IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of MANUEL LOPEZ, JR. Appellant.	No. 40827-9-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Manuel Lopez, Jr., appeals his civil commitment as a sexually violent predator (SVP), arguing that the trial court erred in (1) ruling that the State did not need to prove he committed a recent overt act because he was not released from total confinement during a work camp assignment, and (2) denying his request for a *Frye*[1] hearing before admitting expert testimony about his mental disorder. Finding no error in the trial court's decisions, we affirm.

Facts

Lopez was convicted of third degree rape in 1976, first degree burglary with intent to commit rape and assault with intent to commit rape in 1978, and second degree burglary and

[1] *Frye v. United States*, 54 App. D.C. 46, 47, 293 F. 1013 (1923).

second degree rape by forcible compulsion in 1994. Shortly after his release from prison in 2001, Lopez was charged with attempted second degree rape, bribing a witness, and possession of a controlled substance. These charges resulted from an incident where he entered his niece's bedroom at night, awakened her, and struggled with her before leaving. After a jury deadlocked on the attempted rape charge but convicted him of the remaining offenses, Lopez pleaded guilty to residential burglary in exchange for dismissal of the attempted rape charge. He received a 102-month sentence.

While serving his sentence, Lopez was assigned to a work camp with the Department of Natural Resources (DNR) in 2003, 2005, and September 2006. Under the supervision of the Department of Corrections (DOC) and Olympic Corrections Center, Lopez worked on road maintenance, tree planting, and fire fighting. When he completed his DNR assignments, he returned to prison to serve the rest of his sentence. He was still incarcerated when the State filed a petition for involuntary commitment under the sexually violent predator act, ch. 71.09 RCW, in April 2007.

The State alleged in its petition that Lopez was an SVP in that he had previously been convicted of a sexually violent offense, currently suffers from a mental abnormality that causes him serious difficulty in controlling his behavior such that he is likely to engage in predatory acts of sexual violence if not confined in a secure facility, and had committed a recent overt act. Lopez moved to dismiss the petition, arguing that there was no showing of a recent overt act and thus no probable cause to detain him pending a civil commitment trial. The trial court ruled that Lopez's 2001 residential burglary conviction constituted a recent overt act and that there was probable cause to believe Lopez was an SVP.

Lopez subsequently argued that because he had been released into the community while working for DNR, and thus had the opportunity to reoffend, the State had to prove that he committed a recent overt act during that time to establish his SVP status. The trial court rejected his argument, ruling that Lopez was still under DOC supervision during his work assignment and still incarcerated. As a result, the State was relieved of the burden of proving a recent overt act at trial.

Before trial, Lopez requested a *Frye* hearing to address the admissibility of the diagnosis that the State's expert, Dr. Richard Packard, made after evaluating him. The trial court denied his request.

Dr. Packard testified that he reviewed approximately 3,000 pages of records and interviewed Lopez over a two-day period. He also administered psychological testing to Lopez. Packard used the Diagnostic and Statistical Manual (DSM) in diagnosing Lopez with paraphilia not otherwise specified (NOS) (nonconsent) and polysubstance dependency. After assessing Lopez's risk to reoffend using two actuarial instruments, Packard opined that Lopez was more likely than not to reoffend. He also opined that Lopez's diagnosis of paraphilia NOS (nonconsent) was a mental abnormality that causes Lopez serious difficulty in controlling his behavior and makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

The defense expert, Dr. Robert Halon, disagreed with Dr. Packard's diagnosis and found no evidence of a mental disorder. He acknowledged on cross-examination that in virtually all cases involving rape in which he has done SVP evaluations, other evaluators have rendered a diagnosis of paraphilia NOS (nonconsent), including defense experts.

The jury found Lopez to be an SVP, and the trial court ordered him committed to the Special Commitment Center.

Discussion

Total Confinement and the Recent Overt Act Requirement

Lopez argues first that because he was released from total confinement when he worked for DNR, the State had to prove he committed a recent overt act during that time to establish his status as an SVP.

This argument raises a question of law that we review de novo. *In re Det. of Durbin*, 160 Wn. App. 414, 426, 248 P.3d 124, *review denied*, 172 Wn.2d 1007 (2011). To involuntarily commit a person under the sexually violent predator act, the State must prove beyond a reasonable doubt that the person is an SVP. *In re Det. of Fair*, 167 Wn.2d 357, 363, 219 P.3d 89 (2009) (citing RCW 71.09.060(1)). An SVP is "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).[2]

SVP commitment is predicated on current dangerousness. *In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). Consequently, an SVP petition can be filed against a person "who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement" only where he has committed a recent overt act. RCW 71.09.030(1)(e); *Albrecht*, 147 Wn.2d at 7-8. A recent overt act is any act that has either caused

[2] The applicable statutes have been marginally amended since the State filed its SVP petition, but the law remains the same. We cite the current versions of the statutes for clarity. *State v. Swiger*, 159 Wn.2d 224, 227 n.3, 149 P.3d 372 (2006).

harm of a sexually violent nature or creates a reasonable apprehension of such harm. RCW 71.09.020(12).

Where an individual is incarcerated, proof of a recent overt act is not required because any such requirement would be impossible to satisfy. *Albrecht*, 147 Wn.2d at 8. The recent overt act requirement therefore does not apply to persons convicted of sexually violent offenses who are "about to be released from total confinement." RCW 71.09.030(1)(a). The definition of total confinement in the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, applies in this context. *Albrecht*, 147 Wn.2d at 9.

> "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

RCW 9.94A.030(51).

In *Albrecht*, the offender was released into the community following his incarceration and then arrested and jailed for violating his community placement conditions. 147 Wn.2d at 5. The court concluded that once an offender is released into the community, due process requires a showing of current dangerousness before his commitment as an SVP. *Albrecht*, 147 Wn.2d at 10. "An individual who has recently been free in the community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be currently dangerous." *Albrecht*, 147 Wn.2d at 11. Consequently, the State must prove that the individual committed a recent overt act during his time in the community to commit him as an SVP. *Albrecht*, 147 Wn.2d at 11. The State is relieved of this burden only if an offender has not been released from total confinement since his conviction. *Albrecht*, 147 Wn.2d at 10.

This court applied *Albrecht* to similar facts in *In re Detention of Broten*, 115 Wn. App. 252, 257, 62 P.3d 514, *review denied*, 150 Wn.2d 1010 (2003). Although the offender was incarcerated for community custody violations when the State filed its SVP petition, he had spent time in the community before those violations when he had the opportunity to overtly act. *Broten*, 115 Wn. App. at 257. Proof of a recent overt act thus was not an impossible burden for the State and due process required it to meet that burden. *Broten*, 115 Wn. App. at 257.

Lopez argues that he was not in total confinement when he did forestry work for DNR. He claims that he did not have to wear handcuffs, chains, or a special uniform and that he worked on public roads, ate in public restaurants, and used public restrooms. Lopez adds that he interacted with members of the public at rest stops and other public areas, worked alongside male and female members of the public and other fire fighting units, and slept in the same area as everyone else.

Lopez acknowledges that some prison work camps fall within the statutory definition of "total confinement." *See* RCW 9.94A.030(51) (total confinement includes camps authorized under RCW 72.64.050 and .060); *State v. Olson*, 148 Wn. App. 238, 243, 198 P.3d 1061 (2009) (RCW 72.64.050 authorizes branch institutions or work camps and RCW 72.64.060 authorizes labor camps). He argues, however, that he did not work at such camps because some of his DNR work was done on public roads.

RCW 72.64.050 gives DOC the authority to

> establish temporary branch institutions for state correctional facilities in the form of camps for the employment of prisoners therein in farming, reforestation, wood-cutting, land clearing, processing of foods in state canneries, forest firefighting, forest fire suppression and prevention, stream clearance, watershed improvement, development of parks and recreational areas, and other work to conserve the natural resources and protect and improve the public domain and construction of

> water supply facilities to state institutions.

RCW 72.64.060, in turn, authorizes state and federal agencies to use state inmates

> to perform work necessary and proper, to be done by them at camps to be established pursuant to the authority granted by RCW 72.64.060 through 72.64.090: PROVIDED, *That such prisoners shall not be authorized to perform work on any public road, other than access roads to forestry lands.* The secretary may enter into contracts for the purposes of RCW 72.64.060 through 72.64.090.

(Emphasis added.)

The State responds that even if Lopez worked on public roads other than access roads to forestry lands, he did such work while under total confinement. As support, the State cites a declaration from DNR's former assistant camp manager stating that during his tenure from 1994 to 2005, inmates assigned to work at DNR were put in 10-member crews, with each crew supervised by a foreman. No female inmates were assigned to DNR. All inmates were required to wear red hard hats and red work shirts featuring their prison initials to identify them as inmates. Inmates did not dine at restaurants without supervision, and if dining at a public facility was required, the foreman called ahead. Any public restrooms were cleared before an inmate entered. Inmates fighting forest fires might come into contact with female fire fighters, but socializing was prohibited. During fire fighting, DOC corrections officers watched the inmates 24 hours a day. At night, inmates slept in a cordoned-off area and were separated from non-DOC fire workers.

The State argues that Lopez's situation is distinguishable from *Albrecht* and more similar to *In re Detention of McGary*, 128 Wn. App. 467, 116 P.3d 415 (2005), *review denied*, 156

Wn.2d 1029 (2006). McGary was detained at Western State Hospital (WSH) after the State filed an SVP petition. *McGary*, 128 Wn. App. at 470-71. The State dismissed the petition but refiled it eight months later, after McGary's condition stabilized, without alleging a recent overt act. *McGary*, 128 Wn. App. at 472. McGary argued on appeal that his detention at WSH was not total confinement and that the State thus had to prove he committed a recent overt act during that detention. *McGary*, 128 Wn. App. at 474.

This court disagreed. McGary's detention at WSH involved 24-hour supervision in a tightly controlled environment. He was personally escorted by WSH staff during the few times he left the hospital. Even though McGary wore plain clothes, was not physically restrained, attended a co-ed dance, and used several hospital facilities, he remained in a highly secure environment. *McGary*, 128 Wn. App. at 478. This court recognized that "'[a] placement may not be a "secure facility" appropriate for housing committed SVPs, and yet be restrictive enough to prohibit any meaningful opportunity to commit a ROA [recent overt act] demonstrating current dangerousness.'" *McGary*, 128 Wn. App. at 479 (alteration in original). McGary was not released from total confinement during his stay at WSH and the State did not need to prove a recent overt act. *McGary*, 128 Wn. App. at 479.

Here, too, Lopez's forestry work occurred when he was under constant supervision. As in *McGary*, Lopez's work assignments did not constitute a release into the community comparable to community custody or community placement. Although he may have worked in close proximity to female fire fighters, the restrictions were such that he had no meaningful

opportunity to commit a recent overt act. *See McGary*, 128 Wn. App. at 479 (McGary never had genuine opportunity to reoffend during WSH detention or escorted leaves).

As further evidence that he was still under total confinement, Lopez received a favorable evaluation following some of his forestry work that was on a DOC form entitled "Inmate Performance Evaluation." Clerk's Papers at 205. And, more importantly, he returned to prison after completing his DNR work to complete his sentence, not because of any new violation or misconduct. It would make little sense to release an inmate from total confinement and then, after only laudatory behavior, reincarcerate him to serve the rest of his sentence. His work was in lieu of imprisonment and did not constitute a release into the community during which he had an opportunity to reoffend. *See Rose v. Dep't of Labor & Indus.*, 57 Wn. App. 751, 760, 790 P.2d 201 (confinement in camp under RCW 72.64.050 is in lieu of commitment to other state penal institutions), *review denied*, 115 Wn.2d 1010 (1990); *State v. Matuska*, 9 Wn. App. 850, 851-52, 515 P.2d 827 (1973) (when defendant unlawfully departed from branch institution established under RCW 72.64.050, he unlawfully departed from custody and committed the crime of escape). The trial court did not err in ruling that Lopez was still in total confinement when he worked for DNR and that, as a result, the State did not have to prove that he committed a recent overt act during that time.

Necessity of *Frye* Hearing

Lopez also argues that the trial court erred in denying his request for a *Frye* hearing to determine the admissibility of Dr. Packard's diagnosis that he suffers from paraphilia NOS (nonconsent).[3] We review this issue de novo. *State v. Gregory*, 158 Wn.2d 759, 830, 147 P.3d

[3] Paraphilia includes "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's

1201 (2006).[4]

The *Frye* standard requires a trial court to determine whether a scientific theory or principle has achieved general acceptance in the relevant scientific community before admitting it into evidence. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600-01, 260 P.3d 857 (2011); *In re Det. of Thorell*, 149 Wn.2d 724, 754, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004). Division One of this court recently held that *Frye* does not apply to the diagnosis of paraphilia NOS (nonconsent). *In re Det. of Berry*, 160 Wn. App. 374, 379, 248 P.3d 592, *review denied*, 172 Wn.2d 1005 (2011).

Division One reasoned that the proper focus of *Frye* is the science on which the expert's opinion is founded, and the science at issue with regard to paraphilia diagnoses is standard psychological analysis. *Berry*, 160 Wn. App. at 379. As the Supreme Court reasoned almost 20 years ago, nothing about this science is novel:

> "The sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable cause and effect relation petitioners seek, the level of acceptance is sufficient to merit consideration at trial."

Berry, 160 Wn. App. at 379 (quoting *In re Pers. Restraint of Young*, 122 Wn.2d 1, 57, 857 P.2d

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partner, or 3) children or other nonconsenting persons, that occur over a period of at least 6 months." DSM-IV at 522-23 (4th ed. 1994). The DSM lists 7 specific paraphilias, but hundreds exist, and the DSM categorizes paraphilias that are not specifically listed as "Not Otherwise Specified" (NOS). *In re Det. of Williams*, 163 Wn. App. 89, 93 n.5, 264 P.3d 570 (2011). The diagnosis of paraphilia NOS (nonconsent) is also referred to as paraphilia NOS (rape). *Williams*, 163 Wn. App. at 93 n.6.

[4] Lopez's request for a *Frye* hearing concerning his diagnosis was sufficient to preserve this issue for review. *See In re Det. of Taylor*, 132 Wn. App. 827, 836, 134 P.3d 254 (2006) (where offender did not raise *Frye* issue at commitment trial, he could not raise it on appeal), *review denied*, 159 Wn.2d 1006 (2007).

989 (1993)). Washington courts have repeatedly upheld sexually violent predator commitments based on the paraphilia NOS nonconsent/rape diagnosis. *Berry*, 160 Wn. App. at 380 (citing *In re Det. of Post*, 145 Wn. App. 728, 756-57 n.18, 187 P.3d 803 (2008), *aff'd*, 170 Wn.2d 302, 241 P.3d 1234 (2010)). Arguments concerning the shortcomings of the diagnosis go to weight rather than admissibility, and a preliminary *Frye* hearing is not warranted. *Berry*, 160 Wn. App. at 382.

We agree and find no error in the trial court's denial of a *Frye* hearing to test the admissibility of Dr. Packard's diagnosis. We note that even in the federal cases Lopez cites to highlight the debate concerning this diagnosis, that debate is seen as a factor going to weight rather than admissibility:

> The professional objections to the diagnosis of paraphilia NOS (nonconsent or rape) are not without persuasive value. The existence of the debate is a relevant issue in commitment proceedings and a proper consideration for the factfinder in weighing the evidence that the defendant has the "mental disorder" required by statute.

McGee v. Bartow, 593 F.3d 556, 581 (7th Cir.), *cert. denied*, 130 S. Ct. 3396 (2010); *see also Brown v. Watters*, 599 F.3d 602, 612 (7th Cir.) (citing *McGee* with approval), *cert. denied*, 131 S. Ct. 293 (2010).

Dr. Packard acknowledged that a small group of experts think that paraphilia is not a mental disorder that should be in the DSM at all. He concluded, however, that the paraphilia NOS (nonconsent) diagnosis is generally accepted by experts who practice in his field. Dr. Halon referred to the controversy surrounding the paraphilia NOS (nonconsent) diagnosis and questioned its validity.

Consequently, the jury was presented with both sides of the debate and was free to

consider the strength of each expert's opinion. The validity of Dr. Packard's diagnosis was a matter for the jury to evaluate, and a preliminary *Frye* hearing was neither necessary nor appropriate.

Affirmed.

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

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

HUNT, J.