

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**In re the Detention of:**

**No. 27883-2-III**

**JERRY SPICER,**

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**Division Three**

**Appellant.**

**UNPUBLISHED OPINION**

Kulik, C.J. — Jerry Spicer was committed as a sexually violent predator. Mr. Spicer contends that because he was incarcerated for an offense that did not qualify as a sexually violent offense at the time the petition was filed, the State was required to prove beyond a reasonable doubt that the crime rose to the level of a recent overt act. We disagree and affirm the order finding Mr. Spicer is a sexually violent predator.

**FACTS**

On March 31, 2005, the State filed a petition in Grant County Superior Court requesting that Mr. Spicer be committed as a sexually violent predator (SVP) pursuant to RCW 71.09.030. An SVP is defined as “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.” Former RCW 71.09.020(16) (2003).

The petition alleged that (1) Mr. Spicer was convicted of indecent liberties against a female under the age of 15 in June 1979, (2) he committed the crime of indecent liberties when he was 38 years old , and (3) he committed child molestation in the third degree when he was 46 years old. The State’s petition also alleged that Mr. Spicer suffers from the mental abnormality of pedophilia and a personality disorder that makes him likely to engage in predatory acts of a sexually violent nature if not confined.

The State filed the petition while Mr. Spicer was incarcerated. As a result of his incarceration for the 2002 child molestation, Mr. Spicer had not had the opportunity to commit a recent overt act against minor females, which is a required statutory element for an SVP. Therefore, the State argued that Mr. Spicer’s 2002 conviction for child molestation in the third degree constituted a recent overt act. The molestation involved Mr. Spicer fondling the breasts of a 15-year-old girl and attempting to fondle her vaginal area. The court agreed with the State’s motion that this crime was of a sexually violent nature and constituted a recent overt act.

Mr. Spicer waived his right to a jury trial and was found to be an SVP. Mr. Spicer appeals, alleging that the trial court violated his right to due process when it held that the 2002 conviction for child molestation in the third degree constituted a recent overt act,

without making the State offer more evidence to meet its burden of proof.

#### ANALYSIS

RAP 2.5(a) states that an appellate court may refuse to hear any claim of error that was not raised at the trial court level. The general rule does not apply when the alleged error is a manifest error affecting a constitutional right. RAP 2.5(a)(3).

Whether RAP 2.5(a)(3) merits a new argument on appeal is a two-part analysis. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). In determining the applicability of the constitutional error exception, the court first determines whether the alleged error is truly constitutional. “Second, the court determines whether the alleged error is ‘manifest,’ i.e., whether the error had practical and identifiable consequences in the trial of the case.” *State v. Kirkpatrick*, 160 Wn.2d 873, 880, 161 P.3d 990 (2007) (quoting *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)). A showing of actual prejudice is sufficient to show that the error is “manifest.” *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

The issue is whether Mr. Spicer’s claim on appeal is a manifest error affecting a constitutional right. An involuntary civil commitment requires due process because it is a serious curtailment of an individual’s liberty. *In re Det. of Fair*, 167 Wn.2d 357, 364, 219 P.3d 89 (2009). Mr. Spicer asserts that the court failed to require the State to prove

beyond a reasonable doubt that he committed a recent overt act and, therefore, the procedures followed by the court violated his right to due process. A citizen's due process rights are mandated under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 3 of the Washington Constitution. *Id.*

This court must determine if the alleged error is manifest; that is, whether there were "practical and identifiable consequences" in the trial or prejudicial error to Mr. Spicer. *Kirkman*, 159 Wn.2d at 935 (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). To assess the consequences that an error may have had at trial, we review whether the trial court erred in the first instance. Furthermore, even if a court determines that the claim raises a manifest constitutional error, the claim may still be subject to the harmless error analysis.

The issue is whether the State was required to prove that the conviction for third degree child molestation met the requirements of a "recent overt act" by proof beyond a reasonable doubt, and whether the court, in making that decision, was required to state the burden of proof it was using. In Washington, the trier of fact must find that a person meets the definition of an SVP beyond a reasonable doubt. RCW 71.09.060(1). To satisfy the requirements to find an individual is an SVP, the State must prove that a person is both currently dangerous and suffering from a mental illness that makes it likely

he or she will reoffend if not confined in a secure facility. Former RCW 71.09.020(16).

To curtail one's liberty in such a way, the State must show that a person is currently dangerous. *In re Det. of Lewis*, 163 Wn.2d 188, 193-94, 177 P.3d 708 (2008).

To prove dangerousness, the person either be in custody for a sexually violent offense (as defined in former RCW 71.09.020(15)) or have committed a "recent overt act" (as defined in former RCW 71.09.020(10)). *In re Det. of Henrickson*, 140 Wn.2d 686, 695, 2 P.3d 473 (2000); *see also In re Det. of Albrecht*, 147 Wn.2d 1, 7-8, 51 P.3d 73 (2002). A recent overt act is "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." Former RCW 71.09.020(10).

The procedure established by the statutes and case law pertaining to an SVP commitment produces three different situations. The first is when the person is incarcerated for a sexually violent offense at the time the petition is filed. Confinement makes a showing of a recent overt act impossible. *Henrickson*, 140 Wn.2d at 695 (quoting *In re Pers. Restraint of Young*, 122 Wn.2d 1, 41, 857 P.2d 989 (1993)).

Therefore, the State has the burden of only proving dangerousness by a showing that a person is currently incarcerated for a sexually violent offense. *Id.* The second situation

arises when a person is not incarcerated. In this scenario, the State must make a showing of a recent overt act. *Young*, 122 Wn.2d at 41. The third circumstance occurs when a person is incarcerated at the time the petition is filed but the crime does not meet the statutory definition of a sexually violent offense; therefore, the State must show that the commission of the act for which a person is incarcerated would qualify as a recent overt act. *Henrickson*, 140 Wn.2d at 689. Since Mr. Spicer was incarcerated for third degree child molestation at the time the SVP petition was filed—which does not constitute a sexually violent offense—this case fits into the third situation.

The inquiry into whether an offense for which a person is incarcerated meets the definition of a recent overt act is for the court to decide, not the jury. *In re Det. of Marshall*, 156 Wn.2d 150, 158, 125 P.3d 111 (2005). Mr. Spicer argues that this legal determination, made before the case goes to a jury, should be made beyond a reasonable doubt and that the court should have made it clear that the State met its burden of proof. The facts here are similar to *Marshall* in which the defendant contended that “because he was not incarcerated for a sexually violent offense when the sexually violent predator petition was filed, the State was required as a matter of due process to plead and prove beyond a reasonable doubt that he had committed a ‘recent overt act’ in order to commit him as a sexually violent predator.” *Id.* at 156. The court made it clear that this was not

the case. The court held that the standard was a factual inquiry into the defendant's history and mental condition, and a legal inquiry into whether an objective person would have an apprehension that the act would cause sexually violent harm. *Marshall*, 156 Wn.2d at 158; *State v. McNutt*, 124 Wn. App. 344, 350, 101 P.3d 422 (2004). Although a factual inquiry is necessary, this question of mixed law and fact is one for the court to decide. *McNutt*, 124 Wn. App. at 350.

Pursuant to the statute and precedent, the trial court here decided the question of mixed law and fact pertaining to Mr. Spicer's conviction. The procedure performed by the trial court is the same as that in *Marshall* and *Lewis*. See *Marshall*, 156 Wn.2d 150; *Lewis*, 163 Wn.2d 188. Because Mr. Spicer was incarcerated at the time the SVP petition was filed, it was the court's duty to determine whether the commission of the act for which Mr. Spicer was incarcerated would qualify as a recent overt act. Here, the trial court considered the State's petition and ruled that Mr. Spicer's conviction satisfied the recent overt act requirements. Mr. Spicer's rights were not violated, and the State was not required to make an additional showing on the matter during trial.

No. 27883-2-III  
*In re Detention of Spicer*

We affirm the trial court's order finding that Mr. Spicer is a sexually violent predator.

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

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Kulik, C.J.

WE CONCUR:

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Brown, J.

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Korsmo, J.