No. 82907-1

STEPHENS, J. (dissenting)—I agree with the majority that polygraphs, especially sexual history polygraphs, are invasive, unreliable tools that are disfavored in our legal system. I therefore appreciate the majority's attempt to limit the use of polygraphs not explicitly authorized under the sexually violent predator (SVP) law, chapter 71.09 RCW. As a matter of statutory interpretation, however, I cannot agree. The touchstone of statutory interpretation is legislative intent. In its effort to strictly construe the SVP statute, the majority has subverted the legislature's intent that the Department of Social and Health Services (DSHS) should determine how best to evaluate SVPs. So long as the legislature does not exceed its constitutional bounds, we must respect its intent.

ANALYSIS

1. The SVP law grants DSHS authority to regulate pretrial evaluations.

At issue is whether RCW 71.09.040(4) authorizes one of the State's evaluators to use polygraph testing as part of the pretrial evaluation of an alleged

SVP. RCW 71.09.040(1)-(3) provide for a hearing to establish that there is probable cause to believe that a person is an SVP. A positive finding sets off a process that culminates in a jury trial to determine whether the person is in fact an SVP. *See* RCW 71.09.050-.060. After a judge determines that there is probable cause, RCW 71.09.040(4) begins this process. It reads:

> If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. A witness called by either party shall be permitted to testify by telephone.

RCW 71.09.040(4).

The key sentence for this case reads: "The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services." *Id.* The dispute is over whether the phrase "pursuant to rules developed by the department of social and health services" modifies "conducted" or whether it modifies "deemed." The distinction is important because if the "pursuant" clause modifies "conducted," then DSHS may prescribe rules for how the evaluations are to be conducted, perhaps including whether polygraph examinations may be employed. If the "pursuant" clause modifies "deemed," however, then DSHS may only prescribe the qualifications for evaluators, *not* the means by which the

evaluations are to be conducted.

RCW 71.09.040(4) is ambiguous because it is unclear at what point, if any, the verbal phrase beginning with "deemed" ends and the reader is supposed to revert to the main sentence describing how evaluations are conducted. To illustrate the point, compare the statutory sentence with this one: "The evaluation shall be conducted by Dr. Freud pursuant to rules developed by the department of social and health services." In this sentence, "by Dr. Freud" is a prepositional phrase complete in itself and the "pursuant" clause modifies "conducted"; this is clear because it would be ungrammatical to have "by Dr. Freud" modified by the "pursuant" clause. But in RCW 71.09.040(4), the description of the examiner, "by a person deemed to be professionally qualified to conduct such an examination," *can* be modified by the "pursuant" clause because one can deem someone qualified pursuant to certain rules. The result is that the reader cannot tell whether the "pursuant" clause is part of the description of the examiner, or whether the description of the examiner has concluded and the "pursuant" clause modifies "conducted" as it did in the Dr. Freud sentence.

When a statute is ambiguous, we construe it in a manner that fulfills the legislature's intent. *City of Seattle v. St. John*, 166 Wn.2d 941, 946, 215 P.3d 194 (2009). One means of doing so is to read the ambiguous portion in light of the rest of the provision and in the context of the statutory scheme. *See State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). Doing so in this case, there are three reasons to conclude that the legislature intended to grant DSHS authority to

prescribe rules for how an evaluation of an alleged SVP is to be conducted, not merely the qualifications an evaluator must possess.

First, the term "evaluation" is not defined in the SVP law. *See* RCW 71.09.020. Its ordinary meaning is a "judgment, appraisal, rating, [or] interpretation." Webster's Third New International Dictionary 786 (2002). The "evaluation as to whether the person is a sexually violent predator" called for by RCW 71.09.040(4) therefore asks for the evaluator's judgment on the matter without indicating how the judgment is to be formed, although the evaluator must be "deemed . . . qualified." RCW 71.09.040(4). If, as the majority suggests, DSHS cannot prescribe rules for the evaluation, then it seems from the statute that a qualified evaluator has carte blanche to choose his or her method. Because it provides no information whatsoever about what the evaluation may entail, the statute does not bar *any* method of making the judgment, even flipping a coin.[1] It is absurd to think that the legislature intended to give individual evaluators such unfettered discretion. Instead, it makes sense to interpret the provision as granting DSHS the power to regulate how evaluations must be conducted.

Second, this interpretation explains why, when rulemaking, DSHS must "consult with the department of health and the department of corrections." RCW 71.09.040(4). If DSHS were empowered to prescribe only the qualifications

[1] Hawkins argues that no definition is necessary because "evaluation" refers only to a medical examination, but this interpretation is at odds with the plain meaning of the word, which is broader. Furthermore, RCW 71.09.040(4) explicitly contemplates more than a physical examination, as it provides for the calling of witnesses as part of the evaluation. *See* RCW 71.09.040(4). ("A witness called by either party shall be permitted to testify by telephone.").

necessary for evaluators, it would make sense to require DSHS to consult with the Department of Health (which has experience with medical qualifications) but not with the Department of Corrections (DOC) (which does not). The fact that DSHS must consult with DOC indicates that DSHS is to know what is feasible for the evaluation and treatment of sex offenders, which is one of DOC's areas of expertise. This again is consistent with a grant of authority to DSHS over how evaluations are conducted.

Third, DSHS is afforded similar regulatory power elsewhere in the SVP law. RCW 71.09.800 grants the DSHS secretary broad authority to make rules to carry out the SVP law's operation. Specifically, DSHS is empowered to make rules for the evaluation and treatment of SVPs who are conditionally released to a less restrictive alternative to the Special Commitment Center (SCC). RCW 71.09.350(1). What's more, DSHS is responsible for the costs of evaluation and treatment for all committed individuals, regardless of their placement in the SCC or a less restrictive alternative, and is required to adopt rules to contain these costs. *See* RCW 71.09.110. It would be nonsensical to require DSHS to pay for evaluations for all SVPs and to adopt rules designed to lower the associated costs without giving DSHS the authority to adopt rules for how the evaluations may proceed, which principally affects their cost.

Thus, the appropriate interpretation of RCW 71.09.040(4) is one that grants DSHS the authority to prescribe rules governing evaluations of alleged SVPs, just as DSHS prescribes rules for the evaluation and treatment of SVPs confined in the

SCC and those released to less restrictive alternatives. The question becomes one concerning the scope of this authority.

Reading RCW 71.09.040(4), there is nothing that purports to limit DSHS's authority to prescribe what tools or methods are appropriate during an evaluation. As noted above, "evaluation" is not defined. No methods are mentioned other than the calling of witnesses. A strict construction of RCW 71.09.040(4), as argued for by the majority, would limit "evaluation" solely to this method. But no one seriously believes that the legislature intended to exclude all other evaluative techniques: even Hawkins admits that a medical examination also fits within the provision. At best, we are left with an undefined test and the idea that DSHS may prescribe rules governing it, on the condition that any witnesses called should be allowed to testify by telephone.

At this point, the majority steps in with a new canon of construction tailored solely to the polygraph. If the legislature does not specifically enumerate the polygraph as a permissible testing tool, the majority concludes, polygraph examinations are not permitted. This canon is based on the invasiveness and unreliability of polygraph testing, recognized elsewhere in the law. As evidence that the legislature considered the polygraph but chose to omit it from RCW 71.09.040(4), the majority points to RCW 71.09.096(4), which enumerates a polygraph examination as one possible condition that can be imposed when an SVP is released to a less restrictive alternative:

> Prior to authorizing any release to a less restrictive alternative, . . . [t]he

> court shall order the department of corrections to investigate the less restrictive alternative and recommend any additional conditions to the court. These conditions shall include, but are not limited to the following: Specification of residence, prohibition of contact with potential or past victims, prohibition of alcohol and other drug use, participation in a specific course of inpatient or outpatient treatment that may include monitoring by the use of polygraph and plethysmograph, monitoring through the use of global positioning satellite technology, supervision by a department of corrections community corrections officer, a requirement that the person remain within the state unless the person receives prior authorization by the court, and any other conditions that the court determines are in the best interest of the person or others.

RCW 71.09.096(4). The presence of the polygraph in the later provision, the argument goes, means that the polygraph is impermissible under the earlier provision in which it is not referenced.

This argument is misguided. For one thing, RCW 71.09.096(4) enumerates several types of conditions. The majority's reasoning suggests that anything enumerated in this provision (and perhaps anything similar that is implicitly included in its nonexclusive list) should be impermissible under RCW 71.09.040(4), in which it is not enumerated. The majority circumvents this consequence of its argument by insisting that the polygraph is disfavored, and that a different rule of statutory interpretation applies to it than to all other methods of evaluation. This approach ceases to search for legislative intent and instead applies a general dislike of polygraphs as the rule of decision.

The majority's reasoning sidesteps the statutory scheme. RCW 71.09.096(4) discusses conditions for which DSHS retains the authority to impose once an SVP is released to a less restrictive alternative. DSHS may prescribe rules for the evaluation and treatment of these conditionally released SVPs under RCW

71.09.350(1). If DSHS may permit polygraphs when prescribing rules for evaluating SVPs released to a *less restrictive* alternative, it would seem at a minimum that DSHS has equal authority to permit polygraphs in the evaluations of SVPs in the SCC. And, despite the majority's "intuitive" distinction between those who have been adjudicated SVPs after trial and those who await trial after the probable cause hearing, RCW 71.09.040(4) makes no such distinction.[2] It authorizes only an undefined "evaluation" and leaves it to DSHS to determine what the evaluation entails.

Reading the SVP law as a whole, it is clear that the legislature wished to delegate the definition of "evaluation" and the permissible evaluative techniques to DSHS. Although we must strictly construe the SVP statute, it makes no sense to interpret the undefined term "evaluation" in RCW 71.09.040(4) differently.[3]

2. DSHS regulations authorize a polygraph as part of the pretrial evaluation.

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[2] It may seem troubling that the statute subjects an alleged SVP, upon a showing of probable cause, to an evaluation as though he or she were already adjudicated an SVP. But this court has consistently upheld the SVP scheme as constitutional, including the pretrial evaluation and the delegation of power to DSHS. *See In re Pers. Restraint of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993) (upholding the recently enacted SVP law, which contained a provision identical to current RCW 71.09.040(4)); *see also id.* at 43 (describing how 72 hours of evaluation and treatment occurs under the involuntary commitment act, chapter 71.05 RCW, *before* the probable cause hearing).

[3] Hawkins contends that we must construe the SVP law to preclude compulsory pretrial polygraphs in order to avoid the question of whether the statute is unconstitutional if it permits them. But, the majority's approach goes beyond construing a statute to avoid constitutional infirmity; it abandons the statutory scheme entirely. At any rate, Hawkins did not raise his constitutional arguments below except to claim that provisions affecting fundamental rights must be strictly construed. He did not discuss substantive due process or article I, section 7 in any detail. Even his petition for review omits his constitutional arguments. Consequently, we lack an adequate record on which to decide whether compulsory pretrial polygraphs are necessary to serve the State's compelling interest in detaining and treating SVPs. I decline to fundamentally alter the statutory scheme to avoid Hawkins' ill-defined constitutional arguments.

Contrary to the majority's view, DSHS's regulations allow a clinician to use a polygraph when evaluating an SVP. WAC 388-880-010 defines "evaluation" as "an examination, report, or recommendation by a professionally qualified person to determine if a person has a personality disorder and/or mental abnormality which renders the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." WAC 388-880-030(2) provides that the evaluation must be conducted pursuant to WAC 388-880-033, which sets forth the qualifications for evaluators, and "must be in the form required by and filed in accordance with" WAC 388-880-034 and -036. WAC 388-880-030(2). WAC 388-880-034 to -036 therefore govern the evaluation. In relevant part, these regulations read:

> **WAC 388-880-034 Evaluator—Pretrial evaluation responsibilities.** The evaluation done in accordance with WAC 388-880-030(1) in preparation for a trial or hearing must be based on the following:
>
> (1) Examination of the resident, including a forensic interview and a medical examination, if necessary;
>
> (2) Review of the following records, tests or reports relating to the person:
>
> . . . .
>
> (d) Psychological and psychiatric testing, diagnosis and treatment, and other clinical examinations . . . ;
>
> (e) Medical and physiological testing, including plethysmography and polygraphy;
>
> . . . .
>
> **WAC 388-880-035 Refusal to participate in pretrial evaluation.** If the person refuses to participate in examinations, forensic interviews, psychological testing or any other interviews necessary to conduct the initial evaluation under WAC 388-880-030(1), the evaluator must notify the SCC. The SCC will notify the prosecuting agency for potential court enforcement.
>
> **WAC 388-880-036 Pretrial evaluation—Reporting.** (1) The evaluation must be in the form of a declaration or certification . . . and must be prepared by a professionally qualified person.
>
> (2) The report of the evaluation must include:

> (a) A description of the nature of the examination;
> (b) A diagnosis of the mental condition of the person;
> (c) A determination of whether the person suffers from a mental abnormality or personality disorder;
> (d) An opinion as to whether the person meets the definition of a sexually violent predator.

At first blush, WAC 388-880-034 seems to preclude polygraph testing during the pretrial evaluation. WAC 388-880-034(1) requires the evaluator to examine the person, "including a forensic interview and a medical examination, if necessary," but does not mention polygraphs. In contrast, WAC 388-880-034(2)(d) and (e) mention several types of records the evaluator must consider, including records from psychological testing and medical testing such as the polygraph or plethysmography. Because the polygraph is specifically mentioned in the second, records-review subsection but not in the first, examination subsection, there is an argument that the evaluator may conduct only a medical examination or forensic interview, not a polygraph.

But, WAC 388-880-034 cannot be read to limit the evaluation solely to a medical examination and forensic interview because the next regulation presupposes that the evaluation is broader than that: "If the person refuses to participate in *examinations, forensic interviews, psychological testing or any other interviews necessary to conduct the initial evaluation under WAC 388-880-030(1)*, the evaluator must notify the SCC." WAC 388-880-035 (emphasis added). First, the term "examinations" and "forensic interviews" are plural, suggesting that an evaluation may require more than one of each. Second, "psychological testing" and "other interviews" do not appear in WAC 388-880-034(1) at all. Crucially,

psychological testing appears in the records-review section, WAC 388-880-034(2), and yet is considered part of the "evaluation" in WAC 388-880-035. Thus, it cannot be true that methods that appear only in WAC 388-880-034(2) are necessarily excluded from the "evaluation." Instead, the evaluator has discretion to perform psychological testing or other interviews in addition to medical examinations or forensic interviews when performing his initial evaluation.[4]

The terms "medical examination," "forensic interview," and "other interview" are not defined in either the SVP statute or this portion of the WACs. WAC 388-880-034(2)(e) designates polygraph records as a form of medical or physiological testing relevant to the pretrial evaluation. Essentially, a polygraph is an interview in which the subject is asked to answer questions while physiological data are recorded. So, a polygraph fits within the term "medical examination" as a form of medical testing, within "forensic interview" as a form of interview undertaken in anticipation of trial, or within "other interview" if it is conceived of as a diagnostic interview.

In sum, DSHS's regulations afford the evaluator some discretion to conduct tests beyond a mere physical examination when evaluating an alleged SVP. Because a polygraph fits within the terms of other permissible evaluation

[4] The fact that an evaluator will not necessarily use the same methods to evaluate every alleged SVP is the reason why the evaluator's report must contain a "description of the nature of the examination" as a prelude to the evaluator's conclusions. WAC 388-880-036(2)(a). This description would be largely unnecessary if the evaluator were limited to a physical examination and interview. Because the WACs do not exhaustively define the evaluation in that manner, however, the description is necessary to understand the evaluator's recommendation.

techniques, and because the regulations clearly contemplate that polygraph records can be reviewed during a pretrial evaluation, *see* WAC 388-880-034(2)(e), I would conclude that the evaluator may use a polygraph during the pretrial evaluation. The trial court did not exceed its authority or abuse its discretion in directing Hawkins to comply with the evaluator's authorized request.[5]

CONCLUSION

Although the polygraph has been recognized as invasive and unreliable, this court's objections to the practice cannot trump legislative intent when our sole task is to interpret an admittedly constitutional statutory scheme. The legislature intended to leave the details of pretrial SVP evaluations, like the details of posttrial SVP evaluations and treatment, to DSHS. DSHS regulations afford evaluators some discretion to choose methods of evaluation. A polygraph fits within the ambit of the permissible methods of evaluation, and DSHS clearly contemplates that evaluators may review polygraph records during the pretrial evaluation. Therefore, conducting a polygraph test during the pretrial evaluation is within the evaluator's discretion. I would hold that the trial court did not exceed its authority or abuse its discretion in ordering Hawkins to comply with the evaluator's authorized request. I respectfully dissent.

[5] Finally, Hawkins argues that DSHS's regulations exceed its statutory authority and are unconstitutional. However, he failed to join the appropriate agency as a party, which is a prerequisite to obtaining a ruling that strikes down these regulations. *See* RCW 34.05.570(2)(a); *City of Bremerton v. Spears*, 134 Wn.2d 141, 164, 949 P.2d 347 (1998). Furthermore, he did not raise his constitutional arguments below or in his petition for review. *See supra* note 3. I therefore decline to entertain Hawkins' challenges to the regulations.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Mary E. Fairhurst