99588-5

Supreme Court No. (to be set)
Court of Appeals No. 79377-2-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Detention of

David Lewis,

Petitioner.

Snohomish County Superior Court Cause No. 18-2-06699-7
The Honorable Judge Cindy Larsen

Columbia County Superior Court Cause No. 03-2-00041-7
The Honorable Judge Scott Gallina

PETITION FOR REVIEW

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

DECISION BELOW AND ISSUE PRESENTED 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 2

ARGUMENT 6

I. The trial court should have admitted the proposed conditional release plan into evidence at Mr. Lewis's conditional release trial. 6

A. A proposed conditional release plan is admissible at a conditional release trial because it is the subject of the litigation. 7

B. A proposed LRA plan is not hearsay; it is admissible whether it is "true" or not. 11

II. The State did not prove beyond a reasonable doubt that the proposed plan was inappropriate because it did not place the entire plan before the jury. 15

III. The Supreme Court should accept review because this case presents a significant constitutional issue that is of substantial public interest. 17

CONCLUSION 18

TABLE OF AUTHORITIES

FEDERAL CASES

Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) 7

Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527 (5th Cir. 1994) 9

Stuart v. UNUM Life Ins. Co. of Am., 217 F.3d 1145 (9th Cir. 2000) 9

WASHINGTON STATE CASES

In re Det. of Skinner, 122 Wn.App. 620, 94 P.3d 981 (2004) 11, 13

In re Det. of Turay, 139 Wn.2d 379, 986 P.2d 790 (1999), *as amended on denial of reconsideration* (Dec. 22, 1999) 8, 12, 16

Matter of Det. of P.P., 6 Wn.App.2d 560, 431 P.3d 550 (2018) 20

WASHINGTON STATE STATUTES

RCW 71.09.090 ..... 7, 8, 10, 11, 12, 14, 15, 16, 18

RCW 71.09.092 ..... 7, 8, 10, 14

RCW 71.09.094 ..... 1, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

RCW 71.09.096 ..... 1, 4, 17, 19

OTHER AUTHORITIES

2 McCormick On Evid. (7th ed.) 9, 13, 14

5B Wash. Prac., Evidence Law and Practice (6th ed.) 10, 12, 13, 14

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. (7th ed.) 10, 12

CR 50 ..... 6, 7, 17, 18, 20

ER 801 15

ER 803 15

ER 804 15

RAP 13.4..... 19, 20

INTRODUCTION AND SUMMARY OF ARGUMENT

David Lewis proposed a conditional release plan that met statutory requirements. At his conditional release trial, the court admitted only part of the pln. The jury returned a verdict in the State's favor, and the court denied Mr. Lewis's motion for judgment as a matter of law.

The trial court's order denying conditional release must be reversed for two reasons. First, the trial court should have allowed jurors to consider the entire proposed conditional release plan. The plan was not hearsay; it was the subject of the trial and the focus of the State's burden.

Second, without the plan, the State could not meet its obligation to "prov[e] beyond a reasonable doubt that… [t]he proposed less restrictive alternative is not in the best interests of respondent [and] does not include conditions that would adequately protect the community." RCW 71.09.094(2).

The Supreme Court should grant review, reverse, and remand for a final conditions hearing (under RCW 71.09.096) or for a new trial.

DECISION BELOW AND ISSUE PRESENTED

Petitioner David Lewis, the appellant below, asks the Court to review the Court of Appeals' unpublished opinion entered on December 21, 2020. This case presents two issues:

1. At a conditional release trial, is the proposed conditional release plan admissible into evidence because it is the subject of the litigation?
2. At a conditional release trial, does the State fail to meet its burden of proving a proposed plan's inadequacy without introducing the plan into evidence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 2018, David Lewis was granted a conditional release trial. CP 141-144. The trial was based on his proposed less restrictive alternative (LRA) plan, which was found to meet statutory requirements. CP 141-144.

The proposed plan provided for individual and group therapy. Ex. 5. Unlike the group leaders at the Special Commitment Center (SCC), his proposed treatment provider is certified for sex offender treatment. She would meet with Mr. Lewis individually weekly and conduct twice-weekly group sessions. RP (12/11/18) 2159; RP (12/13/18) 2336-2383. Regular reports would be reviewed by the treatment team, which would also include a Department of Corrections (DOC) probation officer and a staff member from the SCC. RP (12/13/18) 2119, 2352-2356.

Under his plan, Mr. Lewis would leave his apartment only with a chaperone approved by his treatment team. RP (12/10/18) 2016-2024. He would be subject to searches, polygraphs, plethysmographs, and GPS monitoring. RP (12/10/18) 2016-2024. Mr. Lewis would be prevented from having any contact with children, from having access to the internet, and from using alcohol or any other substances. RP (12/10/18) 2016-2029; Ex. 5.

A social worker had visited the apartment in which Mr. Lewis planned to live, met with the landlord, and confirmed that the arrangement was appropriate. She also verified that the apartment complex housed other sex offenders, including one on an LRA. RP (12/12/18) 23-34. The

social worker would help Mr. Lewis get set up in his apartment, apply for benefits, register as a sex offender, obtain identification, and perform other tasks that would be challenging for someone with Mr. Lewis's history and limited freedoms. RP (12/12/18) 36-41.

His case first went to trial in October of 2018. RP (10/15/18, 10/16/18, 10/18/18, 10/19/18, 10/22/18, 10/23/18, 10/24/18, 10/25/18, 10/26/18). At trial, the court admitted Mr. Lewis's conditional release plan into evidence. RP (10/18/18) 278-279. Mr. Lewis rested without calling his housing provider, Theodora Wright, as a witness. RP (10/26/18) 1478; RP (11/7/18) 1600-1654.

A mistrial was declared due to juror misconduct. RP (10/30/18) 1578-1589; RP (10/30/18) 1596. The State filed a motion for judgment as a matter of law, arguing that Mr. Lewis hadn't met his burden, absent testimony from the housing provider. RP (11/7/18) 1601-1654; CP 83, 172-188, 189-192. The trial judge denied the State's motion, noting that the State bore the entire burden of proof. RP (12/4/18) 1665-1668; CP 111-119.

The second trial started in December of 2018. RP (12/7/18) 1704. This time, the State objected to portions of Mr. Lewis's LRA plan, arguing that they contained hearsay. RP (12/4/18) 1680-1681.

Mr. Lewis responded that excluding the plan would relieve the State of its burden to prove the plan's inadequacy and place a burden on the patient. RP (12/10/18) 2012-2013; RCW 71.09.096. Mr. Lewis also pointed out that the court had ultimate responsibility for his release. For

example, if his housing plans changed, the court could deny release or impose additional conditions beyond those contained in the plan.[1] RP (12/10/18) 2012-2013.

During Mr. Lewis's testimony, his attorney offered the plan as an exhibit. Ex 5; RP (12/10/18) 1997-2037. The court deferred ruling. RP (12/10/18) 2036-2037. Later, the court decided that a sufficient foundation had been laid to admit two elements of the plan: Mr. Lewis's declaration and the treatment contract. RP (12/11/18) 2330. The court reasoned that these portions of the plan were "admissible to show their intent, not necessarily for the truth of the matters asserted, but to show their plan." RP (12/11/18) 2331.

The State's expert, Dr. Amy Phenix, testified that she had reviewed Mr. Lewis's proposed conditional release plan and relied on it as the basis of her testimony. RP (12/10/18) 2040-2138; RP (12/11/18) 2147-2207, 2259-2325. She acknowledged that his treatment plan was thorough, and that it offered individual treatment sessions, which were not available to Mr. Lewis at the SCC. RP (12/10/18) 2040-2138; RP (12/11/18) 2147-2207. She also agreed that Mr. Lewis had made significant progress and grown in several important areas since he started treatment in 2013. RP (12/10/18) 2040-2138; RP (12/11/18) 2102, 2103-2104, 2147-2207, 2260-2261, 2284. Despite this, she opined that the LRA plan was not in Mr.

[1] Mr. Lewis also had an updated signature from the housing provider, showing that the status had not changed since the plan was arranged in 2017. RP (12/10/18) 2012-2014.

Lewis's best interests and did not adequately protect the community. RP (12/10/18) 2064-2065.

Mr. Lewis presented the testimony of Dr. Christopher Fisher, who opined that Mr. Lewis had made sufficient progress that the LRA plan was both in his best interests and adequate to protect the community.[2] RP (12/17/18) 2441. Dr. Fisher relied on the entire plan, including the housing provider's declaration, when he determined that Mr. Lewis could be safely treated in the community. RP (12/17/18) 2496. Dr. Fisher testified that it was important that DOC had already vetted and approved this landlord and apartment complex for people on LRAs. RP (12/17/18) 2496.

Mr. Lewis again sought to admit the complete LRA plan. *See* Ex. 5; RP (12/17/18) 2417-2493. Instead of admitting the entire conditional release plan, the trial judge announced her intent to break the LRA proposal into sub-exhibits and to admit only portions of the plan. RP (12/17/18) 2627-2628.

The next day, the court ruled on the admission of parts of the plan. RP (12/18/18) 2675-2678, 2682-2686, 2694-2697. The treatment plan, contract, and declaration were labeled Ex. 5a, 5b, and 5c respectively and admitted. RP (12/18/18) 2676. The resume of the treatment provider was admitted as Ex. 5d; RP (12/18/18) 2676. Mr. Lewis's declaration, now Ex.

[2] Mr. Lewis also presented the testimony of his treatment provider, the social worker who prepared the plan, and his "counselor" at SCC who interacts with him daily. RP (12/12/18) 23-50; RP (12/13/18) 2336-2411.

5e, was likewise admitted. RP (12/18/18) 2676.

The declaration of the housing provider, Ex. 5f, was excluded as hearsay. RP (12/18/18) 2682-2686, 2694-2697. The court also redacted Ex. 5g, the social worker's declaration, removing information about Mr. Lewis's housing plan.[3] RP (12/18/18) 2677-2697.

The jury returned a verdict in the State's favor. CP 120. Jurors found that the plan was not in Mr. Lewis's best interests, and that it did not adequately protect community safety. CP 120.

Following the verdict, the court filed a written ruling denying Mr. Lewis's CR 50 motion for judgment as a matter of law.[4] CP 54, 62.

The Court of Appeals affirmed. Opinion, p. 13.

ARGUMENT

I. THE TRIAL COURT SHOULD HAVE ADMITTED THE PROPOSED CONDITIONAL RELEASE PLAN INTO EVIDENCE AT MR. LEWIS'S CONDITIONAL RELEASE TRIAL.

Mr. Lewis proposed an LRA plan found to meet the criteria outlined in RCW 71.09.092. Among other things, his plan satisfies the statutory requirement of a housing provider who "has agreed in writing" to accept him as a tenant, to provide court-ordered security measures, and to report any unauthorized departures. RCW 71.09.092(3).

Mr. Lewis's entire LRA plan should have been admitted into

[3] The court also excluded material outlining DOC's standard supervision conditions. RP (10/18/18) 278-286; RP (12/10/18) 2101; RP (12/18/18) 2697.

[4] The court also granted the State's CR 50 motion. This decision was reversed by the Court of Appeals. Opinion, pp. 1, 3-5.

evidence. The proposed plan was the subject of the litigation and was admissible as the document at issue in the case. The trial court's ruling excluding the plan and the order denying conditional release must be reversed, and the case remanded with instructions to admit the proposed plan upon retrial.

A. A proposed conditional release plan is admissible at a conditional release trial because it is the subject of the litigation.

Due process "requires the State to bear the burden of proof in all civil commitment proceedings." *In re Det. of Turay*, 139 Wn.2d 379, 423–24, 986 P.2d 790 (1999), *as amended on denial of reconsideration* (Dec. 22, 1999) (citing *Foucha v. Louisiana*, 504 U.S. 71, 86, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Both the Fourteenth Amendment and the statutory scheme reaffirm that the State bears the burden in conditional release trials. *Id.*; RCW 71.09.094(2); *see also* RCW 71.09.090(3)(d).

Here, the trial court violated the statute and infringed Mr. Lewis's Fourteenth Amendment right to due process. *Id.* The court's refusal to admit the entire proposed plan shifted the burden to Mr. Lewis. Under the court's ruling, Mr. Lewis was obligated to introduce the plan so it could be considered by the jury.

To obtain a trial on the issue of conditional release, a patient must propose a plan meeting the requirements of RCW 71.09.092. *See* RCW 71.09.090(2)(d). Once the patient proposes such a plan, the court must order a trial, and the burden shifts to the State. RCW 71.09.090(3)(d).

At trial, the State must "prove beyond a reasonable doubt that

conditional release to any proposed less restrictive alternative" is inappropriate, either because it is not in the patient's best interest or because it does not adequately protect the community. RCW 71.09.090(3)(d). Similarly, the court must instruct jurors to determine if the State has met this burden regarding "[t]he proposed less restrictive alternative." RCW 71.09.094(2).

The "proposed less restrictive alternative" plan is thus the subject of a conditional release trial. By statute, it is the document to be considered by the jury in determining if the State has met its burden. RCW 71.09.090(3)(d); RCW 71.09.094(2).

Conditional release plans are analogous to contracts, wills, promissory notes, defamatory publications, and other documents that provide the basis for litigation. In such cases, the document itself is at issue in the proceeding, and is therefore admissible.[5] *See, e.g., Stuart v. UNUM Life Ins. Co. of Am.*, 217 F.3d 1145, 1154 (9th Cir. 2000) (addressing admissibility of an insurance policy).

The admissibility of the underlying document in such litigation is beyond dispute. For example, "[w]hen a suit is brought for breach of a written contract, no one would think to object that a writing offered as evidence of the contract is hearsay." 2 McCormick On Evid. §249 (7th ed.). Instead, "admission of a contract to prove the operative fact of that

[5] As trial counsel put it, the plan should have been admitted because, like a contract or a will, it was "the essence of the case." RP (12/18/18) 2679.

contract's existence… cannot be the subject of a valid hearsay objection." *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994).

A claimant cannot recover on a contract without introducing the contract into evidence. Nor can a plaintiff collect damages for a defamation claim if the jury never hears the defamatory statements. A probate court cannot authenticate a will unless it is introduced into evidence: "the will [is] obviously the document[ ] in issue, and nobody would even think of objecting to [it] as hearsay." 5B Wash. Prac., Evidence Law and Practice §801.9 (6th ed.)

Similarly, the State cannot prevail at a conditional release trial unless the jury is allowed to consider the conditional release plan. This is reflected in the pattern jury instructions, which contemplate that the plan will be introduced as an exhibit:

> A "less restrictive alternative" is release from total confinement under court-ordered conditions, which include supervision and treatment. The proposed less restrictive alternative plan is found in Exhibit _____.

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. 365.32 (WPI 365.32) (7th ed.).

Here, Mr. Lewis proposed an LRA plan found to meet the requirements of RCW 71.09.092. CP 141-144. Based on this finding, the court set Mr. Lewis's case for trial. CP 144. The burden then shifted to the State to rebut the proposed plan. RCW 71.09.090(3)(d).

Mr. Lewis had no burden at trial. RCW 71.09.090(3)(d); RCW

71.09.094(2); *see also In re Det. of Skinner*, 122 Wn.App. 620, 628-630, 94 P.3d 981 (2004). He was not required to call witnesses or introduce any evidence. Instead, the State was obligated to prove the inadequacy of his proposed plan without any help from Mr. Lewis. It could only meet this burden if the plan were placed before the jury so jurors could evaluate the plan in its entirety and decide if the State met its burden beyond a reasonable doubt. RCW 71.09.094(2).

Mr. Lewis's burden ended when the trial court found that his proposed plan met the statutory requirements. CP 141-144. At that point, the plan became the subject of the ensuing trial: it was the "proposed less restrictive alternative" that provided the focus of the State's burden under RCW 71.09.090(3)(d). It was also the "proposed less restrictive alternative" that the jury should have been allowed to consider in determining if the State met its burden at trial. RCW 71.09.094(2). The court's instructions—drawn from pattern instructions[6]— required the State to address "the respondent's proposed less restrictive alternative placement." CP 127.

As with a contract, a will, or a defamatory writing, Mr. Lewis's proposed plan was "obviously the document[ ] in issue" at trial. 5B Wash. Prac., Evidence Law and Practice §801.9 (6th Ed.). Like any contract, will, or other document that is the subject of litigation, it should have been

[6] As noted, the pattern instruction contemplates that the written LRA plan will be introduced as an exhibit. *See* WPI 365.32.

admitted. *Id.*

Requiring the patient to provide testimony outlining the plan (or to lay a foundation for admitting the plan) shifts the burden of proof, violating the patient's right to due process and the statutory scheme. *See Turay*, 139 Wn.2d at 423–24; RCW 71.09.090(3)(d); RCW 71.09.094(2). Allowing admission only when the State agrees (as happened with the bulk of the plan in this case) grants the State veto power, ensuring that jurors will only see those portions of the plan the prosecuting authority wishes them to see.

The trial court erred by refusing to admit the entire proposed plan. The error violated Mr. Lewis's Fourteenth Amendment right to due process and his rights under RCW 71.09.090 and RCW 71.09.094.

The Supreme Court should accept review and reverse. The case must be remanded with instructions to admit the proposed plan in its entirety when the case is retried.

B. A proposed LRA plan is not hearsay; it is admissible whether it is "true" or not.

In the lower court, the State successfully argued that Mr. Lewis "is offering these documents for the truth of the matter asserted." CP 170; *see also* RP (12/10/18) 2003, RP (12/18/18) 2695. According to the State, "[a]bsent substantive evidence, no jury could find that a plan actually existed, and therefore [Mr. Lewis] could not prevail." CP 170.

This reflects a misunderstanding of the legislature's allocation of the burden at trial. As noted above, Mr. Lewis did not have any burden at

trial. RCW 71.09.090(3)(d); *Skinner*, 122 Wn. App. at 628-630. Rather, by statute, the State bears the burden of proving the LRA plan's inadequacy. RCW 71.09.090(3)(d). Similarly, the jury's task is to determine if the State has met its burden to prove that the plan is not in Mr. Lewis's best interests or is not adequate to protect the community. RCW 71.09.094(2).

The admissibility of an LRA plan does not depend on its truth or falsity. Instead, as with a will, contract, or defamatory statement, the plan must be admitted because it is the subject of the litigation, and the trial cannot go forward without it. *See* 2 McCormick On Evid. §249 (7th ed.); 5B Wash. Prac., Evidence Law and Practice §801.9 (6th ed.)

This is not to say that the plan's "truth" is irrelevant. The State can meet its burden by proving that statements contained in the plan are false. For example, if the State proved that Ms. Wright lied when she claimed in writing to be "the property manager and owner" of the residence,[7] jurors would likely conclude that the State had "proved beyond a reasonable doubt that… [t]he proposed less restrictive alternative is not in the best interests of respondent [and] does not include conditions that would adequately protect the community." RCW 71.09.094(2).

But the "truth" of the plan is a matter for the State to attack. The State is free to call the plan's authors to testify in order to assail their credibility or to confront them with information undermining their statements.

[7] *See* Ex. 5f.

The plan's "truth" is unrelated to admissibility, which rests on the plan's status as the subject of the litigation. *See* 2 McCormick On Evid. §249 (7th ed.); 5B Wash. Prac., Evidence Law and Practice §801.9 (6th ed.). The statutory scheme requires that the plan be placed before the jury so jurors can answer the question set forth in RCW 71.09.094(2).

The Court of Appeals failed to recognize the balance of obligations set forth in the statute and required by the Fourteenth Amendment's due process clause. Instead, the court concluded that the plan was "relevant only insofar as it demonstrates the truth of its assertions." Opinion, p. 8. This logic eviscerates the statutory scheme. It unconstitutionally shifts the burden of proof and grants the State the power to remove from jurors' consideration the document that should be the focus of their deliberations.

If an LRA plan is hearsay, there can be no grounds for either party to introduce it into evidence. Because the written plan is a "statement" that is not "made by the declarant while testifying at the trial," any LRA plan will qualify as hearsay if it must be offered for its "truth." ER 801(c). As Mr. Lewis's trial attorneys pointed out, a writing does not become non-hearsay merely because its author testifies at trial. RP (12/10/18) 2005; RP (12/18/18) 2693-2694. Instead, where the author is available to testify, the writing must either fit within ER 801(d) ("Statements Which Are Not Hearsay") or within one of the exceptions outlined in ER 803 and ER

804.[8]

But these provisions do not apply to a proposed conditional release plan. If such plans are irrelevant unless offered for their "truth," they will always be excluded as hearsay absent agreement from the State.[9] Under this theory, there is no way for a jury to consider the actual conditional release plan, as envisioned by the legislature when it enacted RCW 71.09.090(2)(d), RCW 71.09.092, and RCW 71.09.094(2).

Without examining all the conditions outlined in the plan, jurors cannot determine if the State has proved beyond a reasonable doubt that the patient's proposal "does not include conditions that would adequately protect the community." RCW 71.09.094(2); *see also* RCW 71.09.090(3)(d). Nor can a jury determine if the State has proved beyond a reasonable doubt that the plan is "not in the best interests of [the patient.]" RCW 71.09.094(2); *see also* RCW 71.09.090(3)(d).

There should be no concern that a patient's trial counsel will unscrupulously "pack" a plan with irrelevant information that will favor the patient and disadvantage the State. As with all evidence, the trial court retains authority to craft appropriate instructions limiting the purpose for which jurors can use the plan (or portions thereof).[10]

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[8] As the trial court put it, "I don't know that there would be any rule of evidence under which to admit a bunch of written documents." RP (12/18/18) 2684.

[9] The State did agree to admission of parts of Mr. Lewis's LRA proposal. RP (12/18/18) 2694-2695.

[10] In extreme cases, the court may choose to redact portions of the proposal that have no

The trial court should have admitted the proposed plan in its entirety, so that jurors could determine if the State met its burden of proof. RCW 71.09.094(2). The court should not have excluded the housing provider's declaration and should not have redacted the social worker's declaration. Ex. 5f, Ex. 5g.

The court's ruling unconstitutionally shifted the burden and violated the statutory scheme by requiring Mr. Lewis to call witnesses and introduce evidence outlining his plan. *Turay*, 139 Wn.2d at 423–24; RCW 71.09.094(2); RCW 71.09.090(3)(d). It also denied jurors the opportunity to evaluate the adequacy of "[t]he proposed less restrictive alternative," as required under RCW 71.09.094(2).

The Supreme Court should accept review and reverse the trial court's ruling excluding Mr. Lewis's conditional release plan. The order denying conditional release must be vacated, and the case must be remanded with instructions to admit the proposed plan in its entirety when the case is retried.

II. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE PROPOSED PLAN WAS INAPPROPRIATE BECAUSE IT DID NOT PLACE THE ENTIRE PLAN BEFORE THE JURY.

Although it was the subject of the State's burden of proof, the State failed to introduce Mr. Lewis's proposed LRA plan into evidence. Without introducing the plan into evidence, the State could not prove that "[t]he

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relevance to the issues at trial or that are unduly confusing or prejudicial under ER 403. But this is not the same as excluding portions of the plan as hearsay under ER 802.

proposed less restrictive alternative is not in the best interests of respondent [or] does not include conditions that would adequately protect the community." RCW 71.09.094(2). The trial court should have granted Mr. Lewis's CR 50 motion for judgment as a matter of law.

A motion for judgment as a matter of law should be granted if "there is no legally sufficient evidentiary basis for a reasonable jury to find" in favor of the nonmoving party. CR 50(a)(1). In this case, the State has, at best, "rebutted a partial plan" consisting of those portions of the proposal that were admitted at trial. RP (12/18/18) 2762.

The trial judge should have granted Mr. Lewis's CR 50 motion.

The statutory scheme places the burden on the State "to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community." RCW 71.09.090(3)(d). Similarly, the jury is charged with determining if the State has "proved beyond a reasonable doubt that either: (a) The proposed less restrictive alternative is not in the best interests of respondent; or (b) does not include conditions that would adequately protect the community." RCW 71.09.094(2).

Under these statutory provisions, jurors are required to consider "[t]he proposed less restrictive alternative." RCW 71.09.094(2). If the jury does not have access to the plan as proposed, it cannot find that the State has proved beyond a reasonable doubt that the proposed plan is inappropriate.

The State's (apparently strategic) decision not to introduce the entire plan as proposed prevented it from meeting its burden.

The trial judge should have granted Mr. Lewis's CR 50 motion. There is "no legally sufficient evidentiary basis for a reasonable jury to find" that the plan—as proposed by Mr. Lewis and accepted by the court at the show cause hearing—is inappropriate under the standards outlined in RCW 71.09.094(2). The Supreme Court should accept review, reverse the order denying conditional release, and remand with instructions to hold a final conditions hearing under RCW 71.09.096.

III. THE SUPREME COURT SHOULD ACCEPT REVIEW BECAUSE THIS CASE PRESENTS A SIGNIFICANT CONSTITUTIONAL ISSUE THAT IS OF SUBSTANTIAL PUBLIC INTEREST.

The Supreme Court will accept review of a petition "if a significant question of [constitutional] law is involved; or… [i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3) and (4). This case meets both criteria.

First, the trial court violated Mr. Lewis's Fourteenth Amendment right to due process. The court's ruling placed the burden on Mr. Lewis to produce substantive evidence establishing the elements of his plan. The error involves a significant question of constitutional law, with the potential to impact all detainees who petition for conditional release. RAP 13.4(b)(3).

Second, this case involves the proper interpretation of RCW

71.09.090(3)(d) and RCW 71.09.094(2). Under both statutes, the obligation to produce the proposed LRA plan rests with the State. The trial court ignored the statutory scheme, requiring Mr. Lewis to introduce the proposed plan, even though he had no burden at trial.

This court "has consistently stated that the need to clarify the statutory scheme governing civil commitment is a matter of continuing and substantial public interest." *Matter of Det. of P.P.*, 6 Wn. App.2d 560, 566, 431 P.3d 550 (2018) (discussing mootness.) The case involves an issue of substantial public interest. RAP 13.4(b)(4).

The Supreme Court should accept review under RAP 13.4(b)(3) and (4).

CONCLUSION

Mr. Lewis's proposed conditional release plan was the subject of his conditional release trial. The State bore the burden of proving beyond a reasonable doubt that the plan—as proposed by Mr. Lewis—was inappropriate. Mr. Lewis had no burden to produce any evidence.

As the subject of the litigation, the plan was admissible, regardless of whether it was "true" or "false." The State could not meet its trial burden unless jurors were permitted to review the plan. Because the proposed plan was not placed before the jury, the State did not prove beyond a reasonable doubt that "[t]he proposed less restrictive alternative" was inappropriate. RCW 71.09.094(2). Accordingly, "there [was] no

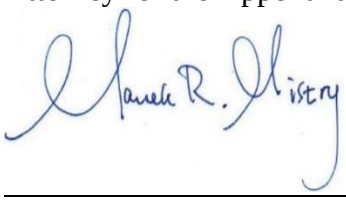
legally sufficient evidentiary basis for a reasonable jury to find" in favor of the State, and the court should have granted Mr. Lewis's CR 50 motion.

For all these reasons, the Supreme Court should accept review and reverse the trial court's order denying conditional release. The case must be remanded for a final conditions hearing under RCW 71.09.096. In the alternative, the case must be remanded for a new trial with instructions to admit Mr. Lewis's proposed LRA plan in its entirety.

Respectfully submitted on March 17, 2021

BACKLUND AND MISTRY

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

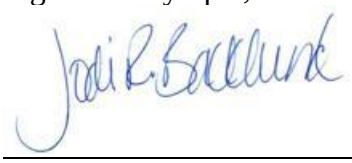
CERTIFICATE OF SERVICE

I certify that on today's date I mailed a copy of the Petition for Review, postage prepaid, to:

David Lewis
McNeil Island Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 17, 2021.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of DAVID JAMES LEWIS, Appellant.	No. 79377-2-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Lewis, an adjudicated sexually violent predator, appeals from a verdict denying his conditional release. He argues the trial court erred in (1) granting the State judgment as a matter of law, (2) denying Lewis judgment as a matter of law, (3) excluding his housing declaration as hearsay, (4) changing the venue from Columbia County to Snohomish County, and (5) denying his motion to exclude the term "sexually violent predator" from use at trial. We reverse the CR 50 ruling, but affirm the jury verdict denying release.

FACTS

David Lewis was sent to prison in 1992 after he pleaded guilty to two counts of child molestation. In May 2005, Lewis was adjudicated as a "sexually violent predator" (SVP) and involuntarily committed to the special commitment center. He has remained in an institution from that time forward.

Involuntarily committed SVPs may petition for release from commitment. RCW 71.09.090. Lewis petitioned for conditional release to a less restrictive alternative (LRA). RCW 71.09.090(2). An LRA is a "court-ordered treatment in a setting less

restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092." RCW 71.09.020(6). Those conditions include a specific treatment plan and a housing provider. RCW 71.09.092(1)-(5).

In January 2018, a show cause hearing was scheduled in Columbia County to consider Lewis's LRA plan. In March 2018 the court issued an order on show cause hearing[1] ordering a trial on the issue of Lewis's conditional LRA and a discovery order setting a conditional release trial date.

In July 2018, the State sought a change of venue to Snohomish County. Lewis objected. The court granted the motion and transferred venue to Snohomish County. Lewis filed a notice for discretionary review in the Court of Appeals. Lewis's motion for discretionary review was denied, finding the issue moot.

The case went to trial in Snohomish County Superior Court in October 2018. Evidence regarding Lewis's proposed housing was admitted without objection. A mistrial was declared due to juror misconduct.

Before the second trial, the parties agreed to retain prior rulings on motions in limine. This included a denial of Lewis's motion to exclude the term "sexually violent predator" on the basis that it is a statutorily created legal term.

In December 2018, the second trial began. The State moved to exclude portions of the LRA proposed by Lewis. It objected to the admission of housing provider Theodora Wright's declaration and any related testimony on hearsay

[1] The order on show cause states that it is based on the evidence presented at the January 10, 2018 hearing, but the court docket indicates that the hearing was stricken and the order was entered by stipulation.

grounds. Lewis's attorney argued for admissibility of the declaration on several grounds. The trial court ruled that the declaration and other testimony were inadmissible hearsay. It redacted the portions of the social worker's release plan declaration that were related to housing and excluded the housing provider's declaration. Because neither party called the housing provider as a witness, the trial court found that there was no direct evidence regarding the housing provider's available apartment or agreement to comply with statutory requirements.

At the conclusion of the evidentiary phase, both parties sought judgment as a matter of law. The State argued it was entitled to judgment as a matter of law under RCW 71.09.094(1), since Lewis had failed to establish his plan met statutory housing requirements. Lewis argued he was entitled to judgment as a matter of law under CR 50, as the State's failure to introduce the housing component of his plan made it impossible for the State to meet its evidentiary burden.

After the jury had returned a verdict in the State's favor, the trial court granted the State's motion and denied Lewis's motion. The trial court opined that although the issue might be moot, guidance from this court would be useful as "the law remains unclear."

Lewis timely appeals.

DISCUSSION

I. Motions for Judgment as a Matter of Law

CR 50(a)(1) authorizes a court to grant judgment as a matter of law where there is no legally sufficient evidentiary basis for a jury to find in favor of the

nonmoving party. "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Sing v. John L. Scott, Inc., 134 Wn. 2d 24, 29, 948 P.2d 816 (1997). We review a motion for judgment as a matter of law de novo. Lodis v. Corbis Holdings, Inc., 192 Wn. App. 30, 62, 366 P.3d 1246 (2015).

A. The State's Motion

After portions of the proposed LRA plan Lewis submitted were stricken pretrial as hearsay, neither party called the housing provider as a witness. At the conclusion of the second trial, the State moved for judgment as a matter of law under RCW 71.09.094(1). The State argued Lewis had failed to establish that his plan satisfied the housing requirements in RCW 71.09.092(3). The trial court held, given the lack of sufficient evidentiary support, no reasonable jury could find the statutory condition had been met. As a result, the court found that "a strict reading of the statute requires judgment as a matter of law in the state's favor."

The order was granted after the jury returned a verdict denying conditional release. The trial court acknowledged the order might be moot, but noted in the order that guidance on this issue would be useful to practitioners. The State briefed the issue, arguing the order was correct. Prior to oral argument, the State withdrew its argument. The State's concession is well taken.

RCW 71.09.094(1) provides that upon the conclusion of the evidence in a hearing[2] held pursuant to RCW 71.09.090, "if the court finds that there is no legally sufficient evidentiary basis for a reasonable jury to find that the conditions set forth in RCW 71.09.092 have been met, the court shall grant a motion by the State for a judgment as a matter of law." At a conditional release trial, the State has the burden to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community. RCW 71.09.090(3)(d). The State may not carry its burden by relying on the lack of evidence from the petitioner. In allowing the State to do so here the trial court effectively shifted the burden of proof. The motion was improperly granted.

We accordingly reverse the trial court's grant of the State's motion for judgment as a matter of law.

B. Lewis's Motion

Lewis argues he was entitled to judgment as a matter of law under CR 50 because the State failed to introduce the housing component of his plan. He contends that once his plan was deemed sufficient at a show cause hearing, the State was obligated to admit the entire plan. He argues, failing to do so made it

[2] RCW 71.09.090 thus uses the word "hearing" to refer to both the show cause hearing and the trial that results from it. It is this latter hearing—the trial—that is the subject of RCW 71.09.094(1).

impossible for the State to prove beyond a reasonable doubt his proposed LRA was statutorily insufficient.

The language of RCW 71.09.094(1) and RCW 71.09.092 does not expressly provide that the State must introduce the plan. Further, the jury is not specifically asked whether the plan satisfies 71.09.092. Rather, it is instructed under RCW 71.09.094(2) which provides,

> Whenever the issue of conditional release to a less restrictive alternative is submitted to the jury, the court shall instruct the jury to return a verdict in substantially the following form: Has the state proved beyond a reasonable doubt that either: (a) The proposed less restrictive alternative is not in the best interests of respondent; or (b) does not include conditions that would adequately protect the community? Answer: Yes or No.

To the extent the plan factors into the answer to these questions, the expert witnesses are free to offer opinions relative to that purpose. See ER 702, 703; In re Det. of P.K., 189 Wn. App. 317, 324-35, 358 P.3d 411 (2015) (holding the trial court properly admitted expert witness testimony relying upon inadmissible records as the basis of her opinion that his LRA should be revoked). Here, the majority of the LRA was entered into evidence. And, the State produced witnesses, such as Dr. Amy Phenix, who opined on whether the plan met the statutory requirements. So, it was possible for a jury to find the State met its burden without looking at the declaration.

And, the State did not argue before the jury at closing that Lewis's housing plan was insufficient. Instead, the State relied on evidence "indicative of [Lewis's] absolute lack of the ability to be transparent," rendering him more likely to fail to adhere to treatment in the community. Viewed in the light most favorable to the

State, there was sufficient evidence to sustain a verdict that the plan was not in Lewis's interest or was insufficient to protect the public.

We affirm the trial court's denial of Lewis's motion for judgment as a matter of law.

II. Exclusion of Portion of LRA on Hearsay Grounds

The declaration of Lewis's housing provider as well as related testimony referencing housing were excluded as inadmissible hearsay. The declaration from his housing provider was an out-of-court statement, but Lewis argues that the court erred in holding the declaration was offered to prove the truth of the matter asserted.

Out-of-court statements offered in court to prove the truth of the matter asserted are hearsay, which is generally not admissible unless an exception applies. ER 801(c), 802. The admission of evidence under a hearsay exception is reviewed for abuse of discretion. State v. Heutink, 12 Wn. App. 2d 336, 356, 458 P.3d 796, review denied, 195 Wn.2d 1027, 466 P.3d 775 (2020). However, whether or not a statement was hearsay is reviewed de novo. State v. Gonzalez-Gonzalez, 193 Wn. App. 683, 688-89, 370 P.3d 989 (2016).

Under RCW 71.09.092, "[b]efore the court may enter an order directing conditional release to a less restrictive alternative, it must find . . . housing exists in Washington that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court,

and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center if the person leaves the housing to which he or she has been assigned without authorization." The factual content of the housing declaration, not its existence, is relevant. If the housing provider's declaration was not offered to demonstrate the truth of the housing provider's assertions, then the trial court could not have made the necessary findings and the declaration served little purpose. The trial court correctly determined the out-of-court statement was being offered to prove the truth of the matter asserted.

A. No Applicable Hearsay Exception

Lewis argues the proposed plan is admissible as the subject of litigation, similar to a will or a contract, because jurors at a conditional release trial are directed to consider the proposed LRA under RCW 71.09.094(2). He relies on Stuart v. UNUM Life Insurance Co. of America, 217 F.3d 1145, 1154 (9th Cir. 2000), which concerned an insurance policy. But, the insurance policy was admitted under Federal Rules of Evidence 801(c) because it was excluded from the definition of hearsay as a statement affecting the legal rights of the parties, not as the subject of litigation. Id. Unlike the insurance policy in Stuart, the housing declaration in Lewis's LRA plan is not being offered to show that it has been signed by both parties. It is relevant only insofar as it demonstrates the truth of its assertions regarding whether his proposed housing satisfies statutory

requirements. The declaration is hearsay, and does not fall under any hearsay exception.

Next, Lewis argues the housing provider's declaration is not hearsay because statutory language requiring the plan to include the agreement in writing makes its existence an operative fact. RCW 71.09.092(3). Similarly, Lewis relies on United States v. Iverson, 818 F.3d 1015, 1020-21 (10th Cir. 2016), where statements in a Federal Deposit Insurance Corporation (FDIC) certificate and on the FDIC website were at issue, admissible not as operative facts but as public record. Further, it is not the mere existence of a housing declaration, but what it details that is relevant to a conditional release trial.

Unlike an insurance policy or administrative website, the excluded LRA documents do not fall under an express exception to the rule against hearsay.

B. LRA as Basis of Witness's Opinion

Lewis asserts the housing provider's declaration and related documents should have been admitted for the limited purpose of explaining the basis for Dr. Christopher Fisher's opinion. He argues expert witnesses' reliance on the documents rendered them admissible under ER 703.

Experts may rely on inadmissible facts if of the type reasonably relied on by experts in their field. Allen v. Asbestos Corp., 138 Wn. App. 564, 579, 157 P.3d 406 (2007). Both cases cited by Lewis address the ability of experts to testify about out-of-court statements, not the admittance of the underlying documents. In re Det. of Leck, 180 Wn. App. 492, 513, 334 P.3d 1109) (2014) (expert could refer to

hearsay); P.K., 189 Wn. App. at 324-35 (expert could testify about contents of medical records as the basis of her opinion, not as substantive evidence). However, neither case holds this use provides a basis to admit the underlying documents under ER 703.

C. Due Process Violation

Lewis contends that under both the Fourteenth Amendment and the statutory scheme under RCW 71.09.094, the State bears the burden of proof in conditional release trials. Therefore, holding that the State can meet its burden by excluding the LRA plan as hearsay, impermissibly shifted the burden of production to Lewis to provide live testimony, in violation of his due process rights.

Here, Lewis relies on In re Detention of Turay, 139 Wn.2d 379, 423-24, 986 P.2d 790 (1999) (citing Foucha v. Louisiana, 504 U.S. 71, 86, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). In Turay, our Supreme Court affirmed the trial court's holding that the state bears the burden of proof at show cause hearings. Id. at 424. The court cited Foucha, concluding due process requires the State to bear the burden in civil commitment proceedings, which "buttress[es] the ruling of the trial court." Id. at 423-24. Thus, Lewis contends that the State must admit the plan. But, neither Foucha nor Turay held that the State had to introduce the LRA plan as part of due process. Nor did either case hold that a trial court must create an exception to the hearsay rule to admit such materials.

While the burden of proof at an LRA trial is upon the State, our Supreme Court has held that the statutory scheme assigning petitioners the burden of

producing a currently available housing plan does not unconstitutionally shift the burden away from the State. In re Det. of Skinner, 122 Wn. App. 620, 627-29, 94 P.3d 981 (2004). RCW 71.09.090(2)(b) expressly provides that a show cause hearing "may be conducted solely on the basis of affidavits or declarations." The housing declarations Lewis offered were properly admitted and considered at the show cause hearing. However, there is no similar exception provided for evidence submitted at conditional release trials.

We affirm the trial court's finding that the documents excluded at trial were inadmissible hearsay.

III. Change of Venue to Snohomish County

Third, Lewis asserts that the Columbia County Superior Court erred when it ordered a change of venue to Snohomish County.

This court reviews a trial court's ruling motion to transfer venue for abuse of discretion. Hickey v. City of Bellingham, 90 Wn. App. 711, 719, 953 P.2d 822. The court abuses its discretion where the exercise of discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

RCW 4.12.030 authorizes the trial court to transfer venue on specific grounds, including where (1) the designated county is improper, (2) there is reason to believe an impartial trial cannot be held therein, or (3) the convenience of witnesses or ends of justice would be forwarded by such change. Lewis challenges these three statutory grounds for transfer.

Lewis argues Columbia County was the proper venue. It does not appear from the record that the trial court purported to grant transfer on grounds that Columbia County was not the proper venue under RCW 4.12.030(1). As such, this point is not dispositive.

Lewis also contends the court erred in transferring on RCW 4.12.030(2) grounds that there was reason to believe an impartial jury could not be empaneled. In granting the change of venue, the court relied in part on the affidavit of Prosecuting Attorney Rea Culwell. Culwell stated that in July cases, "many jurors are or will be working [the] wheat and pea harvest as their sole source of income and are readily excused by the judge." Lewis argues because the court struck the July trial date, there was no longer an issue empaneling jurors during the harvest season. But, the record supports difficulty empaneling an impartial jury outside of harvest season as well. For instance, many county residents knew about Lewis's underlying crimes. The trial court found that spending the resources "vetting a jury" would "prove unfruitful." The trial court did not abuse its discretion in granting a change of venue based on such a finding.

Finally, Lewis also addresses RCW 4.12.030(3). He contends the "ends of justice" did not support a change in venue. Further, he argues that the court was not justified in transferring on RCW 4.12.030(3) grounds of "convenience of witnesses" absent declarations of the witnesses or equivalent support.

Appellants must provide "argument in support of the issues presented for review, together with citations to legal authority and reference to relevant parts of

the record." RAP 10.3(a)(6). Lewis has provided no legal authority for such a specific evidentiary requirement. Here, the record indicates all witnesses would be travelling from western counties. It was within the discretion of the court to consider the traveling distances of various witnesses when considering a motion to transfer venue. Id. The record is sufficient for a court to have reasonably concluded moving the venue would further the convenience of witnesses.

We affirm the Columbia County Court's order transferring venue to Snohomish County.

IV. Inclusion of the Term "Sexually Violent Predator"

Finally, Lewis asserts the trial court erred in denying his motion in limine to exclude use of the term "sexually violent predator."

Parties disagree over the correct standard of review for this decision. Citing an unpublished case, Lewis argues this issue should be reviewed de novo "because it involves an issue of law."

The State cites State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995), which held that appellate courts review trial court rulings on motions in limine for abuse of discretion. The State also asserts that to the extent Lewis is challenging the jury instruction language that too is a matter of discretion. A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds, or for untenable reasons. In re Pers. Restraint of Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009).

It was reasonable for the court to conclude that the use of the term was appropriate because it was a statutorily created legal term. Reviewing de novo, the term is defined by RCW 71.09.020(18). This court has found the use of the word "victim" not to be a comment on the evidence. State v. Alger, 31 Wn. App 244, 249, 640 P.2d 44 (1982). Using the term "sexually violent predator" is arguably no different. Further, the court mitigated its potential prejudicial effect by informing the jury that the term is not a diagnostic term but a legal one.

We affirm the trial court's denial of Lewis's motion in limine to exclude the term "sexually violent predator."

We reverse the CR 50 ruling, but affirm the jury verdict denying release.

Appelwick, J.

WE CONCUR:

Andrus, A.C.J.

Dwyer, J.

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March 17, 2021 - 9:42 AM

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