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

In re the Detention of:

MANUEL LOPEZ, JR.,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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I. ISSUES PRESENTED FOR REVIEW

A. Whether the trial court correctly ruled that Lopez remained in "total confinement" during his temporary placement at an inmate work camp and, therefore, the State was not required to prove a recent overt act.

B. Whether Lopez waived any challenge to the trial court's denial of a *Frye* hearing when he failed to preserve the issue for appeal.

C. Whether the trial court correctly denied Lopez's request for a *Frye* hearing because a psychologist's diagnosis is not subject to *Frye*.

II. STATEMENT OF THE CASE

A. Procedural History

On April 20, 2007, the State filed a petition in Pierce County Superior Court to civilly commit Manuel Lopez Jr. (Lopez) as a sexually violent predator (SVP). CP 1-2. The State alleged that Lopez's April 16, 2002, residential burglary conviction constituted a recent over act (ROA) as a matter of law. CP 5.

Prior to trial, the court ruled that Lopez's residential burglary conviction constituted an ROA. CP 270. The State was therefore not required to prove a recent overt act at trial. *Id.*

The civil commitment trial began on May 24, 2010. During pre-trial motions Lopez orally requested a *Frye*[1] hearing. 1RP 24. It was

[1] *Frye v. United States*, 293 F. 1013 (D.C Cir. 1923)

his first and only such request, it was not supported by any briefing and Lopez did not state any basis for his request. The trial court denied his motion. Lopez did not take exception to the court's ruling and never mentioned the issue again.

On June 2, 2010, the jury returned a verdict finding beyond a reasonable doubt that Lopez is a sexually violent predator. CP 304. The trial court entered an order committing Lopez to the care and custody of the Department of Social and Health Services. CP 305.

B. Factual Background

1. Lopez's Criminal Sexual History

Lopez has convictions for rape in the third degree, burglary in the first degree with intent to commit rape, burglary in the second degree, rape in the second degree by forcible compulsion, and residential burglary. CP 3-6. His victims have included strangers as well as members of his own family.

On October 7, 1976, in Pierce County, Washington, Lopez attended a party at an apartment complex where he met 19-year-old L.E.H. CP 6. L.E.H. left the party with some friends to get ice cream. *Id.* After the group returned, L.E.H. walked back to her apartment. *Id.* Lopez was waiting for her at the stairs leading to her apartment. He asked if he could come in and L.E.H. agreed but told Lopez she planned to go to bed soon.

Id. After some time, she asked Lopez to leave so she could go to bed. *Id.* However, Lopez walked over to the chair where she was seated, picked her up and carried her to her bedroom. *Id.* L.E.H. again told Lopez to leave. He set her down but did not leave. *Id.* Lopez then grabbed her, threw her on her bed and started choking her with his hands. *Id.* He wrapped a towel around her neck and continued to choke her. CP 6-7. When L.E.H. began fighting him, Lopez said he was going to knock her out and kill her if she did not stop fighting. CP 7. He pulled her off the bed with the towel and told her to take off all her jewelry and clothes. *Id.* He threw her back on the bed and resumed choking her with the towel. *Id.* Then he raped her. *Id.* L.E.H. managed to scream once but Lopez hit in her in the face. *Id.* After the rape, L.E.H escaped and called the police. *Id.* They arrested Lopez, who on November 5, 1976, pled guilty to Rape in the Third Degree in Pierce County Superior Court. He was given a 2-year deferred sentence. *Id.*

On September 4, 1978, in Sonoma County, California, Lopez broke into the home of his neighbor K.E.J. CP 7. He had been watching her and saw her lights go off. Deposition Transcript of Manuel Lopez, at 60-70. When she was asleep, Lopez, armed with a knife, entered her residence through an unlocked sliding door. *Id.* She woke up when Lopez pushed her head into her pillow and said "don't say anything, don't move

or scream." CP 7. He grabbed for her breasts and arms and told her "I'm going to make love to you." *Id.* While he fondled her, K.E.J. tried to distract him by asking him questions; this went on for about an hour. *Id.* She eventually told him her roommate was in another bedroom. Lopez then left through the front door. *Id.* K.E.J. positively identified him to the police. *Id.*

On April 25, 1979, Lopez pled guilty to burglary in the first degree with intent to commit rape in Sonoma County Superior Court. He was found to be a mentally disordered sex offender and was committed to Atascadero State Hospital for a maximum treatment period of four years.

On April 17, 1994, in Pierce County, Washington, Lopez raped 30-year-old A.C. at knifepoint. CP 4. A.C. arrived home about 9:30 p.m. *Id.* As she reached for the light switch, Lopez snuck up behind her, covered her eyes with one hand and held a knife against her throat with the other. *Id.* A.C. tried unsuccessfully to grab the knife blade and her right thumb and index finger were lacerated. *Id.* Lopez ordered her not to scream or he would cut her. *Id.* He then pushed her into the bedroom and tied a t-shirt around her head, covering her eyes. *Id.* A.C. pleaded with him to stop while she continued to struggle and grab for the knife. *Id.* Lopez forced her face down onto the bed and moved the t-shirt from her eyes to her mouth, retying it so tightly she could not speak or scream. *Id.*

He used bed sheets to bind her wrists and feet. *Id.* He removed A.C.'s pants and scraped the knife slowly along her back, eventually cutting off her bra. *Id.* Lopez grabbed A.C.'s throat, rubbed his penis against her buttocks and vagina, then raped her. He continued until he ejaculated. *Id.*

Soon thereafter, Lopez heard voices outside A.C.'s apartment. *Id.* He quickly dressed and fled the apartment through the rear sliding door leaving her bound and naked from the waist down. Deposition Transcript of Manuel Lopez, at 98-99. When A.C.'s thirteen-year-old son arrived home he found his mother tied up, laying on the side of the bed. 1RP 72. He helped untie her wrists and feet. *Id.*

Lopez was arrested and eventually pled guilty on August 22, 1994, to burglary in the second degree and rape in the second degree by forcible compulsion in Pierce County Superior Court. CP 4. The court sentenced him to 96 months on the burglary conviction and 14 months on the rape in the second degree by forcible compulsion conviction. Deposition Transcript of Manuel Lopez, at 100.

Within six months of being released from prison for his rape of A.C., Lopez sexually assaulted his 16-year-old niece, M.M. CP 5. On August 25, 2001, Lopez went to his mother's home in Steilacoom, Washington, where M.M. also resided. *Id.* Around 1:30 a.m., he entered M.M.'s bedroom while she slept. *Id.* He sat on her bed and touched her

back, arms and legs. *Id.* When she awoke and tried to scream, Lopez covered her mouth with his hand. *Id.* Holding her mouth closed, Lopez tried to stick his tongue into her mouth through his fingers. *Id.* He also tried to touch her breast but she thwarted him by struggling. *Id.* Lopez held her down as she continued to struggle and gasp for air. *Id.* He pressed down so hard on her mouth that he bruised her chin. CP 60. Lopez eventually released his hold on her and offered her two hundred dollars to not report him. CP 5. He quickly left M.M.'s bedroom when he heard her mother, J.M., arrive home. *Id.* Lopez was initially charged with attempted rape in the second degree, bribing a witness, and possession of a controlled substance in Pierce County Superior Court. CP 60. He was convicted at trial of bribing a witness and possession of cocaine but the jury deadlocked on the attempted rape charge. *Id.* On March 22, 2002, in exchange for dismissal of the attempted rape charge, Lopez pled guilty to residential burglary and was sentenced to 102 months in prison. *Id.*

Just prior to the civil commitment trial, Lopez disclosed to his expert, Dr. Robert Halon, that he had sexually assaulted his sister. 3RP 349-350. Lopez revealed that when he was fifteen years old, he sexually assaulted his twelve-year-old sister J.M. 4RP 450. He would sneak into J.M.'s bed at night while she was asleep and rub his penis on

her buttocks until he ejaculated.. 4RP 450-454. He said this happened approximately seven times over the course of two weeks. *Id.* Lopez acknowledged that J.M. may have been awake during some of the assaults. *Id.* J.M., however, never spoke of the sexual assaults until recently. *Id.* J.M. is the mother of M.M., Lopez's ROA victim. *Id.*

2. Lopez's Temporary Work Camp Placement

While serving his sentence for his assault on M.M, Lopez was assigned to a prison work camp with the Department of Natural Resources (DNR). CP 202. These camps provide "temporary branch institutions for state correctional facilities in the form of camps for the employment of prisoners therein." RCW 72.64.050. Lopez was assigned to road maintenance, tree planting and fire fighting.

Craig Atwood was the Assistant Camp Manager with the DNR from 1994 through 2005, which included the time Lopez worked at the DNR inmate work camp. CP 205, 219. He supervised and evaluated prison inmates at the camp. CP 219. Atwood submitted a declaration in which he stated that inmates are assigned to crews that perform pre-commercial thinning, road maintenance, and tree planting. CP 205, 219. Each crew has a foreman and about ten inmates. *Id.* The inmates are typically paired up to perform tasks and no female inmates were assigned to the DNR. *Id.*

Atwood stated that all inmates wear red hard hats and work shirts with the letters "OCC" (Olympic Corrections Center) to identify themselves as prisoners. CP 219-220. They are strictly required to wear that clothing and cannot leave their units if not properly attired. *Id.* Inmates were not permitted to dine at restaurants without supervision. CP 220. On the few occasions that public dining was necessary, the foreman called ahead to a restaurant to determine if they can handle the number of crew members. *Id.* The inmates are under careful watch of the foreman at all times. *Id.* If public restroom facilities were used, the restrooms were checked and cleared before inmates were allowed in. *Id.*

Atwood stated that if inmates fought fires, they might occasionally come into contact with female firefighters. *Id.* They were prohibited, however, from socializing with other fire fighters. *Id.* During firefighting, Department of Corrections (DOC) officers were dispatched to the site and inmates kept under watch twenty-four hours a day. *Id.* At night, the inmates slept in a cordoned off area, designated by ribbons. *Id.* The inmates were watched by DOC officers at all times and did not sleep alongside fire workers not associated with DOC. *Id.*

Lopez returned to prison after completing DNR work camp and served the remainder of his sentence on the residential burglary, bribing a witness, and possession of cocaine convictions.

3. Expert Testimony at Trial

At trial, the State called Dr. Richard Packard as an expert witness. 2RP 84. Dr. Packard reviewed approximately three thousand pages of records and conducted a clinical interview of Lopez over a two day period. 2RP 104-112. He also administered psychological testing to Lopez. 2RP 106.

Dr. Packard diagnosed Lopez with: Paraphilia, Not Otherwise Specified (NOS) non-consent, and Polysubstance Dependence, In a Controlled Environment. 2RP 116-117. He assessed Lopez's risk to re-offend using two actuarial instruments: the Static-99R and the SORAG. 2RP 177. Dr. Packard opined that Lopez was more likely than not to re-offend. 2RP 214. He also opined that Lopez's diagnosis of Paraphilia NOS non-consent was a mental abnormality that causes him serious difficulty controlling his sexually violent behavior, and makes him likely to engage in predatory acts of sexual violence if not confined to a secure facility. 2RP 236-238

III. ARGUMENT

Lopez makes two arguments on appeal, both of which lack merit. First, Lopez was closely supervised and in total confinement while working at the DNR inmate work camp, therefore, the State was not required to prove a recent overt act. Second, Lopez failed to adequately

preserve a challenge to the trial court's denial of his request for a *Frye* hearing. Even if preserved, the trial court did not err in denying Lopez a *Frye* hearing because the Court of Appeals recently held in *In re Detention of Berry,* ___ P.3d. ___, 2011 WL 800549, that a psychologist's diagnosis in SVP proceedings is not subject to *Frye*.

A. The Trial Court Correctly Determined That Lopez Remained In "Total Confinement" During His Placement At The DNR Inmate Work Camp And That The State Was Not Required To Prove A Recent Overt Act.

Lopez argues that his temporary placement to the DNR inmate work camp constitutes release from confinement and requires the State to prove he committed a recent overt act while working at the camp. His argument should be rejected because the DNR work camp is a state correctional "branch institution" that falls within the statutory definition of "total confinement."

1. Standard of review.

The issue of whether Lopez remained in total confinement while placed in a DNR work camp is a question of law. Therefore, this Court reviews the issue *de novo*. *In re Detention of Fox*, 138 Wn. App. 374, 389, 158 P.2d 69 (2007).

2. Lopez's placement at the DNR inmate work camp meets the statutory definition of "total confinement."

Lopez remained in "total confinement" during his time in the DNR

work camp. The Washington Supreme Court has incorporated the definition of "total confinement" from former RCW 9.94A.030(35)[2] into the SVP statute, RCW 71.09. "Total confinement" is defined as:

> 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.*

In re Detention of Albrecht, 147 Wn.2d 1, 9, 51 P.3d 73 (2002) (emphasis added).

The statutory definition of "total confinement" therefore includes inmate work camps authorized under RCW 72.64.050. This statute provides:

> The secretary shall also have the power 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.

According to the plain language of the statute, "total confinement" is not limited to confinement inside the physical boundaries of a prison, but also includes prisoner work camps that engage in activities such as

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[2] "Total confinement" was re-codified from RCW 9.94A.030(35) to RCW 9.94A.030(50). However, its text remains unchanged.

farming, reforestation, firefighting, and development of parks and recreational areas. Inmates assigned to work camps such as DNR are, by definition, in "total confinement" because these camps are authorized and operate as temporary branch institutions for state correctional facilities. As such, Lopez's placement at the DNR camp does not constitute release from "total confinement." Rather, his placement at the inmate work camp is a continuation of his "total confinement" status, albeit in a branch correctional facility.

Nevertheless, Lopez argues that his work camp time falls outside the statutory definition of "total confinement" because he worked on public roads contrary to the provisions of RCW 72.64.060. His argument does not establish that he was released from confinement.

RCW 72.64.060 authorizes various state and federal agencies to use inmates to perform work at camps. The statute does not authorize inmates to work on public roads other than access roads on forestry lands:

> Any department, division, bureau, commission, or other agency of the state of Washington or any agency of any political subdivision thereof or the federal government may use, or cause to be used, prisoners confined in state penal or correctional institutions 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.

RCW 72.64.060.

Lopez claims he worked on public roads. 2RP 439-440. Even if true, however, Lopez fails to show how working on a public road changed his confinement status as an inmate working under twenty-four hour supervision, with restricted movement and freedoms, while confined to living in a temporary branch institution of a correctional facility.

Lopez argues that *In re the Detention of Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002), requires the State to prove he committed an ROA during his placement at the DNR work camp. Lopez's reliance on *Albrecht* is misplaced. Albrecht completed his original sentence on a sexually violent offense and was released into the community. He was subsequently jailed on a minor community placement violation and just prior to his release, the State filed an SVP petition for his civil commitment. 147 Wn.2d at 4-5. Unlike *Albrecht*, Lopez was never released back into the community. Lopez was placed at an inmate work camp under the supervision of either a camp foreman or a DOC officer twenty-four hours a day. *Albrecht* is inapposite.

Lopez's case more closely resembles the facts in *In re Detention of McGary*, 128 Wn. App. 467, 116 P.3d 415 (2005). McGary was nearing the end of his sentence on a sexually violent offense when the State filed a

SVP petition for his civil commitment. 128 Wn. App. at 470. After the petition was filed, McGary was transferred to the SCC wherein his mental condition deteriorated. *Id.* The State dismissed the SVP petition to involuntarily commit McGary to Western State Hospital (WSH) under RCW 71.05. *Id.* McGary spent nine months at WSH. During his stay, McGary was permitted to leave the WSH premises with a supervised escort. WSH staff escorted him on three occasions: twice when he swam at a nearby swimming pool and once when he registered as a sex offender at the sheriff's office. *Id.* at 472. After McGary's mental condition stabilized, the State filed an SVP petition while he was still at WSH. He was then transferred back to the SCC pending the outcome of the SVP proceeding. *Id.* Prior to trial, McGary filed a motion to dismiss the SVP petition. Relying on *Albrecht*, McGary argued that because he was allowed into the community during his stay at WSH, he was not in "total confinement." He argued the State therefore was required to allege an ROA during the time he was at WSH. *Id.* at 474. McGary noted that during his outings into the community, his escorts wore plain clothes and he was not restrained. McGary also noted that he attended a co-ed dance, was allowed to use the weight room, the dining hall and a smoking pad. *Id.* at 420.

The Court of Appeals rejected McGary's argument, recognizing

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 an ROA demonstrating current dangerousness." *Id.* at 479. Furthermore, the court reasoned that McGary's limited and escorted movements outside of WSH's physical boundaries were not materially different from a prisoner's escorted release from a prison facility to attend a funeral, a doctor visit, or a sporting event. *Id.* at 477. Moreover, McGary never had a genuine opportunity to reoffend during his brief escorted leaves. *Id.* at 479. Consequently, the court held that despite several temporary outings into the community, McGary's detention at WSH was "total confinement," and the State was not required to allege an ROA in its SVP petition. *Id.*

Lopez was under similar restrictions and close supervision at the DNR work camp. Because his movements were restricted and he was under supervision twenty-four hours a day, Lopez never had a genuine opportunity to reoffend. While working, Lopez was under supervision of a DNR foreman. He was required to wear distinctive attire that identified him as an inmate. He was prohibited from socializing with other firefighters. At night, he slept in a cordoned off area, and was under watch of DOC officers.

Lopez argues that he did have an opportunity to reoffend because

he worked on public roads, ate in public restaurants, used public restrooms, and worked alongside female firefighters. Brief of Appellant at 10. This argument is meritless because the "total confinement" nature of a facility does not depend on whether a person has access to his victims. For instance, prison constitutes "total confinement" despite the fact females are employed in prisons as corrections officers, staff workers, or health workers. Moreover, an inmate on temporary release from prison, even while closely supervised, will undoubtedly come into contact with his or her victim pool. [3] To hold that mere access to potential victims would require the state to prove a recent over act would prove untenable. Rather, the total confinement nature of a placement is dependent upon whether conditions are restrictive enough to prohibit any meaningful opportunity to commit an ROA. *McGary*, 128 Wn. App. at 479. Like *McGary*, Lopez's placement at the DNR work camp was restrictive enough to be "total confinement."

Our courts have concluded that only a release into the community provides enough of an opportunity to reoffend such that proof of an ROA is required. *See Albrecht,* 147 Wn.2d at 10-11 (ROA required whenever

[3] RCW 72.01.370 authorizes inmates to be taken outside the walls of prison facilities and into the community for various reasons such as to visit sick relatives, attend a funeral, participate in athletic contests, or receive health care not available in the prison. When offenders leave prison on these occasions, they are escorted and supervised. Despite these escorted forays into the community, prisoners are still deemed to be in "total confinement."

offender is "free in the community"); *In re Pers. Restraint of Young*, 122 Wn.2d 1, 41, 857 P.2d 989 (1993)). (ROA required only where the offender has been "released into the community."); *In re Detention of Paschke,* 121 Wn. App. 614, 621, 90 P.3d 74 (2004) (State must prove a ROA "if the State has released the alleged SVP from total confinement into the community"); *In re Detention of Broten*, 115 Wn. App. 252, 257, 62 P.3d 514 (2003) (ROA necessary when offender has "spent time in the community" since his most recent sexually violent offense).

The Supreme Court in *Albrecht* explained its rationale for tying the ROA requirement to an offender's release into the community from total confinement. It is only when the offender has been released into the community from such confinement that he has a genuine opportunity to reoffend. 147 Wn.2d at 10. Therefore, it is only where such a release has occurred that it is fair to require the state to prove current dangerousness through evidence of an ROA. *Id.*

B. Lopez Waived Any Challenge To The Trial Court's Denial Of A *Frye* Hearing By Failing To Preserve Any Alleged Error.

Lopez argues that the trial court erred by failing to hold a *Frye* hearing. But Lopez failed to preserve his objection because his brief oral request for a *Frye* hearing was unsupported by argument or briefing and

Lopez failed to make any kind of record about the reasons for his request. This Court should refuse to consider this issue.

1. Standard of review

A trial court's ruling after holding a *Frye* hearing is reviewed de novo. *State v. Gregory*, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006). However, the Supreme Court in *Gregory* noted that "[i]t is not clear what standard of review should be applied to a trial court's decision not to conduct a *Frye* hearing at all." 158 Wn.2d at 830. Nevertheless, the Supreme Court applied the de novo standard of review in *Gregory* because the trial court declined to hold a *Frye* hearing on the basis that the scientific evidence has been generally accepted in the scientific community, the same question ultimately addressed on appeal after a *Frye* hearing. *Id.*

2. Lopez failed to state any basis for a *Frye* hearing and failed to take exception to the trial court's denial of his request for a hearing.

The Washington Supreme Court has held that a party's exception to a trial court's ruling is sufficient when

> an exception is taken in such a fashion that the purpose of the rule requiring specificity is satisfied, *i.e.*, so that the trial court is informed of the alleged error, thereby affording it the opportunity to rectify any possible mistakes without the necessity and expense of appeal.

State v. Gosby, 85 Wn.2d 758, 763, 539 P.2d 680 (1975). Likewise, our

courts have long held that an objection that does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. *See, e.g., State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976); *Marr v. Cook*, 51 Wn.2d 338, 341-42, 318 P.2d 613 (1957); *White v. Fenner*, 16 Wn.2d 226, 245-46, 133 P.2d 270 (1943). "Objections must be accompanied by a reasonably definite statement of the grounds therefore so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect." *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 675, 374 P.2d 939 (1962).

Following is the exchange that took place when Lopez asked for a *Frye* hearing;

THE COURT: I'll deny that motion. Are there any other pretrial?

MR. O'MELVENY: I don't think there are any other pretrial motions we have. I have a question, just procedural –

THE COURT: I have lots of procedural –

MR. O'MELVENY: Just a minute. I'm sorry. Judge, Mr. Lopez would like to have the *Frye* motion on the issue of hermaphilia NOS.

THE COURT: That's denied.

MR. O'MELVENY: A *Frye* hearing.

THE COURT: That's denied. Anything else substantively?

MR. LIU: Nothing from the State.

MR. O'MELVENY: No.

THE COURT: Let's talk a little bit about jury selection.

1RP at 24.

As the record shows, Lopez did not make a sufficient record or take exception to the trial court's denial of his request for a *Frye* hearing. Thus, he failed to preserve the issue for appeal. However, even if Lopez had noted an objection with the trial court, his failure to state with specificity what the objection was based upon must also be deemed inadequate to preserve the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Failure to object to the admissibility of evidence at trial precludes appellate review of that issue unless the alleged error involves manifest error affecting a constitutional right. *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992); *State v. Stevens*, 58 Wn. App. 478, 485-86, 794 P.2d 38 (1990). However, our courts have held that failure to preserve for review any challenge to an expert's status or the foundation of an expert's testimony under *Frye* does not involve manifest error affecting a constitutional right. *See State v. Florczak*, 76 Wn. App. 55, 72-73, 882 P.2d 199 (1994); *State v. Jones*, 71 Wn. App. 798, 820, 863 P.2d 85 (1993).

In the present case, the trial court did not err in denying Lopez's request for a *Frye* hearing. The record showed that Lopez requested a *Frye* hearing on the morning of trial. RP at 24. The record further showed that Lopez requested a *Frye* hearing on the diagnosis of "Hermaphilia NOS." *Id.* However, no such diagnosis was made in this case and Lopez made no record, either orally or in writing, as to his basis for a *Frye* hearing, under any diagnosis. Moreover, when the trial court denied his request for a hearing, Lopez did not object or take exception to the trial court's ruling.

The Supreme Court's reasoning in *Gosby* applies here as well: Lopez's failure to make a sufficient record prevented the trial court from being informed of any alleged error, and prevented the opportunity to rectify any possible mistakes. By failing to state the basis of his request for a *Frye* hearing, and failing to take exception to the trial court's ruling, Lopez failed to preserve this issue for appeal.

C. The Trial Court Did Not Err In Denying Lopez's Request For A *Frye* Hearing Because An Expert's Diagnosis Is Not Subject To *Frye*.

Even if Lopez had adequately preserved the issue for review, the trial court did not err in denying his request for a *Frye* hearing. Expert testimony from psychologists and psychiatrists about a sex offender's mental illness or abnormality is not subject to *Frye*. *In re Detention of*

Berry, ___ P.3d. ___, 2011 WL 800549.

Berry addressed the exact issue presented in this appeal: Whether the trial court properly denied a *Frye* hearing on the diagnosis of Paraphilia NOS non-consent. In ruling that the trial court properly denied a *Frye* hearing, the *Berry* court noted that *Frye* applies when a party seeks to admit evidence based upon novel scientific procedures. Id at 2. *Berry* held that there is nothing novel about the science of standard psychological analysis:

> 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.

Id. at 3 (citing *In re Pers. Restraint of Young*, 122 Wn.2d at 57).

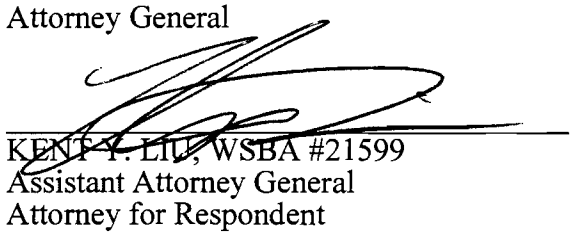
Berry noted that the courts of this state have repeatedly upheld SVP commitments based upon the diagnosis of Paraphilia NOS non-consent. *Id.* In addition, the Court held that debate and criticism of the diagnosis go to the weight of the evidence, not its admissibility. Id. at 4. *Berry* is directly on point and Lopez's argument that the trial court erred by not holding a *Frye* hearing fails.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the order civilly committing Lopez as an SVP.

RESPECTFULLY SUBMITTED this 23rd day of March, 2011.

ROBERT M. MCKENNA
Attorney General



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Attorney for Respondent

NO. 40827-9-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re Detention of: Manuel Lopez, Respondent.	DECLARATION OF SERVICE

I, Kelly Hadsell, declare as follows:

On this 23rd day of March, 2011, I deposited in the United States mail true and correct cop(ies) of and Declaration of Service, postage affixed, addressed as follows:

Catherine Glinski
PO Box 761
Manchester, WA 98353

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

DATED this 23rd day of March, 2011, at Seattle, Washington.

KELLY HADSELL