NO. 48150-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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IN RE THE DETENTION OF DALE ROUSH

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

---

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

---

# APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

After twelve years of involuntary commitment and an earnest effort at change through treatment, Dale Roush challenged the State's ongoing assertion that he had to remain in total confinement pursuant to RCW 71.09. Just getting to the point when a jury would decide whether he could be conditionally released onto a less restrictive alternative (LRA) was a Herculean effort that required securing not only forensic expert support, but also community-based treatment and housing providers.

Article IV, Section 16 of the Washington State Constitution requires that judges only declare the law and not comment on the facts. Here, in a case where the State was to present proof to the jury that Mr. Roush's LRA was either not in his best interest or not adequate to protect the community, a completely erroneous and prejudicial jury instruction declared that as a matter of law, Mr. Roush "is a sexually violent predator."

There is no basis in law for the objected-to instruction, which further announced – again as a matter of law and thus beyond dispute – that Mr. Roush is currently mentally ill and dangerous. Fully aware of the power of the egregious comment on the evidence, the prosecution

made the "Respondent is a sexually violent predator" declaration a cornerstone of its closing argument. Not surprisingly, the jury rejected Mr. Roush's proposed LRA.

A judicial comment on the evidence in a jury instruction is presumed prejudicial. On these facts, the State is in no position to prove, as it must, that no prejudice resulted from the legal error. Mr. Roush is entitled to reversal of the order denying his proposed conditional release and a remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction No. 3.

2. Instruction No. 3 was an impermissible comment on the evidence in violation of Article IV, Section 16 of the Washington State Constitution.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

An impermissible comment on the evidence under Article IV, Section 16 is one that conveys to the jury the court's attitude toward the merits of the particular case. Here, Instruction No. 3 declared to the jury that Mr. Roush "is a sexually violent predator," meaning, he is a "person who has been convicted of 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 to a secure facility." CP 1352 (Appendix A). No pattern jury instruction and no statute supports making such a pronouncement to a jury acting as a fact finder in a conditional release trial.

In attempting to win his conditional release, Mr. Roush testified that through treatment, he had changed from how he used to think and behave, and that he was safe to be released onto his proposed LRA. The forensic expert who opined on his behalf that Mr. Roush's proposed LRA was both adequate to protect the community and in his best interest, had not diagnosed Mr. Roush with any mental abnormality or personality disorder. In closing argument, the State relied on Instruction No. 3 to repeatedly declare that, Mr. Roush "is a sexually violent predator… he's mentally ill and dangerous," just as the State's expert had opined. 10/6/15 RP60.

Was Instruction No. 3 a judicial comment on the evidence in violation of Article IV Section 16? Given that the State relied heavily on this instruction in closing argument, can it now meet its burden of proving that the comment was harmless?

D. STATEMENT OF THE CASE

In 2002, Dale Roush was involuntarily committed to the care and custody of the Department of Social and Health Services (DSHS) under RCW 71.09. CP 4. He participated in the Special Commitment Center's (SCC) sex offender treatment program and by 2014 won the right to have a jury decide whether he could be conditionally released onto a less restrictive alternative (LRA) to total confinement. CP 4-7.

The central piece of evidence supporting his request for an LRA was an expert evaluation by forensic psychologist Dr. Louis Rosell. This expert opined that Mr. Roush's mental condition had so changed through a positive response to continuing participation in treatment such that release to a less restrictive alternative was in his best interest and that conditions could be imposed that would adequately protect the community. CP 25-65.

Mr. Roush's request for a community-based LRA into Pierce County satisfied all of the statutory requirements of RCW 71.09.092. CP 6. He had secured a housing provider willing to house him. CP 22-23. He also secured a certified sex offender treatment provider willing to treat him. CP 1-2, 6, 9-20 (provider's treatment contract and plan).

At the jury trial, held in the fall of 2015, the treatment provider explained the proposed treatment plan and how the LRA would function. 10/6/15am RP4-69. The housing provider testified about the shared home where Mr. Roush would live. 9/29/15 RP25-64. By the parties' agreement, the jury received a DOC Community Custody Officer's description of his role in supervising Mr. Roush were he to be placed onto the LRA. CP 975-77.

Dr. Rosell testified about his work as a forensic psychologist and expertise in treating and evaluating sex offenders. 9/30/15 RP135-50; 10/1/15 RP4-138; 10/5/15 RP4-32. He testified about his evaluation of Mr. Roush and explained how through treatment at the SCC, Mr. Roush had changed since his initial commitment. For example, Mr. Roush has "learned, over time, how to interact better with people, how not to express his anger as he used to." 10/1/15 RP38. Through treatment, the risk he posed of reoffending has gone down as compared to his 2002 commitment. 10/1/15 RP88-89.

Dr. Rosell specifically testified that in his expert opinion, Mr. Roush did not currently suffer from a paraphilic disorder or anti-social personality disorder. 10/1/15 RP46-48, 135; 10/5/15 RP4. Dr. Rosell

opined that Mr. Roush's proposed LRA was in Mr. Roush's best interests and adequate to protect the community. 10/1/15 RP86-89.[1]

Mr. Roush testified about his past offense history, the changes he had made through treatment, and that wanted to be released onto the LRA he had proposed. 9/24/15 RP157-68; 9/28/15 RP6-160. For example, Mr. Roush learned through treatment that he cannot suppress his emotions and that he needs to ask for help when he needs it. 9/28/15 RP82-83. He testified that he believes he will be successful if conditionally released because he now cares about people and himself, because he has changed his life, and is "always going to be aware of [his] triggers and [his] interventions." 9/28/15 RP132.

The jury returned a verdict for the State that the proposed LRA placement plan does not include conditions that would adequately protect the community, but did not answer the question of whether the proposed LRA was in Mr. Roush's best interest. CP 1346. Mr. Roush's petition for conditional release was thus denied. CP 1362.

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[1] Saddled with the burden of proving beyond a reasonable doubt that Mr. Roush's proposed LRA was either not in his best interests or not adequate to protect the community, the State called Dr. Amy Phenix as a witness. 9/29/15 RP65-173; 9/30/15 RP8-134. Dr. Phenix had been the State's expert at the initial commitment trial. 9/29/15 RP107-08. Dr. Phenix opined that Mr. Roush currently had both a mental abnormality and a personality disorder and this was relevant to the question of whether he could be conditionally released. 9/19/15 RP127-28. She agreed with the State that he currently is a sexually violent predator. 9/29/15 RP157; 9/30/15 RP123 ("I still think he qualifies as a sexually violent predator.") Dr. Phenix also opined that the proposed LRA was not in Mr. Roush's best interest and not adequate to protect the community. 9/30/15 RP36-38.

E. ARGUMENT

**The trial court's instruction to the jury that Mr. Roush "is a sexually violent predator" was an impermissible and prejudicial comment on the evidence.**

a. The trial court must not comment on the evidence to the jury.

Article IV, Section 16 of the Washington Constitution requires that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a judge from "'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006), quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

Judicial "'remarks and observations as to the facts before the jury are positively prohibited.'" State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963), quoting State v. Walters, 7 Wn. 246, 250, 34 P. 938 (1893). "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). This constitutional mandate applies to criminal and civil cases. Wuth ex

rel. Kessler v. Lab. Corp. of Am., 189 Wn. App. 660, 697, 359 P.3d 841 (2015); In re Det. of R.W., 98 Wn. App. 140, 145, 988 P.2d 1034 (1999).

An accurate statement of the law pertaining to issues in the case does not constitute a comment on the evidence. Christensen v. Munsen, 123 Wn.2d 234, 249, 867 P.2d 626 (1994); State v. Kepiro, 61 Wn.App. 116, 810 P.2d 19 (1991). But, it is error for a judge to instruct the jury that matters of fact have been established as a matter of law. State v. Boss, 167 Wn.2d 710, 223 P.3d 506 (2009); Becker, 132 Wn.2d at 64-65.

"Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial." Lane, 125 Wn.2d at 838, citing to State v. Bogner, 62 Wn.2d at 249, 253-54. The burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. State v. Boss, 167 Wn.2d at 721; State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

This Court reviews whether a jury instruction was legally correct *de novo*. State v. Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008); State v. Johnson, 152 Wn.App. 924, 935, 219 P.3d 958 (2009).

b. There is no basis in law for the court to have given Instruction No. 3.

In a conditional release trial such as this one, the State must:

> prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community. Evidence of the prior commitment trial and disposition is admissible.

RCW 71.09.090(3)(d).

Pattern instruction WPI 365.31 tracks RCW 71.09.090(3)(d) and sets out the elements to be proven in a conditional release trial. These elements were correctly presented to the jury in Instruction No. 5. See CP 1354.

Over Mr. Roush's objection[2], the trial court also instructed that:

> Respondent **is a sexually violent predator**. "Sexually Violent Predator" means any person who has been convicted of 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 to a secure facility.

[2] See 10/5/15 RP38-42.

CP 1352 (Instruction No. 3) (emphasis added to highlight present tense).

As a citation in support of this instruction, the State had written: "RCW 71.09.020(16)(modified)." CP 310. All that provision[3] provides is a definition of the term "sexually violent predator." Nowhere does the statute say that a judge overseeing an LRA trial should declare to the jury: "Respondent is a sexually violent predator."

The State did not cite to any pattern jury instruction for this proposition, nor could it. No such WPIC exists. There is no basis in law to justify Instruction No. 3 as given.

Mr. Roush proposed instruction read:

> The Respondent **was previously found to meet the definition of a sexually violent predator in 2002** and has been committed to the Special Commitment Center since that time. A "sexually violent predator" is a person who has been convicted of 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 to a secure facility.

CP 742 (emphasis added to highlight use of past tense).

The language proposed by Mr. Roush was consistent with WPI 365.30, the "Advance Oral Instruction" that precedes jury selection in a

[3] Since renumbered as RCW 71.09.020(18).

conditional release trial. That pattern instruction, however, uses language critically different from the court's Instruction No. 3.

WPI 365.30 reads: "**In an earlier proceeding, the respondent**, (name of respondent), **has been adjudicated to be a sexually violent predator**." WPI 365.30 (emphasis added to highlight use of past tense).

The State argued for its instruction by insisting "it is a matter of law that Respondent is a sexually violent predator." 10/5/15 RP39, 41. In a sense, the State was resurrecting a point it had made about the court's jurisdiction in a pretrial pleading: "for Respondent to be placed on an LRA he MUST be under the jurisdiction of the court and therefore MUST be an SVP." CP 515 (capitals in the original). But a jurisdictional hook cannot be morphed into some sort of basis for a jury instruction.

For one, Mr. Roush was not contesting the court's jurisdiction to place him on the LRA. To the contrary, he was submitting to it, precisely to take advantage of the court's power to conditionally release him out of the SCC and into the community.[4] To analogize to a

[4] CP 341 (Mr. Roush expressing a willingness to stipulate that he was committed in 2002 pursuant to RCW 71.09 and has remained in custody and in treatment at the [SCC] since); see also 10/1/15 RP113-14 (Mr. Roush's counsel explaining that "We're not challenging SVP status in this proceeding. Do we think he's changed since 2002? Yes. Do we think there's a difference between 2002 and now? Of course. That's the whole purpose of change and less restrictive alternative.")

criminal case, if a particular Washington court accepts that it has jurisdiction over a case, that jurisdictional hook does not morph into a jury instruction that declares as a matter of law that events in question happened within the county where the court sits. Again, there is no basis in law for Instruction No. 3 as it was given.

Moreover, the way the statute treats evidence of a prior commitment demonstrates that Instruction No. 3 was erroneous. In both unconditional discharge and conditional release trials, "Evidence of the prior commitment trial and disposition is admissible." RCW 71.09.090(3)(c), (d). This plain language speaks for itself: jurors deciding whether to unconditionally discharge or conditionally release someone from the SCC, will be informed that once upon a time, that individual was ordered committed under the statute. But, this statutory statement that the existence of a "prior" disposition may be admitted as evidence does not constitute a command that the jurors acting as fact finders in either of those scenarios be instructed, as Mr. Roush's jury was, that the "Respondent is a sexually violent predator."

Indeed, the sentence in .090(3)(d) deeming evidence of the prior trial and disposition admissible in a conditional release trial cannot possibly justify such an instruction, because if it did, the same would be

true for an unconditional discharge trial under .090(3)(c) and that would absurdly amount to directing the fact finder to render a verdict for the State. (Both provisions use the identical phrasing "Evidence of the prior commitment trial and disposition is admissible.")

It is unfortunate that the trial court accepted the State's invitation to use the erroneous instruction, especially when Mr. Roush offered a viable alternative. CP 742. The ruling below may have been different, had the parties been aware of this Court's opinion in In re Det. of R.W., a RCW 71.05 involuntary commitment case finding an Article IV, Section 16 jury instruction error.

R.W. had been involuntarily committed under RCW 71.09 for a 90-day period of total confinement at Western State Hospital. 98 Wn.App. at 142. The jury considered and rejected the possibility of him receiving a less restrictive alternative to complete hospitalization. Id. at 143. Much like in Mr. Roush's case, the State would prevent R.W. from conditional release if it proved to the jury "that no less restrictive alternative is in [his] best interest [or that of] others." Id. at 144.

The jury instruction deemed erroneous in R.W. was copied directly from a "Legislative intent and finding" section of RCW 71.05 and declared that:

> A prior history of decompensation leading to repeated hospitalizations or law enforcement interventions should be given great weight in determining whether a new less restrictive alternative commitment is in the best interest of the respondent or others.

Id.

R.W. had a history of decompensation and twelve prior admissions to Western State Hospital. Id. at 142. On appeal, this Court found that "[t]he instruction was an impermissible comment on the evidence because it instructed the jury on the weight to give certain evidence." Id. at 145. This Court reversed. Id. at 146.

Critically, this Court rejected the State's "conten[tion] that because this statement is contained in the statute, the instruction that restated this language was permissible as a correct statement of the law." Id. at 145. This Court explained the language copied from the statute was "not operative… not substantive law… and it cannot be used to justify the instruction." Id. at 145.

"[A] statement of legislative intent, used by the Legislature as a preface to an enactment," was "lack[ing] operative force in itself, although it may serve as an important guide in understanding the intended effect of operative sections." Id. at 145 (internal citations omitted). In Mr. Roush's "Evidence of the prior commitment trial and

disposition is admissible" language – which appears in both RCW 71.09.090(3)(c) and (d) – is similarly lacking operative force. It is a guide as to admissibility of a historical fact, but in itself cannot be used to justify the instruction given at Mr. Roush's trial.

There was no basis in law for Instruction No. 3 and the instruction was an impermissible comment on the evidence.

c. Instruction No. 3 declared, as a matter of law, that disputed issues of fact were resolved in the State's favor and against Mr. Roush.

Instruction No. 3 commented directly upon Mr. Roush's defense and violated Article IV, Section 16 of the Washington Constitution.

For the jury to be instructed, *that as a matter of law*, Mr. Roush currently "is a sexually violent predator... who suffers from a mental abnormality or a personality disorder which makes [him] likely to engage in predatory acts of sexual violence if not confined to a secure facility," declared that the State's witness, Dr. Phenix, was correct as a matter of law. See 9/30/15 RP123 ("I still think he qualifies as a sexually violent predator.")

Simultaneously, the instruction damaged Dr. Rosell's credibility as a witness because it was contrary to how Dr. Rosell had testified. 10/1/15 RP46-48. It was a declaration that Dr. Rosell's testimony on

issues critical to the proceeding was wrong *as a matter of law*. This judicial comment on the evidence condemned Mr. Roush's expert on the whole as unreliable and not worthy of any respect.

d. The State's reliance on Instruction No. 3 shows this judicial comment on the evidence badly prejudiced Mr. Roush.

> The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900).

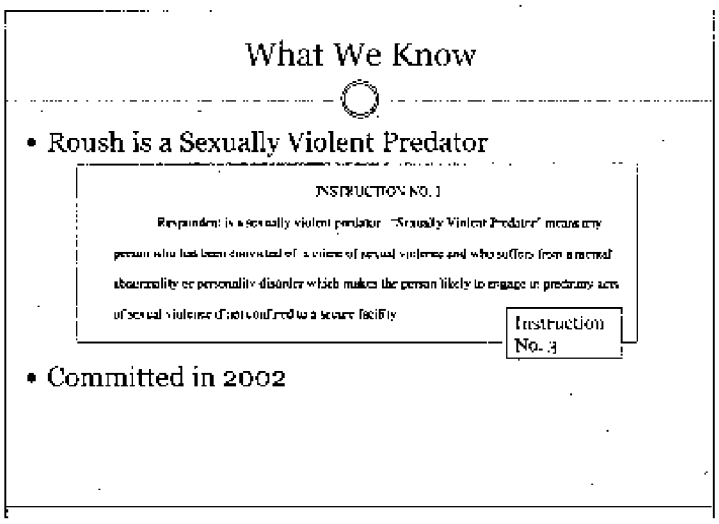
The prosecutor knew the instruction was most helpful to the State and used it early on in closing argument:

> What we know is: Mr. Roush is a sexually violent predator. That's not in question today, so you won't need to debate that issue. **In fact, you are instructed by the Court that he is one. Mr. Roush is a sexually violent predator**.

10/6/15pm RP 5 (emphasis added).

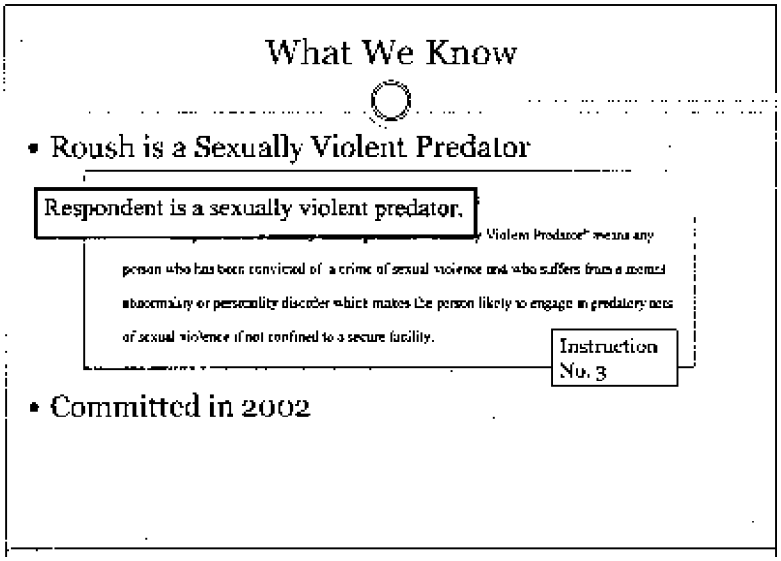
The State's PowerPoint presentation[5] emphasized this point again and again. First, the presentation put up the words "What We Know" and added a bullet-point "Roush is a Sexually Violent Predator" above a copy of the instruction:

[5] CP 984-1018.




CP 987.

Next, the PowerPoint presentation selected just the sentence "Respondent is a sexually violent predator" from Instruction No. 3 and enlarged it:



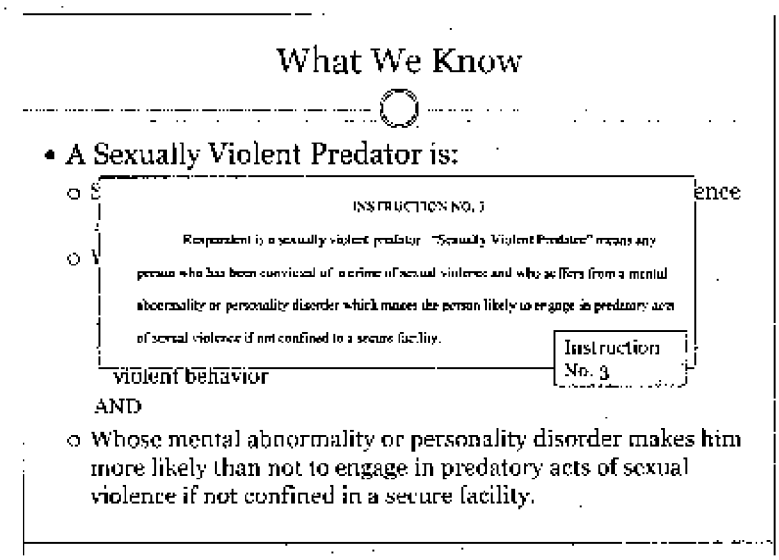

CP 987.

The State then projected for the jury's view the 2002 "Order of Commitment," CP 988, and pressed on, emphasizing that Instruction No. 3 settled the question of Mr. Roush's current mental condition.

> So what is a sexually violent predator?
> …it is someone who suffers from a mental abnormality or personality disorder. So, one of those two things has to be present. We know that because he is a sexually violent predator; he has to meet the definition. So, he suffers from either a mental abnormality or a personality disorder or both; and we know that it has to cause him serious difficulty controlling his behavior.

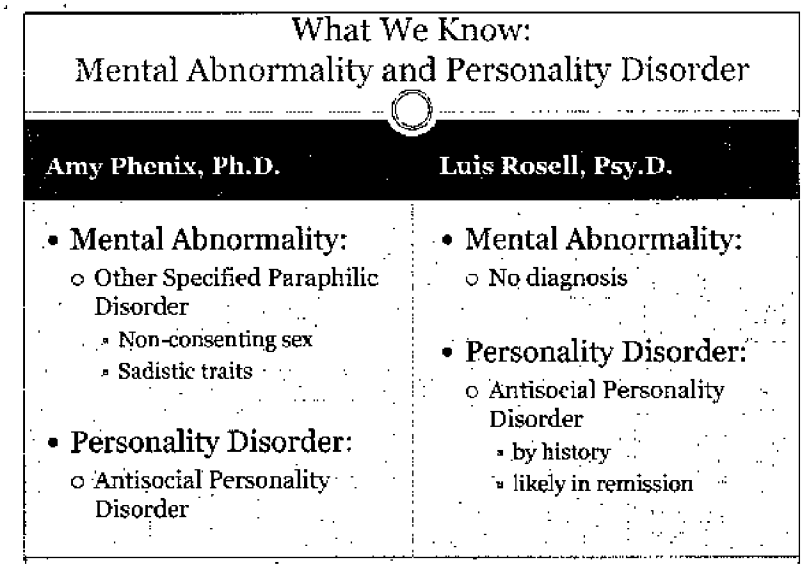
10/6/15pm RP 6 (emphasis added).

The text of Instruction No. 3, with its ominous reminder that "Respondent is a sexually violent predator," was displayed for the jury once more:




CP 989.

Next, the prosecutor reminded the jury that their expert, Dr. Phenix, had diagnosed Mr. Roush with both a mental abnormality and a personality disorder, but that Dr. Rosell had done neither. 10/6/16pm RP 7. The State used what Instruction No. 3 declared to show that as a matter of law, Dr. Phenix was right and Dr. Rosell was wrong.




CP 990; see also CP 996 (another "What We Know: Mental Abnormality" slide showing that Dr. Rosell did not diagnose a mental abnormality and disagrees with the diagnosis Dr. Phenix made).

The prosecutor explicitly relied on the jury instruction to also argue that Mr. Roush posed a high risk of re-offense if released:

> What's the other part of being a sexually violent predator? Risk. So, we know that – again, from Instruction No. 3 – that Mr. Roush is likely to engage, and that's also referred to as more likely than not to engage in these – in these kind of offenses.

10/6/15pm RP 16 (emphasis added).

The prosecutor then linked this to Dr. Phenix's testimony: "his risk is still high according to Dr. Phenix." 10/6/15pm RP 17.

Even in rebuttal, the prosecutor returned to what the instruction conveyed to argue the State had met its burden with respect to proving that Mr. Roush's proposed LRA was neither adequate to protect the community nor in his best interest:

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

10/6/15pm RP60.

> And then I want you to draw your attention to Instruction No. 3. It says, Mr. Roush is a sexually violent predator and that means he's at risk of committing predatory acts of sexual violence if he's not confined to a secure facility…

10/6/15pm RP65.

> And your question that you are to decide, that is, the less restrictive alternative that he has proposed, is that a sufficiently secure facility? Is that proposal a sufficiently secure facility?

10/6/15pm RP65.

A judicial comment on the evidence is presumed prejudicial, and the State must demonstrate that the defendant was not prejudiced by the comment, unless the record affirmatively shows that no

prejudice occurred. Levy, 156 Wn.2d at 723, citing Lane, 125 Wn.2d at 838-39; State v. Stephens, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485 (1973) (the State has the burden of showing that the jury's decision was not influenced, even when the evidence is undisputed or overwhelming).

In State v. Crotts, the Supreme Court reversed a murder in the first degree conviction because the trial judge's own leading questions to witnesses implied the judge was skeptical about Crotts's self-defense claims. 22 Wash. at 247-48.

There was nothing that subtle about the judicial comment in Mr. Roush's trial. The judge read the instructions and the jurors were given copies. The prosecutor repeated "is a sexually violent predator" phrase verbatim at least four times in closing argument and presented it at least five times in the slides accompanying the closing argument.

Here, the prosecution – which made the instruction's comment on the evidence a cornerstone of its closing argument – simply cannot meet its burden of demonstrating a lack of prejudice. Mr. Roush is entitled to reversal for a new trial.

F. CONCLUSION.

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

DATED this 22nd of July 2016

Respectfully submitted,

*/s/ Mick Woynarowski*

_____

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Washington Appellate Project
Attorneys for Appellant

In re det. of Dale ROUSH

Appendix A to Appellant's Opening Brief

Instruction No. 3

(CP 1352)

INSTRUCTION NO. 3

Respondent is a sexually violent predator. "Sexually Violent Predator" means any person who has been convicted of 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 to a secure facility.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION TWO**

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| DALE ROUSH, | ) | NO. 48150-2-II |
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| APPELLANT. | ) | |

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**SIGNED** IN SEATTLE, WASHINGTON THIS 22ND DAY OF JULY, 2016.

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# WASHINGTON APPELLATE PROJECT

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