NO. 48150-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE THE DETENTION OF DALE ROUSH

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The erroneously given instruction was an impermissible and prejudicial comment on the evidence because it told the jury that key disputed matters of fact had been established as a matter of law.

The outcome of Dale Roush's conditional release trial turned on the jury's evaluation of the fit between the less restrictive alternative (LRA) plan he proposed and the condition of his mental health at the time of the LRA trial. The erroneously given jury instruction allowed the State to declare he was, as a matter of law, gravely ill and highly dangerous.[1] The trial prosecutor made these powerful pronouncements the focal point of the State's closing. See AOB at 16-20; CP 984-1018.

The erroneously given jury instruction stripped Mr. Roush of the ability to challenge the State's factual assertions about his mental health, dangerousness, and his alleged impaired volitional control. Not surprisingly, this blatant comment on the facts led the jury to declare the proposed LRA was not adequate to protect the community. CP 1346.

[1] The objected-to Instruction No. 3 declared to the jury, in the present tense, that Mr. Roush "is a sexually violent predator" and specified this means he "suffers from a mental abnormality or personality disorder which makes [him] likely to engage in predatory acts of sexual violence if not confined to a secure facility." CP 1352.

An impermissible comment on the evidence under Article IV, Section 16 is one that conveys to the jury the court's attitude toward the merits of the particular case. Here, the trial prosecutor relied on the erroneous instruction to proclaim to the jury, in strokes broader than the statutory criteria themselves, that Mr. Roush's mental illness and dangerousness were verities:

> He is a sexually violent predator. That's not in dispute in this case. That's what he is as he sits here before you. That means that he's mentally ill and dangerous.

10/6/15pm RP60.

As the Court knows, the instruction proposed by Mr. Roush tracked the use of the past tense from the preliminary pattern instruction. WPI 365.30. His proposed instruction read: "The Respondent was previously found to meet the definition of a sexually violent predator in 2002." CP 742. WPI 365.30 reads: "In an earlier proceeding, the respondent, (name of respondent), has been adjudicated to be a sexually violent predator." WPI 365.30. But the State does not even cite WPI 365.30 in its response, let alone discuss its applicability to the issue on appeal.

The State takes a position contrary to what it argued below, namely, that Mr. Roush's ongoing status as a sexually violent predator

was irrelevant to that trial. See BOR at 13-14, 24 ("Roush's continuing status as an SVP… was not an issue at all.") This is disingenuous.

The legality of Mr. Roush's status as someone civilly committed under RCW 71.09 was not at issue at the trial because he never filed for unconditional discharge. But questions of his mental health and dangerousness – that inhere in the definition of a sexually violent predator as presented to the jury in Instruction No. 3 – were factually critical to the determination of whether the State could defeat his proposed LRA.

Again, the record does not lie and shows the trial prosecutor used the instruction to bolster the State's case with respect to disputed factual contentions. See AOB at 16-20 (discussing State's Power Point and its repeated highlighting of the phrase "respondent is a sexually violent predator"). The State also had its expert testify that Mr. Roush "qualifies as a sexually violent predator." 9/29/15 RP157; 9/30/15 RP123.

Here is one example of how the prosecutor used the jury instruction as support for the State's factual claim that Mr. Roush posed a high risk of re-offense if not at the Special Commitment Center:

> What's the other part of being a sexually violent predator? Risk. So, we know that – again, from Instruction No. 3 – that Mr.

> Roush is likely to engage, and that's also referred to as more likely than not to engage in these – in these kind of offenses.

10/6/15pm RP 16.

This prosecutorial use of the instruction had nothing to do with Mr. Roush's legal status as someone subject to RCW 71.09 commitment, but it had everything to do with disputed factual claims, specifically, whether the proposed LRA was sufficient to mitigate the risk posed by Mr. Roush. In rebuttal, the prosecutor continued to treat the erroneous instruction as proof that Mr. Roush should be denied his proposed LRA because he was too sick and too dangerous.

> He is a sexually violent predator. That's not in dispute in this case. That's what he is as he sits here before you. That means that he's mentally ill and dangerous.

10/6/15pm RP60.

> And then I want you to draw your attention to Instruction No. 3. It says, Mr. Roush is a sexually violent predator and that means he's at risk of committing predatory acts of sexual violence if he's not confined to a secure facility…
>
> And your question that you are to decide, that is, the less restrictive alternative that he has proposed, is that a sufficiently secure facility? Is that proposal a sufficiently secure facility?

10/6/15pm RP65.

Discussing closing argument in its response, the State now writes that "[t]here was nothing improper in the State's repeated

reference to the law, i.e. to Roush's continuing status as an SVP." BOR at 19. Again, the record shows the trial prosecutor was not referencing the law, the trial prosecutor was using the erroneous instruction to argue facts. This proves the instruction was a prejudicial comment on the evidence.

Notably, the State still has not, and cannot, identify any actual on-point authority to support the notion that in a conditional release trial, the jury should be instructed that the individual's mental illness and dangerousness are incontrovertible verities.

In re det. of Bergen, 146 Wn. App. 515, 195 P.3d 529 (2008) certainly did not address the current question of whether a jury should be instructed that the respondent who has proposed an LRA is at the time of that LRA trial, as a matter of law, mentally ill and dangerous. As such, the State's reliance on Bergen is misguided. BOR at 15-17.

The State's reliance on State v. McCuistion, 174 Wn.2d 369, 384-85, 275 P.3d 1092 (2012) is likewise unpersuasive. BOR at 14-15. McCuistion dealt with the "show cause" procedures of RCW 71.09.090 for preliminarily winning the right to an evidentiary hearing, not how the jury should be instructed.

As Mr. Roush explained in his opening brief, it is axiomatic that only someone still subject to ongoing civil commitment as a sexually violent predator can petition for conditional release. (The very point of the less restrictive alternative provision is that it applies to people whose legal status remains as that of someone who meets criteria.) This is why his lawyers let the trial court know they were not challenging his legal status as an SVP in this proceeding. 10/1/15 RP113-14. But this communication – made to the judge, not the jury – was not a concession that Mr. Roush was as mentally ill and dangerous in 2015 as he was at the time of his commitment more than a decade later. That would be completely inconsistent with the facts.[2]

In that respect, Mr. Roush's – not the State's – proposed instruction was an accurate statement of the law because it provided the historical context for why the court had jurisdiction to order a conditional release. CP 742. What the State convinced the trial court to give was radically different and far from "correct." BOR at 13.

It is settled precedent that a judge cannot instruct the jury that matters of fact have been established as a matter of law. State v. Boss,

[2] Indeed, Mr. Roush's lawyer explained to the trial court: "Do we think he's changed since 2002? Yes. Do we think there's a difference between 2002 and now? Of course. That's the whole purpose of change and less restrictive alternative." 10/1/15 RP113-14

167 Wn.2d 710, 223 P.3d 506 (2009); State v. Becker, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997). Unable to challenge this authority, the State clings to the claim that the instruction was "a correct statement of the law" BOR at 13. But the instruction was misleading and inaccurate.

Instruction No. 3 tracked the definition of a "sexually violent predator" from RCW 71.09.020(18) and included the phrase "unless confined to a secure facility." An adjudication as a sexually violent predator is premised on the individual being released into the community and without any conditions. In re Det. of Post, 170 Wn.2d 302, 314, 241 P.3d 1234 (2010). In Post, the Supreme Court held that conditions of confinement at a secure facility and treatment available therein are not relevant to the question of whether someone meets the SVP definition precisely because of this language: "this clause operates to define the relevant inquiry as not including such conditions." Id. at 312 (emphasis in the original).

Mr. Roush's 2002 adjudication was likewise based on analysis of the risk he posed if living in the community without conditions.

But, an LRA residence is a secure facility:

> "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community

transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096.

RCW 71.09.020(16) (emphasis added).

This means the instruction given below was inaccurate and certainly misleading. If placed on the LRA he proposed, Mr. Roush would have been "confined to a secure facility" by the terms of the conditional order. With the instruction, the State managed to transform Mr. Roush's ongoing status that gave the court jurisdiction to place him on conditional release into proof that the conditional release should be denied. This cannot be.[3]

Furthermore, as argued in the opening brief, just because a jury instruction parrots something in the law does not absolutely shield it from functioning as an improper comment on the evidence. In re Det. of R.W., 98 Wn.App. 140, 145, 988 P2d 1034 (1999) (instruction that told the jury what weight to assign particular evidence constituted a comment even though it copied statutory language); State v. Brush, 183

[3] In line with the doctrine of constitutional avoidance, this Court should be mindful of the fact that robust conditional release provisions are necessary to the RCW 71.09 scheme comporting with constitutional due process. See Lieb, R. (2003). "After Hendricks: Defining Constitutional Treatment for Washington State's Civil Commitment Program" (p. 485). Olympia: Washington State Institute for Public Policy (discussing how federal district court Judge Dwyer overseeing a past injunction over the SCC observed that if "Mental health treatment… is to be anything other than a sham, must give the confined person the hope that if he gets well enough to be safely released, then he will be transferred to some less restrictive alternative.").

Wn.2d 550, 558, 353 P.3d 213 (2015) (instruction based on a point of law regarding legal sufficiency nonetheless deemed a comment on the evidence).

Here, the State fails to distinguish R.W. BOR at 23. Even more importantly, the State fails to explain how RCW 71.09.090(3)(d), which states that "[e]vidence of the prior commitment trial and disposition is admissible" in a conditional release trial, can be changed into the present-tense declaration of Instruction No. 3. The simple answer is that it cannot.[4]

For unknown reasons, the State in its response discusses the trial prosecutor's closing argument in terms of prosecutorial misconduct. BOR at 19-20 (citing State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995)). This invitation to use a plainly inapplicable standard of review must be rejected.

The error was a comment on the evidence, "[j]udicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced." State v. Brush, 183 Wn.2d at 559, citing to State v. Levy, 156 Wn.2d 709, 723, 132 P.3d 1076

[4] As explained in the opening brief, under RCW 71.09.090(3)(c), (d), "Evidence of the prior commitment trial and disposition is admissible" in both unconditional discharge and conditional release trials. AOB 12-13. This demonstrates that this part of the statute cannot serve as the basis for a jury instruction in either type of trial and is only an evidentiary directive. Accord R.W..

(2006). In its response, the State does not even try to meet this burden. Nor could it, when slide after slide of the closing argument harped on the improper instruction and its decree that bolstered the State's factual assertions about Mr. Roush while denigrating his expert's testimony.

In sum, the instruction as given was not warranted by any WPIC, statute, or caselaw. The government's position that it was not a comment on the evidence because it was somehow a "correct" statement of the law has to be rejected, largely because the government obscures the impact of the instruction on factual issues in dispute.

Mr. Roush's case should be reversed for a new conditional release trial.

2. The error is properly reviewable because the instruction was objected to and Mr. Roush proposed an alternative.

The record shows that Mr. Roush objected to the State's instruction and offered his own alternative.[5] Nonetheless, the State claims the error was not sufficiently preserved. This attempt to evade appellate review should be rejected.

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[5] Mr. Roush's counsel explained: "the statute does not require that the Court instruct the jury that Mr. Roush, currently, is a sexually violent predator. What it indicates is that the evidence of the prior commitment trial, in this case in 2002, and that disposition back in 2002, is admissible." 10/5/15 RP40. The discussion of the instruction went on for some time. 10/5/15 RP38-42. See also CP 742 (respondent's proposed instruction).

But, the differences in how Mr. Roush phrased his instruction – as opposed to how the State's instruction was worded – were more than sufficient to apprise the trial judge of the nature and substance of the objection. Crossen v. Skagit County, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983) (reversing Court of Appeals conclusion that instructional error had not been sufficiently preserved). In this respect, "[h]ypertechnicality is not required," and the issue is reviewable. Millies v. LandAmerica Transnation, 185 Wn.2d 302, 310, 372 P.3d 111 (2016).

Even if the Court were inclined to consider the State's argument regarding preservation, "[s]ince a comment on the evidence violates a constitutional prohibition," it is manifest error that can be raised for the first time on appeal. State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968).

The instructional issue must be reviewed and resolved in Mr. Roush's favor.

3. Unless the State is conceding that Mr. Roush is free to move out of the SCTF and into the community without any additional legal process, the issue is not moot.

A case is moot if a court can no longer provide effective relief. In re Cross, 99 Wn.2d 373, 376–77, 662 P.2d 828 (1983) citing State v.

Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983). Contrary to the State's assertions, that is not the case here.

The State writes that Mr. Roush's "requested relief was release to an LRA," but Mr. Roush's requested relief was release to a particular community residential placement, not to the SCTF on McNeil Island where he is now. BOR at 8 (emphasis added). He was required to propose a specific housing placement and did so.

Critically, there is a world of difference between the community residential placement Mr. Roush sought and the SCTF. As the State put it in a different RCW 71.09 appeal currently pending in Division I:

> [T]he SCTF-Pierce County is located on McNeil Island, in the middle of the Puget Sound and surrounded by razor-wire… A privately-run, private residence in a residential community is not as restrictive as living behind security gates on a mostly uninhabited island.

See State's Opening Brief, at 27, in In re the Det. of Bradley Ward, No. 75679-6-I, filed September 16, 2016.

Not only does the McNeil location impede Mr. Roush's ability to reintegrate into the community, SCTF residents are subject to

statutorily mandatory regulations that may not apply to a community-based LRA. See RCW 71.09.295; .300; .305; .310.[6]

While Mr. Roush has been moved to the SCTF, his future ability to secure conditional release into the community is completely uncertain, which is why this Court retains the ability to provide effective relief. RCW 71.09.280 states:

> When considering whether a person civilly committed under this chapter and conditionally released to a secure community transition facility is appropriate for release to a placement that is less restrictive than that facility, the court shall comply with the procedures set forth in RCW 71.09.090 through 71.09.096. In addition, the court shall consider whether the person has progressed in treatment to the point that a significant change in the person's routine, including but not limited to a change of employment, education, residence, or sex offender treatment provider will not cause the person to regress to the point that the person presents a greater risk to the community than can reasonably be addressed in the proposed placement.

In the pending Ward case referenced above, the State has taken the position that .280 requires that an individual who is living at the SCTF but wishes to go to alternative housing, must comply with the "show cause" procedures of .090, including a trial on the merits of the proposed residential change.

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[6] The State's argument that RCW 71.09.096 provides for post-verdict judicial oversight on the terms of the actual release is not persuasive. BOR at 9-10. Mr. Roush is not asking that this Court order him released into the residence he proposed, he is asking that this Court order that he be given a new, fair conditional release trial where the factual issues will be decided without an improper comment on the evidence.

Applying .280 to Mr. Roush's case would mean that if this Court dismisses his appeal as moot (because he is now at the SCTF) he would not only have to go through the .090 show cause procedures to try for residential release again, but that he could only get there via another jury trial. To make things worse, .280 requires additional consideration of whether such a residential switch would not cause the risk that the person will regress in their treatment.

There is effective relief to be granted here: a remand for a new trial with instructions that do not violate Article IV, Section 16 prohibition against comments on the evidence. Unless the State is prepared to agree to move Mr. Roush out of the SCTF and into a private residence into the community now, this case is not moot.

Finally, in the event this Court were to disagree with Mr. Roush on this point, the case should nonetheless be resolved because it involves a matter of continuing and substantial public interest. In re Cross, 99 Wn.2d at 377, citing Sorenson v. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

The criteria to be considered in determining whether a sufficient public interest is involved are: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination

which will provide future guidance to public officers; and (3) the likelihood that the question will recur. Id.

Each of these calls for resolving the instructional error below. One, involuntary civil commitment effectuated by the government against an individual is certainly a public question, not a dispute between private parties. Two, at present there is no specific judicial guidance on how conditional release jury instructions are to be worded or how they should accommodate .090(3)(d) phrasing that "[e]vidence of the prior commitment trial and disposition is admissible." Three, as the "latest research on sex offender recidivism [] revealed a general decline in the base rates for sexual violence and identified that sexual recidivism declines with advanced age,"[7] the SCC's population will continue to decline while the numbers of future LRA trials will increase and this question will come up again.

[7] Lieb, R., "Special Commitment Center for Sexually Violent Predators: Potential Paths toward Less Restrictive Alternatives," at 2, Washington State Institute for Public Policy, (January 2013) (available at http://www.wsipp.wa.gov/Reports/336).

B. CONCLUSION.

This Court should reverse the order denying Mr. Roush's proposed conditional release and a remand for a new LRA trial.

DATED this 23rd of September 2016

Respectfully submitted,

/s/ Mick Woynarowski

_____

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DIVISION TWO

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APPELLANT.	)	

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