

NO. 47231-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER LYONS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Jack Nevin

No. 14-1-02408-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant has failed to show a due process violation or the trial court abused its discretion in denying his request for an expert when he failed to specify what relevant evidence the expert would present and chose not to provide such information in a motion for reconsideration as offered by the trial court?

2. Whether this Court should reverse the trial court's order authorizing the involuntary medication of the defendant on the basis that it contained insufficient findings, but decline to take any further action as remand is unnecessary because the case is now moot?

B. STATEMENT OF THE CASE.

1. Procedure

On June 23, 2014, the Pierce County Prosecutor's Officer charged CHRISTOPHER LYONS, hereinafter "defendant," with two counts of assault in the second degree stemming from an incident where defendant allegedly assaulted two individuals with a baseball bat. CP 1-4. An initial competency evaluation by Dr. Thomas LeCompte on July 13, 2014, found defendant lacked the capacity to assist in his own defense and recommended an attempt at competency restoration to include treating

defendant with psychotropic medications on an involuntary basis if necessary. CP 10-14. The Pierce County Superior Court entered an order committing defendant to Western State Hospital (hereinafter “WSH”) for a 90 day competency restoration period, but declined to authorize WSH to provide involuntary medication against the defendant’s will. CP 20-22.

After 90 days of restoration, a forensic psychological evaluation by Dr. Gregg Gagliardi again found defendant lacked the capacity to assist in his own defense and recommended he be remanded to WSH for an additional period of competency restoration. CP 49-58. The evaluation also stated that in view of defendant’s resistance to medication, a *Sell*¹ hearing would likely be required to obtain court approval to administer medications involuntarily. CP 57. An evaluation on December 18, 2014, again found defendant lacked the capacity to assist in his own defense, recommended he be remanded to WSH for an additional period of competency restoration, and again stated that in light of his resistance to taking medication, a *Sell* hearing would likely be required to obtain court approval to administer medications involuntarily. CP 60-69. On December 23, 2014, the trial court entered a second 90 day order of commitment to WSH for competency restoration and again declined to authorize WSH to provide involuntary medication against the defendant’s will. CP 70-72.

¹ *Sell v. U.S.*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

On January 20, 2015, Dr. Sanjay Aulakh of WSH sent a letter to the court and parties involved in defendant's case indicating that the defendant had been unwilling to voluntarily take medications during his period of restoration. CP 81-83. He requested WSH be granted judicial authority to treat the defendant with psychotropic medications involuntarily and notified the parties that if a *Sell* hearing was not scheduled, defendant would be transported back to the Pierce County Jail as it was his opinion that without involuntary medication, defendant would not be restorable. CP 82.

In response, the State scheduled a *Sell* hearing on January 28th, 2015. The day before the hearing, defendant filed his "brief in opposition to forced medication for purposes of restoring competency". CP 85-93. The day of the *Sell* hearing, defendant filed a motion to dismiss alleging his procedural due process rights were violated as no petition for the *Sell* hearing had been filed and he had only recently obtained his medical records from WSH. CP 85-99. The State responded by noting that defense counsel had been aware a *Sell* hearing was likely going to happen since October and the hearing was scheduled quickly because of the letter's statement that if it was not, the defendant would be transported back to the Pierce County Jail and found not restorable. RP 10-13. The trial court denied the defendant's motion to dismiss and considered defendant's request for more time to procure an expert, but stated that the

court wanted to proceed with the hearing and see where they were at after the State's witness testified. RP 12-13.

During the *Sell* hearing, the State presented evidence in the form of testimony from Dr. Aulakh. RP 14-74, 81-102. After the State had presented its case, defense counsel requested the opportunity to call an expert familiar with a University of Washington study. RP 102. Defense counsel admitted she did not have an expert who had evaluated the defendant and could not articulate what testimony they would offer, but stated she had spoken to several on the phone who would be willing to work with her. RP 103-07. She also argued that defendant was statutorily entitled to an expert under RCW 10.77. RP 107. The parties stipulated to the admission of the University of Washington study and the court recessed for the evening. RP 107-114.

The next day, the court ruled defendant was not statutorily entitled to an expert under RCW 10.77. RP 115-117. The court also denied defendant's request for an expert witness since the parties had stipulated to the admission of the study and defense counsel was unable to explain what, if any, testimony her expert would offer. RP 117-121. The court stated it would revisit the issue if defense counsel filed a motion for reconsideration outlining with more specificity what her expert would offer. RP 120-21, 125-27.

The court then found Dr. Aulakh's testimony was credible and that it was necessary to administer psychotropic medication to defendant in

order to restore and maintain defendant's competency and that there was no less intrusive form of treatment available. RP 112, 119-121. The court entered an order allowing WSH to administer psychotropic medication to the defendant within certain parameters and against defendant's will if necessary. CP 100-101.

Defendant sought discretionary review by this Court and shortly thereafter, WSH notified the parties that they no longer believed the defendant's competency could be restored in the foreseeable future. *See* Ruling Denying State's Motion to Dismiss for Discretionary Review and Granting Review. The trial court dismissed the underlying criminal proceedings with prejudice and the State moved to dismiss Lyon's motion for discretionary review as moot. *Id.* The Commissioner denied the State's motion to dismiss and granted discretionary review on the issues concerning the trial court's denial of defendant's request for an expert and the trial court's application of the *Sell* factors authorizing the involuntary medication of the defendant. *Id.*

2. Facts relating to the *Sell* Hearing

Dr. Aulakh, a psychiatrist for WSH and the defendant's treating psychiatrist since October, testified during the *Sell* hearing. RP 14-16. He testified that in his medical opinion, defendant had a major mental illness called delusional disorder where a person has beliefs of being persecuted by others, they act on those beliefs and become agitated. RP

39. The current medical protocol for treating a delusional disorder is with antipsychotic medication. RP 39.

He testified he initially prescribed an antipsychotic medication called Abilify to defendant to decrease his delusional thinking. RP 22-23. Abilify has been on the market for 12-15 years, and Dr. Aulakh testified he had had positive success with it on other patients. RP 26-27.

Specifically, he said Abilify is successful in decreasing delusional thoughts and creating a better quality of life for the person about 40 percent of the time. RP 27. Abilify can have negative side effects which include restlessness, stiffness, tremors, diarrhea, nausea, vomiting, constipation and lethargy. RP 24-25. Defendant took Abilify for one day before he complained about being restless so Dr. Aulakh prescribed a medication called Vistaril. RP 24-25, 82. He said Vistaril can help most of the time, but defendant stopped taking the both medications before it was possible to detect any positive changes. RP 25-26.

Defendant was then prescribed Zyprexa, a medication similar to Abilify that has a success rate of approximately 40-45 percent. RP 28-30. Zyprexa has side effects similar to Abilify, but sedation is more prominent and there is less restlessness. RP 28-29. Both drugs also have an increased chance of diabetes after long term use. RP 29. Defendant told Dr. Aulakh that the Zyprexa made him feel twitchy so he refused to take it anymore, but his chart indicated he refused to take it altogether. RP 28-30, 82. Dr. Aulakh then prescribed an anti-seizure medication called

Trileptal which works to decrease aggressiveness in people with a mood disorder. RP 31. He said like anything, Trileptal has some side effects including eating too much, sedation and it can cause seizures and difficulty with ambulation. RP 31-32. Dr. Aulakh testified he never observed any side effects with Trileptal, but defendant began to complain it was making him feel cloudy so he stopped taking it after a couple weeks. RP 32-33. During his time at WSH, defendant was also prescribed Thorazine around October which is an antipsychotic which decreases delusional thinking. RP 37-38. Defendant stopped taking that after two weeks after saying he believed it was not helping him. RP 38.

Dr. Aulakh testified that while he was treating the defendant, the defendant kept demanding to be put on Ativan and Lorazepam which are benzodiazepines. RP 33-34. Dr. Aulakh said he was hesitant to put him on those because they are addicting and could be easily addictive for someone who has abused drugs in the past. RP 34. The American Psychiatric Association and other peers recommend prescribing serotonin uptake inhibitors (the drugs mentioned before) which are not addicting before going to the benzodiazepines. RP 34-35. Dr. Aulakh testified that Ativan does not decrease delusional thinking and it is a short acting drug to help decrease agitation. RP 35-36. Dr. Aulakh said the last two weeks they had prescribed him Ativan on an as needed basis with only two doses every seven days. RP 37.

Dr. Aulakh testified defendant had not been on any antipsychotic medications since December. RP 40-41. They attempted to determine whether defendant could regain competence without medication, but in January when he was re-evaluated, he was still deemed incompetent to stand trial. RP 40-41. When asked about the defendant being a danger to himself or others, Dr. Aulkah stated that the defendant could be if he acts on the beliefs which are delusional and it depends on the delusion. RP 49-50.

Dr. Aulukh testified there were other antipsychotic medications used to treat delusional disorders including Haldol, Geodon, Navane, Prolixin and Seroquel. RP 39-40. It was his opinion that without antipsychotic medications, defendant would not regain competence to stand trial. RP 42. He also stated that he believed the administration of antipsychotic medication was substantially likely to render the defendant competent to stand trial because it is the course of recommended treatment in the medical community for this type of diagnosis. RP 42.

Dr. Aulakh acknowledged there are occasions where medication does not work. RP 42, 56. He stated that although defendant had been on some of the medications, they were minute doses for very short periods of time and the medications can sometimes take several weeks to be effective. RP 64-65. Dr. Aulakh said that until he gave him the medications and could see the effects, he would not know what the defendant's responses to them would be. RP 64.

If the court gave him the authority to administer medication to the defendant, Dr. Aulakh testified he would sit down with the defendant and go through the medications and their side effects and allow him to choose what to start with. RP 43. The nine drugs he would recommend would be Risperdal, Zyprexa, Abilify, Seroquel, Geodon, Haldol, Navane, Proxilin and Thorazine. RP 43. Dr. Aulakh testified all the drugs have the same side effects he mentioned earlier, just some more prominent or less than others. RP 44-45. In very rare cases, some can cause neuroleptic malignant syndrome which is stiffness, sweating and low blood pressure. RP 87-88.

Dr. Aulakh said he believed it was substantially unlikely that there would be side effects significant enough to undermine the fairness of his trial for several reasons. RP 46. First, not everyone who takes the drugs has side effects and second, there are ways to diminish the side effects with other medication. RP 46. He also doubted there were any alternative less intrusive treatments that would be likely to achieve substantially similar results and the administration of the prescriptions was medically appropriate. RP 47. Dr. Aulakh stated that when treating delusional disorder with antipsychotic medication, the general expectation is that 33 percent of people respond very well to the medications, 33 percent partially respond and 33 percent do not respond. RP 95.

Specifically with the defendant, he stated he believed there was a 40 percent chance he would be fully responsive to the medications, and a 33 percent chance that he would not respond at all. RP 98.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW HIS DUE PROCESS RIGHTS WERE VIOLATED OR THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS REQUEST FOR AN EXPERT WHEN HE FAILED TO SPECIFY WHAT RELEVANT EVIDENCE THE EXPERT WOULD PRESENT AND CHOSE NOT TO PROVIDE SUCH INFORMATION IN A MOTION FOR RECONSIDERATION AS OFFERED BY THE TRIAL COURT.

An individual has a liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment. *Washington v. Harper*, 494 U.S. 210, 221-22, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990). The involuntary injection of drugs represents an interference with the right to privacy and the right to a fair trial. *Riggins v. Nevada*, 504 U.S. 127, 134, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992); *State v. Adams*, 77 Wn. App. 50, 55-56, 888 P.2d 1207 (1995). Nonetheless, the court has the authority to order the involuntary administration of drugs to restore competency. *Sell v. United States*, 539 U.S. 166, 180-81, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

To do so, the State must show by clear, cogent and convincing evidence: (1) important governmental interests are at stake; (2) administration of medication is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that may undermine the fairness of the trial; (3) involuntary medication is necessary to further the State's interests; and (4) administration of the medication is medically appropriate. *Sell*, 539 U.S. at 180-81; RCW 71.05.217(7); *In re Detention of Schuoler*, 106 Wn.2d 500, 510, 723 P.2d 1103 (1986).

In contrasting the involuntary administration of drugs to restore competency as opposed to prevent a dangerous defendant from harming himself or others, *Sell* held that the “balanc[ing of] harms and benefits” required by its factors “related to the more quintessentially legal questions of trial fairness and competence.” *Sell*, 539 U.S. at 183. Thus, “in light of the importance of judicial balancing, and the implication of deep-rooted constitutional rights, a court that is asked to approve involuntary medication must be provided with a complete and reliable medically-informed record, based in part on independent medical evaluations, before it can reach a constitutionally balanced *Sell* determination. *U.S. v. Rivera-Guerrero*, 426 F.3d 1130, 1137 (9th Cir. 2005). An involuntary medication order should only be issued after both sides have had a fair opportunity to present their case and develop a complete and reliable record in light of the importance of the defendant's liberty interest, the

powerful and permanent effects of anti-psychotic medications and the strong possibility that a defendant's trial will be adversely affected by the drugs side effects. *Id.*

Defendant in the present case contends he was denied the right to present a defense when the trial court denied his request for an expert witness. Brief of Appellant at 12-17. A defendant is entitled to an expert witness only when such services are necessary to an adequate defense. *State v. Mines*, 35 Wn. App. 932, 935, 671 P.2d 273 (1983), *review denied*, 101 Wn.2d 1010 (1984). "The determination of whether such services are necessary for an adequate defense is in the sound discretion of the trial court and will not be overturned on appeal unless the appellant clearly establishes substantial prejudice." *Mines*, 35 Wn. App. at 935 (*citing State v. Stamm*, 16 Wn. App. 603, 605, 559 P.2d 1 (1976)). The denial of the request for an expert witness is reviewed for an abuse of discretion. *State v. Adams*, 77 Wn. App. 50, 53-54, 888 P.2d 1207. An abuse of discretion occurs when there is a clear showing that the trial court's decision was manifestly unreasonable, or based on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court's decision to deny the defendant's request for an expert witness was not an abuse of discretion because defendant was unable to outline in relevant detail the additional testimony that the expert would present. Defendant was unable to articulate to the court the specific

reasons why an expert was necessary in the defendant's case other than to explain a University of Washington study which the State stipulated would be admissible. RP 102-03, 106. The court repeatedly asked the defense attorney what she expected her expert to say attempting to pinpoint that the expert would be providing some specific testimony relevant to the defendant and each time, the defense attorney's response was vague with respect to what the actual evidence they would be able to present was. RP 103-05. She could not articulate or show that any of the experts would in fact present any information different than what the WSH doctors had testified to. For example:

The Court: I'm sorry, let me ask you this question, what would he say about your client as a patient.

[Defense Attorney]: My expert?

The Court: Um-hmm.

[Defense Attorney]: Well, I would provide them with all the evaluations, they could meet with Mr. Lyons, they would proffer an opinion as to –

The Court: Now, this is very important, do you know they would do that or is the scope of your conversation with them as to the nature of delusions and their amenability to treatment with these various pharmaceuticals?

[Defense Attorney]: Well, I've consulted with Dr. McClung (phonetic) and he indicated he's willing to work with me on this case and talk to Mr. Lyons and offer insight and opinion into that.

RP 104. Based on the answers the defense attorney gave, the trial court concluded “the precise testimony of the expert to which he would testify is unknown” and to grant a continuance for additional experts “would require more than speculation.” RP 109, 118.

Defendant argues his case is similar to the Washington Supreme Court case *In re Detention of Schuoler* where the Court found the trial court’s refusal to grant a continuance for an expert witness was an abuse of discretion. 106 Wn.2d 500, 723 P.2d 1103 (1986). In that case, the Court’s reasons were premised on the facts that:

Schuoler’s attorney had, at most, 24 hours to prepare for the ECT² hearing. She had no access to many of Schuoler’s medical records, including records involving prior ECT treatments. She had no opportunity to contact members of Schuoler’s family. She had no opportunity to select her own expert witness to testify. She had no time to talk to either one of the experts provided her by the prosecutor.

106 Wn.2d at 512. The present case is distinguishable in all respects. The defendant’s attorney was given 5 days notice of the *Sell* hearing, she had access to all evaluations of defendant over the course of his time at WSH and had received his medical records (although only 2 days before, she had access to them unlike the attorney in *Schuolor*). CP 137; RP 8, 10. The defense attorney had been aware a *Sell* hearing was likely to occur since October, had met with the defendant at WSH and been present for at

² Electroconvulsive Therapy.

least one of his evaluations and had had the opportunity to meet with Dr. Aulakh and chose not to. CP 60-69; RP 4, 10.

Schuolar also involved the use of electroconvulsive therapy which by statute requires the court appoint an expert to testify on behalf of the individual and allows the option for the defense attorney to choose that individual. *See* RCW 71.05.217(7)(c) (“The court shall appoint a psychiatrist... or physician designated by such person or the person’s counsel to testify on behalf of the person in cases where an order for electroconvulsant therapy is sought.”). The decision whether to appoint an expert in all other cases of involuntary medication, including the defendant’s, is a discretionary decision left to the trial court. *See* RCW 71.05.217(7)(c) (“The court may appoint a psychiatrist... to examine and testify on behalf of such person.”). Defendant’s case differs significantly from what occurred in *Schuolar*.

In addition, defendant alleges that like in the Ninth Circuit case of *U.S. v. Rivera-Guerrero*, 426 F.3d 1130 (9th Cir. 2005), he was denied the ability to present his own case and the court’s decision was not based on a complete and reliable medically informed record. But the record shows defendant was unable to point to any specific contradictory evidence he would have presented and his attorney thoroughly cross examined the State’s witness, Dr. Aulakh. The defense attorney questioned Dr. Aulakh about his interactions with the defendant and the defendant’s medical history, specifically relating to the medications they were going to use to

attempt to restore him if authorized. RP 50-71. The doctor even came back a second time and was subject to more cross examination after the defense attorney wanted to inquire further about specific medications. RP 75-79, 89-98, 100-101.

As described previously, the court inquired several times and invited the defense attorney to explain how her expert would provide anything relevant that was contradictory to what Dr. Aulakh testified to. When she was unable to do so, the court relayed its understanding of the issue. The court was not “being asked to decide a factual question.” RP 109. The court was “instead, being asked to decide whether as a matter of law the State has presented clear, cogent and convincing evidence as it relates to the [*Sell*] criteria.” RP 109. The defendant was allowed to challenge that evidence through cross examination. Without an offer of proof as to what substantive evidence an expert would have provided, defendant cannot be said to have been denied an opportunity to present a case or that the trial court’s decision was not based on a complete and medically informed record. The State presented its evidence and defendant was afforded an opportunity to challenge that evidence. It was not a denial of due process to deny defendant’s request for an expert when defendant was unable to show the relevance or substance of any expert’s testimony.

Most importantly however, the trial court offered the defendant the opportunity to present a motion for reconsideration outlining any

additional evidence it would like the court to consider. Because defendant failed to do that, he should not now be allowed to argue that the trial court abused its discretion in its denial of his request for an expert when the trial court left the door open for him.

The trial court repeatedly told the defense attorney that he would reconsider the defendant's request with additional information. During its ruling, the court stated:

Now, should the defense wish to seek reconsideration of this order, should the defense wish to bring to the court additional evidence, whether it be by declaration or other evidence based upon those for whom there is a foundation to suggest that in this particular case it is not a viable option or shouldn't be, the court will certainly open its door to allow that to occur. So if the State, if the defense has more information to provide, or a basis for motions for reconsideration, they can pursue that.

RP 120-121. Twice afterwards the court reiterated its reference to a motion for reconsideration stating “[n]ext, I’m going to ensure that the order includes an acknowledgment that the defense can move for reconsideration” and later “[a]nd I will include it or you can include language if you will that says court acknowledges that the defense may move for reconsideration of this order based upon the discovery of additional evidence, or you can choose the verbiage, but you get the import.” RP 125-126. After the court had ruled, the defense attorney attempted to make an oral offer of proof describing a specific psychologist she would like the defendant to see, the court said “none of that is before

the court, nor has it been, so I look forward to reviewing, in the context of a motion for reconsideration, this new information.” RP 127.

In spite of the repeated reminders that the court would consider a motion for reconsideration and any additional evidence the defendant would like to present, the defendant never moved for reconsideration or provided any additional evidence to the court. It cannot be said that the trial court abused its discretion in denying the request for an expert when it clearly left defendant the opportunity to revisit the issue and defendant chose not to take advantage of that.

Defendant is unable to show that the trial court abused its discretion when he was unable to articulate in relevant detail the additional testimony an expert would present and he chose not to seek a motion for reconsideration after the court repeatedly told the defendant he would consider one.

2. THIS COURT SHOULD REVERSE THE TRIAL COURT’S ORDER AUTHORIZING THE INVOLUNTARY MEDICATION OF THE DEFENDANT AS IT CONTAINED INSUFFICIENT FINDINGS, BUT DECLINE TO TAKE ANY FURTHER ACTION AS REMAND IS UNNECESSARY BECAUSE THE CASE IS MOOT.

As outlined above, the Constitution permits the government to involuntarily administer antipsychotic drugs to a mentally-ill defendant facing serious criminal charges when four requirements are met. *Sell v.*

U.S., 539 U.S. 166, 180-81, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

The State must show by clear, cogent and convincing evidence that: (1) important governmental interests are at stake; (2) administration of medication is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that may undermine the fairness of the trial; (3) involuntary medication is necessary to further the State's interests; and (4) administration of the medication is medically appropriate. *Sell*, 539 U.S. at 180-81; RCW 71.05.217(7); *In re Detention of Schuoler*, 106 Wn.2d 500, 510, 723 P.2d 1103 (1986).

Where the trial court has weighed the evidence, an appellate courts review is generally limited to determining "whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment." *State v. Hernandez-Ramirez*, 129 Wn. App. 504, 511, 119 P.23d 880 (2005)(citing *In re Detention of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986)).

After a *Sell* hearing was conducted in the present case, the trial court found the State had proven that it was necessary to administer psychotropic medication to the defendant in order to restore and maintain his competency and that there was no less intrusive form of treatment. CP 100-101. On appeal, defendant alleges that the State failed to prove three of the *Sell* factors.

- a. Defendant is unable to show the trial court did not appropriately weigh the government's interest in bringing defendant to trial.

Sell recognized that “[t]he Government’s interest in bringing to trial an individual accused of a serious crime is important”. 539 U.S. at 180-81. Whether the offense is a serious crime against a person or against property, the “government seeks to protect through application of the criminal law the basic human need for security.” *Id.* at 180. It also recognized however that there were certain circumstances that could lessen the importance of that interest. *Id.* For instance, if an incompetent defendant faces a lengthy commitment to a mental institution, that consideration “affects, but does not totally undermine, the strength of the need for prosecution.” *Id.*

Defendant argues that the State’s interest in bringing defendant to trial was lessened by the fact that the court was required to involuntarily commit him to WSH under RCW 71.05. Brief of Appellant at 19. But the initial period of involuntary commitment defendant would be subject to was only up to 72 hours for an evaluation, and civil commitment involves a type of risk assessment that is completely different than the assessment of competency and the need for involuntary medication. RCW 10.77.086(4). Dr. Aulakh stated that although it was a possibility that defendant would be subject to civil commitment, he could not say for sure

because he was not evaluating him for that at that time. RP 67-68. Dr. Aulakh also expressed that he did not believe the defendant was a danger to himself and any danger to others occurred only when defendant acted out on his beliefs which are delusional. RP 49-50.

Essentially, it was unknown whether defendant's term of civil commitment would last beyond three days, thereby decreasing any potential affect it had in lessening the State's interest in bringing him to trial. There was no evidence in the record to suggest that the defendant would definitively be subject to civil commitment. The fact that he later was confined after a civil commitment evaluation was unknown to the trial court at the time of the *Sell* hearing, and is thus irrelevant for this Court's inquiry. In addition, there is nothing in the record to suggest the trial court did not consider these interests in its evaluation of the factors. The court twice outlined the factors it was to consider on the record. RP 111, 119. It also referenced throughout the hearing having read many of the prominent cases concerning *Sell*, including *Sell* itself which specifically contemplates the affect civil commitment can have on the first factor. RP 80-81, 110-111, 115, 120. Defendant is unable to show anything in the record suggesting that the court did not appropriately balance this factor and cannot show the trial court did not consider the State's interest was lessened by the potential for incarceration by civil commitment.

- b. The trial court's order was insufficient for proper review of what it found was substantially likely.

The second *Sell* factor the trial court was required to consider asks whether the “administration of medication is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that may undermine the fairness of the trial.” *Sell*, 539 U.S. at 180-81. No Washington court appears to have addressed what “substantially likely” relates to in terms of a percentage rate, but other courts have attempted to quantify the term. *See U.S. v. Gomes*, 387 F.3d 157, 161-162 (2d Cir. 2004) (a seventy-percent chance at restoration to competence was considered substantially likely); *U.S. v. Ghane*, 392 F.3d 317, 320 (8th Cir. 2004) (ten percent chance at restoration is inadequate to meet this standard); *U.S. v. Rivera-Morales*, 365 F.Supp.2d 1139, 1141 (S.D.Cal. 2005) (“a chance of success that is simply more than a 50 percent chance of success does not suffice to meet this standard”).

In the present case, Dr. Aulakh testified that when treating delusional disorder with antipsychotic medication, the general expectation is that 33 percent of people respond very well to the medications, 33 percent partially respond and 33 percent do not respond. RP 95. Specifically with the defendant, he stated he believed there was a 40 percent chance he would be fully responsive to the medications. RP 98. Defendant argues that this 40 percent chance that defendant would be fully

responsive was not sufficient to meet the *Sell* standard requiring the medication be “substantially likely” to render the defendant competent.

But Dr. Aulakh also testified that there was only a 33 percent chance that defendant would not respond at all to the medications. RP 98. This suggests Dr. Aulakh believed there was a 27% chance defendant would partially respond to the medications and it is unknown what that partial response would entail. The record is unclear whether a partial response could allow defendant to be rendered competent while still experiencing some of the symptoms of his disorder.

The trial court’s findings are unclear about whether it considered this in making its ruling or in general on what basis it found the State had proven defendant was “substantially likely” to be rendered competent to stand trial. The court also reviewed the University of Washington study and may have relied in part on that. The court’s order authorizing the medication simply stated:

THE COURT FINDS by clear and convincing evidence that it is necessary to administer psychotropic medication to the defendant in order to restore and maintain the defendant’s competency and there is no less intrusive form of treatment.

CP 100-101. The court’s oral ruling also fails to illuminate its finding on this issue any further. RP 115-120. The court references the University of Washington study and some statistics in it which may have provided further support for its finding, but does not elaborate on why it believed

the medication was substantially likely to render the defendant competent. RP 117-118. In such a situation, the appropriate remedy is for the appellate court to remand the case to the trial court to enter more specific findings on the issue. *See State v. Barber*, 118 Wn.2d 335, 823 P.2d 1068 (1992) (where findings of fact are insufficient to permit meaningful appellate review, an appellate court may remand to the trial court for more specific findings). The State will elaborate further below.

Defendant also argues that the trial court's order failed to properly limit the hospital's discretion in specifying the amount of medication WSH was authorized to administer to defendant. Brief of Appellant at 23-25. Defendant states that the appropriate remedy for this is to vacate the order, but neglects to state that the remedy is to vacate *and remand* the order for more specific delegation of authority as to a treatment plan. *U.S. v. Hernandez-Vasquez*, 513 F.3d 908, 916-917 (9th Cir. 2007). Given that the State is already suggesting a remand would be appropriate for more specific findings on what constitutes substantially likely, any issue regarding the amount of medication could also be addressed through this remedy so the State will not address that issue.

However, because the underlying criminal charges in the present case were dismissed and the case is now moot, a remand in this specific case would be futile and an inefficient use of judicial resources. CP 138-

141. This Court should reverse the trial court's order on the basis that it contained insufficient findings and decline to take any further action³.

D. CONCLUSION.

This Court should find that the trial court did not abuse its discretion in denying defendant's request for an expert, but reverse the trial court's order authorizing the involuntary medication of the defendant on the basis that it contained insufficient findings and decline to take any further action as the case is moot.

DATED: July 25, 2016.

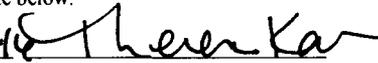
MARK LINDQUIST
Pierce County
Prosecuting Attorney



CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7-25-16 
Date Signature

³ Although the criminal charges were dismissed without prejudice, if charges were to be refiled, the defendant would have to undergo a new evaluation to determine his competency to proceed to trial at that time so there is no concern this order (whether affirmed or reversed) would have any bearing on future competency proceedings.

PIERCE COUNTY PROSECUTOR

July 25, 2016 - 3:27 PM

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