NO. 47975-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of Brian Taylor-Rose:

STATE OF WASHINGTON,

Respondent,

v.

BRIAN TAYLOR-ROSE,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Brian Taylor-Rose, now 38 years old, has a history of deviant sexual fantasies and sexually assaulting young children. Specifically, Taylor-Rose has a 1997 conviction for Child Molestation in the Second Degree for molesting a 13-year-old child. Most recently, Taylor-Rose was convicted in 2009 of Child Molestation in the Third Degree for molesting a 7-year-old child. Additionally, Taylor-Rose has a long history of deviant fantasies about young boys and admitted an inability to control these desires. Taylor-Rose has extremely troublesome unadjudicated behavior as well, including attempts to groom numerous children, both in person and on the internet, viewing child pornography, and violating conditions of his community custody for inappropriate contact with minors. When he was about to be released from the 2009 conviction, the State filed a petition to commit him as a Sexually Violent Predator pursuant to RCW 71.09. After a lengthy jury trial, Taylor-Rose was found to be mentally ill and dangerous by a unanimous jury, and was committed as a sexually violent predator.

Taylor-Rose was committed after a fair trial that comports with the Constitution as well as the Sexually Violent Predator Statute. The State presented the testimony of a highly qualified licensed psychologist that established that Taylor-Rose meets the statutory criteria. The jury was

correctly instructed on all elements of a sexually violent predator petition, and the trial court did not abuse its discretion when it declined to instruct the jury on the definition of a "recent overt act" where the evidence did not support such an instruction. Taylor-Rose has failed to show that the trial court abused its discretion. This Court should affirm the commitment.

II. ISSUES

A. Viewed in the light most favorable to the State, did the evidence support commitment where the State presented overwhelming evidence that Taylor-Rose was mentally ill and dangerous?

B. Where the jury was accurately instructed on all of the statutory elements of a sexually violent predator petition and Taylor-Rose was fully able to argue his theory of the case, did the trial court abuse its discretion in instructing the jury?

C. Where the State Supreme Court has held that the SVP statute imposes no requirement that dangerousness be limited to a specific time period, was the State required to limit the assessment of dangerousness to the foreseeable future or any specific time frame?

D. Where the statute determines certain crimes are sexually violent offenses as a matter of law, and the parties agreed Taylor-Rose had been convicted of qualifying crimes, did the trial court err in instructing the jury that Taylor-Rose's convictions were "crimes of sexual violence" and where there was no objection to the instruction?

E. Should RAP 14.2 costs be awarded in this case when RAP 14.2 does not afford discretion in civil matters for the award of costs?

III. FACTS

Brian Taylor-Rose has two criminal convictions for sex offenses. On February 6, 1998, at the age of 19 years old, Taylor-Rose was convicted of Child Molestation in the Second Degree for molesting a 13-year-old boy. RP 406; CP 53; Supp. CP, Ex. 2. On August 27, 2009, at the age of 31, Taylor-Rose was convicted of Child Molestation in the Third Degree for molesting a 7-year-old boy. Supp. CP, Ex. 20.

This sexually violent predator ("SVP") case was initiated by Petition on December 4, 2012. CP 53-4. In its petition, the State alleged that Taylor-Rose's 1998 conviction for Child Molestation in the Second Degree was the predicate sexually violent offense or crime of sexual violence for his commitment. The first paragraph of the Petition alleges that Brian Taylor-Rose was a sexually violent predator as that term is defined in RCW 71.09.020(18). The Petition continues:

> Respondent has been convicted of a sexually violent offense, as that term is defined in RCW 71.09.020(17). Specifically, on or about February 6, 1998, in Clallam County Superior Court, Cause No. 97-1-00263-9, Respondent was convicted of Child Molestation in the Second Degree, in violation of RCW 9A.44.086.

CP 53.

During pre-trial motions, the court determined that Taylor-Rose's 2009 conviction for Child Molestation in the Third Degree constituted a

recent overt act as a matter of law. CP 51-52. Consistent with case law, the court's determination relieved the State of the burden of proving a recent overt act in this case. *Id.*

At trial, the State presented numerous witnesses in its case-in-chief. The lead investigating officer for the 1998 conviction, Detective Steve Coyle, testified that Taylor-Rose admitted, "that he did fondle the 13-year-old boy, and that during the course of that fondling, he was trying to make him comfortable with the idea of being fondled and being involved in a sexual activity." RP 401. The victim of the 1997 crime also testified that Taylor-Rose essentially groomed and molested him when he was 13 years old.[1] RP 444.

The State also admitted a certified copy of Taylor-Rose's Statement of Defendant on Plea of Guilty to the crime of Child Molestation in the Second Degree. Supp. CP, Ex. 2; RP 473-74. Respondent's counsel repeatedly conceded that the State had met the first element of the statute, that he had been convicted of a "crime of sexual violence."

> And it's true, he was convicted of Child Molestation in the Second Degree, which is defined by law as a sexually violent offense and <u>we won't be arguing that he doesn't meet the first element of this</u>, of the things that you have to

[1] The testimony was presented in a recorded video deposition. Appellant did not have this testimony transcribed.

> find to commit Brian to a secure facility. So just to remind you, that's, number one, we're not going to dispute that.

RP 2590 (emphasis added). *See also* RP 1937, 2371, 2591 (the conviction still "qualifies for the first prong of, of what you guys have to find"); RP 2626 ("I never argued [child molestation in the second degree] wasn't a sexually violent offense.").

Evidence of the 2009 conviction was also presented at trial. Lead investigating officer, Detective Jason Viada, as well as the victim, testified that when he was 7 years old Taylor-Rose molested him under a blanket at his parents' house. RP 474, 580. A friend of Taylor-Rose's at the time, Jason Worth, testified that Taylor-Rose admitted the crime to him, telling him that he touched the 7-year-old's genitalia and was worried the victim's parents would call the police. RP 597. Additionally, Exhibit 20 was admitted in evidence, which was the Judgment and Sentence for the Child Molestation in the Third Degree. The document outlined his 36-48 months of Department of Corrections supervision based on this conviction. Supp. CP, Ex. 20.

The jury also heard testimony from Lourene O'Brien-Hooper, who was a Community Corrections Officer (CCO) and supervised Taylor-Rose on and off for more than ten years after his first conviction for Child Molestation in the Second Degree. RP 611. Ms. O'Brien-Hooper testified

for more than two full days during the trial, highlighting Taylor-Rose's numerous violations, arrests, and high-risk behavior while on supervision and in the community. RP 611-1003. Specifically regarding sexual reoffending, Ms. O'Brien-Hooper testified about her concerns regarding Taylor-Rose's continual deviant fantasies and arousal to children, his continual grooming behavior, and violating his condition to not have contact with children. RP 989-90, 921, 962, 724.

The State's expert, Dr. Harry Hoberman testified that after doing interviews, psychological testing, and a review of the records, Taylor-Rose suffered from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior, specifically pedophilic disorder and antisocial personality disorder. RP 1065, 1111, 1155, 1157. Dr. Hoberman did a risk assessment[2] and opined that this mental abnormality or personality disorder makes the Taylor-Rose likely to engage in predatory acts of sexual violence if not confined to a secure facility. RP 1300. Dr. Hoberman testified that he took into consideration the fact that Taylor-Rose would have a period of supervision if released on the SVP petition. RP 1234.

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[2] Dr. Hoberman testified that his risk assessment took into account numerous measures and approaches, including actuarial risk assessment instruments, structured professional judgment, and dynamic risk factors. RP 1236-39.

Taylor-Rose also testified at trial, which included evidence of his prior statements about his sexual offending and sexual deviancy.[3] Regarding his first victim, Taylor-Rose testified that:

> When I first saw my victim I was very attracted to his smooth, hairless, young body, and how he was slim, and had very nice features, slim, bubble butt, etc. My offense cycle started with masturbating, and thinking about him, and moved to touching him whenever I could, to actually offending against him.

Ex. 134; RP 2016. When describing his grooming and molestation of the second victim from the 2009 offense, Taylor-Rose stated:

> I had an AA sponsor, for about three months, and he had three kids, a 10 year old, a 7 year old and a 4 year old. I noticed a strong sexual attraction to the 7 year old. I made sure to put myself in situations to be able to groom him, and, at night, lay under a blanket together, and I touched his penis.

Ex. 135; RP 2019. Taylor-Rose acknowledged his statements about his deviant behavior telling the jury, "I have serious problems with being sexually aroused to minor children" and stated that he wanted treatment because:

> If things continue as they are, I have no doubt, that I would have continued to view and trade child pornography on the internet, and try and, actually, set up meetings, sex with

[3] Exhibits 133, 134, 135, 136-A, 137, 138, 139, and 141 were admitted at trial but not provided by Appellant in this appeal. The exhibits were prior written statements of Taylor-Rose. The portions of the exhibits cited here were read into the record by Taylor-Rose during his testimony.

> minors, in person, for sex and, by doing that I will continue creating many more victims. RP 2020, 2030.

Taylor-Rose discussed what would happen if he were released into the community untreated and stated:

> If I am ever able to get out on the streets again, I will, more than likely, start my drinking, drug abuse, and more than likely, I will make more victims, and continue to get into legal trouble, and end up back here.

Ex. 139; RP 2031.

Taylor-Rose testified that he made these statements during treatment sessions at the Special Commitment Center ("SCC"). At that time he was fully aware of the conditions of his 2009 criminal sentence that would exist if released on the SVP petition. However, he did not testify about his knowledge of a "recent overt act" ("ROA") or how it would deter him from offending against children once again in the future.

After the evidentiary portion of trial, the court heard arguments from both parties regarding their proposed jury instructions. One instruction at issue was Instruction 15, the "likely to engage" definition. CP 27. The trial court ultimately compromised on Instruction 15, including portions of both the State and Taylor-Rose's proposed instructions. CP 27.

During closing, Taylor-Rose's counsel told the jury:

> After having been petitioned he will have thirty-six to forty-eight months of DOC supervision; he will have to report to DOC; register as a sex offender; follow all Department of Corrections conditions. RP 2617.

His trial counsel further emphasized this point, arguing:

> So to close, I want to talk to you about some conditions that Brian will have when he is in the community. And that's actually in Exhibit 20. You will get that back in the jury room and you will see, there's about seven pages that talk about different conditions that Brian will have in the community. RP 2616.

Nothing limited his ability to present and argue this point.

Although Taylor-Rose never objected at trial, another instruction now at issue is Instruction 6, which outlines the elements the State had the burden to prove. CP 18. When asked by the court if there was any objection, his counsel stated, "Without waiving our prior argument on recent overt act, we'll defer to the Court." RP 2486-87.[4]

Additionally, on Instruction 1, the judge specifically instructed the jury that his comments were not evidence. CP 12; RP 2520-21.

After deliberating, the jury unanimously found beyond a reasonable doubt that Taylor-Rose was a sexually violent predator. CP 9. On August 5, 2015, the trial court signed an Order of Commitment placing

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[4] The court was inquiring about proposed instruction number 5, but the instructions were re-numbered and this instruction, WPI 365.10, became Instruction Number 6. RP 2506; CP 18.

Taylor-Rose in the custody of the Department of Social and Health Services until he no longer meets criteria. CP 6.

IV. ARGUMENT

A. The State Presented Overwhelming Evidence That Taylor-Rose Is a Sexually Violent Predator

Despite his clear and repeated argument at trial explaining the supervision he will have, Taylor-Rose argues that the jury's verdict does not support commitment because the jury was not specifically instructed about the 36-48 months of supervision remaining from his criminal conviction. Taylor-Rose's argument is confusing and provides no clear standard of review or applicable legal basis in support for his contention. Because he ultimately argues that the "verdict does not justify civil commitment…under the facts of this case", a sufficiency of the evidence analysis is appropriate in this case. Appellant's Brief ("App. Br.") at 12.

To determine whether the evidence is sufficient to support a commitment in SVP cases, the question upon review is whether a rational trier-of-fact could have found the essential elements beyond a reasonable doubt, when viewed in the light most favorable to the State. *In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003) (citing *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997)). When viewed in the light most favorable to the State, there must be sufficient

evidence in the finding: (1) The Respondent has been convicted of a crime of sexual violence; (2) That the Respondent suffers from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior; and (3) That this mental abnormality or personality disorder makes the Respondent likely to engage in predatory acts of sexual violence if not confined to a secure facility. RCW 71.09.020; RCW 71.09.060; *See In re Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999); *Thorell*, 149 Wn.2d 724.

Taylor-Rose argues that because the trial court included the statutory definition of "likely to engage" in the jury instructions, the jury's verdict did not support commitment. Consistent with Civil Washington Pattern Jury Instruction 365.14, the trial court instructed the jury: "'Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding." CP 27. Specifically, Appellant argues that by including the word "unconditionally" in the instruction, the jury verdict does not justify civil commitment of Taylor-Rose because if released he would have 36-48 months of court-ordered community supervision from his criminal case. App. Br. at 12.

First, Appellant incorrectly applies *State v. Miller*[5] in support for his argument that "Jury instructions must be read "the way a reasonable juror could have interpreted" them." App. Br. at 9. It is unclear how this applies to his argument that the evidence does not support the verdict. *Miller* cites to *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979) for that proposition, which, in fact, addressed jury instructions involving legal presumptions and whether they shifted the burden of disproving an element of the crime charged to the defendant. *Id.* at 513. Because this issue is clearly not relevant in this case, this Court should decline to follow Taylor-Rose's legal argument and his proposed standard for reviewing jury instructions.

Per the SVP statute, "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" is defined as "the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7). The court-ordered supervision is not a condition of the SVP petition. Thus, the jury was properly instructed and was able to consider the criminal conditions of supervision in its determination in this case.

Furthermore, the State does not have an additional burden to prove the SVP will reoffend in the foreseeable future. *In re Detention of Moore*,

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[5] *State v. Miller*, 131 Wn.2d 78, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997).

167 Wn.2d 113, 125, 216 P.3d 1015 (2009) (*see* Section C for further analysis of the issue). In this case, Dr. Hoberman used the proper legal standard in forming his opinion, testifying that Taylor-Rose was like to engage in predatory acts of sexual violence based on his lifetime risk. RP 1235, 1245, 1869, 1919-21, 1920, 1972.

Finally, when viewed in the light most favorable to the State, there was more than sufficient evidence presented that a rational trier-of-fact could have found the three essential elements for commitment beyond a reasonable doubt. First, sufficient evidence was presented that Taylor-Rose has been convicted of a sexually violent offense (Child Molestation in the Second Degree). RP 406; CP 53; Supp. CP, Ex. 2. Second, Dr. Hoberman testified that after doing interviews, psychological testing, and a review of the records, that Taylor-Rose suffered from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior, specifically pedophilic disorder and antisocial personality disorder. RP 1065, 1111, 1155, 1157. Third, Dr. Hoberman did a risk assessment[6] and opined that this mental abnormality or personality disorder makes the Respondent

[6] Dr. Hoberman testified that his risk assessment took into account numerous measures and approaches, including actuarial risk assessment instruments, structured professional judgment, and dynamic risk factors. RP 1236-39.

likely to engage in predatory acts of sexual violence if not confined to a secure facility. RP 1300.

Additionally, the jury also heard testimony from numerous witnesses that provided testimony that would support their verdict. Lourene O'Brien-Hooper was a Community Corrections Officer (CCO) and supervised Taylor-Rose on and off for more than ten years after his first conviction for Child Molestation in the Second Degree from 1997. RP 611. Ms. O'Brien-Hooper testified for more than two full days during the trial, highlighting Taylor-Rose's numerous violations, arrests, and high-risk behavior while on supervision and in the community.[7] Specifically regarding sexual reoffending, Ms. O'Brien-Hooper testified about her concerns regarding Taylor-Rose's continual deviant fantasies and arousal to children[8], his continual grooming behavior[9], and violating his condition to not have contact with children.[10] A rational trier-of-fact could conclude, and did conclude, that given his past poor performance while on supervision, including being arrested and convicted of molesting another child, Taylor-Rose would be likely to engage in predatory acts of

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[7] RP 611-1003.

[8] RP 989-90.

[9] RP 921, 962.

[10] RP 724.

sexual violence regardless of 36-38 months of court-ordered community supervision.

Taylor-Rose himself testified about his prior written statements about his sexual offending and sexual deviancy. He described his grooming and molestation of both victims and told the jury that he has "serious problems with being sexually aroused to minor children." RP 2016, 2019, 2020. He stated that if things continued as they have, he has "no doubt" he would "continue creating many more victims." RP 2030. He also testified that he wrote about what would happen if he were released without treatment, stating:

> If I am ever able to get out on the streets again, I will, *more than likely*, start my drinking, drug abuse, and *more than likely*, I will make more victims, and continue to get into legal trouble, and end up back here.

Ex. 139; RP 2031 (emphasis added).

Undoubtedly, taken in the light most favorable to the State, there was more than sufficient evidence before the jury that supported the verdict that Taylor-Rose was a sexually violent predator. Including "unconditionally" in the jury instruction did not prevent that evidence to come in or prevent counsel to argue that theory during closing arguments.

B. The Trial Court Did Not Abuse Its Discretion In Instructing the Jury.

When reviewing a challenge to jury instructions, the Court of Appeals' inquiry is whether the trial court abused its discretion by giving or refusing to give certain instructions. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). Jury instructions are not erroneous if they (1) permit each party to argue the theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier-of-fact of the applicable law. *Judd v. Department of Labor & Indus.*, 63 Wn. App. 471, 820 P.2d 62 (1991). Even if an instruction is misleading, and therefore erroneous, it will not require reversal unless prejudice is shown. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). Error is not prejudicial unless it affects or presumptively affects the outcome of the trial. *Id.* To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). However, the "constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the

constitutional rule." *State v. Fowler*, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990) (citing *State v. Scott*, 110 Wn.2d 682, 689, 757 P.2d 492 (1988)), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). As long as the instructions properly inform the jury of the elements, "any error in further defining terms used in the elements is not of constitutional magnitude." *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011).

Appellant alleges three reasons for the trial court's error in giving its jury instructions: (1) the court did not remove the word "unconditionally" from Instruction 15; (2) the court did not include "placement conditions" in Instruction 15; and (3) the court did not provide an instruction defining a "recent overt act". Taylor-Rose argues that the trial court's flawed "likely to engage" instruction relieved the State of its burden to prove this element. App. Br. at 12. He is wrong. The trial court did not abuse its discretion in this case because the instructions permitted each party to argue their theory of the case, they were not misleading, and when read as a whole, they properly informed the trier-of-fact of the applicable law.

Despite Taylor-Rose's claim to the contrary, Appellate Courts do not automatically review jury instructions *de novo*. The initial inquiry is whether the alleged errors rise to constitutional magnitude. If not, the

question is whether the trial court abused its discretion, and if the trial court abused its discretion, was the error so prejudicial that it affected the outcome of the trial. *Thomas*, 99 Wn.2d at 104. Here, none of the alleged errors rise to the level of constitutional magnitude.

1. The Alleged Errors Regarding the Trial Court's Jury Instructions Do Not Rise To The Level Of Constitutional Magnitude.

The Supreme Court has held that only specific types of jury instructional errors constitute manifest constitutional error. *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). Those include: directing a verdict, *State v. Peterson*, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); shifting the burden of proof to the defendant, *State v. McCullum*, 98 Wn.2d 484, 487–88, 656 P.2d 1064 (1983); failing to define the "beyond a reasonable doubt" standard, *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); failing to require a unanimous verdict, *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974); and omitting an element of the crime charged, *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds by State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985). None of these apply in this case.

The State cannot require the defendant to disprove any fact that constitutes the crime charged. *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). For instance, the State cannot shift the burden when

an affirmative defense negates an element of the crime; however, if it excuses conduct that would otherwise be punishable but does not controvert any of the elements of the offense itself, then the State has no constitutional duty to overcome the defense beyond a reasonable doubt. *Smith v. U.S.*, 133 S. Ct. 714, 184 L.Ed.2d 570 (2013).

In contrast, in *Scott*, the trial court provided an accomplice liability instruction requiring the jury to find the defendant acted "with knowledge." 110 Wn.2d at 683 n. 1. Absent an objection, the trial court did not further define the term "knowledge." *Id.* This court held any error would not be constitutional in magnitude. *Id.* at 689–91. Rejecting a rule that courts are constitutionally obligated to define technical terms, we reasoned the trial court had instructed the jury on all of the elements—it just failed to further define an element. *Id.* In rejecting the rule that courts are constitutionally required to define technical terms, the court distinguished *Scott* from *State v. Allen*, 101 Wn.2d 355, 678 P.2d 798 (1984), where we held the trial court erred in failing to define the *mens rea* element of intent. *Scott*, 110 Wn.2d at 684, 689–90.

In this case, including "unconditionally" and omitting "placement conditions" in the jury instructions did not shift the burden and did not rise to any other error of constitutional magnitude provided in *O'Hara* or *Smith*. Instruction 6 provided the elements that the State was required to

prove beyond a reasonable doubt. CP 18. Instruction 15 simply defines part of element 3, "Likely to engage in predatory acts of sexual violence if not confined in a secure facility." CP 27. Clearly, this instruction does not rise to the level of constitutional magnitude because both terms in question, "unconditionally" and "placement conditions", were part of an instruction that merely further defined the elements in Instruction 6.

Similarly, "recent overt act" was not an element of the State's case. Denying Respondent's request to define a "recent overt act" does not affect the State's burden, and failing to include does not rise to the level of constitutional magnitude.

Therefore, regarding the three bases for which the Appellant assigns error, the proper standard of review is abuse of discretion.

2. The Trial Court Did Not Abuse Its Discretion Because Each Party Was Able To Argue Their Theory Of The Case, The Instructions Are Not Misleading, and When Read As A Whole, They Properly Informed The Trier-Of-Fact Of The Applicable Law.

The trial court did not abuse its discretion by providing these instructions to the jury. The instructions were not erroneous in this case, and even if this Court determined they were, there was no prejudice to the Appellant.

a. Including the word "Unconditionally" and Omitting the words "Placement Conditions" In Instruction 15 Was Not An Abuse Of Discretion.

First, Taylor-Rose was permitted to, and did in fact, argue his theory of the case. The jury was able to consider the fact that if unconditionally released from the SVP petition, Taylor-Rose would have a period of supervision imposed by his criminal conviction. Supp. CP, Ex. 20, p. 4. Even the State's expert, Dr. Hoberman, testified that he took into consideration the fact that Taylor-Rose would have a period of supervision if released on the SVP petition. RP 1234. During closing, Taylor-Rose's trial counsel told the jury if he were released he "will have thirty-six to forty-eight months of DOC supervision; he will have to report to DOC; register as a sex offender; follow all Department of Corrections conditions." RP 2617.

Additionally, Exhibit 20, which was admitted into evidence, specifically outlined the Department of Corrections supervision. His trial counsel further emphasized this point, arguing:

> So to close, I want to talk to you about some conditions that Brian will have when he is in the community. And that's actually in Exhibit 20. You will get that back in the jury room and you will see, there's about seven pages that talk about different conditions that Brian will have in the community.

RP 2616.

Nothing limited Taylor-Rose's ability to present and argue this point. Evidence of this supervision was admitted through exhibits, the State, and the defense's case, and the jury was told to consider all the evidence before it. Counsel made the clear argument that Taylor-Rose's supervision was a factor that would minimize his risk. Therefore, because he was able to argue his theory, he cannot show that the trial court abused its discretion.

Second, Instruction 15 was not misleading. It was an accurate statement of the law, pulled directly from the statute and the Washington Pattern Jury Instructions. The term "placement conditions" is bracketed within the second bracketed paragraph in WPI 365.14 and is thus, discretionary. CP 27. WPI 365.14 states:

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

The second paragraph is discretionary and omitting a discretionary term within a discretionary paragraph is not a misstatement of the law.

Additionally, the statute specifically defines "likely to engage in predatory acts of sexual violence" to mean that "the person more probably than not will engage in such acts if released ***unconditionally from detention on the sexually violent predator petition***." RCW 71.09.020(7) (emphasis added). "Unconditionally" is clearly referring to the individual's release from the hold of the SVP petition, and not criminal case. Therefore, because Instruction 15 is an accurate statement of the law, Appellant fails to demonstrate the trial court abused its discretion based on the second factor.

Finally, when read as a whole, the jury instructions properly informed the trier-of-fact of the applicable law in this case. Specifically, Instruction 15 tells the jury, "In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, ***you may consider all evidence that bears on the issue***." CP 27 (emphasis added). As counsel argued, the period of supervision for Taylor-Rose "bears on the issue" and the jury considered it. Thus, this instruction essentially cures any argument over the omission of "placement conditions" and the inclusion of "unconditionally." Therefore, the trial court did not abuse its discretion by giving jury Instruction 15 and Taylor-Rose's argument should be rejected.

b. Denying An Instruction About A "Recent Overt Act" Was Not An Abuse Of Discretion.

Similarly, the trial court did not abuse its discretion by declining an instruction that defined a "recent overt act." The court's instructions to the jury sufficiently allowed the Respondent to argue his theory of the case. Moreover, if the trial court had allowed an instruction regarding the definition of a recent overt act ("ROA"), it would have been error.

Appellant incorrectly interprets *Post*[11] to hold that the ROA provision of RCW 71.09 is relevant and admissible in this case, and therefore, the jury must be instructed on it. In actuality, the *Post* Court only recognized the potential relevance of ROA ***evidence*** insofar as such evidence relates to a respondent's likelihood of committing another predatory act of sexual violence. Specifically, how such likelihood may be decreased because of the respondent's knowledge of the consequences of the ROA provision. *Post* did not hold that the jury should be instructed on the definition of an ROA in a non-ROA case, nor did it discuss a basis for the relevance of ROA evidence beyond this.

Further, the Court made it clear it did not hold that such evidence was admissible in every case. Contrary to Taylor-Rose's express assertions, *Post* did not in any way hold that the evidence is always

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[11] *In re Detention of Post*, 170 Wn.2d 302, 241 P.3d 1234 (2010).

relevant merely because ROAs exist, and in no way can the case be read to mean that the jury should be given a definitional instruction where the SVP does not offer actual evidence about how it relates to his likelihood of committing another predatory act of sexual violence. *Post* only discussed whether potential ROAs are conditions that "would exist" in the community to explain that such evidence should not be automatically excluded on the basis of "running afoul" of RCW 71.09.060(1), which limits admissible release condition evidence to conditions that "would exist" in the community. 170 Wn. 2d at 317. In *Post*, the respondent wanted to offer testimony about how knowing that he could be arrested for committing a recent overt act would curtail his behavior. *Id.* The trial court disallowed it, but the Court of Appeals found that such testimony could be relevant. *Id.*

At this trial, Taylor-Rose never testified about his knowledge of an ROA or how it would deter him from offending against children once again in the future, nor was there any other evidence offered to suggest that he would be less inclined to offend knowing he could be re-arrested if he committed such an act. Therefore, any arguments from counsel during closing would have been improper and objectionable, because there was no relevant evidence from Taylor-Rose about his knowledge of ROAs or how it affects his state of mind.

3. Assuming *Arguendo* The Trial Court Erred, There Was No Prejudice And The Error Did Not Affect The Outcome Of The Trial.

Even if the instructions in this case were error, Appellant has not demonstrated prejudice or provided any argument as to how it affected the outcome of the trial.

The combination of Dr. Hoberman's expert opinion and Ms. O'Brien-Hooper's testimony of continuous violations over the ten years of DOC supervision is enough in itself for a reasonable juror to conclude that Taylor-Rose is "likely to engage in predatory acts of sexual violence if not confined in a secure facility." Moreover, most recently, Taylor-Rose committed a second predatory act of sexual violence against a 7-year-old boy while on supervision and with the threat of a ROA.[12] Supp. CP, Ex. 18, Ex. 20.

In SVP trial court cases, the jury is asked whether the Respondent would ***engage in*** a sexually violent offense, not whether the Respondent would be arrested or convicted of such offense. As Instructions 11 and 12 indicate, engaging in these acts includes an attempt or solicitation of a sexually violent offense. CP 23-24. These could include attempted acts

[12] Although Taylor-Rose was convicted of Child Molestation in the Third Degree (CM 3), which is not a sexually violent offense per statute, his underlying conduct was an act of sexual violence. His conduct cannot meet the statutory elements for CM 3 because of the age of the victim. He accepted a plea deal to a charge that is essentially a "legal fiction" in order to take advantage of the State's offer and not risk the conviction of Child Molestation in the First Degree at trial.

that go undetected as well. Given the evidence presented about Taylor-Rose's history of offending against children, his current and continuing deviant sexual fantasies, and his ongoing grooming behavior, the Appellant cannot show that the jury's verdict was affected by a few months of community supervision, or that they would think potential arrest for an ROA would somehow reduce his risk.

Finally, Taylor-Rose has specifically said that if he remained in the community he had "no doubt" he would continue his sexually violent behavior and he would "more than likely…make more victims." RP 2030-31. Therefore, even if this Court determines that the trial court abused its discretion in regards to the inclusion or omission of instructions, Appellant cannot demonstrate any prejudice.

C. The State Is Not Required To Prove That Taylor-Rose Will Reoffend In the Foreseeable Future Or Any Other Particular Timeframe.

Contrary to well settled case law, Taylor-Rose argues that the State did not prove that he was "currently dangerous" and that the trial court erred in allowing the jury to consider his "lifetime risk" in assessing whether or not he is a sexually violent predator. Taylor-Rose, while arguing that lifetime risk violates due process, urges this Court to create "some other formulation" to express a person's overall risk. Appellant puzzlingly points to RCW 10.77.86, which addresses the restoration of

criminally incompetent defendants awaiting trial, as legal authority for his proposition. App. Br. at 28.

Moreover, while citing *Moore*, 167 Wn.2d at 123 (App. Br. at 28), he overlooks the fact that, in that case our Supreme Court squarely rejected this argument. There, the appellant argued that the State's prediction of dangerousness in an SVP case must be "refined" to the foreseeable future. *Id.* at 123. The court rejected this argument, concluding that, "[b]y properly finding a person to be an SVP, *it is implied that the person is currently dangerous*. We do not deem it necessary to impose on the State the additional burden that it prove the SVP will reoffend in the foreseeable future." *Id.* (emphasis added). Taylor-Rose does not provide any argument or authority why the *Moore* decision does not apply in his case. Additionally, the Court of Appeals held in *In re Detention of Keeney*, 141 Wn. App. 318, 326, 169 P.3d 852 (2007), that factfinders are not required to consider any particular time frame when making the determination a person is likely to commit predatory acts of sexual violence in the future. This Court rejected an identical argument, and the State Supreme Court recently denied review. *See In re Det. of Hancock*,

194 Wn. App. 1045 (2016)[13], *review denied*, No. 93441-0, 2016 WL 7166786 (Wash. Dec. 7, 2016).

Appellant's argument in this case is precluded by the decisions in *Moore* and *Keeney*. The State is not required to refine the period of risk in order to meet its burden; his lifetime risk of recidivism is the proper legal standard, and the Court should reject Taylor-Rose's argument.

D. The Trial Court's Instruction To The Jury Was Not An Unconstitutional Comment On The Evidence And Did Not Relieve The State Of Its Burden Of Proof.

Taylor-Rose argues that the trial court relieved the State of its burden to prove that Taylor-Rose had been convicted of a crime of sexual violence. He argues the court's Instruction 6 was an unconstitutional comment on the evidence. He further argues (for the first time) that the statute requires a showing of actual force in order to prove a sexually violent conviction. His arguments lack merit.

First, Taylor-Rose failed to object to the instructions at trial, and as such this argument is waived. Second, Taylor-Rose repeatedly conceded the fact that he had been convicted of a qualifying crime at trial, thus his claim that the court relieved the State of its burden fails. Third, the Petition alleging he was an SVP very specifically notified him the State

[13] Pursuant to GR 14.1, the State offers this an unpublished opinion as persuasive authority.

was relying on his conviction for child molestation in the second degree as his predicate prior offense. Fourth, his attempt to differentiate the terms "sexually violent offenses" and "crimes of sexual violence" has already been rejected by this Court in *Coppin*[14], a case he argues was "wrongly decided" and should be ignored. App. Br. at 42. The *Coppin* Court, however, conducted a thorough statutory analysis and correctly rejected his argument as unpersuasive.[15] Finally, the court's instruction does not constitute a comment on the evidence. This argument is without merit.

1. Taylor-Rose waived objection to this Instruction

Taylor-Rose did not preserve this issue for appeal because he did not object to Instruction 6, which reads as follows:

> To establish that Brian Taylor-Rose is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:
>
> > (1) That Brian Taylor-Rose has been convicted of a crime of sexual violence, namely Child Molestation in the Second Degree

CP 18.[16]

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[14] *In re Detention of Coppin*, 157 Wn. App. 537, 238 P.3d 1192 (2010).

[15] Furthermore, the Washington State Supreme Court denied Coppin's petition for review. See 170 Wn.2d 1025 (2011).

[16] During argument regarding instructions, the court was referring to this as "Instruction 5," and "WPI 365.10." RP 2486-87. The instructions were later renumbered and this became "Instruction 6." RP 2506; CP 18.

Failure to object to jury instructions waives the issue on appeal. *Estate of Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978). "Instructions to which no exceptions are taken become the law of the case." *Hudson v. United Parcel Serv., Inc.*, 163 Wn. App. 254, 269, 258 P.3d 87, 95 (2011) (citing *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001)).

Taylor-Rose now argues that he preserved this issue for appeal by proposing an alternative instruction, a modified version of WPI 365.10. [17] But his sole purpose in proposing the alternative instruction was to include a requirement that the State prove a recent overt act. CP 98; RP 2487. During pre-trial motions, the court determined that Taylor-Rose's 2009 conviction for child molestation in the third degree constituted a recent overt act as a matter of law. CP 51-2. The pre-trial ruling relieved the State of the burden of proving a recent overt act in this case. *Id.* In order to preserve the pre-trial ruling for appeal, Taylor-Rose proposed an instruction that included a requirement that the State prove he had committed a recent overt act. CP 98. Taylor-Rose's proposed instruction

[17] Respondent's proposed jury instruction was a modified version of the WPI, which eliminated the "namely" language at issue. The instruction the court gave to the jury follows the WPI, which includes the "namely" language and requires the court to "identify the crime of sexual violence." WPI 365.10.

happened to have omitted the language from the WPI that is at issue here: "namely Child Molestation in the Second Degree." CP 98. Taylor-Rose did not raise this language as an issue with the trial court and he specifically did not object to this instruction. When asked by the court if there was any objection, his counsel stated, "Without waiving our prior argument on recent overt act, we'll defer to the Court." RP 2486-87.[18] Because he did not object to this portion of the instruction, his objection is waived.

2. Taylor-Rose conceded he had been convicted of a crime of sexual violence

The State introduced a certified copy of Taylor-Rose's Statement of Defendant on Plea of Guilty to the crime of Child Molestation in the Second Degree. Supp. CP, Ex. 2; RP 473-74. Respondent's counsel repeatedly conceded that the State had met the first element of the statute, that he had been convicted of a "crime of sexual violence."

> And it's true, he was convicted of Child Molestation in the Second Degree, which is defined by law as a sexually violent offense and we won't be arguing that he doesn't meet the first element of this, of the things that you have to find to commit Brian to a secure facility. So just to remind you, that's, number one, we're not going to dispute that.

[18] The court was inquiring about proposed instruction number 5, but the instructions were re-numbered and this instruction, WPI 365.10, became Instruction Number 6. RP 2506; CP 18.

RP 2590 (emphasis added). *See also* RP 1937, 2371, 2591 (the conviction still "qualifies for the first prong of, of what you guys have to find"); RP 2626 ("I never argued [Child Molestation in the Second Degree] wasn't a sexually violent offense."). Because his trial counsel conceded the Child Molestation in the Second Degree conviction satisfied the first element of the statute, he cannot now argue that it was error to so instruct the jury.

3. The Instruction was based on the Washington Pattern Instruction and the SVP Petition

The instruction informed juror that to commit Taylor-Rose, they would have to find beyond a reasonable doubt that he had been convicted of the specific crime of Child Molestation in the Second Degree. This sexually violent predator case was initiated by Petition on December 4, 2012. CP 53-4. In the Petition, the State alleged that Taylor-Rose's 1998 Clallam County conviction for Child Molestation in the Second Degree was the predicate sexually violent offense that it would be relying on as the basis of his commitment. CP 53.

The Washington Pattern Jury Instructions provide that the prior crime of sexual violence should be identified in the instruction. WPI 365.10. Because as a matter of law certain enumerated crimes are sexually violent offenses (and others are not), the jury needed to be

instructed that Child Molestation in the Second Degree is a sexually violent offense as a matter of law. This did not obviate the requirement that the State prove he had indeed been *convicted* of such an offense. The State was clearly able to offer evidence of the conviction. Supp. CP, Ex. 20. Thus, it was not error for the court to instruct the jury that the State had to prove that Taylor-Rose had been convicted of that specific conviction beyond a reasonable doubt. Using the designation in the jury instruction of "namely" is the equivalent of using the language "to wit." *Black's Law Dictionary* 1658 (4th ed. 1968). Indeed, since the Petition is so specific, the absence of specificity ("namely" or "to wit") in the instruction would likely be error, as Taylor-Rose could argue that the jury could have found some of his other conduct to constitute a "crime of sexual violence."

The instruction here, that to commit Taylor-Rose the jury must find beyond a reasonable doubt that the State had proved he had a specific criminal conviction, ensured that the jury would be restricted in what they could consider and comports with the Petition. This prevented the risk of the jury considering some other of his convictions as a "crime of sexual violence."

4. A "sexually violent offense" means a "crime of sexual violence"

Taylor-Rose now argues, for the first time, that "child molestation in the second degree" is not necessarily a "crime of sexual violence." App. Br. at 30. Taylor-Rose's argument starts with the contention that there is a difference between "sexually violent offense" and "crime of sexual violence." App. Br. 30-42. He argues that one term, sexually violent offense, is defined by RCW 71.09.090 and the other term is used in the statute, but not specifically defined.

He suggests, without citing any authority, that the term "sexually violent offense" is defined because the prior conviction for a "sexually violent offense" merely triggers jurisdiction for a prosecuting authority to file a petition alleging a prior "crime of sexual violence." He then argues, citing dictionary.com, that the State <u>should</u> be required to prove that the prior "crime of sexual violence" was committed "through the application of 'swift and intense force' or through "rough and injurious physical force." App. Br. at 36-37. Taylor-Rose argues that because he was convicted of child molestation in the second degree, involving no "swift and intense force" and no "rough and injurious physical force," it was error to instruct the jury that "child molestation in the second degree" was a crime of sexual violence.

This Court rejected a claim identical to that made by Taylor-Rose in *In re Detention of Coppin,* 157 Wn. App. 537, 553, 238 P.3d 1192, 1200-1201 (2010), *review denied*, 170 Wn.2d 1025 (2011). Coppin, after his initial commitment trial, argued that his convictions for "sexually violent offenses" were not "crimes of sexual violence." This Court rejected Coppin's argument, finding that the statute uses the two terms interchangeably:

> The legislature expressly defined "sexually violent offense" to include statutory rape in the first degree. ***Given this definition, it would be absurd to conclude that first degree statutory rape, a "sexually violent offense" is not also a "crime of sexual violence."*** Accordingly, Coppin's two 1988 convictions for statutory rape necessarily were for crimes "of sexual violence," as the SVP definition requires.
> …
> In view of this analysis, ***Coppin's argument that the State failed to prove that he had been convicted of or charged with a "crime of sexual violence," because it did not prove that the 1988 convictions for first degree statutory rape involved "violence,"*** as defined by the dictionary, is also unpersuasive.

Id. at 553 (emphasis added).

Taylor-Rose's argument that the State should have been required to show that his offenses involved "actual violence" is likewise unpersuasive. It doesn't matter whether or not he applied "swift and intense" force nor is it a requirement to show "rough or injurious physical force." Qualifying "sexually violent offenses" and "crimes of sexual

violence" are defined by statute regardless of the amount of force applied. This argument should be rejected.

5. The Legislative intent is plain

Even if this Court decides to conduct a new statutory analysis, Taylor-Rose's argument still fails. In interpreting a statute, the court should look first to the statute's plain language, and assume that the legislature means what it says. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). "When interpreting a statute, we must avoid unlikely, absurd, or strained results." *Morris v. Blaker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992). Under the "plain meaning rule," the court must "examine the language of the statute, other provisions of the same act, and related statutes to determine whether we can ascertain a plain meaning." *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). "Each provision must be read in relation to the other provisions, and we construe the statute as a whole." *In re Detention of Williams*, 147 Wn.2d 476, 490, 55 P.3d 597 (2002).

Here, the legislative intent is clear. In order to prove that an individual is a sexually violent predator, the State must prove beyond a reasonable doubt that the individual "has been convicted of or

charged with a crime of sexual violence…". RCW 71.09.020(18)[19]. RCW 71.09.020(17) defines a "sexually violent offense" as:

> (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, *rape of a child in the first* or second degree, statutory rape in the first or second degree, indecent liberties against a child under age fourteen, or child molestation in the first or second degree…

(Emphasis added). Under the plain language of RCW 71.09.020(17)(a), a conviction for child molestation in the second degree meets the definition of a "crime of sexual violence" and qualifies as a predicate offense for commitment as a sexually violent predator. There can be no other reasonable interpretation of the statute, and the intent of legislature is clear: an individual must have been charged or convicted of a sexually violent offense to qualify as a sexually violent predator. Any other interpretation of the statute would render RCW 71.09.020(17) superfluous and meaningless.

Furthermore, throughout RCW 71.09 the legislature uses the term "sexually violent offense" in a manner requiring such a charge or conviction as a necessary predicate to the filing of an SVP petition.

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[19] In 2009, the legislature amended RCW 71.09.020. Laws of 2009, ch. 409, § 1, eff. May 7, 2009. The pertinent provisions are identical, but have been renumbered. The definitions of "sexually violent offense" and "sexually violent predator" that were formerly RCW 71.09.020(15) and (16) respectively, are now subsections (17) and (18).

See RCW 71.09.030.[20] This indicates the clear intent of the legislature that a "sexually violent predator" be one who has been charged or convicted of a "sexually violent offense" under RCW 71.09.020(17).

6. The Instruction is not an unconstitutional comment on the evidence

Article 4, section 16 of the Washington State Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of the constitutional provision is to prevent juries from being influenced by knowledge conveyed to it by the trial judge. *State v. Swan,* 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046, 112 L.Ed.2d 772, 111 S. Ct. 752 (1991).

This constitutional provision prohibits the trial judge from any action or words which would convey to the jury his personal opinion as to the truth or falsity of any evidence. *State v. Brown*, 19 Wn.2d 195, 142 P.2d 257 (1943). "An instruction which does no more than accurately state the law pertaining to an issue in the case does not constitute an impermissible comment on the evidence by a trial judge under article 4,

[20] The SVP Act allows the State to file an SVP petition "[w]hen it appears that…[a] person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement." RCW 71.09.030(1). The statute outlining the procedure for filing an SVP petition does not reference "crimes of sexual violence".

section 16." *Seattle v. Smiley,* 41 Wn. App. 189, 192, 702 P.2d 1206, *review denied,* 104 Wn.2d 1017 (1985).

The court instructed the jurors that child molestation in the second degree is, as a matter of law, a crime of sexual violence. CP 19. The court also instructed the jury that the State was required to prove each element, including that Taylor-Rose had been convicted of child molestation, beyond a reasonable doubt. CP 18.

The court also specifically instructed the jury that his comments were not evidence. "The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely." CP 12; RP 2520-21.

Juries are presumed to follow all instructions given. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184, 189 (2001) (citing *Degroot v. Berkley Constr., Inc.,* 83 Wn. App. 125, 131, 920 P.2d 619 (1996)).

Taylor-Rose failed to object to this language in the instruction at trial, and therefore this argument is waived. He further conceded the fact that he had been convicted of qualifying crimes, thus his claim that the court relieved the State of its burden fails. The instruction accurately

informed the jury that the State bears the burden of proving the conviction as alleged in the Petition and was not a comment on the evidence. Taylor-Rose urges this Court to disregard the *Coppin* decision that determined "sexually violent offense" and "crime of sexual violence" mean the same thing. The *Coppin* opinion conducts a thorough statutory analysis and rejects the argument as unpersuasive. This Court should do the same.

E. Costs Must be Imposed to the State if it is the Prevailing Party

Taylor-Rose asserts that this Court dictated in *Sinclair* that a portion of a Sexually Violent Predator's opening appellate brief should contain argument on the issue of RAP 14 costs. This in incorrect. *Sinclair* held this was an appropriate practice in criminal cases.

> We conclude that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief.

State v. Sinclair, 192 Wn. App. 380, 389–90, 367 P.3d 612, 616, *review denied*, 185 Wn.2d 1034, 377 P.3d 733 (2016). SVP cases are resolutely civil in nature. *In re Pers. Restr. of Young*, 122 Wn.2d 1, 18, 857 P.2d 989, 996 (1993).

When a party is deemed to be the "substantially prevailing party" in an appeal of a civil matter, the court "will award costs" to that party.

RAP 14.2. Put another way, the substantially prevailing party on review is "entitled to an award of costs." RAP 14.2 "Who is *Entitled* to Costs"; *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 38 P.3d 1024 (2002), *reconsideration denied, review denied,* 147 Wn.2d 1016, 56 P.3d 992 (2002) (Plaintiff was the substantially prevailing party on appeal…and thus plaintiff was *entitled* to an award of costs on appeal.).

Where State is the substantially prevailing party in an appeal by a convicted defendant and timely requests recoupment of appellate costs as authorized by statute, award of costs is virtually automatic, subject to the commissioner's resolution of any *disputes regarding the reasonableness of the expenses and their necessity to the process of review,* and subject to the right of the aggrieved party to seek modification of the ruling. *State v. Nolan*, 98 Wn. App. 75, 988 P.2d 473, *affirmed,* 141 Wn.2d 620, 8 P.3d 300 (1999).

The discretion of the award of costs lies almost wholesale in determining the reasonableness of the amount claimed, not whether costs are awarded at all. Taylor-Rose is a civil litigant, not a criminal defendant, thus Taylor-Rose's reliance on the *Sinclair* decision (which centers more squarely on RCW 10.73.160 which has a much broader definition of "costs" than RAP 14.2 and can result in thousands of dollars upon indigent criminal defendants) is misplaced. It is clear that *Sinclair* recognizes the

lack of discretion under RAP 14.2. *Sinclair* at 385-386 (the court "will award costs"). It does note that "the appellate court, however, may 'direct otherwise in its decision.'" *Id* (citing *Nolan,* 141 Wn.2d at 626). What Taylor-Rose fails to recognize is that the *Sinclair* court draws that discretion from the criminal statute governing (and expanding) what may be awarded as "costs" in a criminal case under RCW 10.73.160, *not* as a blanket discretion under RAP 14.2.

> The ***statute*** vests the appellate court with discretion to deny or approve a request for an award of costs. Under RAP 14.2, that discretion may be exercised in a decision terminating review.

Sinclair at 388.

It is only under the *criminal statute* that discretionary terms like "may award" appear, along with the recognition of "manifest hardship on the *defendant* or the defendant's immediate family" to justify relief from otherwise due costs. RCW 10.73.160(4). To be sure, costs (not fees) awarded to civil litigants are nominal by comparison to criminal defendants who, among other things, are asked to reimburse the cost of their assigned attorneys and the costs for either party obtaining the Verbatim Report of Proceedings. RCW 10.73.160(2) and (3). If the State prevails, costs should be awarded.

V. CONCLUSION

For the reasons set forth above, this Court should affirm Taylor-Rose's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 12th day of December, 2016.

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NO. 47975-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE WASHINGTON STATE

In re the Detention of: BRIAN TAYLOR-ROSE, Appellant.	DECLARATION OF SERVICE

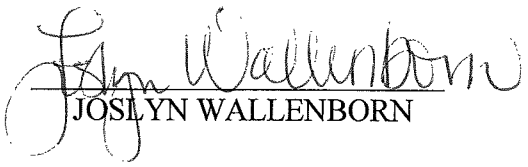
I, Joslyn Wallenborn, declare as follows:

On December 16, 2016, I sent via electronic mail, per service agreement, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

JODI BACKLUND
BACKLUND & MISTRY
BACKLUNDMISTRY@GMAIL.COM

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

DATED this 16th day of December, 2016, at Seattle, Washington.



JOSLYN WALLENBORN

WASHINGTON STATE ATTORNEY GENERAL

December 16, 2016 - 1:40 PM

Transmittal Letter

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Court of Appeals Case Number: 47975-3

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