factual and legal inquiry. *McNutt*, 124 Wn. App. at 350. In such cases, the factual inquiry determines the circumstances of the alleged SVP's history and mental condition, while 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.

In re Marshall, 156 Wn.2d at 158 (citing *McNutt*, 124 Wn. App. at 350). There is no requirement that the recent overt act or threat be physically dangerous. *See In re Det. of Hovinga*, 132 Wn. App. 16, 130 P.3d 830 (act of masturbating while covertly following girls around a store), *review denied*, 158 Wn.2d 1024 (2006); *In re Det. of Broten*, 130 Wn. App. 326, 122 P.3d 942 (2005) (act of being in a park at a children's playground without a chaperone), *review denied*, 158 Wn.2d 1010 (2006); *In re Det. of Albrecht*, 129 Wn. App. 243, 252, 118 P.3d 909 (2005) (act of luring a young boy with 50 cents), *review denied*, 157 Wn.2d 1003 (2006).

Here, the trial court's unchallenged findings and conclusions show that the State proved a recent overt act. Furthermore, the record amply supports the challenged conclusion of law, which is really a mixed question of fact and law. The State proved a recent overt act.[2] *In re Marshall*, 156 Wn.2d at 158; *In re Hovinga*, 132 Wn. App. at 24; *In re Broten*, 130 Wn. App. at 335-36; *In re Albrecht*, 129 Wn. App at 252.

Accordingly, we hold that, under *Fair*, the State was not required to prove that LeBaum committed an overt act to support a finding that he is an SVP requiring confinement. *See In re Fair*, 167 Wn.2d at 368. Nevertheless, we further hold that the trial court's unchallenged findings as well as the challenged conclusion of law 11 amply satisfy any recent overt act requirement that the State may have had. Therefore, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

[2] We note that during oral argument, LaBaum conceded that the State proved a recent overt act.

We concur:

HOUGHTON, J.

VAN DEREN, C.J.