

NO. 48526-5-II

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

STATE OF WASHINGTON, Respondent

v.

BRIAN CHRISTOPHER COZAD, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01038-9

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

- I. The trial court did not err in instructing the jury on the definition of a “fixed residence”. 1
- II. Cozad received the benefit of effective assistance of counsel. . 1
- III. The trial court properly refused to instruct the jury on the defense of necessity..... 1
- IV. The trial court properly excluded irrelevant testimony. 1

STATEMENT OF THE CASE..... 1

ARGUMENT..... 5

- I. The trial court did not err in instructing the jury on the definition of a “fixed residence”. 5
- II. Cozad received the benefit of effective assistance of counsel. . 9
- III. The trial court properly refused to instruct the jury on the defense of necessity..... 10
- IV. The trial court properly excluded irrelevant testimony. 14

CONCLUSION..... 15

TABLE OF AUTHORITIES

Cases

<i>Arbee v. Collins</i> , 219 Ga.App. 63, 463 S.E.2d 922, 925 (1995).....	7
<i>City of Bremerton v. Widell</i> , 146 Wn.2d 561, 51 P.3d 733 (2002).....	7
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997) ..	11, 14
<i>In re Pers. Restraint of Pirtle</i> , 136 Wn.2d 467, 965 P.2d 593 (1998).....	9
<i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289, <i>cert. denied</i> , 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993).....	11
<i>State v. Berube</i> , 150 Wn.2d 498, 79 P.3d 1144 (2003).....	8
<i>State v. Borrero</i> , 147 Wn.2d 353, 58 P.3d 245 (2002)	8
<i>State v. Bray</i> , 52 Wn.App. 30, 756 P.2d 1332 (1988)	6
<i>State v. Chase</i> , 134 Wn.App. 792, 142 P.3d 630 (2006)	11
<i>State v. Diana</i> , 24 Wn.App. 908, 604 P.2d 1312 (1979)	11
<i>State v. Dixon</i> , 169 Vt. 15, 725 A.2d 920, 922 (1999)	7
<i>State v. Dye</i> , 178 Wn.2d 541, 309 P.3d 1192 (2013).....	11, 14
<i>State v. Horton</i> , 116 Wn.App. 909, 68 P.3d 1145 (2003).....	9
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983)	14
<i>State v. Krikman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	6
<i>State v. Linehan</i> , 147 Wn.2d 638, 56 P.3d 542 (2002).....	6, 8
<i>State v. Madison</i> , 53 Wn.App. 754, 770 P.2d 662, <i>rev. denied</i> , 113 Wn.2d 1002 (1989).....	6
<i>State v. Peterson</i> , 168 Wn.2d 763, 230 P.3d 588 (2010).....	6, 8, 9, 12
<i>State v. R.H.</i> , 86 Wn.App. 807, 939 P.2d 217 (1997).....	7
<i>State v. Schaffel</i> , 4 Conn. Cir. Ct. 234, 229 A.2d 552, 562 (1966).....	7
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	6
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	14
<i>State v. Turner</i> , 42 Wn.App. 242, 711 P.2d 353 (1985)	11
<i>State v. Vanderpool</i> , 99 Wn.App. 709, 995 P.2d 104 (2000)	14
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	9, 10

Statutes

RCW 9A.44.130.....	3
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Other Authorities

LAWS OF 1990, ch. 3, sec. 401	12
WPIC 18.02.....	12

Rules

ER 401 14
RAP 2.5(a) 6

RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court did not err in instructing the jury on the definition of a “fixed residence”.**
- II. **Cozad received the benefit of effective assistance of counsel.**
- III. **The trial court properly refused to instruct the jury on the defense of necessity.**
- IV. **The trial court properly excluded irrelevant testimony.**

STATEMENT OF THE CASE

Brian Cozad (hereafter ‘Cozad’) was charged by information with Failure to Register as a Sex Offender while having two or more prior convictions. The charge was based on an allegation that Cozad, a sex offender required to register with the Clark County Sheriff, did report he was transient and thereafter failed to report in person on a weekly basis as required by the registration statute. RP 90-96. At trial, the State presented the testimony of Cozad’s community corrections supervisor with the Department of Corrections, a detective with the sex offender registration unit in Clark County, Washington, and an identification specialist who analyzed and matched fingerprints from Cozad’s prior convictions to a known sample. Cozad testified in his defense. The jury convicted Cozad and he was sentenced to a standard range sentence. CP 42-43, 50.

At trial, the testimony showed that Sandy Heurion is a community corrections supervisor for the Department of Corrections. RP 55. As a

community corrections supervisor, she supervised Cozad starting in November 2013. RP 55. Ms. Heurion's job duties entailed supervising a defendant regarding his court ordered conditions, like treatment, and verifying a residence. RP 55. Cozad was being supervised by DOC for a 2008 and a 2011 conviction, both for Failing to Register. RP 57-59. On November 18, 2013, Ms. Heurion met with Cozad and went over a sex offender registration requirement form. RP 60. Ms. Heurion directed Cozad to register as required, and made a note in her file that Cozad indicated he was going to register immediately after his meeting with her. RP 61.

Barry Folsom is a deputy sheriff with the Clark County Sheriff's Office, and works in the sex offender registration unit as a detective. RP 83. Detective Folsom's duties include monitoring sex offenders who are required to register in the county and investigating potential violations of the registration requirements. RP 83-84. A sex offender who is homeless is required to check in, in person, at the sheriff's office on Tuesdays every week. RP 84-85. The offender lists where they've been for the preceding seven days. RP 85. If an offender has a change in residence or change in status, such as from homeless to having a residence, or from having a residence to homeless, the offender must notify the sheriff's office within three days. RP 87.

On April 18, 2014, Cozad filled out a change of circumstance form indicating he had become homeless. RP 90, 92-93. The form instructed Cozad to check in with the sex offender office every Tuesday during business hours. RP 90. Cozad signed this document, affirming he understood the requirements of registration listed in RCW 9A.44.130. RP 90-91; Ex. 20. Cozad signed a second document which directed him to report in person to the sheriff's office the following week, on Tuesday, April 22, 2014. RP 94. Cozad did not report in person to the sheriff's office on April 22, 2014, nor did he appear there on April 29, 2014 or May 6, 2014. RP 95-96. In fact, Cozad did not appear again until September 6, 2014 when he was arrested by police. RP 95-96.

Nancy Druckenmiller is an identification specialist with the Clark County Sheriff's Office. RP 113. She is trained in fingerprint analysis and identification. RP 114. Ms. Druckenmiller compared fingerprints obtained from Cozad at the time of his arrest and booking on September 6, 2014 with fingerprints from the fingerprint cards associated with the disposition order in Cozad's 1990 Attempted Child Molestation in the First Degree and determined they were from the same person. RP 121, 124, 127; Ex. 5, 8. Ms. Druckenmiller also compared fingerprints from Cozad at the time of his arrest and booking on September 6, 2014 with fingerprints from his arrests and convictions on three other failure to register convictions and

found that the fingerprints were all from the same person. RP 132, 135, 138.

Cozad testified in his defense at trial. RP 140-166. He indicated that he lived with his now wife, her brother, and his cousin at an apartment in Vancouver. RP 142. Cozad testified that DOC was hounding his apartment manager about whether he was on the lease, so Cozad told the sheriff's office that he was homeless even though that wasn't true. RP 142-43.

Cozad testified that around the time period of April 18, 2014 he worked for Labor Works, a temp agency of sorts. RP 143. Cozad indicated he worked from 5a.m. until 7:30 or 8p.m. during the time period, first indicating he started work on April 25, 2014, then amending it to April 21, 2014 after being shown an exhibit indicating he had not reported as required on April 22, 2014. RP 144-46. Cozad testified that he called the sex offender registration unit of the sheriff's office on Tuesdays, even though he was aware of the requirement that he report in person. RP 147.

Cozad admitted he was convicted of Attempted Child Molest in the First Degree, and three counts of failing to register as a sex offender. RP 160-61. Cozad was aware of his duty to register as a sex offender. RP 161. Cozad admitted to registering as transient on April 18, 2014, however

indicated this was inaccurate as he still lived with his girlfriend/wife in an apartment. RP 163.

Cozad requested the trial court instruct the jury on the defense of necessity, arguing that he had a necessity to maintain employment and that it was better for the community that he would be in a residence as opposed to homeless. RP 167-68. The trial court denied Cozad's request finding there was inadequate evidence to instruct the jury on necessity. RP 169.

The case was submitted to the jury who returned a unanimous verdict finding Cozad guilty of Failure to Register and finding that he had at least two prior convictions for the same. CP 42-43. Cozad timely filed his notice of appeal. CP 64.

ARGUMENT

I. The trial court did not err in instructing the jury on the definition of a "fixed residence".

Cozad argues that the trial court erred in giving instruction 13, specifying the duties of registering as a sex offender by including the duty of a person who has "fixed residence." Cozad argues this was error because it allowed the jury to convict him of the crime of failure to register as a sex offender based on an impossibility. In reality, Cozad's argument appears to be that the trial court improperly instructed the jury on an alternative means that is not supported by the evidence. However,

failure to register is not an alternative means crime, and there was sufficient evidence that Cozad violated every duty specified to the jury. Cozad's argument fails.

Initially, Cozad did not object to the jury instruction to which he now assigns error. Cozad failed to take exception to the instruction at trial when any error could have been corrected. *State v. Krikman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (citing *State v. Madison*, 53 Wn.App. 754, 762-63, 770 P.2d 662, *rev. denied*, 113 Wn.2d 1002 (1989)). This Court should not review a claim of error that was not raised at the trial court unless it the error was a manifest error of constitutional magnitude. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 686-88, 757 P.2d 492 (1988). Though a trial court may not instruct the jury on an uncharged alternative means of committing a crime, it is well established that failure to register is not an alternative means crime. *State v. Bray*, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988); *State v. Peterson*, 168 Wn.2d 763, 771, 230 P.3d 588 (2010). "Definition statutes do not create additional alternative means of committing an offense." *State v. Linehan*, 147 Wn.2d 638, 646, 56 P.3d 542 (2002). Further, an offender's residential status is not an element of the crime of failure to register. *Peterson*, 168 Wn.2d at 772. Thus, the trial court did not improperly instruct on alternative means that were not supported by the record; there is one means of committing failure to

register. Any error in instructing the jury was not of constitutional magnitude and Cozad cannot raise it for the first time on appeal.

If the Court finds it should consider the merits of Cozad's instructional error allegation, this Court should find that Cozad's argument that he did not, by his own testimony, have a "fixed residence" is without any merit. Specifically Cozad argues that he could not "lawfully" reside at the apartment, and thus he could not have a "fixed residence." However, Cozad could "lawfully" be at that residence. Under Cozad's argument, he was a trespasser to the apartment and thus was not a "lawful" resident. However, permission of someone empowered to grant another access to a residence negates any unlawfulness to their presence. *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002) (citing *State v. R.H.*, 86 Wn.App. 807, 812, 939 P.2d 217 (1997)). A landlord may not prevent an invitee of a tenant from entering the tenant's premises, and even after a landlord specifically prohibits a person from entering, said invitee does not enter unlawfully such that said entry would support a criminal trespass conviction. *Widell*, 146 Wn.2d at 571 (citing *State v. Dixon*, 169 Vt. 15, 725 A.2d 920, 922 (1999), *State v. Schaffel*, 4 Conn. Cir. Ct. 234, 229 A.2d 552, 562 (1966), and *Arbee v. Collins*, 219 Ga.App. 63, 463 S.E.2d 922, 925 (1995)). While Cozad's entry or residence at the apartment of his now-wife may have been against the landlord's or manager's wishes, it is

clearly not “unlawful” as Cozad could face no legal ramifications for staying at the apartment with the permission of the residents. While it may have become a basis for the landlord to attempt to evict Cozad’s wife/girlfriend, it was not “unlawful.” Thus Cozad’s argument that the “fixed residence” requirements were inapplicable to him because of the unlawfulness of his remaining at the apartment is without merit.

Even if this Court finds Cozad’s presence at the apartment was “unlawful” and thus he did not have a “fixed residence,” any error in the trial court instructing the jury on the requirements of someone with a “fixed residence” was harmless. An instructional error is harmless when the record supports a finding that the jury verdict would be the same absent the error. *State v. Berube*, 150 Wn.2d 498, 506, 79 P.3d 1144 (2003) (citing *State v. Borrero*, 147 Wn.2d 353, 365, 58 P.3d 245 (2002)). Here, the evidence that Cozad failed to register was overwhelming, whether it was by failing to report in person as directed every week, or lying on his registration form, or maintaining a fixed residence that he hid from the sheriff’s office.

Importantly, failure to register is not an alternative means crime. *State v. Peterson*, 168 Wn.2d 763, 771, 230 P.3d 588 (2010). “Definition statutes do not create additional alternative means of committing an offense.” *State v. Linehan*, 147 Wn.2d 638, 646, 56 P.3d 542 (2002).

Further, an offender's residential status is not an element of the crime of failure to register. *Peterson*, 168 Wn.2d at 772. The different duties of an offender upon registering are not alternative means or additional elements of the crime, rather they simply identify which notification requirements Cozad is alleged to have violated.

II. Cozad received the benefit of effective assistance of counsel.

Attempting an end-around the requirement that he must timely object to a jury instruction and give the trial court a chance to correct any error, Cozad argues that his trial counsel's performance was ineffective for failing to object to the trial court's instruction on the requirements of an offender when registering. Cozad cannot show his counsel's performance was ineffective or that he was prejudiced thereby. Cozad's claim fails.

Trial counsel's representation of a defendant is presumed effective. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). An appellant can overcome this presumption by showing counsel's performance was deficient and that he was prejudiced by this deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney's performance is deficient if it falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn.App. 909, 912, 68 P.3d 1145 (2003). To prevail, Cozad must show that his attorney's

deficient performance was so inadequate that if not for this failure to object to the jury instruction the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694.

Cozad's counsel was not ineffective. The jury instructions did not improperly allow the jury to consider an uncharged or unsupported alternative means of committing failure to register. In fact, Cozad's testimony itself formed the evidentiary basis for the now complained-of instruction. No objection to this instruction was appropriate and counsel need not make frivolous objections in order to be effective. Counsel's performance was not ineffective and Cozad cannot show that the result of the trial would have been different had his attorney objected to the jury instruction. Cozad's claim of ineffective assistance of counsel should be rejected.

III. The trial court properly refused to instruct the jury on the defense of necessity.

Cozad argues the trial court erred in failing to instruct the jury on the defense of necessity. Cozad did not have an available defense of necessity and therefore the trial court properly declined his requested instruction. The trial court should be affirmed.

Both the State and a defendant are entitled to jury instructions that embody its theory of the case if the evidence supports that theory. *State v.*

Benn, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993). On appeal, this Court reviews a trial court's decision whether to give a particular instruction for abuse of discretion. *State v. Chase*, 134 Wn.App. 792, 803, 142 P.3d 630 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon unreasonable or untenable grounds. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)).

The defense of necessity is only available to a defendant

when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law. The defense is not applicable where the compelling circumstances have been brought about by the accused or where a legal alternative is available to the accused.

State v. Diana, 24 Wn.App. 908, 913-14, 604 P.2d 1312 (1979). The “pressure” must come from the physical forces of nature, and not from other human beings, in order for a defendant to argue necessity. *State v. Turner*, 42 Wn.App. 242, 247, 711 P.2d 353 (1985). No “physical forces of nature” caused Cozad to fail to register, and no “pressure of circumstances” caused Cozad to fail to register. Cozad did not support his request for a necessity defense instruction with sufficient evidence.

WPIC 18.02 sets forth the instruction Cozad requested on the defense of necessity. It specifically states that the defendant has to show by a preponderance of the evidence that 1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm, that the harm sought to be avoided was greater than the harm resulting from a violation of the law, that the threatened harm was not brought about by the defendant, and no reasonable legal alternative existed. WPIC 18.02. Cozad's testimony at trial simply did not fulfill the elements of a necessity defense. Cozad did not testify that he believed committing the crime of failure to register was necessary to avoid or minimize a harm. He did not show that he did not bring the potential harm about; he did not show no alternative existed; and he did not show that the harm avoided by maintaining employment was greater than the harm resulting from failing to register. The trial court properly found that a necessity defense instruction was improper here.

The purpose of the sex offender registration statute is to aid law enforcement in keeping communities safe by requiring offenders to divulge their presence in a particular jurisdiction. *Peterson*, 168 Wn.2d at 773-74 (citing to LAWS OF 1990, ch. 3, sec. 401). The potential harm to society in having a sex offender in an unknown location and failing to check in is great. Further, this potential harm involves society as a whole,

whereas the potential harm of Cozad not working, or missing some hours at work in order to check in in person only involves a single individual. Cozad also could not show that he did not bring the potential harm about. He is the one who committed multiple sex offenses and brought about his requirement to register as a sex offender. He is the one who told the registration office he was transient, thus requiring the weekly check-ins, never reporting that he had started living with his wife/girlfriend again and thus had a “fixed residence” at which point he would not have been required to check in weekly. Finally, Cozad cannot show that no legal alternative was available. It was legal for him to ask for time off for work, come in late to work, leave early for work, or report in on a lunch break. The hours Cozad reports working clearly violate a laborer (thus hourly) worker’s rights under the Fair Labor Standards Act unless he received lunch breaks and other breaks during his 13 hour days, seven days a week. That Cozad had no ability within the framework of his job to check in stretches credulity, but more importantly, even if true it does not provide a basis for a necessity defense. No physical forces of nature were involved; the harm to society was greater than the potential harm to him; a legal alternative existed; and he brought about the situation. The trial court did not abuse its discretion and properly denied Cozad’s request for a necessity defense jury instruction. The trial court should be affirmed.

IV. The trial court properly excluded irrelevant testimony.

Cozad argues the trial court erred in excluding evidence that he called the sheriff's office when he did not check in in person and left a voicemail indicating the information he would have given had he reported in person. The trial court properly excluded this evidence as irrelevant.

A trial court has broad discretion in determining the admissibility of evidence. *Dye*, 178 Wn.2d at 548 (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). A trial court only abuses its discretion if its decision is manifestly unreasonable or based upon unreasonable or untenable grounds. *Id.* (citing *Littlefield*, 133 Wn.2d at 46-47). The evidence Cozad sought to admit was clearly irrelevant. “[A] criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.” *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Relevant evidence is admissible pursuant to ER 403, however irrelevant evidence is not. Evidence is relevant only if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence. ER 401. Whether Cozad called the sheriff's office after he failed to report in person as required is not a fact of consequence in the case. Cozad was attempting to show substantial compliance with the failure to register statute, which is not a defense. *State v. Vanderpool*, 99 Wn.App. 709, 711, 995 P.2d 104 (2000). The fact that Cozad called a

couple times to report instead of reporting in person for over a month when he was required to do so every week is irrelevant. The failure to register statute does not allow for an offender to call in instead of appear in person. Whether Cozad called or not was of no relevance to whether he appeared in person knowing that he had to report in person. Cozad's only purpose in attempting to admit this evidence was to set up an argument for substantial compliance or jury nullification, neither of which is permissible. The trial court properly excluded this evidence and should be affirmed.

CONCLUSION

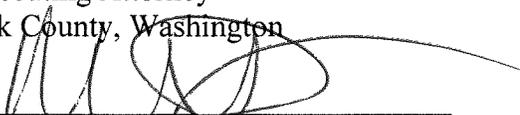
The trial court properly instructed the jury on failing to register, and the trial court properly excluded irrelevant evidence and improper jury instructions. Cozad's claims should be denied and the trial court should be affirmed in all respects.

DATED this 26th day of August, 2016.

Respectfully submitted:

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