SUPREME COURT NO. 93815-6
COA NO. 32555-5-III

IN THE SUPREME COURT OF WASHINGTON

IN RE DETENTION OF RONALD LOVE:

STATE OF WASHINGTON,

Respondent,

v.

RONALD LOVE,

Petitioner.

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

The Honorable Robert G. Swisher, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Ronald Love asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Love requests review of the decision in In re Detention of Ronald Love, Court of Appeals No. 32555-5-III (slip op. filed June 14, 2016), attached as appendix A. The Court of Appeals entered an order denying reconsideration on October 4, 2016 (attached as appendix B).

C. ISSUES PRESENTED FOR REVIEW

1. Whether the evidence was insufficient to commit Love as a sexually violent predator under the law of the case doctrine, where the "to commit" instruction required the jury to find a mental abnormality *or* personality disorder made him likely to reoffend, but the State's expert witness opined only the combination of mental abnormality *and* personality disorder made him likely to reoffend?

2. Whether the "to commit" instruction, phrased in the disjunctive, violated Love's right to due process because it allowed the jury to base its verdict on speculation, lessened the State's burden of proof, and was unsupported by substantial evidence?

3. Whether trial counsel rendered ineffective assistance in not objecting to the flawed "to commit" instruction?

4. Whether the trial court committed reversible error in admitting former testimony under ER 804(b)(1) because the State failed to establish the witness's unavailability?

D. STATEMENT OF THE CASE

In 2005, a judge found Love to be a sexually violent predator (SVP) following a bench trial and ordered his indefinite commitment under chapter 71.09 RCW. CP 804. In 2013, the court ordered an unconditional release trial after Love showed probable cause he no longer met the commitment criteria. CP 804-07.

At the ensuing trial, the State presented evidence from Dr. Phenix concerning Love's past sex offenses ranging from 1973 to 1992. 1RP 784, 792-95, 878-91, 1008-14, 1503-05, 1534. Phenix diagnosed Love with alcohol use disorder, rape paraphilia, and antisocial personality disorder. 1RP 858, 869, 894, 897, 902, 907-08. She testified none of these mental conditions standing alone made Love likely to sexually reoffend; rather these conditions worked in combination to render him dangerous to the community. 1RP 913, 988-90. Phenix also relied on actuarial instruments to conclude he was more likely than not to commit future acts of sexual violence. 1RP 918, 925-27, 935-40.

In his defense, Love presented evidence from psychologists challenging the bases for Dr. Phenix's diagnoses and assessment that he

was likely to reoffend,[1] evidence of his involvement in Native American religious and healing practices that showed he had changed for the better,[2] and medical evidence that his current physical state made it unlikely he would engage in sexual violence.[3] Love denied committing any sex offenses, including the 1978 rape of A.P. 1RP 1470-76, 1599, 1895.

The State sought to admit A.P.'s former testimony under ER 804(b)(1). 1RP 1023. The defense objected, arguing the State had not shown A.P. was unavailable under ER 804 and that the testimony was cumulative and unnecessarily prejudicial. 1RP 1023. The State contended A.P. was not amenable to subpoena because she lived in Puerto Rico and was therefore "unavailable." 1RP 1024. The State further argued her former testimony was not cumulative because Dr. Phoenix's testimony regarding the A.P. rape was admitted for the limited purpose of explaining the basis for her expert opinion. 1RP 1024. A.P.'s testimony, in contrast, was offered for substantive purposes. 1RP 1024. The State maintained A.P.'s testimony was needed for substantive purposes because "there's room for difference of opinion about the -- about what happened during those incidents." 1RP 1025. The court admitted A.P.'s former testimony,

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[1] 1RP 1225, 1236-56, 1271, 1292, 1655-58, 1664, 1680, 1725, 1779, 1852.
[2] 1RP 1080-81, 1311-12, 1334, 1344, 1347-51, 1387, 1389, 1078-81, 1086, 1308-09, 1315-16, 1400-02, 1407, 1691-93, 1719-23, 1789.
[3] 1RP 1369-78.

accepting the State's representation that A.P. was unavailable. 1RP 1026-27. The testimony was read to the jury. 1RP 1199-1201; CP 32-48.

The court instructed the jury that to commit Mr. Love as an SVP, it needed to find that he had previously been found to be an SVP, he continued to suffer from "a mental abnormality or personality disorder" and that "[t]he mental abnormality or personality disorder continues to make Ronald Love likely to commit predatory acts of sexual violence unless confined to a secure facility." CP 16. The jury returned a verdict that Love remained an SVP. CP 8.

On appeal, Love argued the evidence was insufficient under the law of the case doctrine, the "to commit" instruction lessened the State's burden of proof and was unsupported by the evidence, trial counsel was ineffective in not objecting to the "to commit" instruction, and the trial court wrongly admitted A.P.'s former testimony without a showing of unavailability. See Brief of Appellant at 11-34; Reply Brief at 1-14. The Court of Appeals affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE VERDICT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE UNDER THE LAW OF THE CASE DOCTRINE.

Under "the law of the case" doctrine, what facts need to be proven depends on how the jury is instructed. "[I]nstructions given to the jury by

the trial court, if not objected to, shall be treated as the properly applicable law." Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 L. Orland & K. Tegland, Wash. Prac., Judgments § 380, at 56 (4th ed. 1986)). Where a party challenges the sufficiency of evidence on appeal, "[t]he sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions." Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948). Whether the Court of Appeals can disregard the law of the case doctrine in favor of interpreting the meaning of a jury instruction through resort to statutory construction is an issue of substantial public interest warranting review. RAP 13.4(b)(4)

The jury was instructed that it must find beyond a reasonable doubt that Love suffers from a "mental abnormality or personality disorder" and that "[t]he mental abnormality or personality disorder continues to make Ronald Love likely to commit predatory acts of sexual violence unless confined to a secure facility." CP 16. Use of the disjunctive "or" in the "to commit" instruction, instead of the conjunctive "and," requires reversal of the verdict under the law of the case doctrine. The State's expert testified the combination of Love's mental abnormality and personality disorder made him likely to reoffend, not that one or the other standing alone made him likely to reoffend. 1RP 913, 988-90. The evidence does

not show one mental condition or the other made Love likely to reoffend, but the "to commit" instruction required that finding because of its use of the disjunctive "or." The evidence is therefore insufficient to sustain Love's commitment under the jury instructions. RCW 71.09.090(3)(c); U.S. Const. amends. V, XIV; Const. art. 1, § 3.

The Court of Appeals miscast Love's argument in an effort to defeat it: "Although cast as a jury instructional issue, his true challenge is to the construction of the statute since the challenged aspect of the jury instruction merely recites the statutory definition." Slip op. at 6 n.2. This is untrue. Love does not challenge the statute. Love raised a "law of the case" sufficiency argument and the Court of Appeals, unable to deal with it, ignored it in favor of a theory more to its liking.

The Court of Appeals relied on the notion that the word "or" can be either exclusive or inclusive. Slip op. at 7 (citing Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010)). The Court in Lake, for example, engaged in statutory construction to determine whether the word "or" *used in a statute* should be interpreted as an exclusive disjunctive or an inclusive disjunctive. Lake, 169 Wn.2d at 527-31. The Court of Appeals then said the Supreme Court has already

construed the relevant statutory language under RCW 71.09.020(18)[4] as meaning an inclusive "and" rather than an exclusive "or." Slip op. at 7 (citing In re Pers. Restraint of Young, 122 Wn.2d 1, 58, 857 P.2d 989 (1993)). To be precise, the statute is construed to permit commitment of a person who has a combination of mental abnormality and a personality disorder because these conditions can act alone or in tandem. Young, 122 Wn.2d at 58.

But the statutory analysis does not resolve Love's law of the case challenge. The jury gets the law from the court through its instructions. The Court of Appeals went wrong in interpreting the meaning of the instruction as if it were a statute. A jury lacks the ability to apply principles of statutory construction to interpret the meaning of a statute. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Instructions are read in the same manner as an ordinary, reasonable juror would read them. State v. Killingsworth, 166 Wn. App. 283, 288, 269 P.3d 1064 (2012). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain

[4] An SVP is "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." RCW 71.09.020(18).

the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev. in part on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). An ordinary, reasonable juror does not apply principles of statutory construction to figure out whether "or" really means "and" in the "to commit" instruction. See State v. Owens, 180 Wn.2d 90, 101 n.6, 323 P.3d 1030 (2014) (conjunctive "and" rather than a disjunctive "or" in the "to convict" instruction became law of the case in the absence of objection); State v. Stephens, 93 Wn.2d 186, 189-90, 607 P.2d 304 (1980) (where defendant was charged with one count of assault against two victims conjunctively, the instruction referencing the names of the victims in the disjunctive violated right to jury unanimity).

Whether an instruction is rightfully or wrongfully given, it is binding and conclusive upon the jury. State v. Hickman, 135 Wn.2d 97, 102 n.2, 954 P.2d 900 (1998); see McGovern v. Greyhound Corp., 53 Wn.2d 773, 779-80, 337 P.2d 290 (1959) ("Although we do not approve of the language used in this part of the instruction, as given, since no exception was taken thereto, it became the law of the case into which we will not inquire."). In the absence of expert testimony that either a mental abnormality *or* personality disorder caused Love to be at risk of reoffense, sufficient evidence is lacking to prove the proposition required by the jury instruction.

2. THE DISJUNCTIVE "TO COMMIT" INSTRUCTION IS FLAWED BECAUSE IT ALLOWED THE JURY TO BASE ITS VERDICT ON SPECULATION, LESSENED THE STATE'S BURDEN OF PROOF, AND WAS UNWARRANTED BY THE EVIDENCE.

Even if the evidence is sufficient to sustain the verdict under the "law of the case" doctrine, the "to commit" instruction is flawed because substantial evidence did not support use of the disjunctive "or" on the issue of whether the mental abnormality or the personality disorder made Love likely to reoffend. The instruction improperly allowed the jury to base its verdict on a finding that either the mental abnormality or the personality disorder made Love likely to reoffend, rather than requiring the jury to find both conditions made him likely to reoffend. In this manner, the instruction permitted the jury to render a verdict based on speculation and lessened the State's burden of proving both conditions made Love likely to reoffend, in violation of due process. U.S. Const. amends. V, XIV; Const. art. 1, § 3. In the alternative, Love's counsel provided ineffective assistance in failing to object to the "to commit" instruction. Given the frequency with which experts rely on a combination of mental abnormality and personality disorder to opine someone meets the SVP definition, this case presents an issue of significant constitutional law or substantial public interest calling for review. RAP 13.4(b)(3), (4).

a. The disjunctive language in the "to commit" instruction permitted the jury to choose between the mental abnormality or the personality disorder as the sole condition that made Love likely to reoffend, but the evidence did not support such a finding.

The Court of Appeals did not address Love's argument that the "to commit" instruction is infirm. In connection with the sufficiency issue, the Court of Appeals relied on Young's recognition that a "mental abnormality" and "personality disorder" can work in conjunction to satisfy the statutory definition of an SVP. Slip op at 7-8. This is an accurate statement of the law. It also shows why the "to commit" instruction is flawed.

The determination of whether an instruction invades a fundamental constitutional right "requires careful attention to the words actually used in the instruction because whether a defendant has been accorded full constitutional rights depends on the way a reasonable juror could have interpreted the instruction." State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The "to commit" instruction, through use of the disjunctive, allowed the jury to find Love was an SVP if either the mental abnormality made him likely to reoffend or the personality disorder made him likely to reoffend. See Viking Automatic Sprinkler Co. v. Pac. Indem. Co., 19 Wn.2d 294, 298, 142 P.2d 394 (1943) ("Framed in the disjunctive, as it is, the instruction permitted the jury to return a verdict for respondent without

regard to [one of the causes of the harm]."); State v. Bower, 28 Wn. App. 704, 708, 626 P.2d 39 (1981) ("Here 'threat' was defined to include the requisite mental state, but the disjunctive instruction was inadequate to inform the jury that the alternatives of force or violence had to be accompanied by the knowledge or intent that the conduct would prevent the performance of the guard's duties."), disapproved on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).

A jury instruction must be supported by substantial evidence. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Substantial evidence did not support use of the disjunctive "or" in the "to commit" instruction. Dr. Phenix testified the combination of the mental abnormality and the personality disorder made Love likely to reoffend. 1RP 913, 960-61, 988-90. Expert testimony was needed to support the verdict because an essential element needed to be established by an opinion that is beyond the expertise of a layperson. Berger v. Sonneland, 144 Wn.2d 91, 110, 26 P.3d 257 (2001); In re Detention of Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006); RCW 71.09.020(9). For this reason, the instruction needed to use the conjunctive "and." Use of the disjunctive "or" in this instruction was unwarranted by the evidence presented to the trier of fact. "It is prejudicial error to submit an issue to the jury that is not warranted by the evidence." State v. Clausing, 147 Wn.2d 620, 627, 56 P.3d 550 (2002).

The instruction may have misled the jury into believing it could find Love was an SVP based on the mental abnormality or personality disorder alone as the cause of risk of reoffense. Although the Court of Appeals was content to interpret the meaning of the instruction as if it were construing a statute, "the standard for clarity in jury instructions is higher than that for a statute because although courts may use statutory construction, juries lack these same interpretive tools." State v. Harris, 122 Wn. App. 547, 553-54, 90 P.3d 1133 (2004).

That the instruction was based on statutory language does not save it. An instruction taken from the language of a statute "must be justified by the evidence, pertinent to the case, confined to the issues of the case, and it must not mislead the jury." Day v. Goodwin, 3 Wn. App. 940, 944, 478 P.2d 774 (1970). Love had the right "to have a jury base its decision on an accurate statement of the law applied to the facts in the case." Miller, 131 Wn.2d at 90-91. In this regard, "an instruction that is correct in the abstract, or correct as applied to one set of facts, may become misleading when applied to another set of facts." State v. Irons, 101 Wn. App. 544, 553, 4 P.3d 174 (2000). The set of facts at play here is Dr. Phenix's testimony that the combination of the mental abnormality and personality disorder makes Love likely to reoffend. The jury needed to be instructed in the conjunctive to avoid submitting an issue to the jury that

was not supported by substantial evidence and to avoid lowering the State's burden of proof. The alternative means of establishing someone is an SVP — mental abnormality and personality disorder — can work in conjunction. In re Detention of Halgren, 156 Wn.2d 795, 810, 132 P.3d 714 (2006). This means in a particular case the conjunctive "and" is appropriate in a jury instruction instead of the disjunctive "or" when it comes to the mental conditions that contribute to risk of reoffense.

Pattern instructions are supposed to be individually tailored to the facts of a particular case, not mindlessly replicated regardless of the evidence presented at trial. 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 0.10 (6th ed.). WPI 365.34, the pattern "to commit" instruction, thus notes for "elements (2) and (3), use the bracketed 'mental abnormality' and/or 'personality disorder' language in accord with the evidence presented at trial." The instruction in Love's case needed to be tailored to the evidence presented. It wasn't. That's reversible error.

b. Love's counsel provided ineffective assistance in failing to object to the "to commit" instruction.

Love's trial counsel did not object to the "to commit" instruction. Violation of the due process right to a fair trial by a misleading and legally inapplicable instruction is an error of constitutional magnitude under RAP 2.5(a)(3). State v. O'Hara, 167 Wn.2d 91, 98-99, 105, 217 P.3d 756 (2009).

But if the error is not reviewable under RAP 2.5(a)(3), then Love's ineffective assistance of counsel claim will need to be reviewed.

Those facing involuntary commitment have a statutory and due process right to counsel and courts apply the Strickland standard to determine whether counsel was ineffective. In re Detention of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015, 1021 (2009) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); U.S. Const. amend. V and XIV; RCW 71.09.050(1); RCW 10.101.005. To establish ineffective assistance of counsel, Love must show deficient performance and resulting prejudice. Moore, 167 Wn.2d at 122. Deficient performance is that which falls below an objective standard of reasonableness. Id. There is no legitimate reason why Love's counsel failed to object to the "to commit" instruction on the basis that the use of the disjunctive "or" lessened the State's burden of proof, allowed the jury to base its verdict on speculation, and was not supported by substantial evidence. The flawed "to commit" instruction made it easier for the State to prove and the jury to find Love met the SVP definition. No competent attorney makes it easier for his client to be civilly committed.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Moore, 167 Wn.2d at 122. Love shows prejudice because, based on the evidence

presented in his defense, there was a basis for a reasonable jury to reject either the mental abnormality or the personality disorder as the condition that made Love likely to reoffend. Confidence in the outcome is undermined because the "to commit" instruction allowed the jury to find Love met the SVP definition based on one or the other but not both conditions.

3. THE ADMISSION OF PRIOR WITNESS TESTIMONY CONSTITUTED REVERSIBLE ERROR BECAUSE THE STATE FAILED TO ESTABLISH THE WITNESS WAS UNAVAILABLE TO TESTIFY AT THE PRESENT TRIAL.

To admit a witness's prior testimony as an exception to the hearsay rule under ER 804, the proponent must establish unavailability, which means the use of reasonable means to secure the witness's attendance. The State made no effort to obtain the voluntary attendance of A.P. as a witness at trial. Having failed to establish A.P. was unavailable, her former testimony was inadmissible. In holding any error was harmless, the Court of Appeals decision conflicts with precedent. Review is warranted under RAP 13.4(b)(2).

ER 804(a)(5) defines a witness as unavailable if the witness "[i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." "If a witness is found unavailable under this test, the witness'

former testimony may be admitted into evidence under ER 804(b)(1)." Rice v. Janovich, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987).

ER 804(b)(1) provides: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) *Former Testimony. Testimony given as a witness at another hearing* of the same or a different proceeding, *or in a deposition* taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." (emphasis added).

At the trial level, the State argued A.P. was unavailable because she could not be subpoenaed. 1RP 1024. But the inability to reach a witness by subpoena power is insufficient to establish unavailability. Rice, 109 Wn.2d at 57. The party calling the witness must also establish an inability to reach the witness by "other reasonable means." Young v. Key Pharm., Inc., 63 Wn. App. 427, 432, 819 P.2d 814, review denied, 118 Wn.2d 1023, 827 P.2d 1392 (1991). "The party offering the out-of-court statement of a witness beyond the legal reach of a subpoena should at least be required to represent to the court that it made an effort to secure the voluntary attendance of the witnesses at trial." Rice, 109 Wn.2d at 57. On

appeal, the State acknowledged it made no such effort. Brief of Respondent at 12.

Even so, the Court of Appeals could not quite bring itself to acknowledge admission of A.P.'s former testimony was error. Instead, it held any error was harmless because "[t]he evidence could have been admitted through the prior deposition, making the problem merely one of form rather than substance." Slip op. at 10. In support, the Court of Appeals relied on CR 32(a)(3), which provides a deposition is admissible if the witness resides out of the county more than 20 miles from the site of the trial. Slip op. at 9-10.

The Court of Appeals' decision on this point conflicts with precedent. Absent a showing of unavailability, any "deposition taken in compliance with law in the course of the same or another proceeding" is inadmissible hearsay under ER 804(b)(1). "ER 804(b)(1) requires the proponent of the evidence to establish unavailability of the [witness] before deposition testimony may be admitted at trial." State v. Scott, 48 Wn. App. 561, 564, 739 P.2d 742 (1987), aff'd, 110 Wn.2d 682, 757 P.2d 492 (1988); accord Kinsman v. Englander, 140 Wn. App. 835, 840, 167 P.3d 622 (2007). In light of this authority, where the State fails to establish the witness's unavailability under ER 804(b)(1), that witness's

deposition cannot be admitted under CR 32(a)(3) and the error in admitting A.P.'s former testimony cannot be washed away on this ground.

Moreover, there is no deposition. The only thing the State sought to be admitted, and what was admitted, was A.P.'s former trial testimony. CP 32-48. Nothing in the record establishes A.P. even gave a deposition. The Court of Appeals assumed a deposition existed. Appellate courts "may not speculate upon the existence of facts that do not appear in the record." State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977).

The Court of Appeals further opined the error was harmless because the incident involving A.P. "did not seriously impact the jury's ultimate decision in this case." Slip op. at 11. The Court of Appeals' harmless error analysis cannot be reconciled with the Supreme Court's categorical recognition that "[t]he admission of evidence without a proper showing of unavailability of the witness is reversible error." Rice, 109 Wn.2d at 58. Love's case provides this Court with an opportunity to clarify whether this is the appropriate standard for assessing prejudice in this context.

Even if the error is subject to harmless error analysis under an ordinary evidentiary error standard, Love need only show a reasonable probability that the error affected the outcome. State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961, 965 (1981). An expert's opinion is only as good

as the facts upon which it relies. The erroneous admission of A.P.'s testimony as substantive evidence, which countered Love's contradictory testimony on the matter, improperly bolstered Dr. Phenix's opinion. Phenix's testimony on the A.P. rape was not substantive evidence; it was admitted as the basis for her expert opinion. 1RP 875-76; CP 14. The admission of facts forming the basis for an expert's opinion is not proof of them. Group Health Co-op. of Puget Sound, Inc. v. Dep't of Revenue, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986). Dr. Phenix relied on the A.P. rape in forming her opinion that Love harbored deviant sexual arousal. 1RP 885-86. The probative force of her expert testimony hinges on the accuracy of the bases for her opinion: if a basis is false or mistaken, then the expert's opinion has diminished value. Without substantive evidence regarding A.P. to back up Dr. Phenix's opinion, the jury may have been more inclined to discount the persuasive force of her expert testimony. A new trial is necessary when "there is no way to know what value the jury placed upon the improperly admitted evidence." Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983).

Further, the State argued A.P.'s former testimony, offered as substantive evidence, was important to rebut Love's version of events because there was "room for difference of opinion" about what happened. 1RP 1024-25. This undermines the State's current, and contrary, assertion

on appeal that A.P.'s substantive testimony was not at all important. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014) (recognizing State's flip-flop on importance of evidence undermined its harmless error argument). Dr. Phenix's testimony was not substantive evidence, so the State needed A.P.'s testimony admitted as substantive evidence to counter Love's denial of the rape and his account of his relationship with the woman.

F. CONCLUSION

For the reasons stated above, Love requests that this Court grant review.

DATED this 3rd day of November 2016.

Respectfully submitted,

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APPENDIX A

FILED
June 14, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Detention of	)	
	)	No. 32555-5-III
RONALD D. LOVE,	)	
	)	
	)	
Appellant.	)	UNPUBLISHED OPINION

KORSMO, J. — Ronald Love appeals from a jury's determination that he remains a sexually violent predator (SVP) despite his evidence to the contrary. We conclude that there were no evidentiary errors of consequence and that the evidence supported the jury's verdict. We thus affirm.

FACTS

Mr. Love was originally committed as a sexually violent predator in 2005. Evidence adduced at that trial included a recitation of Mr. Love's history of sexually violent assaults committed in California during the 1970s. In 1973, Mr. Love, then 16, was convicted of attempting to rape a six-year-old. Two years later he sodomized a juvenile male and attempted to rape a juvenile female. In 1978, he and some accomplices attempted to kidnap a 16-year-old; that incident did not lead to a criminal prosecution. Later that year, in separate incidents he raped two women on the same night. He pleaded

guilty to one count of forcible rape for each of the two women. After release from custody in California he moved to Pasco. In 1991, Mr. Love was convicted of attempting to rape a 19-year-old boy.

SVP proceedings were filed in 2005 as Mr. Love was nearing the end of his Washington prison sentence. That matter proceeded to a bench trial. Among the evidence considered at trial was the testimony of A.P., one of the 1978 rape victims. She traveled to Pasco from Puerto Rico to describe Mr. Love's entry into her home and ensuing sexual assault. After considering expert testimony and the testimony of some of the victims, the court found that Mr. Love was a sexually violent predator and committed him to the Special Offender Center.

In 2013, Mr. Love brought a petition for an evidentiary hearing, asserting he no longer met the requirements to be considered an SVP. Clerk's Papers (CP) at 805. To support that petition he presented declarations from Dr. Robert Halon and Brad Mix, a Native American Healer, indicating that during his commitment, he had been an active participant in Native American culture, rituals, and healing, that serve as equivalents to treatment, and that through those programs he has gained control over his impulses and eliminated his antisocial behaviors. He also submitted evidence of increasing health problems. The court granted a new trial after determining Mr. Love presented probable cause that he no longer met the definition of an SVP.

In the ensuing trial, the State presented evidence from Dr. Amy Phenix concerning Mr. Love's past crimes as well as her psychological assessment of him. She diagnosed Mr. Love with alcohol dependence, rape paraphilia, and antisocial personality disorder. She gave substantial information about all three of these disorders; her ultimate conclusion was that they worked in combination to render him dangerous to the community. She also applied several actuarial instruments to Mr. Love, including a dynamic risk assessment, the Structured Risk Assessment-Forensic Version (SRA-FV), and concluded he was more likely than not to commit future acts of sexual violence.

In his defense, Mr. Love presented evidence from psychologists challenging the bases for Dr. Phenix's diagnoses and assessment that he was likely to reoffend, evidence from Native leaders involved in religious and healing practices at the commitment center to the effect that he was no longer likely to engage in criminal activities, and medical evidence that his current physical state made it unlikely he would engage in acts of violence. He also testified in his own defense and denied ever having committed any acts of sexual violence. He also asserted he had only pleaded guilty as part of plea deals to get reduced charges on non-sexual, violent crimes that he did commit. He also testified that A.P. had been a prostitute.[1]

[1] A.P. testified in the 2005 trial that she had worked for the Superior Court and the District Attorney in Modesto, California at the time of the attack.

Apparently surprised by Mr. Love's testimony, the State offered the previous testimony of A.P. to rebut it. The defense objected on the basis that the testimony was cumulative to that of Dr. Phenix, who already had described the incident, and that the State had made no effort to seek A.P.'s presence from Puerto Rico before offering the transcript of her previous testimony. The State argued that A.P. lived in Puerto Rico and was therefore unavailable because she was not amenable to a subpoena. The trial judge admitted the testimony.

The court instructed the jury that to commit Mr. Love as a sexually violent predator, it needed to find that he had previously been found to be an SVP, he continued to suffer from "a mental abnormality or personality disorder" that made it difficult to control his sexually violent behavior, and that the "mental abnormality or personality disorder" continues to make it more likely that he would reoffend. CP at 16. Defense counsel did not object to instruction 5 and had proposed an instruction containing similar language. CP at 64.

The jury returned a verdict that Mr. Love remained an SVP. CP at 8. The court entered an order committing Mr. Love to the Special Offender Center. CP at 7. Mr. Love then timely appealed to this court.

ANALYSIS

This appeal raises multiple challenges that we address as three issues, but the only two discussed in any detail involve Mr. Love's challenges to the sufficiency of the

evidence and use of the prior testimony of A.P. After briefly discussing general principles governing review of SVP cases and Mr. Love's challenge to the SRA-FV dynamic risk assessment tool, we then address the sufficiency of the evidence and A.P.'s testimony.

Appellate courts apply the criminal standard to sufficiency challenges made to SVP civil commitments. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004). A commitment order is reviewed to see if, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the State has proven each required element beyond a reasonable doubt. *Id.* A claim of insufficiency admits the truth of the State's evidence, along with all reasonable inferences that may be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

An SVP is someone "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). A "mental abnormality" is "a congenital or acquired 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). A mental abnormality, when coupled with an individual's history of sexually predatory acts, supports the conclusion

that the person has serious difficulty controlling his or her behavior. *Thorell*, 149 Wn.2d at 742.

The one issue we summarily address is the challenge to Dr. Phenix's use of the SRA-FV to support her opinion that Mr. Love continued to be an SVP. This court has concluded that the test satisfies the standard of *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923). *See In re Det. of Ritter*, 192 Wn. App. 493, __ P.3d __ (2016); *In re Det. of Pettis*, 188 Wn. App. 198, 352 P.3d 841, *review denied*, 184 Wn.2d 1025 (2015). We will not revisit those decisions.

Sufficiency of the Evidence

Mr. Love's primary remaining contention is a claim that the evidence is not sufficient to support the jury's verdict given the instructions. His challenge combines a traditional sufficiency of the evidence argument with a law of the case argument predicated on his construction of the definition of the term "sexually violent predator." As the Washington Supreme Court did nearly a quarter century earlier, we reject his reading of the statutory language[2] and conclude that the evidence did support the jury's verdict.[3]

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[2] Although cast as a jury instructional issue, his true challenge is to the construction of the statute since the challenged aspect of the jury instruction merely recites the statutory definition.

[3] In light of our conclusion, we need not address the State's argument that Mr. Love invited the alleged error or his rejoinder that counsel performed ineffectively by proposing similar language. There was no instructional error.

"Sexually violent predator" is defined as 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." RCW 71.09.020(18). The elements instruction provided to the jury largely tracked this definition. CP at 16. In particular, the second element required the jury to find that Mr. Love "continues to suffer from a mental abnormality or personality disorder." *Id.* (emphasis added). Mr. Love contends that use of the word "or" renders the evidence insufficient to support the verdict because Dr. Phenix testified it was the *combination* of Mr. Love's mental abnormalities and personality disorders, rather than a single one of them, that established his future dangerousness.

This argument is largely semantic, but it turns on a not uncommon problem of construing the meaning of the word "or." In common English usage, the word "or" can be either exclusive or inclusive. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010). The meaning of the term typically is derived from the context in which it is used. *Id.* Mr. Love argues that the instruction (and hence the statute) apply an exclusive "or," but the Washington Supreme Court already has construed this statutory language as meaning "and." *In re Det. of Young*, 122 Wn.2d 1, 58, 857 P.2d 989 (1993) *superseded by statute on other grounds as stated in In re the Det. of Thorell*, 149 Wn.2d at 746. The terms "mental abnormality" and "personality

disorder" are both defined by statute, and nothing indicates that an individual might not suffer from both. *Young* recognizes that both can work in conjunction to satisfy the statutory definition.[4] *Id.* Consequently, evidence that the combination of Mr. Love's personality disorders and his mental abnormalities made it likely that he would commit future acts of sexual violence was properly considered by the jury.

Thus viewed, the evidence was sufficient to support the jury's verdict. The evidence established that Mr. Love had previously been found to be an SVP. There was testimony from Dr. Phenix that he continues to suffer from mental abnormalities and personality disorders. She also opined that the combination of Mr. Love's current problems made it likely that he still will engage in acts of predatory sexual violence. The jury was free to credit that testimony and therefore find that each of the statutory elements was proven.

The evidence supported the jury's verdict.

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[4] The Legislature intended that all dangerous sex offenders be incapacitated and treated. Frequently . . . an individual will suffer from multiple mental abnormalities and personality disorders which make violent rape likely. It would thwart the legislative purpose if the Statute only allowed the commitment of those who suffer from one or the other, while prohibiting the commitment of more seriously afflicted sexually violent predators.

In re the Det. of Young, 122 Wn.2d at 58.

Admission of Prior Testimony of A.P.

Mr. Love also argues that the trial court committed error when it admitted the transcript of A.P.'s testimony from the first trial. If error, it was harmless.

Typically, rulings admitting or excluding evidence are reviewed for an abuse of discretion. *In re Det. of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Error in the admission of evidence is harmless if "within reasonable probabilities" it did not affect the outcome of the trial. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).[5]

Former testimony is exempted from the reach of the hearsay rule if the witness is unavailable and the opposing party previously had the opportunity to develop the testimony. ER 804(b)(1). A declarant is unavailable if she is absent from the proceedings and the proponent was not able to procure her attendance. ER 804(a)(5). In addition, a deposition is admissible if the witness resides out of the county more than 20 miles from the site of the trial. CR 32(a)(3).

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[5] Even constitutional error, such as the omission of an element from a "to convict" instruction, is harmless error if it is clear beyond a reasonable doubt that the error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); *State v. Thomas*, 150 Wn.2d 821, 845, 83 P.3d 970 (2004).

Given that A.P. lived in Puerto Rico and could not be subpoenaed, the State contends she was unavailable. Additionally, the State contends any error was harmless since (1) her deposition governing the same discussion of the facts of the 1978 case could have been used, and (2) the substance of those facts were already before the jury from the testimony of Dr. Phenix. We agree that A.P.'s substantive description of the event was not critical to the outcome of this action.

First, we note that while A.P. was outside the subpoena power of the court, the rule still requires the State as proponent of the testimony to make a good faith effort to secure the voluntary attendance of the witness. *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987). Given that A.P. did appear to testify at the 2005 SVP trial, there certainly was the possibility that she would voluntarily appear if asked, even though the mid-trial request would not have amounted to much advance notice.

Nonetheless, any error was harmless for the reasons noted. The evidence could have been admitted through the prior deposition, making the problem merely one of form rather than substance. While A.P.'s version of the events was already before the jury through Dr. Phenix, that evidence was admitted for the limited purpose of explaining Dr. Phenix's evaluation of Mr. Love. ER 703. Here, the primary purpose of using A.P.'s testimony was to rebut Mr. Love's new version of the 1978 attack. The only element seriously at issue in this trial was whether Mr. Love was currently dangerous or not in

light of his progress in treatment. The 1978 incident did not seriously impact the jury's ultimate decision in this case.

Accordingly, we conclude that the error was harmless since it did not realistically impact the verdict. The judgment is affirmed.

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

Korsmo, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

APPENDIX B

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

In the Matter of the Detention of,	)	No. 32555-5-III
RONALD LOVE,	)	
	)	ORDER DENYING
	)	MOTION FOR
Appellant.	)	RECONSIDERATION

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 14, 2016 is hereby denied.

PANEL: Judges Korsmo, Fearing, Pennell

FOR THE COURT:

GEORGE FEARING
Chief Judge

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State V. Ronald Love

No. 32555-5-III

Certificate of Service

On November 3, 2016, I mailed and or e-served the petition for review directed to:

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Re Ronald Love
Cause No., 32555-5-III in the Court of Appeals, Division III, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

John Sloane
Office Manager
Nielsen, Broman & Koch

11-03-2016
Date
Done in Seattle, Washington