Supreme Court No. (to be set)
Court of Appeals No. 47975-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Detention of

Brian Taylor-Rose

Appellant/Petitioner

Clallam County Superior Court Cause No. 12-2-01143-8
The Honorable Judge Brian Coughenour

Amended PETITION FOR REVIEW

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SUMMARY OF ARGUMENT

Upon his release from confinement, Brian Taylor-Rose will serve years of court-ordered community supervision. Despite this, jurors at his civil commitment trial were instructed to consider his risk of recidivism if "released unconditionally." They were told to "consider only voluntary treatment options that would exist" if Mr. Taylor Rose were "unconditionally released from detention in this proceeding," and were not asked to consider his "placement conditions." As a result, their verdict does not authorize commitment. The erroneous instructions also violated due process: they weren't based on the evidence, they prevented Mr. Taylor-Rose from arguing his theory, they misstated applicable law, and they weren't manifestly clear. These and other instructional errors require reversal of the commitment order and remand for a new trial.

DECISION BELOW AND ISSUES PRESENTED

Petitioner Brian Taylor-Rose requests review of the appellate court's Published Opinion entered July 25, 2017.[1]

ISSUE 1: A court's instructions define and limit the question answered by a jury's verdict. Did the court's erroneous instructions produce a verdict that does not authorize commitment?

ISSUE 2: Civil commitment must rest on proof of current dangerousness. Did the instructions allow commitment even absent proof of this element?

ISSUE 3: Commitment requires proof that the patient is likely to engage in predatory acts of sexual violence. Did the instructions fail to make this standard manifestly clear to the average juror?

ISSUE 4: If a civil commitment petition concerns a person who will sub-

[1] A copy of the opinion is attached.

ject to conditions of court-ordered supervision upon release, the instructions must allow jurors to consider "placement conditions" when assessing risk. Is reversal required because the court refused to instruct on "placement conditions" such as court-ordered community supervision and the availability of a "recent overt act" petition?

ISSUE 5: Civil commitment requires proof of current dangerousness. By relying exclusively on estimated lifetime risk of reoffense, did the State fail to prove this element?

ISSUE 6: A judge may not comment on the evidence. Did the court comment on the evidence by instructing jurors that Mr. Taylor-Rose's prior offense was a "crime of sexual violence"?

STATEMENT OF THE CASE

When Brian Taylor-Rose came out to his parents at age 13, they told him homosexuality was unacceptable and evil. RP[2] 414, 2346, 2355-2356, 2363. He was beaten by his stepfather, and he left home soon after. RP 414, 2354-2355. Twenty years later, he was in prison, facing civil commitment as an alleged sexually violent predator. CP 53-54.[3]

His trial focused on the likelihood that he'd commit predatory acts of sexual violence. The State introduced opinion testimony on his lifetime risk of committing such acts. RP 1235, 1245, 1869, 1919-1921, 1920, 1972. In closing, the State's attorney also directed jurors to consider lifetime risk. RP 2624.

Mr. Taylor-Rose wished to have jurors consider factors that will ameliorate his risk. Upon release, he will serve 36-48 months of court-ordered community supervision. Ex. 20. Based on this, he asked the court to

[2] The VRP is sequentially numbered except for the hearing on February 12, 2013. That hearing is not cited in this petition. All citations to transcripts will be RP.

[3] Mr. Taylor-Rose pled guilty to second-degree child molestation in 1997, and third-degree child molestation in 2009. Ex. 1, 2, 19, 20; RP 66, 406; CP 53.

instruct jurors they could consider "placement conditions," including community supervision and "the fact that the state may file a new Petition…if it learns he has committed a 'recent overt act.'"[4] Supp. CP 99; RP 2490-2502.[5] The judge refused and instead instructed jurors that

> "Likely to engage in predatory acts of sexual violence…means that the person more probably than not will engage in such acts *if released unconditionally* from detention in this proceeding…In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all the evidence that bears on the issue. In considering voluntary treatment options, however, you may consider only voluntary treatment options that would exist if the respondent is *unconditionally released* from detention in this proceeding. CP 27 (emphasis added)

Mr. Taylor Rose also objected to an instruction on the State's burden to prove a prior conviction for "a crime of sexual violence, namely Child Molestation in the Second Degree." CP 18, 19, Supp. CP 98.

The jury found that Mr. Taylor-Rose met commitment criteria, and the court entered an order committing him indefinitely. CP 8, 9. Mr. Taylor-Rose appealed, and the Court of Appeals affirmed in a published decision. CP 4; Opinion.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE SUPREME COURT SHOULD REVERSE BECAUSE THE JURY'S VERDICT ADDRESSES A NONEXISTENT HYPOTHETICAL SCENARIO RATHER THAN THE UNDISPUTED FACTS ESTABLISHED AT TRIAL.

A. Instructions define and limit the question answered by a verdict.

Jury verdicts "incorporate the instructions on which they are

[4] He asked the court to define "recent overt act," using the statutory language. Supp. CP 99; *see* RCW 71.09.020(12).

[5] He proposed a "likely to engage" instruction that did not include the word "unconditionally." Supp. CP 99-100.

grounded, and reflect the facts required to be found as a basis for decision." *State v. Pharr*, 131 Wn. App. 119, 124, 126 P.3d 66 (2006), *disapproved of on other grounds by State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010). Instructions thus define and limit the question answered by a verdict. *Williams-Walker*, 167 Wn.2d at 899. In *Williams-Walker,* the court imposed a firearm enhancement even though jurors had been instructed on deadly weapon enhancements. *Id.* The Supreme Court reversed, concluding that "[w]hen the jury is instructed on a specific enhancement and makes its finding, the sentencing judge is bound by the jury's finding." *Id.; see also In re Pers. Restraint of Delgado*, 149 Wn. App. 223, 237, 204 P.3d 936 (2009). In *Delgado*, as in *Williams-Walker,* the court instructed jurors to determine if the defendants were armed with deadly weapons. Because of this, the jury's special firearm verdicts "necessarily reflect[ed] the jury's finding that [the defendants] were armed with 'deadly weapons'" rather than operable firearms. *Id.*, at 237.

Here, the instructions directed jurors to address a hypothetical situation contrary to the undisputed facts presented at trial. Their verdict reflects a finding that Mr. Taylor-Rose *would* meet criteria for commitment if he did not face years of court-ordered community supervision.

B. The verdict does not reflect a finding that Mr. Taylor-Rose meets criteria for commitment under the facts; jurors only determined he would meet criteria if released without community supervision.

In any proceeding under Chapter 71.09 RCW, the legislature has specifically authorized consideration of "conditions that would exist… in

the absence of a finding that the person is a sexually violent predator." RCW 71.09.015. Such conditions are "typically *pre-existing community supervision conditions* placed on respondent in connection with a prior criminal conviction." Comment to WPI 365.14 (emphasis added).[6]

It is undisputed that Mr. Taylor-Rose will serve 36-48 months of court-ordered community supervision upon release. Ex. 20. This condition stems from his 2009 conviction. Ex. 20, p. 4. But the court did not ask jurors to consider this "pre-existing community supervision condition[ ]" when evaluating his risk of recidivism. Comment to WPI 365.14; CP 27. Instead, the court instructed jurors to determine his risk "if released *unconditionally* from detention in this proceeding." CP 27 (emphasis added).[7]

The word "unconditionally" defined and limited the jury's verdict. *Williams-Walker*, 167 Wn.2d at 899; *Delgado*, 149 Wn. App. at 237. The verdict cannot support commitment under the undisputed facts.

Jury instructions must be read "the way a reasonable juror could have interpreted" them. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997). A reasonable juror "could have interpreted" the instruction to require evaluation of the risk of predatory sexual violence without considering the term of court-ordered supervision.[8] *Miller*, 131 Wn.2d at 90; Ex. 20, p. 4.

[6] 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 365.14 (6th ed.)

[7] The instruction allowed consideration of "all evidence that bears on the issue," including *voluntary* treatment options. CP 27. However, because "the issue" centered on unconditional release, this language did not solve the problem. CP 27; *see* Opinion, p. 13.

[8] This is especially true given the court's refusal to mention "placement conditions." *Compare* CP 27 *with* Supp. CP 99-100.; RCW 71.09.060(1); RCW 71.09.015; WPI 365.14. The instruction directed jurors to consider "voluntary treatment options" rather than both "placement conditions" and "voluntary treatment options." CP 27; Supp. CP 99-100. The

The jury is presumed to have followed this reasonable interpretation of the instruction. *Id.; State v. Mohamed*, 186 Wn.2d 235, 244, 375 P.3d 1068 (2016). Because of this, the verdict does not support the court's commitment order. *Williams-Walker*, 167 Wn.2d at 899; *Delgado*, 149 Wn. App. at 237-238. Instead, the jurors found that Mr. Taylor-Rose will likely engage in predatory sexual violence if released *without* court-orde red supervision. *See Pharr*, 131 Wn. App. at 124; Ex. 20, p. 4. The verdict does *not* reflect a finding that Mr. Taylor-Rose is at risk of such violence if released with 36-48 months of court-ordered community supervision. *Id.* In other words, it does not allow commitment under the undisputed facts.[9] Ex. 20, p. 4.

The court phrased its instruction in the statutory language. *See* RCW 71.09.020(7). But "[t]he standard for clarity in a jury instruction is higher than for a statute." *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369, 372 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). Courts may resolve statutory ambiguities through the rules of statutory construction, but "a jury lacks such interpretive tools." *Id.*

Although the court allowed jurors to "consider all evidence that bears on the issue," this did not solve the problem. Under the instructions

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Note On Use to WPI 365.14 indicates that the phrase "placement conditions" applies to Mr. Taylor-Rose's circumstances: "Use the bracketed phrase 'placement conditions' only if the evidence indicates that the respondent *will be subject to court-ordered supervision*, even if released on the predator petition." WPI 365.14 – Note On Use (emphasis added).

[9] The legislature has made clear its desire to have juries decide civil commitment cases based on real-world conditions. *See* RCW 71.09.015.

plain language, "the issue" under consideration was the likelihood of predatory sexual violence upon unconditional release. CP 27

Furthermore, the instruction went on to say that jurors could consider voluntary treatment options but "only voluntary treatment options that would exist if the respondent is *unconditionally released* from detention in this proceeding." CP 27 (emphasis added). This language emphasized the jury's task as defined by the court: to determine how Mr. Taylor-Rose would do if released into the public without any supervision whatsoever. CP 27.

A reasonable juror "could have interpreted" the instruction to preclude consideration of Mr. Taylor-Rose's community supervision when determining his likelihood of sexually violent recidivism. *Miller*, 131 Wn.2d at 90. As in *Williams-Walker*, "[w]hen the jury is instructed on a specific [set of conditions] and makes its finding, the [committing] judge is bound by the jury's finding." *Williams-Walker*, 167 Wn.2d at 899.

The jury's verdict would have authorized commitment if the facts showed Mr. Taylor-Rose would be released without any conditions. CP 27. But the record unequivocally establishes that he will be subject to court-ordered community supervision for three to four years. Ex. 20, p. 4.

Just as the verdicts in *Delgado* and *Williams-Walker* did not permit imposition of firearm enhancements, the verdict in this case does not justify civil commitment. *Id; Delgado,* 149 Wn. App. at 237-238; *see also Pharr*, 131 Wn. App. at 124. The Supreme Court should accept review

and reverse the commitment order.[10] The case must be remanded for a new trial. *See In re Det. of Pouncy*, 168 Wn.2d 382, 392, 229 P.3d 678 (2010).

II. THE SUPREME COURT SHOULD REAFFIRM THAT JURY INSTRUCTIONS ARE REVIEWED *DE NOVO* AND MUST BE MANIFESTLY CLEAR.

The critical issue at Mr. Taylor-Rose's trial was whether he was "likely to engage in predatory acts of sexual violence" if released. CP 18, 27; *see* RCW 71.09.020(7) and (18). This element limits commitment to those who are currently dangerous, as required by due process. U.S. Const. Amend. XIV; *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009).

Here, the trial court's flawed "likely to engage" instruction relieved the State of its burden to prove current dangerousness. This violated Mr. Taylor-Rose's constitutional right to due process. *Id.; Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)) U.S. Const. Amend. XIV.

A. The Court of Appeals departed from Supreme Court precedent by refusing to evaluate the instructions *de novo*.

Appellate courts review instructions *de novo.*[11] *Peralta v. State*,

[10] The Court of Appeals didn't address Mr. Taylor-Rose's argument regarding the authority granted by the jury's verdict. Opinion, pp. 1-18. The court may have believed its discussion of Instruction No. 15 sufficed; however, the two issues are distinct. One need look no farther than *Williams-Walker* to understand that instructions may limit the authority granted by a verdict. *Williams-Walker*, 167 Wn.2d at 901 ("[N]o error exists in the instructions or jury findings. The error occurred when the judge imposed a sentence not authorized by the jury's express findings"); *see also Delgado*, 149 Wn. App. at 237-238.

[11] Constitutional arguments, legal errors, and issues of statutory construction are also reviewed *de novo. State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373 (2017); *Barton v. State, Dep't of Transp.*, 178 Wn.2d 193, 202, 308 P.3d 597 (2013). The *de novo* standard applies here for these reasons as well.

187 Wn.2d 888, 894, 389 P.3d 596 (2017).[12] This standard applies in both civil and criminal cases. *See, e.g.*, *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 849, 348 P.3d 389 (2015); *State v. Jackman*, 156 Wn.2d 736, 743-45, 132 P.3d 136, 140 (2006), *as corrected* (Feb. 14, 2007).

The Court of Appeals opinion conflicts with these decisions. It claimed the arguments involved only "word choice," and reviewed the instructions for an abuse of discretion. Opinion, pp. 12-17.

Legal errors cannot be divorced from the language that creates them. Although trial courts have some discretion to choose "specific language" when drafting an instruction, this does not insulate instructional error from *de novo* review. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996) (internal quotation marks and citation omitted); *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 274–75, 96 P.3d 386 (2004).

Thus, for example, in *Jackman* the Supreme Court reviewed *de novo* a set of "to convict" instructions that identified alleged victims by listing initials and birth dates. *Jackman*, 156 Wn.2d at 743-45. The *Jackman* court reviewed the error *de novo;* it did not defer to the trial judge's

[12] The *de novo* standard became firmly established following *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995), which cited *State v. Benn*, 120 Wn.2d 631, 654–55, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993). However, *Benn* did not employ the phrase "*de novo.*" The court first used the phrase "*de novo*" to review instructions in *State v. Mays*, 65 Wn.2d 58, 66, 395 P.2d 758 (1964). In *Mays*, the court examined instructions that it had previously approved and that seemed unquestionably correct. At the appellant's request, the court agreed to "take a new look at these instructions and regard them *de novo* as though they were offered in a murder trial for the first time." *Mays*, 65 Wn.2d at 65–66.

choice of language. *Id.* Similarly, the *Barrett* court rejected instructions using "obviously intoxicated" instead of "apparently under the influence" to describe the plaintiff's burden to show negligent over-service of alcohol. *Barrett,* 152 Wn.2d at 266, 274-75. The court reviewed the instructions *de* novo; it did not defer to the trial court's choice of language. *Id.*

Instructions must include all necessary legal concepts and omit any that are inapplicable or incorrect. Once this threshold is met, courts may have *some* discretion in selecting the precise language used to convey the properly-included legal concepts. *See Bodin*, 130 Wn.2d at 732. However, the "abuse of discretion" standard cannot apply where instructions omit necessary legal concepts or misstate the law. *Barrett,* 152 Wn.2d at 266, 274-75.

Here, the *de novo* standard applies. The court omitted two important legal concepts: the court should have instructed jurors to consider (1) placement conditions, and (2) the availability of an ROA petition.[13] Mr. Taylor-Rose does not complain that the court used imprecise language to address these subjects: the court failed to address them at all.[14]

These arguments do not merely "involve word choice" or the exclusion of "additional language" covering principles already addressed.

[13] His arguments are set forth below.

[14] He also argues the court improperly instructed jurors to consider his risk of recidivism "if released unconditionally." CP 27. His quarrel is not with the precise language chosen to address this concept; rather, he argues that anything relating to "unconditional release" is misleading under the facts of his case. The lower court did not reference the standard of review in discussing this issue. Opinion, pp. 12-14. If the court upheld the instruction as a proper exercise of discretion rather than reviewing the issue *de novo*, it erred for the reasons outlined in this section.

Opinion, p. 12. Instead, the argument relates to legal concepts omitted entirely from the instructions.

The Court of Appeals erred by applying an abuse of discretion standard.[15] Opinion, p. 12. This error led the court to reach the wrong decision on each argument advanced by Mr. Taylor-Rose. Opinion, pp. 12-17.[16] The Supreme Court should accept review and clarify that instructional error is reviewed *de novo* except in rare cases. The more deferential abuse-of-discretion standard only applies where a litigant agrees the instructions address the necessary legal subjects and challenges the language used to express those subjects. The lower court decision conflicts with *Peralta* and the long line of cases requiring *de novo* review. RAP 13.4(b)(1). In addition, this issue is of substantial public interest. RAP 13.4(b)(4).

B. The Court of Appeals should have evaluated the instructions under the "manifestly apparent" standard.

In criminal cases, instructions must make legal standards "manifestly apparent to the average juror." *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (internal quotation marks and citation omitted). Because civil commitment involves a "massive"[17] deprivation of liberty, the "manifestly apparent" standard should apply here as well.

[15] In addition, Mr. Taylor-Rose raised constitutional arguments which should have been reviewed *de novo. Watson v. City of Seattle*, No. 93723-1, Slip Op. at 2 (Wash. Aug. 10, 2017). Despite this, the Court of Appeals failed to apply the *de novo* standard. Opinion, pp.11-12.

[16] As noted, it is not clear what standard the court applied to Mr. Taylor-Rose's argument regarding the reference to unconditional release. Opinion, pp. 12-14.

[17] *See, e.g., In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) ("massive" deprivation of liberty requires narrow construction of statute).

Procedural and substantive due process require this result. *See Matter of Det. of M.W. v. Dep't of Soc. & Health Servs.*, 185 Wn.2d 633, 654, 374 P.3d 1123 (2016) (analyzing substantive and procedural due process challenges to RCW 71.05.320(3)(c)(ii); *State v. McCuistion*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012) (analyzing substantive and procedural due process challenges to RCW 71.09.090(4)).

Procedural due process. Courts resolve procedural due process claims by balancing the parties' interests and the risk of error posed by the current procedure. *M.W.*, 185 Wn.2d at 653-54 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Because civil commitment involves a massive curtailment of liberty, the first factor weighs in favor of more rigorous procedural protections. *Id.*, at 654.

The second factor also supports the "manifestly apparent" standard. Instructions may be clear "to the trained legal mind" without adequately communicating an important legal standard to the average juror. *State v. Fischer*, 23 Wn. App. 756, 759, 598 P.2d 742 (1979) (cited with approval by *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)). Any miscommunication regarding the correct legal standard may lead to an erroneous finding. This potential for error supports the "manifestly apparent" standard in the criminal context. *Id.; see Kyllo*, 166 Wn.2d at 864; *see also State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). No lesser standard should apply in the civil commitment context, where the massive curtailment of liberty is based on predictions of the future rather than on past criminal conduct.

The third factor also weighs heavily in favor of applying the *Kyllo* standard here. The State has a "'compelling interest both in treating sex predators and protecting society from their actions.'" *In re Det. of Morgan*, 180 Wn.2d 312, 322, 330 P.3d 774 (2014) (*Morgan* I) (quoting *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993)). This interest is furthered by jury instructions that are manifestly clear. Jurors who misinterpret their instructions may well release a predator who should be confined.[18] There are no additional costs associated with ensuring that jury instructions are manifestly clear.

Under *Mathews*, procedural due process requires application of the "manifestly apparent" standard for jury instructions in civil commitment cases. All three *Mathews* factors favor application of this standard.

Substantive due process. Civil commitment is constitutional if it is narrowly drawn to serve compelling state interests. *McCuistion*, 174 Wn.2d at 387. Our civil commitment statute is constitutional because it requires proof that the detainee is "mentally ill and currently dangerous." *Moore*, 167 Wn.2d at 124 (citing, *inter alia*, *Foucha*, *supra*). Where jury instructions are not manifestly clear, jurors might erroneously find that a detainee qualifies for civil commitment, even in the absence of sufficient evidence. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) (due process violated where reasonable juror "could have interpreted" instruction as mandatory presumption relieving the State

[18] Furthermore, they are just as likely to commit someone who should be released, resulting in unnecessary costs relating to detention and treatment of someone who should be at liberty.

of its burden to prove intent).

Civil commitment violates substantive due process if the jury misreads the court's instructions to allow commitment of someone who is not mentally ill and currently dangerous. *Id.; Foucha,* 504 U.S. at 77. A procedure allowing erroneous detention is not narrowly tailored to the State's compelling interest in confining those who are mentally ill and currently dangerous. Requiring courts to provide manifestly clear instructions would ensure the statute is implemented in a manner that complies with substantive due process. *Foucha,* 504 U.S. at 77*; McCuistion,* 174 Wn.2d at 387.

Citing *Kyllo,* the Court of Appeals erroneously suggested that the "manifestly apparent" standard applies only where instructions are conflicting. Opinion, p. 11, n. 2. It refused to apply the standard here because Mr. Taylor-Rose did "not argue that there were contradictory instructions given in this case." Opinion, p. 11, n. 2.

This mischaracterizes *Kyllo.* The instructions in that case did not conflict, and the court made no mention of any inconsistency in its analysis. *Kyllo,* 166 Wn.2d at 859-60; 863-65. Furthermore, as other cases show, the "manifestly apparent" standard is not limited to situations involving "one incorrect instruction and one correct instruction." Opinion, p. 11 n. 2; *Id; see also State v. Studd,* 137 Wn.2d 533, 546, 973 P.2d 1049, 1055 (1999), *as amended* (July 2, 1999); *State v. Walden,* 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *LeFaber,* 128 Wn.2d at 900.[19]

[19] It appears that the Supreme Court has only applied the standard to cases involving self-defense. However, there is no reason it should be limited to self-defense cases, and the Courts of Appeals has applied it more broadly. *See In re Schreiber,* 189 Wn. App. 110, 116, 357 P.3d 668 (2015); *State v. Smith,* 174 Wn. App. 359, 369, 298 P.3d 785 (2013); *State v.*

The Supreme Court should accept review and clarify that due process requires application of the "manifestly apparent" standard to jury instructions in civil commitment cases. The Court of Appeals' decision conflicts with *Kyllo,* and other Supreme Court precedent, and presents constitutional issues that are of substantial public interest. RAP 13.4(b)(1), (3), and (4).

C. The Supreme Court should accept review, evaluate the court's instructions *de novo,* and reverse the commitment order because the instructions were not manifestly clear.

1. The trial court violated due process by refusing to instruct jurors to consider "placement conditions."

In keeping with WPI 365.14, Mr. Taylor-Rose asked the court to instruct jurors to consider "placement conditions or voluntary treatment options that would exist if [he were] released from detention in this proceeding." Supp. CP 99-100; WPI 365.14. The court refused, and omitted the phrase "placement conditions" from its "likely to engage instruction." CP 27.

The phrase "placement conditions" applies when a "respondent will be subject to court-ordered supervision, even if released on the predator petition." WPI 365.14 – Note On Use. This is in keeping with two statutory provisions. First, "[i]n determining whether or not [a] person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only *placement conditions* and

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Carter, 156 Wn. App. 561, 565, 234 P.3d 275 (2010), *disapproved of on other grounds by State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011); *State v. Watkins*, 136 Wn. App. 240, 243, 148 P.3d 1112 (2006).

voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition." RCW 71.09.060(1) (emphasis added). Second, juries are to be "presented only with *conditions* that would exist or that the court would have the authority to order in the absence of a finding that the person is a sexually violent predator." RCW 71.09.015 (emphasis added).

Upon release, Mr. Taylor-Rose will be subject to court-ordered community supervision of 36-48 months. Ex. 20, p. 4. This is a "placement condition" under RCW 71.09.060(1). *See* WPI 365.14 – Note On Use. Although jurors were told to consider "all the evidence that bears on the issue," the court singled out "voluntary treatment options that would exist if the respondent is unconditionally released." CP 27. The court did not tell jurors they could also consider the conditions under which Mr. Taylor-Rose would be released. CP 27.

Under the court's instructions, a reasonable juror would not have known to consider "placement conditions… that would exist if the respondent is unconditionally released." Supp. CP 99-100.; WPI 365.14. This is especially true given the court's inclusion of the word "unconditionally," which appears twice in the instruction. CP 27. A reasonable juror could interpret the instruction to preclude consideration of an existing placement condition—that he would be subject to court-ordered supervision for 36-48 months following release.

The Court of Appeals agreed that "it would have been appropriate for the trial court to include 'placement conditions' in the instruction," and

that "it would have been more helpful to Taylor-Rose if the instruction explicitly drew the jury's attention to placement conditions." Opinion, p. 15. The court's erroneous decision rejecting Mr. Taylor-Rose's argument rested on its failure to apply the correct standard of review and its refusal to evaluate the instructions using the "manifestly apparent" standard. Opinion, pp. 15-16.

Under the court's instructions, trial counsel was put in the untenable position of "having to convince [jurors] what the applicable law is." *Pouncy*, 168 Wn.2d at 392. But "[a] jury should not have to obtain its instruction on the law from arguments of counsel." *State v. Aumick,* 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). The Court of Appeals' failure to apply the correct legal standards led it to the wrong decision.

The court's "likely to engage" instruction did not make the legal standard manifestly apparent to the average juror. *Kyllo,* 166 Wn.2d at 864. By omitting any language about Mr. Taylor-Rose's actual placement conditions, the court relieved the State of its burden to prove current dangerousness. This violated due process and requires reversal of the commitment order. *Foucha,* 504 U.S. at 77.

2. The trial court relieved the State of its burden to prove current dangerousness by refusing to instruct jurors on the availability of a "Recent Overt Act" Petition.

At a civil commitment trial, jurors must determine if the detainee is likely to engage in predatory acts of sexual violence. RCW 71.09.060(1). The jury may consider "placement conditions… that would exist for the

person if unconditionally released." RCW 71.09.060(1).

The fact that a respondent who is released "could be subject to another SVP proceeding if he commits a recent overt act is relevant" to this determination, because the availability of a new petition "is a condition that would exist upon placement in the community." *In re Det. of Post*, 170 Wn.2d 302, 316–17, 241 P.3d 1234 (2010) (citing RCW 71.09.020(12) and RCW 71.09.030(1)(e)).

Post controls. Here, the trial judge refused to instruct jurors that "the state may file a new Petition charging Brian Taylor-Rose as a sexually violent predator if it learns he has committed a 'recent overt act.'" Supp. CP 99.[20] But as the *Post* court noted, "knowledge of the consequences for engaging in [a recent overt act] may well serve as a deterrent to such conduct and, therefore, has some tendency to diminish the likelihood of [the respondent] committing another predatory act of sexual violence." *Id.* It is therefore "relevant to the determination of whether [a detainee] is an SVP." *Id.* It is also "a condition to which [the detainee] would be subject if released," and thus is not barred by the legislature's insistence that the jury evaluate real world conditions. *Id.,* at 317 (citing RCW 71.09.060(1); *see also* RCW 71.09.015.

The availability of a recent overt act (ROA) petition serves another important function as well. Juries are understandably reluctant to release detainees who are potentially dangerous, even if they do not qualify for

[20] The proposed instruction also defined "recent overt act" in accordance with RCW 71.09.020(12). Supp. CP 99.

commitment. Jurors should be informed that a new petition can be filed following release even absent a new criminal offense. Allowing jurors to know this would ameliorate their reluctance to release a potentially dangerous person.

Although *Post* addressed the admissibility of evidence, its reasoning applies here. The availability of an ROA petition increased the deterrent pressure to which Mr. Taylor-Rose was subject and would have relieved juror anxiety about releasing a person with his criminal record. His attempt to tell jurors of this possibility through an instruction does not distinguish his case from *Post,* so long as the instruction was proper.

As a matter of law, Mr. Taylor-Rose would be subject to a new petition based on a recent overt act committed after release. RCW 71.09.020(7) and (12); RCW 71.09.030(1)(e); RCW 71.09.060(1). The proffered instruction was a correct statement of the law. It was not misleading, and it would have allowed Mr. Taylor-Rose to argue his theory of the case. *Id.* Without it, he was unable to explain to jurors that even a non-criminal act could subject him to future commitment.

The court's failure to give Mr. Taylor-Rose's proposed instruction relieved the State of its burden to prove he is currently dangerous. Without the instruction, jurors were unable to make an accurate assessment of his dangerousness and thus could not determine whether he was "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(7)

Although the Court of Appeals conceded that the availability of an

ROA petition is relevant to the risk of recidivism, it rejected Mr. Taylor-Rose's arguments based on its erroneous view of the applicable legal standards. Opinion, p. 17. The court should have reviewed the instructional issue *de novo* and applied the "manifestly apparent" standard.

Without instruction on the availability of an ROA petition, trial counsel had no opportunity to even try "to convince [jurors] what the applicable law is." *Pouncy*, 168 Wn.2d at 392; *see Aumick*, 126 Wn.2d at 431. Furthermore, because the availability of such a petition is a matter of law, Mr. Taylor-Rose was not under any obligation to introduce evidence proving that RCW 71.09.030(1)(e) authorizes an ROA petition. *See* Opinion, p. 17. Jury instructions are the appropriate vehicle for informing jurors about the law. Nor should it have been necessary to introduce evidence that the availability of such a petition would tend to reduce a person's risk of recidivism: the Supreme Court has concluded it would as a matter of law. *Post*, 170 Wn.2d at 317.

The court should have given the instruction. *Id.* Mr. Taylor-Rose's commitment order must be reversed and the case remanded for a new trial. Upon retrial, the court must instruct jurors regarding the "conditions" to which Mr. Taylor-Rose will be subject upon release, including the possibility that the State would file a new petition based on a "recent overt act" that fell short of a new criminal offense. *Id.*; *Post,* 170 Wn.2d a 316–17.

3. The Supreme Court should accept review.

Review is appropriate under RAP 13.4(b)(1) and (4). The Supreme

Court should clarify the standards applicable to jury instructions in civil commitment cases. The lower court's opinion conflicts with Supreme Court precedent and presents issues of substantial public interest. RAP 13.4(b)(1) and (4).

III. THE SUPREME COURT SHOULD REAFFIRM THAT JURY INSTRUCTIONS MUST BE SUPPORTED BY EVIDENCE, ALLOW EACH PARTY TO ARGUE ITS THEORY, AND PROPERLY INFORM JURORS OF APPLICABLE LAW.

Jury instructions must be "supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law." *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015).[21] Instructions are not sufficient merely because a party can argue its position to the jury: "lawyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is." *Pouncy*, 168 Wn.2d at 392; *see also Aumick*, 126 Wn.2d at 431 ("A jury should not have to obtain its instruction on the law from arguments of counsel.")

An instruction's propriety "is governed by the facts of the particular case." *Fergen*, 182 Wn.2d at 803. Pattern jury instructions are not "immune from judicial scrutiny." *State v. Morgan*, 123 Wn. App. 810, 820, 99 P.3d 411 (2004) (*Morgan* II); *see also State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) ("The fact that the instruction was modeled on a

[21] In addition, the "manifestly apparent" standard for instructional clarity in criminal cases should apply to civil commitment proceedings, as argued elsewhere in this Petition. The instructions here did not make the relevant standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.

Washington pattern instruction for a criminal case does not alter our conclusion.")

Jury instructions are read "the way a reasonable juror could have interpreted" them. *Miller,* 131 Wn.2d at 90. In addition, "[t]he standard for clarity in a jury instruction is higher than for a statute." *LeFaber,* 128 Wn.2d at 902. Jurors cannot rely on the interpretive tools used by lawyers to resolve ambiguities in a jury instruction. *Id.*

Here, the court's "likely to engage" instruction failed to meet these criteria, and relieved the State of its burden to prove current dangerousness. CP 27. Despite this, the Court of Appeals affirmed the order committing Mr. Taylor-Rose. The Supreme Court should accept review and reverse this decision for the reasons outlined below.

A. The instructions were improper under well-established standards.

In any proceeding under Chapter 71.09 RCW, the legislature has specifically authorized consideration of "conditions that would exist… in the absence of a finding that the person is a sexually violent predator." RCW 71.09.015. Such conditions are "typically pre-existing community supervision conditions placed on respondent in connection with a prior criminal conviction." Comment to WPI 365.14.

If released, Mr. Taylor-Rose will serve 36-48 months of court-ordered community supervision. Ex. 20, p. 4. Thus, the "facts of [this] particular case" establish that Mr. Taylor-Rose will not be unconditionally released even "in the absence of a finding that [he] is a sexually violent

predator." RCW 71.09.015; *Fergen*, 182 Wn.2d at 803.

These facts should have governed the court's instructions. *Id.* Instead, over objection, the trial court instructed jurors to determine if Mr. Taylor-Rose "more probably than not will engage in [predatory sexual violence] if released *unconditionally* from detention in this proceeding." CP 27 (emphasis added); RP 2490-2502; *see* Supp. CP 99-100. The instruction was improper for several reasons.

First, the instruction was not "supported by the evidence." *Id.* Nothing in the record suggested that Mr. Taylor-Rose would be unconditionally released. The court should have stricken references to unconditional release as requested by Mr. Taylor-Rose. *Id.*

Second, the instruction did not allow Mr. Taylor-Rose to advance his theory of the case. *Id.* By referencing unconditional release, the instruction precluded argument that jurors could consider conditions of supervision when determining Mr. Taylor-Rose's risk of predatory sexual violence. CP 27.

Third, even when considered together, the court's instructions did not "properly inform the trier of fact of the applicable law." *Id.*[22] Instead, the instructions left trial counsel in the position of attempting to convince the jury "what the applicable law is." *Pouncy*, 168 Wn.2d at 392; *see Aumick*, 126 Wn.2d at 431.

A reasonable juror "could have interpreted" the instruction to

[22] Nor did it make the standard manifestly apparent to the average juror, as argued elsewhere in this petition.

prohibit consideration of Mr. Taylor-Rose's community supervision when assessing his level of risk. *Miller*, 131 Wn.2d at 90; CP 27. Such an interpretation would allow commitment even if he could live safely in the community while on community supervision. Trial counsel could not rely on any of the court's instructions to persuade jurors that the court wished them to consider conditions of release.

For all these reasons, the instruction was improper. *Fergen*, 182 Wn.2d at 803. The error relieved the State of its burden to prove an element required for commitment and allowed the jury to vote in favor of the State even absent proof of current dangerousness. Thus, in addition to violating the rules set forth in *Fergen*, the instruction also violated Mr. Taylor-Rose's Fourteenth Amendment right to due process. *See Foucha*, 504 U.S. at 77; *Moore*, 167 Wn.2d at 124.

B. The disputed instruction lacked evidentiary support, prohibited Mr. Taylor-Rose from arguing his theory, and misstated the law.

The Court of Appeals ignored the principles outlined in *Fergen*, *LeFaber*, *Pouncy*, and *Aumick*, and upheld the commitment order despite the instruction's inappropriate reference to unconditional release.[23] This court should accept review because the lower court's opinion conflicts with Supreme Court decisions. RAP 13.4(b)(1). It also presents a significant question of constitutional law that is of substantial public interest. RAP 13.4(b)(3) and (4).

[23] The court made no reference to the standard of review when discussing this challenge. To the extent it relied on an abuse of discretion standard, it erred for the reasons outlined elsewhere in this Petition.

In reaching its decision, the Court of Appeals relied on Instruction No. 15's similarity to the statutory language and the pattern instruction. Opinion, pp. 12-13. Under "the facts of [this] particular case," the court's reliance was misplaced. *Fergen* 182 Wn.2d at 803.

The jurors could not resort to tools of statutory construction to resolve an inconsistency between the instruction and the facts. *LeFaber*, 128 Wn.2d at 902. They had no way to harmonize the instruction's reference to unconditional release with the undisputed evidence that Mr. Taylor-Rose would serve three to four years of community supervision.[24] CP 27; Ex. 20, p. 4. References to "'all evidence that bears on the issue'" and to "release 'in this proceeding' did nothing to clarify the issue. *See* Opinion, p. 13 (quoting CP 27).

Without citation to any relevant authority, the Court of Appeals suggests that "an instruction is not erroneous simply because counsel may need to explain certain language." Opinion, p. 13.[25] This assertion conflicts with the Supreme Court's admonition that the jury "should not have to obtain its instruction on the law from arguments of counsel." *Aumick*, 126 Wn.2d at 431; *see also Pouncy*, 168 Wn.2d at 392.

The court's "likely to engage" instruction was not supported by the evidence, prevented Mr. Taylor-Rose from arguing his theory of the case, and misstated the applicable law. *Fergen*, 182 Wn.2d at 803. A reasonable

[24] Nor was the instruction immune from judicial scrutiny as a pattern instruction. *Morgan II*, 123 Wn. App. at 820; *Cronin*, 142 Wn.2d at 579.

[25] The court cites *State v. Harris*, 164 Wn. App. 377, 387, 263 P.3d 1276 (2011) (*Harris* I) for the proposition that "'a trial court should use the statute's language' when instructing the jury." Opinion, p. 13.

juror could have interpreted the instruction to relieve the State of its burden to prove current dangerousness under the real-world conditions that will exist upon release. *Miller*, 131 Wn.2d at 90.

This violated Mr. Taylor-Rose's Fourteenth Amendment right to due process. *Foucha*, 504 U.S. at 77; *Moore*, 167 Wn.2d at 124. The Supreme Court should accept review, reverse the commitment order and remand the case for a new trial with proper instructions. *See Pouncy*, 168 Wn.2d at 392. The Court of Appeals decision conflicts with *Fergen, LeFaber, Aumick,* and *Pouncy.* This case presents a significant constitutional issue that is of substantial public interest. RAP 13.4(b)(1), (3), and (4).

IV. THE SUPREME COURT SHOULD DETERMINE IF ESTIMATED LIFETIME RISK OF RECIDIVISM PROVES CURRENT DANGEROUSNESS.

Due process prohibits civil commitment for those who are not currently dangerous. *Foucha* 504 U.S. at 78. The word "currently" is an adverb meaning "at the present time; now." *Dictionary.com Unabridged,* Random House, Inc. (2016).[26] A person who is "currently dangerous" is dangerous at the present time. *Dictionary.com.* Someone who is unlikely to reoffend unless risk is aggregated over a long period cannot be described as "currently" dangerous: he is not dangerous at the present time.

Where possible, statutes must be construed to avoid constitutional difficulty. *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015). If interpreted to allow commitment of those who are

[26] Available at http://www.dictionary.com/browse/currently (accessed August 1, 2017).

not currently dangerous, RCW 71.09 would be unconstitutional under *Foucha.*

Because of this, RCW 71.09 may not be construed to allow commitment based on lifetime risk.[27] *Utter*, at 434. A person who is not currently dangerous but who might reoffend over the course of his lifetime does not qualify for commitment under *Foucha.*[28]

This is consistent with the rule requiring courts to strictly construe statutes involving a deprivation of liberty. *Hawkins*, 169 Wn.2d at 801. When strictly construed in favor of liberty, the statute does not allow commitment based on lifetime risk.

Substantive due process also requires this interpretation. The provisions of RCW 71.09 are constitutional only to the extent they are narrowly tailored to achieve the government's interest in protecting the public and providing treatment. *Young*, 122 Wn.2d at 26; *In re Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

Allowing commitment based on lifetime risk would violate substantive due process. Commitment based on lifetime risk is not narrowly tailored to achieving the government's goals of protecting the public from and providing treatment to those who are currently dangerous. *Young*, 122 Wn.2d at 26; *Albrecht*, 147 Wn.2d at 7. A lesser period would still allow the State to confine and treat those most likely to commit predatory acts of

[27] The sole exception would be the rare case where the State seeks commitment of a person nearing the end of his life.

[28] In some cases, a person's low life expectancy may permit commitment based on lifetime risk.

sexual violence. At the same time, such a standard would exclude those whose recidivism risk is low, unless considered over the course of an entire lifespan.

Instead of lifetime risk, some other formulation must be used to express a person's overall risk. The State need not prove imminent risk. *In re Harris*, 98 Wn.2d 276, 281-282, 654 P.2d 109 (1982) (*Harris* II) (addressing RCW 71.05). Nor is the State required to prove the risk arises within the foreseeable future or within a fixed number of years. *Moore*, 167 Wn.2d at 123; *In re Det. of Keeney*, 141 Wn. App. 318, 327, 169 P.3d 852 (2007). But this does not eliminate the possibility of other formulations of the appropriate standard.

For example, the State may be required to prove that a detainee is likely to engage in predatory acts of sexual violence within "a reasonable period of time." *See, e.g.*, RCW 10.77.86 (in cases of incompetency, requiring a judge or jury to determine if "there is a substantial probability that the defendant will regain competency *within a reasonable period of time*") (emphasis added).

Alternatively, the court's instructions should explicitly incorporate the *Foucha* court's requirement of current dangerousness. *Foucha*, 504 U.S. at 77. This would ensure that juries reach their verdicts in harmony with *Foucha* and substantive due process. *Id.; Young*, 122 Wn.2d at 26; *Albrecht*, 147 Wn.2d at 7.

It is possible to imagine other standards that accord with the con-

stitution's requirements. What is prohibited is commitment based on lifetime risk. Such a commitment does not rest on a finding of current dangerousness and thus violates due process. *Foucha*, 504 U.S. at 77.

Here, the Court of Appeals failed to meaningfully engage with Mr. Taylor-Rose's argument. Opinion, p. 10. Relying on *Moore*, the court noted that current dangerousness can be implied from the elements required for commitment, and the State need not prove a risk of recidivism within the foreseeable future. Opinion, p. 10. The court did not explain how a person's lifetime risk can show current dangerousness. Opinion, pp. 9-10. Nor did the court suggest that commitment based on lifetime risk is narrowly tailored to achieve a compelling purpose. Opinion, pp. 9-10.

In this case, Mr. Taylor-Rose argued to the trial court that due process prohibited commitment based on lifetime risk.[29] RP 119-123; Supp. CP 70-74. He sought to exclude evidence of his lifetime risk. RP 119-123; Supp. CP 70-74. The trial court denied his motion. CP 46.

At trial, the State's evidence focused on Mr. Taylor-Rose's lifetime risk of committing predatory sexual violence. [30] Dr. Hoberman repeatedly told the jury that his task was to determine Respondent's lifetime risk. RP 1235, 1244, 1869, 1919-1921, 1970-1972. No witness examined the risk over a shorter period. In closing, the State relied on lifetime risk.

[29] Respondent's attorney argued for consideration of risk within the foreseeable future or within a term of years. Supp. CP 70-74.

[30] Mr. Taylor-Rose is currently 39 years old (DOB 6/13/78). Ex. 1. According to the Social Security Administration, he can be expected to live approximately 42 more years. Social Security Administration, Life Expectancy Calculator, available at https://www.ssa.gov/cgi-bin/longevity.cgi (last accessed August 21, 2017).

RP 2624. The court did not instruct jurors to consider risk over a shorter timeframe. CP 10-30.

The Supreme Court should accept review and determine if civil commitment constitutionally rests on estimates of a patient's lifetime risk of recidivism.

V. THE SUPREME COURT SHOULD REVERSE BECAUSE THE TRIAL JUDGE COMMENTED ON THE EVIDENCE.

A. RCW 71.09 differentiates between "sexually violent offenses" and "crimes of sexual violence."

Because involuntary commitment involves a "massive curtailment of liberty, Chapter 71.09 RCW must be strictly construed to its terms. *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008).[31] Statutory interpretation principles require a "comprehensive reading," deriving legislative intent from "ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *In re Det. of Strand*, 167 Wn.2d 180, 188, 217 P.3d 1159 (2009) (internal quotation marks and citations omitted).

A person's prior offenses play a significant role in commitment proceedings. The statute uses two different phrases to describe a predicate offense under RCW 71.09: "sexually violent offense" and "crime of sexual violence." *See* RCW 71.09.020(17) *and* RCW 71.09.020(18). Since

[31] Ordinarily, courts must choose a "narrow, restrictive construction" over a "broad, more liberal interpretation." *Id.* at 510. However, courts "will not resort to a rule of strict construction where the liberty or property of a citizen is put at hazard." *State v. Superior Court of King Cty.*, 74 Wash. 689, 691, 134 P. 178 (1913).

the legislature used different language, it necessarily intended different meanings. *State v. Costich*, 152 Wn.2d 463, 475-476, 98 P.3d 795 (2004).

The phrase "sexually violent offense" is used repeatedly throughout the statute; however, the phrase "crime of sexual violence" occurs only once: in the definition of sexually violent predator. RCW 71.09.020(18); *see also* RCW 71.09.020(17), RCW 71.09.025; RCW 71.09.030; RCW 71.09.060; RCW 71.09.140.

The legislature has given "sexually violent offense" a specific and concrete meaning based on a list of qualifying offenses. RCW 71.09.020(17). An inmate with a qualifying conviction will be referred to a state or county prosecuting agency when nearing release. RCW 71.09.025(1)(a). The agency may then file a civil commitment petition. RCW 71.09.030(1). The phrase "sexually violent offense" also appears in statutes setting venue, outlining notice requirements, and governing trial of the petition. RCW 71.09.030(2); RCW 71.09.060; RCW 71.09.140.[32]

By contrast, the legislature has not defined the phrase "crime of sexual violence," which appears only in the definition of sexually violent predator. RCW 71.09.020(17). Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v.*

[32] RCW 71.09.060's two references to "sexually violent offenses" impose additional requirements where the offense was a crime that was sexually motivated or where the person charged with a sexually violent offense has been found incompetent.

Kelso Sch. Dist. No. 458, 162 Wn.2d 196, 202, 172 P.3d 329 (2007). Because Chapter 71.09 RCW must also be strictly construed, the most restrictive definition applies. *Martin*, 163 Wn.2d at 509; *Hawkins*, 169 Wn.2d at 801.

Assuming a predicate offense qualifies as a sexual crime, only the word "violence" must be examined. "Violence" means (in relevant part) "swift and intense force," or "rough or injurious physical force." *Dictionary.com*.[33] In other words, a "crime of sexual violence" is one accomplished by means of "swift and intense force" or "rough and injurious physical force." *Dictionary.com*.[34]

Thus, the State may file a petition against any offender convicted of an offense enumerated in RCW 71.09.020(17); however, to prevail at trial, the State must prove that the offense was a "crime of sexual violence" involving "swift and intense force" or "rough and injurious physical force." RCW 71.09.020(18); *Dictionary.com.*

The reason becomes apparent from examination of the statutory scheme. *Strand*, 167 Wn.2d at 188. Threshold questions involving screening, jurisdiction, and notice require no factfinding; they are resolved with reference to the list of offenses. RCW 71.09.020(17). By contrast, indefinite civil commitment requires proof of *violence in fact*. RCW 71.09.020(18); RCW 71.09.060(1); *Dictionary.com.*

[33] Available at http://www.dictionary.com/browse/violence (accessed August 31, 2017).

[34] Some "sexually violent offenses" will always qualify as "crimes of sexual violence." Others (i.e. Child Molestation or Residential Burglary with Sexual Motivation) might occur without the use of intense or rough force.

Here, the State alleged that Mr. Taylor-Rose had been convicted of second-degree child molestation, "a sexually violent offense, as that term is defined in RCW 71.09.020(17)." CP 53. The jury had to decide if he qualified as a sexually violent predator, which required proof of conviction of a "crime of sexual violence," accomplished by physical force that was rough, injurious, swift, and/or intense. RCW 71.09.020(18); *Dictionary.com.*

B. The instructions commented on the evidence and relieved the State of its burden to prove a "crime of sexual violence."

Under the state constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, §16. A court may not "instruct the jury that matters of fact have been established as a matter of law." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Civil incarceration achieved by means other than strict compliance with Chapter 71.09 RCW violates due process. *Martin*, 163 Wn.2d at 511; U.S. Const. Amend. XIV.

Here, the court did not allow jurors to determine if Mr. Taylor-Rose had been convicted of a "crime of sexual violence." Instead, the court instructed jurors (over objection) that the State had to prove "a crime of sexual violence, *namely Child Molestation in the Second Degree."* CP 18 (emphasis added); *see also* CP 19.[35]

The instruction was an unconstitutional judicial comment. *Becker*, 132 Wn.2d at 64; *see also State v. Brush*, 183 Wn.2d 550, 556-560, 353

[35] The court rejected Mr. Taylor-Rose's proposed instruction, which did not tell jurors that his prior offense automatically qualified. Supp. CP 98.

P.3d 213 (2015). It removed from jurors' consideration a critical issue: whether the prior conviction involved physical force that was rough, injurious, swift, and/or intense. RCW 71.09.020(18); *Dictionary.com.* It directed a "yes" verdict based on the prior conviction, even if the offense did not involve violence in fact. *Becker*, 132 Wn.2d at 65.

A judicial comment is presumed prejudicial, requiring reversal unless the record affirmatively establishes that no prejudice could have resulted. *Brush*, 183 Wn.2d at 559. Here, no evidence suggested the prior conviction involved "swift and intense force," or "rough or injurious physical force;" instead the evidence showed he touched a sleeping 13-year-old. RP 406; CP 53.

The instruction was a judicial comment, requiring reversal. *Id.* It also violated due process. *Martin*, 163 Wn.2d at 509. The Supreme Court should accept review, reverse, and remand for a new trial with proper instructions. *See Brush*, 183 Wn.2d at 561.

C. The Court of Appeals departed from "firmly established" Supreme Court precedent .

By concluding the two phrases have the same meaning, the Court of Appeals ignored settled rules of statutory interpretation. Opinion, pp. 6-7 (citing *In re Det. of Coppin*, 157 Wn. App. 537, 553, 238 P.3d 1192 (2010)). First, "[i]t is firmly established… that where the legislature uses different language in the same statute, differing meanings are intended."

Costich, 152 Wn.2d at 475–76.[36] Second, the court failed to strictly construe Chapter 71.09 RCW against the State. *Martin*, 163 Wn.2d at 508.

The Court of Appeals' decision conflicts with *Costich*, *Durland*, *Martin*, and other Supreme Court decisions. The Supreme Court should accept review. RAP 13.4(b)(1).

CONCLUSION

For the foregoing reasons, the Supreme Court should accept review under RAP 13.4(b)(1), (3), and (4). The lower court's decision must be reversed and the case remanded for a new trial with proper instructions.

Respectfully submitted September 1, 2017.

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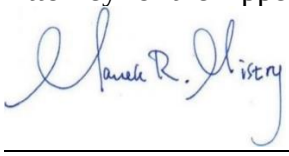

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Attorney for the Appellant

[36] This is a "basic rule" of statutory construction. *Durland v. San Juan Cty.*, 182 Wn.2d 55, 79, 340 P.3d 191 (2014) (internal quotation marks and citation omitted).

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Amended Petition for Review, postage pre-paid, to:

Brian Taylor-Rose
Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

and I sent an electronic copy to:

Attorney General's Office
farshad.talebi@atg.wa.gov
crjsvpef@atg.wa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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 September 1, 2017.

_____

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

APPENDIX: Court of Appeals Published Opinion, filed on July 25, 2017.

Filed
Washington State
Court of Appeals
Division Two

July 25, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Detention of: BRIAN TAYLOR-ROSE.	No. 47975-3-II PUBLISHED OPINION

MAXA, A.C.J. – Brian Taylor-Rose appeals his civil commitment as a sexually violent predator (SVP) under RCW 71.09.060 following a jury trial.

We hold that (1) the trial court did not err in instructing the jury that second degree child molestation is a crime of sexual violence, (2) the State provided sufficient evidence that Taylor-Rose was likely to engage in predatory acts of sexual violence if not confined to a secure facility, (3) the trial court did not err in instructing the jury to determine Taylor-Rose's risk level if released "unconditionally" from detention on the SVP petition, (4) the trial court did not err in declining to expressly include "placement conditions" as evidence the jury could consider in determining whether Taylor-Rose was likely to engage in predatory acts of sexual violence if not confined to a secure facility, and (5) the trial court did not err by declining to give Taylor-Rose's proposed instruction about the State's ability to bring a new SVP petition based on a recent overt act following his release.

Accordingly, we affirm Taylor-Rose's commitment as an SVP.

FACTS

Taylor-Rose has two criminal convictions for sex offenses. In 1998, he pleaded guilty to second degree child molestation. In 2009, he pleaded guilty to third degree child molestation. In December 2012, before the end of Taylor-Rose's sentence, the State filed an SVP petition against him. The State used Taylor-Rose's 1998 conviction as the predicate sexually violent offense for the petition.

Trial Testimony

At trial, the State presented several witnesses to testify about the conduct leading to Taylor-Rose's two convictions. Lourene O'Brien-Hooper, a community corrections officer who supervised Taylor-Rose on and off for more than 10 years after he was released following his 1998 conviction, testified about his violations, arrests and high risk behavior while on supervision. She also stated her concerns about Taylor-Rose's deviant fantasies and arousal to children and his violating the condition to not have contact with children.

Dr. Harry Hoberman, a forensic psychologist, testified that in his expert opinion it was more likely than not that Taylor-Rose would commit an act of sexual violence if not confined to a secure facility. Hoberman explained how he arrived at that conclusion using various assessments. His analysis included determining Taylor-Rose's lifetime risk of sexual reoffending. Hoberman also noted that the fact that Taylor-Rose would be under community supervision if released did not impact his opinion about Taylor-Rose's risk of reoffending.

Taylor-Rose also testified. He stated that he no longer had deviant thoughts about children. He also stated that he would not have an issue being around children if released.

However, he acknowledged that during earlier treatment sessions he had stated that, if released, he probably would create more victims.

Jury Instructions

The trial court instructed the jury on the three elements required to find Taylor-Rose met the definition of SVP. The first element was that he had been convicted of a crime of sexual violence. Two of the court's instructions informed the jury that second degree child molestation was a crime of sexual violence.

The second element, which is not in dispute here, was that Taylor-Rose suffered from a "mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior." Clerk's Papers (CP) at 18.

The third element was that Taylor-Rose was likely to engage in predatory acts of sexual violence if not confined to a secure facility. The trial court gave instruction 15, which explained that " '[l]ikely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding." CP at 27. The instruction stated that the jury could consider certain voluntary treatment options in making this determination. Taylor-Rose argued against this instruction, and proposed an instruction similar to instruction 15 that removed any reference to unconditional release and allowed the jury to consider his placement conditions if released. The court declined to give Taylor-Rose's proposed instruction.

Verdict and Appeal

The jury returned a verdict finding that the State had proved beyond a reasonable doubt that Taylor-Rose met the definition of an SVP. Pursuant to that verdict, the trial court issued an

order of commitment confining Taylor-Rose to a special commitment center until such a time when his mental abnormality and/or personality disorder had changed so that he could be conditionally released or unconditionally discharged.

Taylor-Rose appeals his commitment as an SVP.

ANALYSIS

A. LEGAL PRINCIPLES

For a person to be committed as an SVP, RCW 71.09.060(1) requires the State to prove beyond a reasonable doubt that the person is a sexually violent predator within the meaning of the commitment statute. *In re Det. of Post*, 170 Wn.2d 302, 309-10, 241 P.3d 1234 (2010). RCW 71.09.020 (18)[1] defines a "[s]exually violent predator" as:

> 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.

This definition contains three elements:

> (1) that the respondent "has been convicted of or charged with a crime of sexual violence," (2) that the respondent "suffers from a mental abnormality or personality disorder," and (3) that such abnormality or disorder "makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."

Post, 170 Wn.2d at 309-10 (quoting RCW 71.09.020(18)).

Regarding the third element, a person is "likely to engage in predatory acts of sexual violence" within the meaning of RCW 71.09.020(18) if "the person more probably than not will

[1] RCW 71.09.020 has been amended since the events of this case transpired. However, these amendments do not impact the statutory language relied on by this court. Accordingly, we do not include the word "former" before RCW 71.09.020.

engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7).

B. INSTRUCTIONS ON "CRIME OF SEXUAL VIOLENCE"

The first element the State must prove to show a person is an SVP is that the respondent "has been convicted of or charged with a *crime of sexual violence*." RCW 71.09.020(18) (emphasis added). Taylor-Rose argues that the trial court improperly commented on the evidence and relieved the State of its burden of proof when it gave two instructions stating that second degree child molestation was a "crime of sexual violence." We disagree.

1. Legal Principles

Article IV, section 16 of the Washington Constitution states, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A trial court makes an improper comment on the evidence if it gives an instruction that (1) conveys to the jury his or her personal attitude on the merits of the case or (2) instructs the jury that matters of fact have been established as a matter of law. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). But because it is the trial court's duty to declare the law, a jury instruction that does no more than accurately state the law pertaining to an issue is proper. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). We review the instructions de novo to determine if the trial court has improperly commented on the evidence. *Levy*, 156 Wn.2d at 721.

Here, the trial court's instructions stating that second degree child molestation was a crime of sexual violence reflected a legal conclusion on that issue. If that legal conclusion was correct, the court's instructions accurately stated the law and did not constitute a comment on the evidence.

2. Analysis

The SVP statute does not define the term "crime of sexual violence." However, RCW 71.09.020(17) provides a list of offenses that qualify as a "sexually violent offense" and that list includes second degree child molestation.

Taylor-Rose argues that "crime of sexual violence" cannot mean the same thing as "sexually violent offense" based on the principle that when the legislature uses different language in the same statute, different meanings are intended. *State v. Costich*, 152 Wn.2d 463, 475-76, 98 P.3d 795 (2004).

Division One of this court addressed this issue in *In re Detention of Coppin*, 157 Wn. App. 537, 238 P.3d 1192 (2010). In *Coppin*, the court stated that under general principles of statutory interpretation, the meaning of "crime of sexual violence" in RCW 71.09.020(18) must be considered in conjunction with other provisions in the same statute. *Id.* at 553; *see State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). The court also stated that the interpretation of a statutory provision must avoid unlikely, absurd or strained results. *Coppin*, 157 Wn. App. at 553; *see State v. Shirts*, 195 Wn. App 849, 858, 381 P.3d 1223 (2016).

Applying these principles, the court looked to the definition of "sexually violent offense" in RCW 71.09.020(17) to determine the meaning of "crime of sexual violence." *Coppin*, 157 Wn. App. at 553. The court stated, "The legislature expressly defined 'sexually violent offense' to include statutory rape in the first degree. Given this definition, it would be absurd to conclude that first degree statutory rape, a 'sexually violent offense,' is not also a 'crime of sexual violence.' " *Id.*

The court in *Coppin* expressly rejected the argument Taylor-Rose makes here: that because the legislature used different terms in subsections (17) and (18), it must have intended different meanings. *Id.* The court stated that "there is no material difference between the term 'violent' used in subsection 17 and the term 'violence' used in subsection 18." *Id.*

Taylor-Rose urges this court to reject Division One's holding in *Coppin*. But we agree with the analysis in *Coppin*. A crime that is expressly listed in the definition of "sexually violent offense" in RCW 71.09.020(17) necessarily also qualifies as a "crime of sexual violence."

Here, the trial court's instructions correctly declared the law that second degree child molestation is a crime of sexual violence under RCW 71.09.020(18) and therefore those instructions did not relieve the State of its burden of proof. Accordingly, we hold that the trial court did not err in instructing the jury that second degree child molestation was a crime of sexual violence.

C. SUFFICIENCY OF THE EVIDENCE – LIKELIHOOD OF REOFFENDING

The third element the State must prove to show a person is an SVP is that the respondent's mental abnormality or disorder "makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). Taylor-Rose argues that the State presented insufficient evidence to establish this element because the State's expert relied on Taylor-Rose's lifetime risk of committing such acts. He asserts that his lifetime risk could not support a finding that he was "currently dangerous," as required by due process. We disagree.

1. Standard of Review

We treat sufficiency challenges to SVP civil commitment determinations like sufficiency challenges to criminal convictions. *In re Det. of Thorell,* 149 Wn.2d 724, 744, 72 P.3d 708 (2003). We view the evidence in the light most favorable to the State and ask whether the evidence was "sufficient to persuade a fair-minded, rational person that the State has proved beyond a reasonable doubt that [the respondent] is a sexually violent predator." *State v. Hoisington*, 123 Wn. App. 138, 147, 94 P.3d 318 (2004). We defer to the trier of fact on determinations of witness credibility and evidentiary weight. *In re Det. of Sease,* 149 Wn. App. 66, 80, 201 P.3d 1078 (2009).

2. Legal Principles

In order for the civil commitment process to comply with due process requirements, the State must prove that the alleged SVP is both mentally ill and currently dangerous. *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009) (citing *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). However, our Supreme Court in *Moore* held that "by properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact finder impliedly finds that the SVP is currently dangerous." 167 Wn.2d at 124.

In *Moore*, the court stated that "[l]ikely to engage in predatory acts of sexual violence" as defined in RCW 71.09.020(7) contains a temporal component. *Id.* For example, the court noted that "if an expert predicts that an alleged SVP will reoffend only in the far distant future, then there is less likelihood that the 'more probable than not' standard has been legally satisfied." *Id.* But the court stated that whether that standard is satisfied depends on the specific facts of the case and the expert testimony, including the statistical likelihood of reoffending. *Id.* at 124-25.

The court in *Moore* held that if a jury properly finds a person to be an SVP – that the person will more probably than not engage in predatory acts of sexual violence if not confined to a secure facility – "it is implied that the person is currently dangerous." *Id.* at 125. The court concluded that "[w]e do not deem it necessary to impose on the State the additional burden that it prove the SVP will reoffend in the foreseeable future." *Id.*

3. Sufficiency Analysis

Hoberman testified that he performed a risk assessment based on multiple risk assessment approaches and measures in order to form an opinion about whether Taylor-Rose was likely to engage in predatory acts of sexual violence over his remaining lifetime if not confined to a secure facility. He stated that to reach his conclusion he used various actuarial instruments, his structured professional judgment, and an analysis of dynamic risk factors, which involved identifying predispositions or enduring characteristics that may convey risk for sexual offending in the future. He also considered other factors that might bear on overall risk. Hoberman concluded that in his expert opinion Taylor-Rose would more likely than not commit a predatory act of sexual violence if not confined in a secure facility.

Taylor-Rose argues that Hoberman's testimony improperly relied on Taylor-Rose's lifetime risk for reoffending, and that some other formulation must be used to express a person's overall risk. Taylor-Rose relies on the United States Supreme Court's decision in *Foucha*, which stated that due process requires that civil commitment be based on a finding that a person is both mentally ill and currently dangerous. 504 U.S. at 77, 80. He argues that lifetime risk cannot show the required *current* dangerousness.

However, Taylor-Rose does not provide any legal authority supporting his interpretation of "currently dangerous" as excluding lifetime risk. And our Supreme Court clearly stated in *Moore* that current dangerousness is not a separate factor, but is inherent in the existing definition of an SVP. 167 Wn.2d at 125. The court expressly rejected the idea that the State's burden should include showing a likelihood of reoffending within the foreseeable future. *Id.* Therefore, we reject Taylor-Rose's assertion that consideration of lifetime risk is improper or represents insufficient evidence.

Further, Hoberman's testimony was not the only evidence the State presented. The testimony regarding Taylor-Rose's prior offenses, his conduct while on community supervision, and his own statements during treatment about creating new victims if released support the jury's finding that Taylor-Rose was likely to engage in predatory acts of sexual violence if not confined to a secure facility.

Accordingly, viewing Hoberman's testimony and other supporting evidence in the light most favorable to the State, there was sufficient evidence to support the jury's finding that Taylor-Rose more probably than not would commit predatory acts of sexual violence if not confined in a secure facility.

D. INSTRUCTION ON LIKELIHOOD OF REOFFENDING

The trial court's instruction 15 addressed the third element the State must prove to show a person is an SVP: the likelihood that the respondent will "engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). Taylor-Rose argues that the trial court erred in giving instruction 15 because that instruction (1) required the jury to determine Taylor-Rose's risk level if released "unconditionally" from detention in the SVP

proceeding, (2) did not include a reference to "placement conditions," and (3) did not include language instructing the jury about the State's ability to bring a new SVP petition in the future if he was not confined. We disagree.

1. Standard of Review

"Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law." *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015); *see also In re Det. of Monroe*, 198 Wn. App. 196, 202, 392 P.3d 1088 (2017) (applying general rule to SVP case). When we review a jury instruction, we consider all the trial court's instructions as a whole to ensure that both parties are allowed to fairly state their case.[2] *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 120, 323 P.3d 1036 (2014).

We review alleged errors in law in a trial court's jury instructions de novo. *Fergen*, 182 Wn.2d at 803. However, absent a legal error we review a trial court's decision regarding the specific language of the instruction for an abuse of discretion. *Terrell v. Hamilton*, 190 Wn. App. 489, 498, 358 P.3d 453 (2015). A trial court has broad discretion in determining the wording of jury instructions. *State v. Walters*, 162 Wn. App. 74, 82, 255 P.3d 835 (2011). We also review a trial court's decision not to give a proposed instruction for abuse of discretion.

[2] Taylor-Rose argues that we must review the jury instructions to determine whether the relevant legal standard was "manifestly apparent" to the average juror, citing *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). But the court in that case was tasked with determining whether one incorrect instruction and one correct instruction read together made the correct standard apparent to the jury. *Id.* at 864-65. Taylor-Rose does not argue that there were contradictory instructions given in this case as in *Kyllo*. Accordingly, we reject Taylor-Rose's request to apply the standard from *Kyllo*.

Rekhter, 180 Wn.2d at 120. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Terrell*, 190 Wn. App. at 499.

Because Taylor-Rose's arguments regarding instruction 15 involve word choice and the trial court's decision to not include his proposed additional language, we apply an abuse of discretion standard.

2. Reference to "Unconditional" Release

Instruction 15 stated:

> "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if *released unconditionally* from detention in this proceeding.
> . . . .
> In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue. In considering voluntary treatment options, however, you may consider only voluntary treatment options that would exist if the respondent is *unconditionally released* from detention in this proceeding.

CP at 27 (emphasis added). Taylor-Rose's proposed instruction removed the word "unconditionally" from this instruction. He argues that using that term was inappropriate because his release from detention would not have been unconditional if the jury found that he was not an SVP. Taylor-Rose emphasizes that he would have been subject to 36 to 48 months of community supervision under the sentence for his 2009 conviction.

But instruction 15 contained language that was almost identical to the applicable statutes. RCW 71.09.020(7) states:

> "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts *if released unconditionally from detention* on the sexually violent predator petition.

(Emphasis added.) RCW 71.09.060(1) states:

> In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person *if unconditionally released from detention* on the sexually violent predator petition.

(Emphasis added.) The word "unconditionally" also is included in the applicable pattern jury instruction on which instruction 15 was based: WPI 365.14. 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 365.14, at 577 (6th ed. 2012) (WPI).

Further, instruction 15 allowed Taylor-Rose to argue that the conditions of his release from confinement on his criminal conviction made him less likely to reoffend. The instruction states that the jury could consider "all evidence that bears on the issue."[3] CP at 27. In fact, the challenged portions of instruction 15 do not even address the conditions of Taylor-Rose's release from confinement on his criminal conviction. They refer to release "in this proceeding," CP at 27; i.e., on the SVP petition. Taylor-Rose argues that a jury would not understand this nuance. But an instruction is not erroneous simply because counsel may need to explain certain language to the jury, particularly when the legislature has chosen that language. *See State v. Harris*, 164 Wn. App. 377, 387, 263 P.3d 1276 (2011) (stating that "a trial court should use the statute's language" when instructing the jury).

Removing the word "unconditionally" from instruction 15 as Taylor-Rose proposed would have been contrary to the statutory language. And when read as a whole, the instruction would not lead the jury to believe that it could not consider Taylor-Rose's community

[3] This portion of instruction 15 did not come from any part of the SVP statute. RCW 71.09.060(1) is unartfully written, and it could be argued based on that statute that the *only* evidence regarding the likelihood of reoffending that a jury could consider was the respondent's placement conditions and voluntary treatment options. But because Taylor-Rose does not challenge this language, we do not consider this issue.

supervision for his criminal conviction. Therefore, we hold that the trial court did not err in referencing unconditional release in instruction 15.

3. Failing to Include "Placement Conditions"

Taylor-Rose's proposed instruction added language to the final paragraph of instruction 15. He proposed that the instruction should include "placement conditions" in addition to "voluntary treatment options" as something the jury could consider in determining whether he would likely engage in predatory acts of sexual violence if not confined in a secure facility. He emphasizes that both RCW 71.09.060(1) and WPI 365.14 support including that language.

RCW 71.09.060(1) refers to placement conditions. That statute states:

> In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only *placement conditions* and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition.

(Emphasis added.)

WPI 365.14 includes "placement conditions" as language that can be included in the instruction:

> [In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue. In considering [*placement conditions or*] voluntary treatment options, however, you may consider only [*placement conditions or*] voluntary treatment options that would exist if the respondent is unconditionally released from detention in this proceeding.]

(Emphasis added.) The note on use accompanying the pattern instruction states that the bracketed paragraph "should be used when evidence of . . . 'placement conditions' has been introduced into evidence. Use the bracketed phrase 'placement conditions' only if the evidence

indicates that the respondent will be subject to court-ordered supervision, even if released on the predator petition." WPI 365.14 note on use at 577.

The comment to WPI 365.14 states that the instruction allows "consideration of court-ordered conditions that would exist if the SVP petition were dismissed. . . . 'Conditions that would exist' are typically pre-existing community supervision conditions placed on respondent in connection with a prior criminal conviction." WPI 365.14 comment at 578-79.

Based on the statute and pattern jury instruction, it would have been appropriate for the trial court to include "placement conditions" in the instruction because evidence was admitted at trial regarding Taylor-Rose's community supervision. However, the fact that it would be proper to include certain language in a jury instruction does not mean that the trial court was required to include that language. *See Terrell*, 190 Wn. App. at 506. The issue here is whether the trial court abused its discretion in not including the "placement conditions" language.

As noted above, instruction 15 stated that the jury may consider "all evidence that bears on the issue" of whether Taylor-Rose was likely to engage in predatory acts of sexual violence if released. CP at 27. This instruction did not prevent or prohibit the jury from considering Taylor-Rose's community supervision. Although it would have been more helpful to Taylor-Rose if the instruction explicitly drew the jury's attention to placement conditions, the instruction allowed the jury to consider "all evidence." The trial court admitted the terms of his community supervision into evidence. Taylor-Rose's community supervision was also discussed by Hoberman when he testified about the risk assessment he performed on Taylor-Rose. Therefore, instruction 15 as given did not prevent Taylor-Rose from arguing his theory that he could be

safely released from the SVP petition because his community supervision would prevent him from engaging in predatory acts of sexual violence.

When read as a whole, instruction 15 would not lead the jury to believe that it could not consider placement conditions such as Taylor-Rose's community supervision and allowed Taylor-Rose to argue those placement decisions. Accordingly, we hold that even though including a reference to "placement conditions" in instruction 15 would have been appropriate, the trial court did not abuse its discretion in declining to include that language.[4]

4. State's Ability to Bring a New SVP Petition

Taylor-Rose's proposed version of instruction 15 included language stating that the State could bring a new SVP petition if Taylor-Rose committed a recent overt act following his release. Under RCW 71.09.030(1)(e), the State can file an SVP petition if a person who has previously been convicted of a sexually violent offense and later is released from confinement commits a recent overt act. Taylor-Rose argues that the trial court erred by refusing to include that language because without it, he was unable to argue that he was less likely to reoffend because certain acts could subject him to future confinement. We disagree.

Taylor-Rose relies on *Post*, 170 Wn.2d at 316-17. In *Post*, the court held that "[e]vidence that a respondent in an SVP proceeding who is subsequently released could be subject to another SVP proceeding if he commits a recent overt act is relevant and is a condition that would exist upon placement in the community." *Id.* at 316. The court noted that this evidence is relevant

[4] Although we hold that the trial court did not err in giving instruction 15, we believe that the language of WPI 365.14 – on which instruction 15 was based – could be clearer. The second sentence of the final paragraph does not follow from the first sentence. Adding the following second sentence would be helpful: "This evidence includes the respondent's [placement conditions and] voluntary treatment options."

because the threat of a new SVP petition would have "some tendency to diminish the likelihood of [respondent] committing another predatory act of sexual violence." *Id.* at 317.

However, *Post* did not require that a trial court give a proposed jury instruction regarding the possibility of a new SVP petition and in fact did not address jury instructions at all. Therefore, the issue here is whether Taylor-Rose's proposed language was necessary for him to argue his theory that the threat that the State could file a new SVP petition would make him less likely to reoffend. *See Monroe*, 198 Wn. App. at 202.

Here, as noted above, instruction 15 stated that the jury could consider all evidence that bears on the issue of whether Taylor-Rose was likely to engage in predatory acts of sexual violence if not confined to a secure facility. The threat that the State would file a new SVP petition based on certain conduct was evidence relating to that issue, and therefore this instruction allowed Taylor-Rose to argue his theory without the need for more specific language.

Further, in this case there was no evidence presented at trial that Taylor-Rose would be less likely to reoffend because of the potential for new SVP petitions. Therefore, Taylor-Rose's proposed language was not supported by the evidence. A trial court does not abuse its discretion when it refuses to give an instruction that is not supported by the evidence. *See State v. Green*, 182 Wn. App. 133, 152, 328 P.3d 988 (2014).

Accordingly, we hold that the trial court did not abuse its discretion by refusing to include in instruction 15 Taylor-Rose's proposed language regarding the State's ability to file a new SVP petition.

E. APPELLATE COSTS

Taylor-Rose requests that we not impose appellate costs if the State prevails because he is indigent. We decline to consider this issue. A commissioner of this court will consider whether to award appellate costs in due course under RAP 14.2 if the State decides to file a cost bill and if Taylor-Rose objects to that cost bill.

CONCLUSION

We affirm Taylor-Rose's commitment as an SVP.

Maxa, A.C.J.
MAXA, A.C.J.

We concur:

J. J
LEE, J.

Sutton, J.
SUTTON, J.

BACKLUND & MISTRY

September 01, 2017 - 1:14 PM

Transmittal Information

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