NO. 100664-1
COA NO. 54681-7-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MUNYWE,

Petitioner.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

PETITION FOR REVIEW

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A. INTRODUCTION

Michael Munywe is serving time for two crimes that should have counted as one. According to the evidence, Mr. Munywe led the complainant a short distance to an alcove and forced her to perform oral sex. The evidence showed no restraint on her liberty before or after this solitary, continuous incident.

Based on this conduct, the jury convicted Mr. Munywe of unlawful imprisonment and second-degree rape. At sentencing, counsel observed both offenses were carried out against the same person, with the same objective, at the same time and place. The trial court nonetheless refused to find they were the same criminal conduct for sentencing purposes, and the Court of Appeals affirmed. The result was to add years to Mr. Munywe's sentence. This Court should grant review.

B. IDENTITY OF PETITIONER

Petitioner Michael Munywe asks for review of the decision affirming his convictions and sentence.

C. COURT OF APPEALS DECISION

Mr. Munywe seeks review of the unpublished decision in *State v. Munywe*, No. 54681-7-II (Wash. Ct. App. Jan. 19, 2022).

D. ISSUES PRESENTED FOR REVIEW

1. Two or more offenses are the "same criminal conduct" if they were committed against the same victim, with the same criminal intent, at the same time and place. The evidence showed Mr. Munywe pulled the complainant a short distance to an alcove and compelled oral sex. The jury convicted him of second-degree rape and unlawful imprisonment. Where the purpose of both crimes was sexual intercourse with the complainant and they occurred almost simultaneously, the crimes were the same criminal conduct.

2. Article I, section 16 of the Washington State Constitution forbids a court from commenting on the evidence. This prohibition extends to language in the jury instructions that conveys that a fact bearing on the defendant's guilt has been established. Here, the to-convict instructions used the complainant's initials rather than her name, implying she was a victim of a crime. The trial court's use of the complainant's initials in the instructions was a comment on the evidence.

3. Supervision fees are a discretionary legal financial obligation that may not be imposed on an indigent defendant. The trial court erred by imposing supervision fees in Mr. Munywe's judgment and sentence despite indicating it intended to impose only mandatory legal financial obligations. The Court of Appeals affirmed, contrary to this Court's recent precedent.

4. Mr. Munywe raised several issues under the U.S. Constitution in his pro se statement of additional grounds. He asks this Court to grant review of those issues.

E. STATEMENT OF THE CASE

The complainant, a 15-year-old teenager, testified Mr. Munywe walked alongside her as she walked home from a bus stop in Tacoma. 1/30/20 RP 559, 563–66. She said Mr. Munywe held her hand, even as she pulled away to signal the contact was unwelcome. *Id.* at 570–71. Despite the unwanted touching, Mr. Munywe did not try to control her movements, and she freely chose where to walk. *Id.* at 623–24, 633.

The complainant decided to vary from her usual path home and turned onto a side street. 1/30/20 RP 569, 633. The alley led in front of a building with a gate recessed in a small alcove next to a low garden wall. *Id.*

at 574, 636, 641; Exs. 5–6. As they walked through the alley, the complainant said, Mr. Munywe led her to the alcove, sat on the wall, and compelled her to perform oral sex. 1/30/20 RP 575, 577–79, 641.

The complainant stood up and walked away, and Mr. Munywe held her hand again. 1/30/20 RP 582–83. She called 911 and pretended to speak to her mother when the dispatcher answered, asking, "Mom, can you come pick me up from McDonald's please?" *Id.* at 584; Ex. 20 at 0:24–1:04. The complainant then set off for a nearby McDonald's location, with Mr. Munywe at her side and no longer holding her hand. 1/30/20 RP 584–85. Two police officers arrived soon after. *Id.* at 587.

The trial court instructed the jury on first-degree rape, first-degree kidnapping, and a number of lesser included offenses. 2/5/20 RP 940–45; CP 30, 33, 35, 39, 43. Each instruction used the complainant's initials

rather than her full name. *Id.* The prosecutor explained the instructions are "public documents" and "we don't put rape victims' full names in there." 2/5/20 RP 954. The jury found Mr. Munywe guilty of second-degree rape and unlawful imprisonment. CP 50, 53, 55.

The trial court rejected defense counsel's argument the two offenses were the "same criminal conduct" for sentencing purposes. 3/27/20 RP 1024–25. Despite imposing only mandatory legal financial obligations and striking discretionary fees, the trial court inadvertently included an obligation to pay community custody supervision fees in the boilerplate judgment and sentence. CP 79, 83, 89, 91. The court imposed a sentence of 136 months to life. CP 82.[1]

[1] Second-degree rape carries an indeterminate life sentence where the minimum term is the standard range sentence. RCW 9.94A.507(1)(a)(i), (3); RCW 9A.20.021(1)(a); RCW 9A.44.050(2).

F. WHY THIS COURT SHOULD ACCEPT REVIEW

1. **The Court of Appeals contravened its own published precedent when it held the rape and unlawful imprisonment convictions were not the same criminal conduct for sentencing purposes.**

When a person has two or more current convictions, the trial court includes the other convictions in the offender score for each count. RCW 9.94A.589(1)(a). If multiple convictions are the "same criminal conduct," however, they count as only one conviction in the offender score. *Id.* Crimes are the "same criminal conduct" if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *State v. Aldana Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013) (quoting RCW 9.94A.589(1)(a)).

Where a person unlawfully imprisons another to commit rape, the two offenses are the same criminal conduct. *See State v. Phuong*, 174 Wn. App. 494, 547–

48, 299 P.3d 37 (2013). Unlawful imprisonment is the "knowing[] restrain[t of] another person." RCW 9A.40.040(1). To "restrain" is to "restrict a person's movements . . . in a manner which interferes substantially with . . . her liberty." RCW 9A.40.010(6).

In *Phuong*, the defendant pulled the victim out of a car, through a garage, and upstairs to a bedroom, where he attempted to force himself on her. 174 Wn. App. at 500. This Court reasoned the attempted second-degree rape and unlawful imprisonment were carried out with "the same criminal intent" because the objective purpose of both was the rape. *Id.* at 548. The victim was obviously the same. *Id.* And both offenses occurred "at the same time and place"—the defendant restrained the victim only within and immediately outside the house, in the short time required to pull her out of the car and up to the bedroom. *Id.*

Here, the trial court correctly found the unlawful imprisonment and second-degree rape involved the same intent—as in *Phuong*, the objective purpose of both was rape. 3/27/20 RP 1024; 174 Wn. App. at 548; *see* 2/5/20 RP 956 (arguing the "only reason" Mr. Munywe led the complainant to the garden wall was "to rape her"). The court also correctly concluded both counts involved the same victim. 3/27/20 RP 1024.

The trial court's error was in finding the rape and the unlawful imprisonment did not occur at the same time and place. RP 1024–25. According to the trial evidence, the only time Mr. Munywe "restrained" the complainant—the only time he forced her to be somewhere she did not want to be—was when he pulled her into the alcove and sat on the garden wall. 1/30/20 RP 577–79, 649. Both before and after, the complainant freely chose where to walk, and Mr.

Munywe walked alongside her, holding her hand part of the time. *Id.* at 570, 583–85, 623–24, 633; Ex. 20 at 0:24–0:57, 1:59–2:11. As in *Phuong*, Mr. Munywe restrained the complainant only immediately before and during the rape. 174 Wn. App. at 548.

The Court of Appeals noted the complainant was free to go where she wished after the rape, but found Mr. Munywe's holding her hand was enough restraint to become a new unlawful imprisonment. Slip op. at 8–9. The Court ignored the statute—the force Mr. Munywe used must have "interfere[d] substantially" with the complainant's "liberty." RCW 9A.40.010(6); Slip op. at 8. Merely holding the complainant's hand for a time while she walked where she chose to walk did not substantially interfere with her liberty. The Court did not analyze—or even mention—its published decision in *Phuong*. Slip op. at 7–9.

The trial court's error added years to Mr. Munywe's sentence. Mr. Munywe has no prior criminal history, and the only conviction contributing to the offender score for each count was the other offense. CP 78. The score for each count was 3, leading to a standard range of 102–136 months for second-degree rape. CP 78; *see* RCW 9.94A.515 (seriousness level of XI); RCW 9.94A.510. Because the counts are the same criminal conduct, the correct offender score is zero, and the correct range is 78–102 months. RCW 9.94A.510; RCW 9.94A.589(1)(a).

In affirming Mr. Munywe's sentence, the Court of Appeals both disregarded the statutory definition of "restrain" and contravened its own published authority. RAP 13.4(b)(2). The Court's misapplication of the "same criminal conduct" doctrine added years to Mr. Munywe's time behind bars, raising an issue of

substantial public interest to every person convicted of multiple offenses. RAP 13.4(b)(4). This Court should grant review.

2. The trial court's use of the complainant's initials in the to-convict instructions violated the constitutional prohibition of judicial comments on the evidence.

A trial court may not comment on the evidence. Const. art. IV, § 16. More concretely, a court many not "'convey[] to the jury [the court's] personal attitudes toward the merits of the case' or instruct[] a jury that 'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). A comment on the evidence is "presumed prejudicial." *Id.* at 725.

A to-convict instruction that conveys to the jury the defendant's guilt has been proved is a comment on the evidence. *See State v. Jackman*, 156 Wn.2d 736,

744, 132 P.3d 136 (2006). In *Jackman*, the charges required proof the victims were minors. *Id.* at 740 & n.3. The to-convict instructions included each victim's birthdate, implying to the jury the fact of the victims' minority was already established. *Id.* at 740–41 & n.3, 744. Accordingly, the Supreme Court held the instructions were comments on the evidence. *Id.* at 744.

As in *Jackman*, the to-convict instructions in this case conveyed to the jury Mr. Munywe was guilty of an offense against the complainant. Throughout the trial, the parties, witnesses, and court freely referred to her by her first or last name. *See, e.g.*, 2/5/20 RP 952, 960 (closing argument). Nevertheless, when the time came to instruct the jury, the trial court modified the pattern version of each to-convict instruction to use her initials rather than her name. *Compare* CP 30, 33, 35, 39, 43 *with* WPIC 40.02, 41.02, 42.02, 39.02, 39.16.

This grant of anonymity conveyed to the jury the court believed the complainant was a crime victim who needed protection. Based on the evidence, the only person who could have victimized her was Mr. Munywe, and he could have done so only by way of the crimes the prosecution charged. By implying in the to-convict instructions the complainant was a victim in need of protection, the trial court commented on the evidence. *Jackman*, 156 Wn.2d at 744.

Many courts remark that a jury may perceive a grant of anonymity as "a subliminal comment on the harm the alleged encounter with the defendant has caused." *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014). "[T]he very knowledge by the jury that pseudonyms were being used would convey a message to the fact-finder that the court thought there was merit to the plaintiffs' claims." *James v. Jacobson*, 6

F.3d 233, 240–41 (4th Cir. 1993); *accord Doe v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000). "The effect of this 'subliminal' suggestion . . . is likely to be strong enough that a limiting instruction would not sufficiently eliminate the resulting prejudice." *Doe v. Rose*, No. CV-15-07503-MWF-JCx, 2016 WL 9150620, at *3 (C.D. Cal. Sept. 22, 2016) (unpub.); see GR 14.1(b); App'x B.

In holding the trial court did not comment on the evidence, the Court of Appeals adopted the reasoning of *State v. Mansour*, 14 Wn. App. 2d 323, 470 P.3d 543 (2020).[2] Slip op. at 6–7. There, the Court of Appeals held use of initials in the to-convict instructions is not a judicial comment for three reasons.

First, the court observed "the name of the victim . . . is not a factual issue requiring resolution." 14 Wn.

[2] *Review denied*, 196 Wn.2d 1040 (2021).

App. 2d at 329–30. Second, "a juror would likely not presume that [the minor] was a victim—or believe the court considered her one—merely because the court chose to use [the minor]'s initials." *Id.* at 330. Third, the court noted the federal cases cited above concerned civil plaintiffs' requests to proceed anonymously at trial, while here, the parties used the complainant's full name outside the jury instructions. *Id.* at 330.

Mansour's reasoning is unpersuasive. First, it does not matter that the victim's name is not an element—the court's use of the complainant's initials communicated she was a victim and, therefore, the defendant committed a crime.

Second, it is not plausible to suggest the jury would not catch on to the implications of using initials. In fact, that possibility is absent here, where the prosecutor explained to the jury the instructions are

"public documents" and "*we don't put rape victims' full names in there.*" RP 954 (emphasis added).

Third, granting anonymity to any degree in any context risks being perceived as "a subliminal comment" on the need for protection from the defendant. *Doe*, 307 F.R.D. at 10.

Anonymizing the complainant in the jury instructions is a comment on the evidence. *Jackman*, 156 Wn.2d at 744; Const. art. IV, § 16. In holding to the contrary, the Court of Appeals contravened this Court's precedent and deprived Mr. Munywe of an important right under the Washington State Constitution. RAP 13.4(b)(1), (b)(3). This Court should grant review.

3. The Court of Appeals contravened this Court's precedent in refusing to remand for the trial court to strike the obligation to pay supervision fees.

Courts may not impose discretionary legal financial obligations on defendants who have been

found indigent. RCW 10.01.160(3); *State v. Ramirez*, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). "[B]ecause 'supervision fees are waivable by the trial court, they are discretionary LFOs.'" *State v. Bowman*, 198 Wn.2d 609, 629, 498 P.3d 478 (2021) (quoting *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020)). Where a trial court expresses intent to impose only mandatory fees, yet boilerplate language in the judgment imposes supervision fees, remand is required. *Id.*

The trial court imposed only two mandatory fees—the $100 DNA collection fee and $500 victim penalty assessment—and struck a discretionary fee entered in the form judgment and sentence. CP 79. In so doing, the court expressed its intent to impose only mandatory fees. Nonetheless, the boilerplate judgment form included an obligation to pay supervision fees. CP

83, 89, 91. Failing to strike the supervision fees was error. *Bowman*, 198 Wn.2d at 629.

The Court of Appeals reasoned the trial court did not show intent to impose only mandatory fees. Slip op. at 10. On the contrary, by striking all discretionary fees in the legal financial obligation section of the judgment, the trial court clearly showed it wanted to impose only mandatory fees. CP 79. Its omission to strike the boilerplate imposition of supervision fees was a scrivener's error. *Bowman*, 198 Wn.2d at 629.

The Court of Appeals's refusal to remand with instructions to strike the supervision fees was contrary to this Court's decision in *Bowman*. This Court should grant review. RAP 13.4(b)(1).

4. Mr. Munywe asks this Court for review of the issues he raised in his statement of additional grounds.

The Sixth Amendment guarantees an accused person's right to a speedy trial. U.S. Const. amend. VI; *Barker v. Wingo*, 407 U.S. 514, 515, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Mr. Munywe objected to the continuances the trial court granted and argued the delay violated his right to a speedy trial. 2d Mot. to Supp. Statement of Add'l Grounds at 15 (July 28, 2021); Statement of Add'l Grounds at 2 (Nov. 18, 2020); 3/20/19 RP 1; 8/23/19 RP 11; 9/27/19 RP 14; 11/8/19 RP 24; 1/21/20 RP 4; 1/22/20 RP 9–10.

The Court of Appeals read the claim as one of ineffective assistance, though Mr. Munywe raised it as a standalone speedy trial claim as well. Slip op. at 10; 2d Mot. to Supp. at 15. Mr. Munywe asks for review of this constitutional issue. RAP 13.4(b)(3).

The Fifth Amendment guaranteed Mr. Munywe's right to be informed that he has the right to remain silent, that any statement may be used against him, that he has the right to presence of counsel, and that he has the right to appointment of counsel if indigent. *Miranda v. Arizona*, 384 U.S. 436, 444–45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Dickerson v. United States*, 530 U.S. 428, 444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

Despite knowing English is not his first language, the police read Mr. Munywe his *Miranda* warnings in English. 1/23/20 RP 48–49, 63. The police also never asked Mr. Munywe whether he could understand what they said. RP 50. Mr. Munywe argued giving the *Miranda* warnings in English without the help of an interpreter violated his constitutional rights. Mot. to Supp. Statement of Add'l Grounds at 1–2 (Apr. 16,

2021). He asks this Court to grant review. RAP 13.4(b)(3).

G. CONCLUSION

This Court should grant Mr. Munywe's petition for review.

Pursuant to RAP 18.17(c)(10), the undersigned certifies this petition for review contains 3,038 words.

DATED this 16th day of February, 2022.

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Petitioner's Appendix

A. Court of Appeals Opinion

B. *Doe v. Rose*, No. CV-15-07503-MWF-JCx, 2016 WL 9150620 (C.D. Cal. Sept. 22, 2016) (unpub.); *see* GR 14.1(d)

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

January 19, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL MUTHEE MUNYWE, Appellant.	No. 54681-7-II UNPUBLISHED OPINION

MAXA, J. – Michael Munywe appeals his convictions of second degree rape and unlawful imprisonment with sexual motivation and his sentence. The convictions arose out of an incident in which Munywe grabbed the wrist of a 15-year-old girl as she was walking down the street, then directed her into an alcove and raped her, and then continued to grab her wrist when she walked away.

We hold that (1) the trial court did not err by declining to dismiss a juror who was coughing excessively during testimony, (2) the trial court did not improperly comment on evidence by using the victim's initials rather than her full name in the to-convict instructions, (3) the trial court did not abuse its discretion in finding that the rape and unlawful restraint were not the same criminal conduct for sentencing purposes, (4) the trial court did not err in imposing community custody supervision fees as determined by the Department of Corrections (DOC) as a legal financial obligation (LFO), and (5) we decline to consider or reject Munywe's multiple claims asserted in his statements of additional grounds (SAG).

Accordingly, we affirm Munywe's convictions and sentence.

FACTS

Background

On November 21, 2018, it was dark when 15-year-old AG got off a bus in downtown Tacoma. As AG started to walk home, Munywe called out to her. AG initially thought Munywe was one of her mother's friends, but when she turned around, she realized she was mistaken. Munywe kept talking to AG as she turned around and continued walking home.

Munywe walked beside AG and continued to talk to her. AG walked past the route to her house because she did not want Munywe to know where she lived. Munywe then began to hold AG's wrist. AG tried to pull away more than once, but she could not.

The two crossed the street and walked up a hill. Munywe was still holding AG's wrist and he led her up the hill, walking in front of her. Munywe led AG to an alleyway where he sat down on a ledge and pulled AG down to her knees close to him. Munywe took out his penis and forced it into AG's mouth. AG eventually pushed Munywe off her, got up, and began to walk away.

AG attempted to call her mother, but she did not answer. As AG continued to walk, Munywe grabbed her by the wrist again. AG then dialed 911 and pretended like she was speaking with her mother so Munywe would not know she was calling 911. She told the operator to pick her up at the McDonald's. Munywe eventually let go of AG and the two walked to McDonald's.

As Munywe and AG walked toward McDonald's, Tacoma Police officer Jeffrey Thiry saw and detained Munywe, later arresting him. Thiry took Munywe to police headquarters, where detective William Muse interviewed him.

The State charged Munywe with first degree rape and first degree kidnapping.

Pretrial Issues

On January 22, 2020, the scheduled first day of trial, Munywe addressed the trial court himself and claimed that the time for trial rules and his constitutional right to a speedy trial had been violated. He requested a stay to allow the court to consider his motion to dismiss. Munywe also claimed that defense counsel had failed to provide him with discovery materials, which prejudiced his ability to prepare a defense. The court deferred addressing Munywe's motions until the next day.

The next day, defense counsel stated that Munywe wanted him to raise the speedy trial issue. Counsel stated that he did not intend to file a written motion Munywe had prepared because he did not believe that there was a reasonable basis for the motion. The trial court stated that it appreciated Munywe's concerns because the case was approximately 420 days old, but the court did not believe there was a speedy trial violation after reviewing the file.

CrR 3.5 Hearing

At the CrR 3.5 hearing, Thiry testified about his detention and arrest of Munywe. Thiry mentioned Munywe's accent to him, and Munywe said that he was from Kenya. Thiry testified that Munywe's English was very good and that he did not exhibit any confusion.

Detective Muse testified that he advised Munywe of his *Miranda*[1] rights. Munywe said he understood the rights read to him and never expressed any confusion about those rights. A video of the interrogation was played for the trial court. Even though Muse knew that English was not Munywe's first language, Muse did not provide an interpreter. But Munywe also never

[1]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

requested an interpreter. And Muse did not think that Munywe needed an interpreter or that Munywe did not understood him.

The trial court ruled that Munywe's statements were admissible, concluding that Munywe understood his *Miranda* warnings, was not confused about them, and willingly spoke to the police.

Trial

At trial, Munywe had a Swahili interpreter. AG, Thiry, and Muse testified to the facts presented above.

At a recess, the trial court mentioned the health of juror 8. The court noted that the juror was coughing and drying her eyes. The court was concerned that the juror could not be paying attention to all of the evidence because she was distracted by her condition. Defense counsel stated that "it did seem to me that she was always focused on the evidence that was coming out." 7 Report of Proceedings (RP) at 713. He asked the court to inquire before dismissing the juror. The prosecutor stated, "I have seen her, and I have noticed the coughing. It does look like she's paying attention, but she does have that issue." 7 RP at 714.

At the end of the day, the trial court questioned juror 8. Juror 8 stated that despite her coughing episodes, she was still able to listen to the evidence. She also stated that she had been sick, but was getting better. The court did not dismiss juror 8.

The court gave to-convict instructions for the charged offenses and the lesser included offenses of second and third degree rape and unlawful imprisonment with sexual motivation. Each instruction used AG's initials rather than her full name. The prosecutor stated that initials were used in public documents for rape victims. The jury convicted Munywe of second degree rape and unlawful imprisonment with sexual motivation.

Sentencing

At sentencing, Munywe argued that the rape and unlawful imprisonment with sexual motivation were a part of the same criminal conduct for the purposes of calculating his offender score. The court stated:

> Here, the rape occurred by . . . a little ledge between the two buildings. It was stopped. There was a period of time, and then Mr. Munywe marches the victim down the street and holds her against her will. . . . The jury could have easily concluded that he was simply going to take her to another location and rape her again.

RP at 1017. The court concluded:

> The identity of the victim is clearly established as the same, but the location and timing of the crimes is different.
>
> After the original rape was concluded, Mr. Munywe could have simply walked away, but he didn't. I do believe that the facts will indicate that he either had ahold of the victim or had his arm around her. She was in no way free to leave. He coerced her in walking several blocks down the street from the location of the rape to the McDonald's on 9th and Tacoma Avenue.

RP at 1024-25. Therefore, the court ruled that the two offenses did not constitute the same criminal conduct.

Regarding LFOs, the prosecutor asked that the trial court impose the DNA collection fee and the crime victim penalty assessment. No other LFOs were discussed. In the judgment and sentence, the court imposed the two requested LFOs but struck the criminal filing fee. In addition, standard language regarding community custody included the provision "pay supervision fees as determined by DOC." Clerk's Papers at 83. An appendix to the judgment and sentence stating community custody conditions contained the same provision.

Munywe objected to several community custody conditions in the appendix to the judgment and sentence, and the trial court struck or modified some of the conditions. Munywe did not object to the imposition of supervision fees as a community custody condition.

Munywe appeals his convictions and his sentence.

ANALYSIS

A. FAILURE TO DISMISS JUROR

Munywe argues that the trial court erred in not dismissing a juror who was coughing excessively. We disagree.

The trial court has "a mandatory duty to dismiss an unfit juror" under RCW 2.36.110 and CrR 6.4(c)(1). *State v. Lawler*, 194 Wn. App. 275, 284, 374 P.3d 278 (2016). And RCW 2.36.110 places a continuous obligation on the trial court to dismiss a juror who is unable to perform the duties of a juror. *Lawler*, 194 Wn. App. at 284. We review for an abuse of discretion a trial court's decision whether to dismiss a juror. *Id*. at 282.

Here, the trial court raised the issue of juror 8's coughing, stating a concern that she might have missed some evidence. But neither Munywe nor the prosecutor shared that concern. And the court questioned juror 8, who said that she had been able to listen to the evidence despite her coughing. Therefore, the court had no reason to dismiss juror 8.

We hold that the trial court did not abuse its discretion in not dismissing juror 8.

B. USE OF VICTIM'S INITIALS IN TO-CONVICT INSTRUCTIONS

Munywe argues that the trial court improperly commented on the evidence in violation of article IV, section 16 of the Washington Constitution when it used AG's initials in the to-convict instructions. We disagree.

Division One of this court rejected this comment on the evidence argument in *State v. Mansour*, 14 Wn. App. 2d 323, 329-33, 470 P.3d 543 (2020), *review denied* 196 Wn.2d 1040

(2021). Munywe urges us to reject the holding in *Mansour*, but we agree with Division One's reasoning. Therefore, we reject Munywe's argument regarding the use of AG's initials.[2]

C. SAME CRIMINAL CONDUCT

Munywe argues that the second degree rape and unlawful imprisonment with sexual motivation convictions constitute the same criminal conduct for sentencing purposes. We disagree.

1. Legal Principles

Multiple current offenses that encompass the same criminal conduct are counted as one offense for purposes of calculating a defendant's offender score. RCW 9.94A.525(5)(a). Under RCW 9.94A.589(1)(a)[3], two or more offenses constitute the same criminal conduct when they "require the same criminal intent, are committed at the same time and place, and involve the same victim."

If any of the three elements is not present, the offenses are not the same criminal conduct. *State v. Johnson*, 12 Wn. App. 2d 201, 211, 460 P.3d 1091 (2020), *aff'd on other grounds*, 197 Wn.2d 740 (2021). And we generally apply the definition of "same criminal conduct" narrowly to "disallow most same criminal conduct claims." *Id.* The defendant has the burden of showing that two or more offenses constitute the same criminal conduct. *Id.*

[2] Munywe argues that this case is different from *Mansour* because here the prosecutor remarked in closing argument that initials were used in the jury instructions for rape victims. But the court in *Mansour* explained that the trial court's reference to a person as a "victim" does not convey the court's personal opinion of the case. 14 Wn. App. 2d at 330. Munywe has not established that a comment from *the prosecutor* changes this result.

[3] RCW 9.94A.89 has been amended since the events of this case transpired. Because these amendments are not material to this case, we do not include the word "former" before RCW 9.94A.589.

We review a trial court's determination of whether two offenses encompass the same criminal conduct for an "abuse of discretion or misapplication of law." *State v. Aldana Graciano*, 176 Wn.2d 531, 537, 295 P.3d 219 (2013). Under this standard, a trial court abuses its discretion if the record supports only one conclusion regarding same criminal conduct and the court makes a contrary ruling. *Id.* at 537-38. "But where the record adequately supports either conclusion, the matter lies in the court's discretion." *Id.* at 538.

"A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1). To restrain means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6). And restraint is "without consent" if it is accomplished by physical force or intimidation. RCW 9A.40.010(6)(a).

2. Analysis

The question here is whether Munywe's unlawful imprisonment occurred at the same time and place as the rape. Munywe primarily argues that any unlawful restraint before the rape occurred at the same time and place as the rape. However, the trial court focused on Munywe's restraint of AG *after* the rape occurred.

The evidence showed that AG was walking away from the area where she was raped when Munywe grabbed her wrist again. He held onto AG as the two walked toward the McDonald's, where AG told the 911 operator she was going. During this time, Munywe was restraining AG. This evidence supports the trial court's conclusion that Munywe's restraint after the rape occurred at a different time and location than the original rape.

Munywe argues that because AG chose to walk to the McDonald's, she was not unlawfully imprisoned. But it is immaterial that Munywe allowed AG to walk in the general

direction that she wanted. RCW 9A.40.040(1) states that "[a] person is guilty of unlawful imprisonment if he or she knowingly restrains another person." There is no dispute that Munywe forcibly grabbed AG's wrist after the rape and held on to it for a period of time as they walked. Even though AG was walking in the direction that she chose, she still was being restrained.

Munywe also argues that the trial court's reliance on conduct that occurred after the rape is inconsistent with how the State charged first degree kidnapping, for which unlawful imprisonment was a lesser included offense. He points out that the information charged that Munywe kidnapped AG with the intent to commit rape. However, the court found that the post-rape restraint also could have been with the intent to commit rape: "The jury could have easily concluded that he was simply going to take her to another location and rape her again." RP at 1017.

We hold that the trial court did not abuse its discretion in determining that the second degree rape and unlawful imprisonment were not the same criminal conduct.

D. COMMUNITY CUSTODY SUPERVISION FEES

Munywe argues that the trial court erred in imposing community custody supervision fees because he was indigent. We disagree.

RCW 9.94A.703(2)(d) provides that "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the department." Supervision fees are considered discretionary LFOs because they are waivable by the trial court. *State v. Spaulding*, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020). However, because supervision fees do not constitute "costs" under RCW 10.01.160(3), they can be imposed even if the defendant is indigent. *Id.* at 536-37. Therefore, the trial court had authority to impose supervision fees as an LFO even though Munywe was indigent.

Munywe claims that the trial court expressed its intention to impose only mandatory LFOs. Not so. The court made no statement that it was imposing only mandatory LFOs; it merely struck one discretionary LFO.

We hold that the trial court did not err when it imposed community custody supervision fees as an LFO.

E. SAG CLAIMS

Munywe asserted multiple claims in three SAGs. We do not reach most of these arguments because they rely on evidence outside the record, were not preserved below, or are immaterial, and we reject Munywe's assertion that sufficient evidence did not support his convictions.

1. Ineffective Assistance of Counsel

Munywe claims that defense counsel improperly agreed to trial continuances and improperly refused to make his speedy trial motion on the first day of trial. But the reasons for the continuances and the lengthy delay are not in the record. Without that information, we cannot evaluate whether trial counsel was ineffective in agreeing to the continuances or in failing to present the speedy trial motion. And without that information, we cannot evaluate Munywe's time for trial and speedy trial claims to determine whether he suffered any prejudice.

Munywe's second and third ineffective assistance of counsel claims also involve facts outside the record. The record does not show what defense counsel provided to Munywe before trial or whether Munywe requested counsel to present a sentencing alternative.

Because Munywe's claims rely on facts outside the record, we cannot consider them in this direct appeal. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). They are more properly raised in a PRP. *Id.*

2. *Miranda* Violation

Munywe claims his *Miranda* rights were violated when he was not given an interpreter during his interrogation. We decline to consider this issue.

Because Munywe did not raise this issue in the trial court, we will not consider the issue unless there was a manifest error affecting a constitutional right. An error is manifest if the appellant shows actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). The appellant must make a plausible showing that the claimed error had practical and identifiable consequences at trial. *Id.* The focus is on whether the error "is so obvious on the record that the error warrants appellate review." *Id.* at 100.

Here, the record shows that Munywe understood his *Miranda* rights even without an interpreter. The two officers testified that Munywe's English was very good. He was responsive when the police asked him questions and he never expressed any confusion. At no point during the interrogation did Munywe ask for an interpreter. The court found Munywe understood each and every right read to him, he waived his *Miranda* rights, and was not confused about them. As a result, there was no manifest error, and we decline to consider this argument.

3. Fabrication, Mistreatment, Spoliation

Munywe argues that (1) the State fabricated and falsified evidence during trial, (2) he was mistreated and subjected to psychological torture while being detained and interrogated after his arrest, and (3) the State discarded crucial pieces of DNA evidence. All of these claims rely on matters outside of the record. Again, we cannot consider these claims in this direct appeal and they are more properly raised in a PRP. *Alvarado*, 164 Wn.2d at 569.

4. Sufficiency of Evidence/Other Claims

Munywe asserts 30 instances where the evidence was insufficient to establish particular facts and raising additional claims. Most of these assertions relate to immaterial facts, rely on matters outside the record, or were not preserved, and therefore do not support relief.

Munywe does make a few material assertions – that there was insufficient evidence that (1) he restrained, abducted or kidnapped AG; and (2) any crimes took place. We reject those assertions – there was substantial evidence to support the kidnapping and rape convictions.

CONCLUSION

We affirm Munywe's convictions and sentence.

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 in accordance with RCW 2.06.040, it is so ordered.

Maxa, J.

MAXA, J.

We concur:

, C.J.

LEE, C.J.

Glasgow, J

GLASGOW, J.

APPENDIX B

2016 WL 9150620
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Jane DOE
v.
Derrick ROSE, et al.

Case No. CV–15–07503–MWF–JCx
|
Signed September 22, 2016

Attorneys and Law Firms

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Proceedings (In Chambers): ORDER GRANTING DEFENDANT ROSE'S MOTION TO PRECLUDE PLAINTIFF'S USE OF A PSEUDONYM AT TRIAL AND DENYING DEFENDANTS HAMPTON AND ALLEN'S MOTION TO STRIKE AS MOOT [192] [249]

The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

***1** Before the Court is Defendant Rose's Motion to Preclude Plaintiff's Use of a Pseudonym at Trial (the "Motion") (Docket No. 192), filed on August 22, 2016. Plaintiff submitted her Opposition (Docket No. 196) on August 29, 2016, and Defendant Rose submitted his Reply (Docket No. 220) on September 2, 2016. On September 15, 2016, Defendants Allen and Hampton filed a Motion to Strike Scandalous and False Allegations from Plaintiff's Opposition to Motion to Use Plaintiff's Name at Trial; and for Attorneys Fees and Costs (Docket No. 249) (the "Motion to Strike"). The Court reviewed and considered the papers on the Motions, and held a hearing on **September 20, 2016**.

Defendant Rose's Motion is **GRANTED.** Plaintiff's use of a pseudonym at trial would unduly prejudice Defendant Rose. Further, the public's interest in disclosure is increased at trial. Finally, because Defendant Rose's motion is granted, Defendants Hampton and Allen's motion to strike is **DENIED as moot.**

I. BACKGROUND

In September 2015, Plaintiff Jane Doe filed a complaint in California Superior Court alleging that Defendants Derrick Rose, Randall Hampton, and Ryan Allen engaged in sexual intercourse with her without her consent, giving rise to various claims under California law, including sexual battery. (Docket No. 1 ¶ 1). The parties and the Court have referenced this alleged act as a "rape", although that term is used in California law for a particular crime. Plaintiff alleges that, as a result of the sexual battery, she has suffered severe emotional distress, humiliation, embarrassment, and anxiety. (Id. ¶ 59). On June 17, 2016, the Court denied Defendant Rose's motion for dismissal on account of Plaintiff's use of a pseudonym (the "June Order"). (Docket No. 99). The Court applied *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000), to decide that Plaintiff would be permitted to use a pseudonym for all pretrial filings. (June Order at 6). The Court reserved for the pretrial conference the question of whether Plaintiff would be permitted to use a pseudonym at trial. (*Id.*).

II. DISCUSSION

In deciding whether to permit a party's use of a fictitious name, the district court must weigh the need for anonymity against any "prejudice to the opposing party and the public's interest in knowing the party's identity." *Advanced Textile*, 214 F.3d at 1068. As the Court discussed in the June Order, courts generally permit alleged rape victims to use pseudonyms in pretrial

proceedings. (June Order at 2–3 (citing, e.g., *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir.1997); *Doe v. Cabrera*, 307 F.R.D. 1, 3 (D.D.C. 2014); *Doe v. Penzato*, No. CV–10–5154–MEJ, 2011 WL 1833007, at *3 (N.D. Cal. May 13, 2011))). The Court also acknowledged, however, that "Plaintiff's anonymity could significantly prejudice Defendant Rose if this action were to progress to trial" in part because "the jury may interpret the Court's permission for Plaintiff to conceal her identity as a comment on the harm Defendants allegedly caused." (June Order at 6). Therefore, the Court proceeds to reconsider whether Plaintiff should be permitted to use a pseudonym at trial under the *Advanced Textile* framework.

A. Plaintiff's Need for a Pseudonym

***2** "When a party requests 'Doe' status, the factors to be 'balance[d] ... against the general presumption that parties' identities are public information,' are: '(1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation.' " *Doe v. Ayers*, 789 F.3d 944, 945 (9th Cir. 2015) (quoting *Advanced Textile*, 214 F.3d at 1068).

In its June Order, the Court determined that "[g]iven the public nature of this action, and the fame of Defendant Rose, forcing Plaintiff to abandon her anonymity could subject her to significant harassment and humiliation from the public." (June Order at 3). This concern continues to be true. Defendant Rose is an exceedingly famous athlete, and thus media attention will presumably increase as the trial date approaches. Plaintiff can reasonably fear that losing her anonymity will subject her to close scrutiny by media and the public. As an alleged rape victim, Plaintiff may be particularly vulnerable to such scrutiny. *See Doe v. Blue Cross*, 112 F.3d at 872.

Defendant Rose's argument that Plaintiff "is not a minor who is a true victim of rape or assault" (Mot. at 10) is as unpersuasive as it is distasteful. Whether Plaintiff is truly a victim of rape is for the jury to decide, not this Court. Moreover, Plaintiff's age has little to do with whether she was truly raped, or whether she would be harmed by the harassment and publicity that is likely to result from increased public scrutiny. It is Plaintiff's status as an alleged rape victim, and Defendant's wealth and notoriety, that makes her particularly vulnerable to harassment. Accordingly, this factor weighs in favor of allowing Plaintiff to continue to proceed anonymously at trial.

Finally, the Court notes that it is extremely displeased by Defendant Rose's renewed implication that evidence Plaintiff was "sexually adventurous with [Defendant] Rose" and drank alcohol with Defendant Rose on the night in question in any way affects whether Plaintiff consented to group sex with Defendants Rose, Allen, and Hampton later that night. (*See* Mot. at 3). The Court previously made clear to Defendant Rose that such rhetoric is unworthy of this Court. (June Order at 4). That the Court now grants Defendant Rose's motion to preclude Plaintiff's use of a pseudonym at trial is in no way an invitation to continue his attempts to prejudice Plaintiff in this way. If Defendant Rose continues to utilize language that shames and blames the victims of rape either in his motion practice or before the jury, the Court will consider sanctions.

B. Prejudice to Defendant Rose

The Court previously held that Defendant Rose was unlikely to be prejudiced by Plaintiff's use of a pseudonym in pretrial proceedings because he would be permitted to use Plaintiff's name in discovery and would not be prevented from publicly telling his side of the story. Defendant Rose now argues that the likelihood of prejudice will greatly increase if Plaintiff is permitted to use a pseudonym at trial. (Opp. at 10–11); *see also Advanced Textile*, 214 F.3d at 1072 (cautioning that courts must evaluate the precise prejudice plaintiffs' pseudonymity would cause defendants at each stage of the litigation); *John Doe 140 v. Archdiocese of Portland in Oregon*, 249 F.R.D. 358, 361 (D. Or. 2008) (holding that "defendants should retain the right to refile their request later in this action, as [Plaintiff's] claims approach trial.").

***3** The weight of authority on this issue supports Defendant Rose's position. Many courts have expressed the concern that allowing a plaintiff to proceed under a pseudonym at trial would communicate "a subliminal comment on the harm the alleged encounter with the defendant has caused the plaintiff." *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014) (citing *E.E.O.C. v. Spoa, LLC*, No. CIV. CCB–13–1615, 2013 WL 5634337, at *3 (D. Md. Oct. 15, 2013), for the proposition that "the court's limited grant of anonymity would implicitly influence the jury should this case advance to trial"); *see also Doe No. 2 v. Kolko*, 242 F.R.D. 193, 198 (E.D.N.Y. 2006) (holding that the leave to proceed pseudonymously "only appl[ies] to the discovery period and may be reconsidered if this case goes to trial"). The effect of this "subliminal" suggestion—indeed, it is perhaps more accurately characterized as an overt suggestion, repeated each time

Plaintiff is referred to as "Jane Doe"—is likely to be strong enough that a limiting instruction would not sufficiently eliminate the resulting prejudice to Defendant Rose. *See Cabrera*, 307 F.R.D. at n.15.

At the hearing, Plaintiff renewed her contention that any prejudice to Defendant could be resolved by revealing Plaintiff's name only to the jury and otherwise restricting the media's ability to publish her name and image. (*See* Opp. at 7). Closing the courtroom would likewise send the same prejudicial message to the jury that would be sent by use of the pseudonym. And closing the courtroom is the only practical way of revealing Plaintiff's name to the jury alone. Closing the trial would raise First Amendment concerns that have not adequately been briefed. The Court is not willing to violate the First Amendment, or even skirt its edges.

C. The Public's Interest in Disclosure

Previously, the Court found that the public has a strong interest "in encouraging victims of sexual assault to bring claims against their assailants." (June Order at 5) (citing *Advanced Textile*, 214 F.3d at 1073 (9th Cir. 2000); *Kolko*, 242 F.R.D. at 195 (E.D.N.Y. 2006) ("The public generally has a strong interest in protecting the identities of sexual assault victims so that other victims will not be deterred from reporting such crimes."). However, as trial approaches, the public's interest in disclosure also increases. *See, e.g.*, *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("It is ... well-established that the right of access to public ... proceedings is 'necessary to the enjoyment' of the right to free speech." (quoting *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982))); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599 (1980) ("[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." (Stewart, J., concurring)). Therefore, while not discounting the public's strong interest in encouraging victims of sexual assault to pursue their rights in court, the Court finds that, for purposes of the trial itself, the balance of the public interest has shifted to favor public access and disclosure.

In sum, although Plaintiff's need for a pseudonym has not vanished, the prejudice to Defendant Rose and the public's interest in disclosure together weigh against allowing Plaintiff to proceed under a pseudonym at trial.

D. Defendants Hampton and Allen's Motion to Strike

Defendants Hampton and Allen move to strike certain allegations made by Plaintiff's counsel in support of Plaintiff's Opposition to Defendant Rose's Motion. (Mot. to Strike at 1). Because the Court grants Defendant Rose's motion and was not influenced by the disputed material, Defendants Hampton and Allen's motion is moot. The Motion to Strike places on the docket counsel's vociferous denial of the allegations in Plaintiff's Opposition.

III. CONCLUSION

For the foregoing reasons, Defendant Rose's Motion is **GRANTED.** Plaintiff will be precluded from using a pseudonym at trial. The parties will continue to use the pseudonym until the jury panel is called. Defendants Hampton and Allen's Motion is **DENIED as moot.**

***4** IT IS SO ORDERED.

All Citations

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: February 16, 2022
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