Supreme Court No.: 94477-6
Court of Appeals No.: 48150-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: THE DETENTION OF DALE ROUSH

DALE ROUSH

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

Marla L. Zink
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Petitioner Dale Roush, proponent of conditional release to a least restrictive alternative (LRA) placement from McNeil Island and the appellant below, requests this Court grant review of the decision of Division Two of the Court of Appeals. In *In re Detention of Roush*, the Court of Appeals held a jury instruction declaring Mr. Roush "is a sexually violent predator" was not an unconstitutional comment on the evidence. No. 48150-2-II (Apr. 4, 2017). Mr. Roush objected to the giving of the instruction at trial and proposed an alternative instruction stating he "was previously found to meet the definition of a sexually violent predator in 2002." The trial court rejected Mr. Roush's proposed instruction. This Court should grant review of this significant question of law under the Washington constitution. RAP 13.4(b)(3). A copy of the opinion is attached as an Appendix.

B. ISSUE PRESENTED FOR REVIEW

Seeking his conditional release at trial, Dale Roush presented evidence showing he was safe to be released to his proposed LRA. But the State not only argued against the LRA, it relied on a jury instruction that declared Mr. Roush "is a sexually violent predator"; that is, 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 more like to engage in predatory acts of sexual violence if not confined to a secure facility." Not surprisingly. the jury thereafter rejected Mr. Roush's proposed LRA.

An impermissible comment on the evidence under article IV, section 16 conveys to the jury the court's attitude toward the merits of the particular case. Instruction three. here, declared to the jury that Dale Roush "is a sexually violent predator," which means 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 more likely to engage in predatory acts of sexual violence if not confined to a secure facility." No pattern instruction and no statute support making such a pronouncement to a jury acting as a factfinder in a conditional release trial. Should the Court accept review to determine whether the instruction is an improper judicial comment on the evidence in an LRA trial? RAP 13.4(b)(3).

C. 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 to a less restrictive alternative 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 RP 4-69. The housing provider testified about the shared home where Mr. Roush would live. 9/29/15 RP 25-64. 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 on 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 RP 135-50; 10/1/15 RP4-138; 10/5/15 RP 4- 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 RP 38. Through treatment, the risk he posed of reoffending has gone down as compared to his 2002 commitment. 10/1/15 RP 88-89.

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 RP 46- 48, 135; 10/5/15 RP 4. 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 RP 86-89.

Mr. Roush testified about his past offense history, the changes he had made through treatment, and that he wanted to be released to 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 RP 82-83. 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 RP 132.

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.

D. ARGUMENT IN SUPPORT OF GRANTING REVIEW

The Court should grant review to determine whether an instruction stating a committed individual "is a sexually violent predator" is an unconstitutional comment on the evidence at trial for a least restrictive alternative placement, a significant state constitutional question of first impression.

The Court should grant review to determine whether the trial court's instruction to the jury that Mr. Roush "is a sexually violent predator" who is "likely to reoffend if not confined to a secure facility" was an unconstitutional comment on the evidence that prejudiced Mr. Roush.

1. Our state constitution makes plain that a trial court cannot 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 Wash. 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. Mun*, 123 Wn.2d 234, 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 presumes the comments were prejudicial. *Lane*, 125 Wn.2d at 838 (citing *Bogner*, 62 Wn.2d at 249, 253-54). The burden is on the State to show that the respondent 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).

2. There is no legal basis for the instruction provided at Mr. Roush's LRA trial.

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, 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.

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. That provision simply provides 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 pattern instruction exists. There is no basis in law to justify Instruction No. 3 as given.

Mr. Roush proposed an instruction that 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 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." 10/15/15 RP 39, 41. 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."

Instruction No. 3 tracked the definition of a "sexually violent predator" from RCW 71 09.020(18) and included the phrase "unless

confined to a secure facility." An adjudication as a sexually violent predator is premised on the individual being released into the community and without any conditions. *In re Det. of Post*, 170 Wn.2d 302, 241 P.3d 1234 (2010).

In *Post*, this Court held that conditions of confinement at a secure facility and treatment available therein are not relevant to the question of whether someone meets the SVP definition precisely because of this language: "this clause operates to define the relevant inquiry as not including such conditions." *Id.* at 312 (emphasis in the original).

Mr. Roush's 2002 adjudication was likewise based on analysis of the risk he posed if living in the community without conditions. But, an LRA residence is a secure facility:

> "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096.

RCW 71.09.020(16).

This means the instruction given below was inaccurate and certainly misleading. If placed on the LRA he proposed, Mr. Roush

would have been "confined to a secure facility" by the terms of the conditional order. With the instruction, the State managed to transform Mr. Roush's ongoing status that gave the court jurisdiction to place him on conditional release into proof that the conditional release should be denied. This cannot be.

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 Court of Appeals opinion *In re Det. of R.W.*, an RCW 71.05 involuntary commitment case finding an Article IV, Section 16 jury instruction error, is instructive. R.W. had been involuntarily committed under RCW 71.05 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.

R.W. had a history of decompensation and twelve prior admissions to Western State Hospital. *Id.* at 142. The Court of Appeals 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. Accordingly, the 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." 98 Wn. App. at 145. The appellate 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 case, "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.

In re Detention of Bergen, relied on by the State, does not counsel otherwise. *In re Det. of Bergen*, 146 Wn. App. 515, 195 P. 3d 529 (2008); BOR at 15-17. That decision did not address the current question of whether a jury should be instructed that the respondent who has proposed an LRA is, at the time of that LRA trial, as a matter of law, mentally ill and dangerous. As such, any reliance on *Bergen* is misplaced.

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

3. The instruction 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 RP 123 ("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 RP 46-48. 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.

4. The State relied extensively on this instruction, demonstrating the prejudice it caused 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.

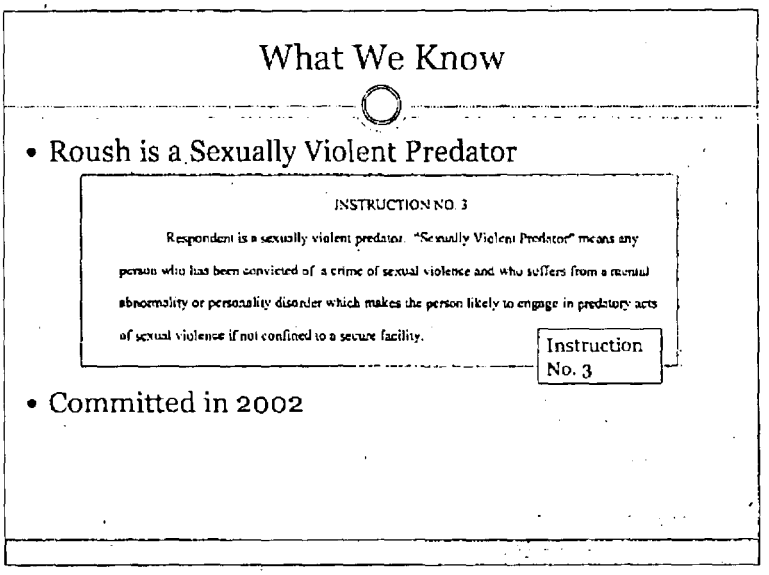
State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900).

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.

The State's PowerPoint presentation emphasized this point again and again. *See* CP 84-1018. 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:



CP 987.

Next, the PowerPoint presentation selected just the sentence "Respondent is a sexually violent predator" from Instruction No. 3 and enlarged it. *Id.* The text of the instruction with its ominous reminder that "[Mr. Roush] is a sexually violent predator" was displayed for the jury again. CP 989.

Then, 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 RP 60.

> 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 RP 65.

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 by 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).

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 the "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. The Court should grant review, reverse and remand for a new trial.

E. CONCLUSION

The Court should grant review of the significant constitutional issue whether a court in a LRA trial can instruct the jury that the respondent is a sexually violent predator who is likely to reoffend unless confined to a secure facility.

DATED this 3rd day of May, 2017.

Respectfully submitted,

s/ Marla L. Zink
Marla L. Zink WSBA 39042

Washington Appellate Project
Attorney for Petitioner

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 48150-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Sarah Sappington, AAG
[crjsvpef@atg.wa.gov] [sarahs@atg.wa.gov]
Office of the Attorney General – Criminal Justice Division

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 3, 2017

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April 4, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In Re The Detention of:	No. 48150-2-II
DALE EVAN ROUSH,	
Appellant.	UNPUBLISHED OPINION

SUTTON, J. — Dale E. Roush was found to be a sexually violent predator (SVP) in 2002 and was civilly committed to the Special Commitment Center (SCC) on McNeil Island. Following a trial on his conditional release to a community based less restrictive alternative (LRA) placement, the jury found that conditions could not be imposed that would adequately protect community safety and Roush's conditional release was denied. Roush appeals, arguing that the trial court improperly commented on the evidence by instructing the jury that Roush met the definition of an SVP as a matter of law. The trial court's jury instruction was proper because whether Roush was an SVP was not a disputed issue at trial. Accordingly, we affirm.

FACTS

In 2002, Roush was committed as an SVP. In 2014, the trial court found that Roush had established probable cause for a jury trial to determine whether he could be conditionally released to an LRA. Roush's proposed LRA included residence at a group home located in Tacoma and treatment with Jeanglee Tracer, a certified sex offender treatment provider in Tacoma.

Roush's conditional release trial began September 21, 2015. The State's expert, Dr. Amy Phenix, testified that she diagnosed Roush with Other Specified Paraphilic Disorder, Nonconsent and Antisocial Personality Disorder. Dr. Phenix also testified that she used several different actuarial tools to classify Roush as a high risk offender. Phenix opined that conditional release was not in Roush's best interests and there were not conditions that would adequately protect the community.

Roush presented testimony from his own expert, Dr. Luis Rosell. Rosell testified that he did not agree that Other Specified Paraphilic Disorder, Nonconsent was a valid diagnosis and Roush's current behavior in the SCC demonstrated that his Antisocial Personality Disorder was remitting. Accordingly, Rosell diagnosed Roush with Antisocial Personality Disorder by history. Rosell also testified that the actuarial tools used by Dr. Phenix did not account for the effect of Roush's 13 years in treatment in the SCC. Rosell opined that conditional release was in Roush's best interests and conditions could be imposed that would adequately protect the community.

The State proposed the following jury instruction:

> 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.

Clerk's Papers (CP) at 322. Roush objected and proposed an alternate instruction:

> 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 at 723. The trial court gave the State's proposed instruction as jury instruction number three.

The jury returned a verdict finding that the State proved beyond a reasonable doubt that the proposed less restrictive alternative placement plan does not include conditions that would adequately protect the community. On October 12, 2015, the trial court entered an order denying Roush's petition for conditional release. Roush Appeals.

ANALYSIS

Roush argues that the trial court erred by instructing the jury that he is an SVP. Specifically, Roush argues that the trial court's instruction was an impermissible comment on the evidence. However, the trial court's instruction was a proper statement of the law; therefore the trial court did not err by instructing the jury that Roush is an SVP.[1]

We review jury instructions de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Article IV, section 16 of the Washington Constitution 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. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). If a jury instruction removes a disputed issue of fact from the jury's consideration, the jury instruction relieves the State of its burden of proof. *Becker*, 132 Wn.2d at 65. But an instruction that

[1] The State argues that Roush's appeal is moot because Roush has now been granted conditional relief to the Secure Community Transition Facility on McNeill Island. An issue is moot if this court can no longer provide effective relief. *In re Schuoler*, 106 Wn.2d 500, 503, 723 P.2d 1103 (1986). Because there is a possibility that the terms of Roush's conditional release could be different following another trial, his appeal is not moot.

The State also argues that we should not review Roush's alleged error because he failed to adequately preserve the issue in the trial court. We disagree with the State. Roush's objection at the trial court was sufficient to preserve the issue for review.

accurately states the applicable law and is supported by substantial evidence, is not an impermissible comment on the evidence. *State v. Johnson*, 152 Wn. App. 924, 935, 219 P.3d 958 (2009).

Here, the trial court gave the following instruction to the jury:

> 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.

CP at 1352 (Inst. No. 3). As an initial matter, the trial court's instruction is an accurate statement of the law. RCW 71.09.020(18) defines "sexually 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.

And Roush was found to be an SVP beyond a reasonable doubt in 2002. The issue, therefore, is whether the trial court's instruction removed a disputed issue of fact from the jury's consideration. Here, it did not.

RCW 71.09.090(3)(d) states,

> [I]f the issue at the hearing is whether the person should be conditionally released to a less restrictive alternative, the burden of proof at the hearing shall be upon the [S]tate to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community.

In a conditional release trial, there is no disputed issue as to whether the committed person meets the definition of an SVP. Accordingly, the trial court's jury instruction was not improper because it did not remove a disputed issue of fact from the jury's consideration.

To support his assertion that the jury instruction was an improper comment on the evidence, Roush relies on the language used in Washington Pattern Jury Instruction, Civil 365.30 (WPI).[2] Roush also relies on the statement regarding the use of evidence of the prior commitment trial and disposition contained in RCW 71.09.090(3). And Roush relies on our opinion in *In re the Detention of R.W.*, 98 Wn. App. 140, 988 P.2d 1034 (1999). Roush's arguments are unpersuasive.

Although Roush correctly asserts that the language in WPI 365.30 is similar to the language in his own proposed jury instruction, WPI 365.30 only provides support for the argument that his jury instruction was correct—not that the State's jury instruction was incorrect. WPI 365.30 is the advanced oral instruction used for voir dire in both unconditional and conditional release trials and reads, in relevant part:

> In an earlier proceeding, the respondent, (name of respondent), has been adjudicated to be a sexually violent predator. A sexually violent predator is a person who previously has been convicted of a crime of sexual violence and who suffers from a mental abnormality or personality disorder that makes it likely for the person to engage in predatory acts of sexual violence if not confined in a secure facility.
>
> . . . .
>
> The respondent has been confined at the Special Commitment Center, which is a secure facility. [The respondent has proposed an alternative placement plan for release to a less restrictive alternative. The State has the burden of proving, in this trial, that this proposed plan is not in respondent's best interests or that the proposed plan does not include conditions that will adequately protect the community.] [The State has the burden of proving that the respondent continues to meet the definition of a sexually violent predator]. Although this is a civil proceeding, the State must prove its case beyond a reasonable doubt and the jury must be unanimous in its decision.

[2] 6A Washington Practice: Washington Pattern Jury Instructions: Civil 365.30, at 587 (6th ed. 2012)

6A WPI 365.30, at 587. The first paragraph of WPI 365.30 is similar to the language Roush proposed in his own jury instruction. However, as the note on use states, "This is not one of the written instructions on the law." 6A WPI 365.30 n.594. Moreover, the instruction is meant for use for both unconditional and conditional release trials. The issue in an unconditional release trial is whether the respondent continues to meet the definition of an SVP. RCW 71.09.090(3)(c). Therefore, it would be inappropriate in an unconditional release trial to instruct the jury that the respondent is currently an SVP. Because WPI 365.30 is not meant to be an instruction on the law and applies to both unconditional and conditional release trials, it does not demonstrate that the trial court erred by instructing the jury that Roush is an SVP when that is not a disputed issue in a conditional release trial.

Roush also alleges that RCW 71.09.090(3)(d) supports his position that the jury instruction was erroneous. But the language on which Roush relies simply does not support his argument. Roush relies on the language stating, "Evidence of the prior commitment trial and disposition is admissible." RCW 71.09.090(3)(d); Br. of Appellant at 12. Roush argues, "[T]his 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.'" Br. of Appellant at 12. But it does not follow that the trial court erred by giving such an instruction. When determining whether a jury instruction is an improper comment on the evidence, the issue is whether the jury instruction comments on a *disputed* fact. Here, whether prior dispositions are admissible in

conditional release trials, sheds no light on whether the jury instruction comments on a disputed fact.[3]

Finally, Roush relies on our opinion in *In re the Detention of R.W.*, which was a civil commitment case under the mental illness statute, chapter 71.05 RCW. *R.W.*, 98 Wn. App. at 142. The trial court instructed the jury 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.

R.W., 98 Wn. App. at 144. The instruction was based on language in the legislative intent section of the statute. *R.W.*, 98 Wn. App. at 144-45. We held that "[b]ecause [the legislative intent] section is not operative, it is not substantive law, and it cannot be used to justify the instruction." *R.W.*, 98 Wn. App. at 145. We also held that "[t]he instruction was an impermissible comment on the evidence because it instructed the jury on the weight to give certain evidence." *R.W.*, 98 Wn. App. at 145.

Unlike in *R.W.*, the instruction in Roush's case does not come from an inoperative legislative intent section of the law. The instruction is a correct statement of the law derived from

[3] Roush attempts to further support his argument by noting that the same language regarding the admissibility of prior commitments is contained in RCW 71.09.090(c) which applies to unconditional release trials. According to Roush, if we approve the instruction as given in this case, then the language in RCW 71.09.090(c) would require the same instruction in unconditional release trials. Roush correctly points out this would be inappropriate but his argument only highlights the fundamental issue in this case. In an unconditional release trial, the disputed issue is whether the respondent continues to meet the definition of an SVP so an instruction – regardless of the admissibility of prior dispositions – would be a direct comment on the disputed issue. Accordingly, Roush's argument related to unconditional release trials lacks merit and is irrelevant to resolving the issue before us.

codified, operative statutes. Accordingly, our reasoning in *R.W.* that the instruction lacked any foundation in law does not apply here. *R.W.* also disapproved of the instruction because it assigned weight to a piece of evidence that the jury was required to consider in reaching the ultimate issue in the trial. *R.W.*, 98 Wn. App. at 145-46. Here, whether Roush met the definition of an SVP was not disputed. Therefore, the instruction did not improperly instruct the jury on how much weight to assign a piece of relevant evidence.

Roush's arguments for why the trial court erred in instructing the jury that Roush is an SVP are unpersuasive. Here, the jury instruction was a proper statement of the law and did not comment on a disputed fact at trial. Therefore, the trial court did not err by giving the instruction. Thus, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

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

Worswick, J.
WORSWICK, J.