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NO. 71460-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In re the Detention of:

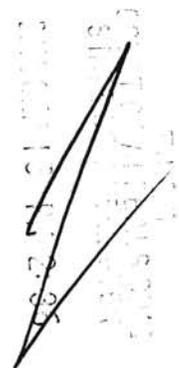
RICHARD RUDE,

Appellant.

RESPONDENT'S OPENING BRIEF

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 ORIGINAL

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I. ISSUES

- A. **Did the State present sufficient evidence to prove beyond a reasonable doubt that Rude's proposed LRA was not in his best interest?**
- B. **Did the State present sufficient evidence to prove beyond a reasonable doubt that Rude's proposed LRA did not include conditions that were adequate to protect the community?**

II. FACTS

A. Procedural and Factual Background

Richard Rude is a violent rapist who has been convicted of multiple sexually violent offenses, including Rape in the First Degree, Rape in the Second Degree by Forcible Compulsion, and Attempted Rape in the Second Degree by Forcible Compulsion. RCW 71.09.020(17); CP 101. In addition to these offenses, Rude has been convicted of making obscene phone calls and five counts of indecent liberties. *Id.* His history also includes a reported attempted rape in Texas, sexual assault of a male at Western State Hospital and an allegation and significant investigatory conclusion of sexually assaulting a male inmate while incarcerated. *Id.*

On June 22, 2012, a jury determined that Rude is a Sexually Violent Predator. CP 232. He was "committed to the Special Commitment Center in Steilacoom, Washington, to the custody of the Department of Social and Health Services, for control, care, and treatment until such time as his mental abnormality and/or personality disorder has so changed that [he] is safe to be conditionally released to a less restrictive alternative or unconditionally

discharged.” CP 33. In January 2014 his commitment was affirmed by this Court in an unpublished opinion and his petition for review of that decision was denied. *In re Detention of Rude*, 179 Wn. App. 1011, 2014 WL 295772, review denied, 180 Wn.2d 1017 (2014).

On July 24, 2013, Rude petitioned for an evidentiary hearing (trial) on his proposed release to a Less Restrictive Alternative (LRA). CP 44-48. The State conceded that because the trial court had not previously considered an LRA for Rude, that he met the criteria for obtaining an LRA trial under RCW 71.09.090(2)(a) and .090(2)(d). VRP 9; CP 797 (Finding of Fact 3). The parties stipulated to the written record that would be considered by the trial court as evidence. CP 115-21. The record included voluminous documents, including Verbatim Reports of Proceedings, and 32 numbered exhibits, consisting of forensic evaluations and reports, Special Commitment Center (SCC) records, Department of Corrections (DOC) records, declarations, photographs, letters and certificates. CP 115-744. After considering all the evidence, the trial court denied Rude’s request for an LRA, and Rude moved for reconsideration. His motion was denied and the trial court entered Findings of Fact, Conclusions of Law, and an Order denying Rude’s request for conditional release to an LRA. CP 796-801. Rude appeals.

III. ARGUMENT

A. Statutory Framework

An individual determined to be an SVP¹ is committed to the custody of Department of Social and Health Services (DSHS) for placement in a secure facility:

for control, care, and treatment until such time as: (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community.

RCW 71.09.060(1). DSHS is required to conduct a yearly evaluation of the SVP's mental condition to determine whether he continues to meet the commitment criteria. RCW 71.09.070. Unless the SVP affirmatively waives the right to a hearing, the trial court must schedule a show cause hearing. RCW 71.09.090(2). An SVP may also submit his own expert evaluation to the court to request an unconditional release or release to a less restrictive alternative (LRA). *Id.*

Generally, an SVP will be granted a trial only if he presents evidence that he has "so changed" such that he either no longer meets the

¹ An SVP is defined as a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18). "Likely to engage..." means that the person more probably than not will engage in such acts if unconditionally released. RCW 71.09.020(7).

definition of an SVP, or release to a less restrictive alternative is appropriate. *See* RCW 71.09.090(2)(c).² RCW 71.09.090(4) requires that very specific criteria be met in order for the SVP to satisfy the “so changed” requirement. The SVP must show that since his last commitment trial, there has been a “substantial change” in condition due to either (1) a permanent physiological change that renders him unable to reoffend; or (2) a change in mental condition due to a “positive response to continuing participation in treatment[.]” RCW 71.09.090(4)(b). If the SVP makes the required showing, there is probable cause to order a new trial. RCW 71.09.090(2)(c).³

There is one statutory exception to the requirement of demonstrating substantial change to obtain an LRA trial: If the court has not previously considered the issue of release to a less restrictive alternative, an SVP may petition for an LRA and the court shall consider whether release to an LRA would be in the best interest of the person and whether conditions can be imposed that would adequately protect the community without considering whether the person’s condition has changed. RCW 71.09.090(2)(d). This provision allows an SVP one

² The State’s Response to Respondent’s Motion for Reconsideration describes the legislative evolution of LRAs in the SVP statute at CP 761-771.

³ The constitutionality of the amendment requiring either a permanent physiological change or a treatment-based change was upheld by the Supreme Court in *State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012) *cert. denied*, 133 S. Ct. 1460 (2013).

opportunity to petition for an LRA trial without showing a substantial change through participation in treatment.⁴ Although this provision allows the court to set a trial in the absence of a showing of substantial change, it does not preclude the trier of fact from considering all relevant evidence, including treatment progress. Indeed, ensuring successful treatment is paramount in LRAs. *In re Detention of Bergen*, 146 Wn. App. 515, 529-31, 195 P.3d 529 (2008).

B. Standard of Review

The criminal standard of review applies to sufficiency of the evidence challenges under the SVP statute. *In re Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). “Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Paulson*, 131 Wn. App. 579, 585-86, 128 P.3d 133 (2006) (quoting *State v Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

All credibility determinations are for the trier of fact to determine and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794

⁴ In this case, the State conceded that Rude was entitled to an LRA trial without showing substantial change through continuous participation in treatment. CP 797.

P.2d 850 (1990). An appellate court may not second-guess the credibility determinations of the fact-finder. *In re Detention of Halgren*, 156 Wn.2d 795, 811, 132 P.3d 714 (2006); *In re Detention of Davis*, 152 Wn.2d 647, 680, 101 P.3d 1(2004) (“A trial court’s credibility determinations cannot be reviewed on appeal, even to the extent there may be other reasonable interpretations of the evidence.”).

The reviewing court must defer to the trier of fact regarding conflicting testimony and the persuasiveness of the evidence. *In re Detention of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005); *see also State v. Paulson*, 131 Wn. App. at 586 (citing *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992)) (reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against Rude. *In Re Detention of Audett*, 158 Wn.2d 712, 727, 147 P.3d 982 (2006).

1. The State Demonstrated Beyond a Reasonable Doubt That it Was Not in Rude’s Best Interest to be Released to His Proposed LRA

Rude argues that the State failed to prove the LRA was not in his best interest and that the trial court erred in so finding. Appellant’s Brief (Brief) at 18. His argument is without merit. The State presented overwhelming evidence that it was not in Rude’s best interest to be released to his proposed LRA.

Washington case law belies Rude's assumption that his treatment participation history is irrelevant to what is in his best interest when a factfinder considers conditional release. The "best interest" standard "is directly related to the SVP's dangerousness and mental illness and is narrowly tailored to serve the State's compelling interest in appropriately treating dangerous sex offenders." *Bergen*, 146 Wn. App. at 536. The "best interest" inquiry, therefore, necessarily must consider treatment:

Thus, the "best interests" standard accounts for the inherent dangerousness of SVPs and their unique, extended treatment needs: it relates to the SVP's successful treatment, ensuring that the LRA does not remove "incentive for successful treatment participation" or "distract[] committed persons from fully engaging in sex offender treatment" and is the "appropriate next step in the person's treatment."

Id. at 529 (quoting legislative intent behind RCW 71.09.090).

With these considerations in mind, the trial court considered the stipulated evidence, including forensic evaluations from Kathleen Longwell, Ph.D. and Steven Marquez, Ph.D.⁵ CP 98-114, 165-203, 744-54. Dr. Marquez examined factors that have changed since Rude's commitment, including current functioning, treatment progress, medical conditions, etc., that could impact Rude's status and his readiness and eligibility for an LRA. CP 100-101.

⁵ Dr. Longwell twice evaluated Rude prior to his commitment trial and she testified at his trial. CP 116; 166-203. More recently, in the fall of 2013, Dr. Marquez evaluated Rude to determine whether he still meets the definition of an SVP and whether an LRA would be appropriate. CP 98-114; 744-754.

Dr. Marquez reported that Rude had not participated in treatment in any meaningful way since his admission to the SCC. CP 104. His refusal to participate in treatment “effectively prevented professional staff from monitoring and assessing his internal world,” and had not “provided any substantive data to suggest progress toward meaningful positive changes in his risk for reoffending since being admitted and then committed to the SCC.” *Id.* Dr. Marquez noted that by refusing to participate in treatment, Rude had avoided “the established process of transparently examining his risks, constructing viable intervention strategies and effectively practicing them under clinical supervision.” *Id.* at 119.

Dr. Marquez diagnosed Rude with Paraphilia Not Otherwise Specified (nonconsent with sadistic features); Alcohol Dependence, in institutional remission; Cocaine dependence, in institutional remission, tentative; and Antisocial Personality Disorder. CP 105. Dr. Marquez assessed Rude’s recidivism risk and found he remained at high risk to re-offend. CP 110. Rude’s score on a risk assessment instrument, the Static 99R, indicated that “[c]ompared to all other adult sex offenders, Rude’s score ranks in the 99.9th percentile.” CP 105. Further, Dr. Marquez identified specific long-term vulnerabilities and risks for Rude, including sexualized violence, sexual preoccupation, lack of emotional intimate relationships with adults, grievance thinking, poorly-managed anger, resistance to rules and supervision, and dysfunctional coping. CP 108-10.

Though Rude has not participated in treatment at the SCC, he participated in sex offender treatment while in prison. CP 208-230. But he was inconsistent with meeting treatment goals and refused to fully disclose his sexual offense history to his community based treatment provider. CP 229.

Based on the evidence presented at trial, the trial court found that given Rude's sexual offending history, his lack of transparency and poor participation in sex offender treatment in prison, his lack of understanding of his offending patterns, risks and interventions, his disagreement with his diagnosed disorders and risk factors, and his ongoing refusal to address any of these issues in sex offender treatment, Rude's proposed LRA was not in his best interest. CP 800-01. This Court must defer to the trial court regarding the persuasiveness of that evidence. *Brotten*, 130 Wn. App. at 133. Rude's current claim of insufficient evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Paulson*, 131 Wn. App. at 585-86. When all reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against Rude, the evidence is more than sufficient to support the findings and conclusions of the trial court that an LRA was not in Rude's best interest. The trial court's credibility determinations are not subject to review. *E.g.*, *Camarillo*, 115 Wn.2d at 71; *Halgren*, 156 Wn.2d at 811; *Audett*, 158 Wn.2d at 727. The evidence

presented at trial supports the findings of the trial court and Rude's argument has no merit.

2. The State Proved Beyond a Reasonable Doubt That Rude's Proposed LRA Did Not Include Adequate Conditions to Protect the Community

Rude argues that the evidence was insufficient to support the trial court's finding that Rude's proposed LRA did not include adequate conditions to protect the community. Brief at 18. Specifically, Rude contends that the trial court impermissibly relied on his lack of treatment progress to determine that the proposed LRA was not adequate. Brief at 19-20. Rude argues that the court must consider his proposed LRA without considering whether he has changed since his commitment and without considering whether he has participated in treatment.⁶ *Id.* at 22.

Rude relies on *In re Adams*, 178 Wn.2d 417, 430, 309 P.3d 451 (2013), to support his argument that his refusal to participate in treatment should not have been considered by the trial court. Brief at 20. Rude's citation is actually to the sole concurrence/ dissent of Justice Gordon McCloud in a criminal murder case, however, it supports the State's position here: "Statutory interpretation begins with the plain language and meaning of the statute, *viewed in the context of the larger statutory*

⁶ Although Rude stipulated to the admissibility of the evidence, he did argue during reconsideration that the court should not have considered his refusal to participate in treatment. CP 755-60. Because this evidence was properly admitted by stipulation, his argument, which was rejected by the trial court, goes to the weight of evidence, but not to admissibility.

scheme.” *Adams*, 178 Wn.2d at 430 (Gordon McCloud, Justice, concurring/dissenting) (emphasis added). Viewed in the context of the larger statutory scheme, Rude’s argument that RCW 71.09.090(2)(d) provides a sweeping rule prohibiting a trial court from considering relevant treatment or evidence of changes in an LRA trial is without merit.

Pursuant to RCW 71.09.090(3)(a), once a court has granted an LRA trial, that trial includes the same protections as an initial commitment trial. For instance, the burden of proof is on the State to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community. RCW 71.09.090(3)(d), .094(2).⁷ The State and Respondent each have the right to a jury trial. RCW 71.09.090(3)(a). The State also has the right to have the committed person evaluated by experts chosen by the state. The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state. *Id.* The judge may require the person to complete any or all of the following procedures or tests if requested by the evaluator: (i) A clinical interview; (ii) psychological testing; (iii) plethysmograph testing; and (iv) polygraph testing. *Id.* The judge may order the person to complete any other procedures and tests

⁷ The issue at an LRA trial is exactly the same whether it is the first LRA trial granted under RCW 71.09.090(2)(d), or a subsequent LRA trial granted under RCW 71.09.090(2)(c).

relevant to the evaluation. *Id.* Evidence of the prior commitment trial and disposition is admissible. *Id.*

Generally, at trial relevant evidence is admissible and irrelevant evidence is inadmissible. ER 401, 402. The trial court has broad discretion in ruling on the admissibility of evidence. *Bergen*, 146 Wn. App. at 534. *Bergen* was an LRA trial where the court admitted evidence of prior annual reviews over the respondent's objection. *Id.* at 535. That evidence included testimony that Bergen had never "productively engaged in a treatment program" or "substantially learned to control his risk factor." *Id.* The evidence in question "provided the basis for the experts' opinions on the appropriateness of the proposed LRA and [was] properly admitted as relevant evidence." *Id.*

Here, the fact that Rude has never engaged in SCC treatment was part of the basis of Dr. Marquez's opinion that the LRA proposed by Rude is not adequate to protect the community. CP 104. Dr. Marquez reported that Rude's refusal to participate in treatment had allowed him to avoid the established process of transparently examining his own risks, of constructing viable intervention strategies, and of effectively practicing intervention strategies under clinical supervision. CP 110. The trial court evaluated all the evidence, including Rude's refusal of treatment, and found that Rude's extensive offending history, failure to be transparent, failure to disclose details surrounding his sexual offending, and the overall

risk he poses to the community, supported the conclusion that Rude's proposed LRA did not have conditions sufficient to protect the community. CP 800.

Nor did the trial court impermissibly rely on Rude's refusal to participate in treatment. The court specifically recognized that it had authority to grant an LRA despite Rude's refusal to participate in treatment. CP 800. It found, however, that Rude's attitude toward treatment, as well as his performance in treatment, were relevant to the whether the proposed LRA was in his best interest and would adequately protect the community. CP 797. The evidence, when considered as true and viewed in a light most favorable to the State, and considering the inferences that reasonably can be drawn therefrom, are more than sufficient to support the trial court's findings that Rude's proposed LRA did not include adequate conditions to protect the community. Further, this court must defer to the trial court's credibility determinations and the persuasiveness of the evidence.

Rude argues that he could have immediately petitioned for release to an LRA, in which case his refusal to participate in treatment since his commitment would not be before the court. Brief at 20. But this argument is also without merit. First, a court may not order an LRA trial until after the first annual review. *In re Det. of Thorell*, 149 Wn.2d 724, 751, 72 P.3d 708, 723 (2003). "Because of this restriction on the trial court, those who meet the

statutory definition and are committed as SVPs are not entitled to consideration of LRAs until their first annual review.” *Id.* at 751. Further, his argument regarding what might have been admissible evidence in a non-existent, hypothetical trial that might have occurred at a different time is irrelevant and speculative.

Rude argues that he wanted to participate in individual sex offender treatment rather than group treatment, but was deprived of that opportunity, describing DSHS’ position as follows: “[I]f Mr. Rude is unwilling to participate in group treatment, then he should have no treatment.” Brief at 18. The record does not support Rude’s view of the facts.

Rude participated in sex offender treatment in prison, but did not do well. CP 798 (unchallenged Finding of Fact No. 10). He was resistant to change, not transparent, appeared to manipulate information, and lacked understanding of his offending patterns, risks, vulnerabilities, triggers, and intervention strategies. *Id.*

Consistent with his DOC treatment history, and while at the SCC prior to his commitment as an SVP, Rude took issue with his individual SCC treatment plan. CP 255. He disagreed with his diagnoses, dynamic risks, interventions, and history, showing notable rigidity. *Id.* Following his commitment, Rude inquired about doing individual treatment with Mr.

Rockwell.⁸ CP 256. He was informed that the primary sex offender treatment modality at the SCC is cohort groups and that treatment is not provided on an individual basis. CP 258. Rude was encouraged to sign up for Awareness and Preparation class, which is a prerequisite to joining a cohort group. *Id.* He was also informed he could sign up for the “Truthought” group. *Id.* Rather than taking advantage of either option, Rude continued to refuse to participate; when presented with his individualized plan, he was highly critical, vocal and angry. CP 266. Rude was reminded that individual sessions were seen as less effective because of the potential for manipulation of the therapist and the absence of peer feedback. CP 262. When he was resistant to those ideas, he was referred to his prison treatment summary, which described his suboptimal performance in that program. *Id.*

This evidence, which was stipulated to at trial, supports the trial court’s finding that Rude wants to control his environment so that any treatment he receives will be on his own terms. CP 800.

Rude argues that group treatment, as provided by the SCC, is marginal at best and may be harmful. Brief at 16. Rude’s only support for this argument is an article about the efficacy of group sex offender

⁸ Rude correctly notes that Mr. Rockwell is not a psychologist, rather he is a “Psychology Associate,” with an MSW degree. Brief at 14, n.10; CP 255.

treatment for treating child molesters.⁹ His argument again asks this Court to re-determine credibility and re-weigh the evidence. This Court does not perform that function and, even if it did, it would have to consider that Rude's history includes violent rapes and attacks on women and men, not child molestation.

Finally, Rude assigns error to Finding of Fact No. 11, arguing that the court drew a negative inference from his refusal to participate in the annual review conducted by Dr. Marquez, implicating his right to counsel. Brief at 3, 5. While it is correct that Rude refused to participate in his annual review (CP 100-01), this refusal has nothing to do with Finding of Fact No. 11, which concerns Rude's failure to disclose his sexual offending history to his assigned community based treatment provider prior to his release from prison. CP 798. Accordingly, Rude's argument that the court improperly relied on his refusal to participate in his annual SCC not supported by the record and is without merit.

IV. CONCLUSION

The evidence presented at the October 9, 2013 stipulated facts trial is sufficient to support the trial court's Findings of Fact, and the Findings of Fact support the Conclusions of Law. The evidence proved beyond a

⁹The citation in Rude's brief is <http://www.psychologytoday.com/blog/witness/201309/efficacy-sex-offender-treatment-still-in-the-air>. The article consists of a "systematic review" of "scientifically rigorous studies that establish a link between treatment completion and a reduced risk of reoffending among men who have sexually abused children."

reasonable doubt that Rude's proposed LRA is not in his best interest and does not include conditions that would adequately protect the community. Therefore, for the reasons set forth above, this Court should affirm the trial court's determination that Rude's proposed LRA was not in his best interest and his proposed LRA did not include conditions that were adequate to protect the community.

RESPECTFULLY SUBMITTED this 5th day of September, 2014.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Mary E. Robnett", written over a horizontal line.

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NO. 71460-1-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention of:

RICHARD RUDE,

Appellant.

DECLARATION OF
SERVICE

I, Allison Martin, declare as follows:

On September 15, 2014, I sent via electronic mail and deposited in the United States mail true and correct copies of Respondent's Opening Brief, and Declaration of Service, postage affixed, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of September, 2014, at Seattle, Washington.


ALLISON MARTIN

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