

FILED  
Court of Appeals  
Division II  
State of Washington  
9/21/2020 3:31 PM  
NO. 54136-0-II

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

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STATE OF WASHINGTON, Respondent

v.

KEVIN DALE CARSON, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-02757-8

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. Instruction no. 16 was a proper statement of law and did not relieve the State of its burden of proof.**
- II. The trial court did not abuse its discretion in denying Carson's request for public funds to obtain a SSOSA evaluation.**
- III. The trial court did not abuse its discretion in denying Carson's request for new counsel for sentencing where there was no breakdown in communication.**
- IV. The trial court entered written findings justifying the exceptional sentence based on the jury found aggravator of abuse of trust.**

## STATEMENT OF THE CASE

The State substantially agrees with the statement of facts laid out by Carson as it relates to the factual history of the case. The State sets forth these additional facts that pertain directly to the issues on appeal.

At trial A.M.B. testified that during the abuse Carson put oil on her vagina that came from a container "kind of like a bottle, but it was a different shape." RP 414. Investigators testified that A.M.B told them that Carson used something that vibrated on her and put oil on her vagina. A.M.B. also told these witnesses that Carson showed her a video of "teenagers" having sex. RP 423-25. In Court A.M.B. testified that Carson showed her videos of "other people touching privates" on his phone. At trial she was

unsure of the people's ages. RP 424-25. There were no witnesses to the abuse and no forensic evidence was found.

Prior to closing the State requested jury instruction no.16, which stated, "[i]n order to convict a person of the crime of child molestation in the first degree or rape of a child in the first degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated." CP 62. Carson objected based on the trial court's previous finding during the child hearsay hearing that there was corroboration of the allegations. RP 752. The State argued that a finding of corroboration in a child hearsay hearing is not the same as direct corroboration of the allegations in the form of an eyewitness or DNA evidence. RP 754-55. The judge agreed with the State, pointing out that the standard is different in a child hearsay hearing than in a jury trial and that his finding in the child hearsay context is not binding on the jury. RP 755.

In closing argument defense counsel argued that the vibrator, essential oils, and evidence from Carson's phone were not corroboration. He claimed that the vibrator and essential oil bottles were a different shape than A.M.B. described to investigators and argued that the pornography on Carson's phone was also not consistent with what she described. RP 853-56. He also argued multiple times that lack of corroboration was reasonable doubt and that one person's testimony should not be enough to

find someone guilty. RP 842, 862, 865. He pointed multiple times to there being “no forensic evidence....no physical evidence....no corroborating evidence from the search warrant” and argued at the end of his closing that, among other things, “the absence of any corroborative proof” was reasonable doubt. RP 849, 864-65. The jury convicted Carson as charged and found that he had abused his position of trust when he had committed these offenses. CP 81-83.

Carson filed a letter on September 19, 2019 seeking to discharge trial counsel, Mr. Baldwin. CP 47, RP 879. The motion was granted, and Mr. Sowder was appointed to handle sentencing. CP 88, RP 880. Carson, through Sowder, filed a motion to discharge Sowder on October 15, 2019. CP 89-90. In his motion Carson asserted that Sowder was “too busy to properly represent him and ...did not speak with Defendant's wife for a sufficiently long period of time while in court.” CP 90. The motion also referenced a two-week homicide trial coming up that would take precedence over Carson’s case, however by the time the motion for new counsel was heard that trial had been moved. CP 90, RP 893. Carson’s wife handed forward a letter at the hearing on October 19, 2019 which alleged that Sowder was not going to be able to give the case sufficient time and that they felt that they were not getting adequate representation because they could not afford private counsel. CP 278-80. After reading

the letter the trial court asked Carson if he would like to say anything. Carson said no. RP 890. The motion was denied. RP 894. Carson did not renew his motion to substitute counsel in the interim or during sentencing. RP 896- 967.

Sowder filed multiple motions on Carson's behalf for sentencing including a Motion for Special Sex Offender Sentencing Alternative Evaluation, Motion and Memorandum in Support of SSOSA, and Motion for a New Trial or in the Alternative Arrest of Judgement. CP 94-96, CP 117-35, CP 97 – 106. The Court considered the Motion for Special Sex Offender Sentencing Alternative Evaluation on December 18, 2019. RP 906-33. The trial judge denied the request, finding that it did not make sense to expend resources where he did not believe that it would change his mind on a Special Sex Offender Sentencing Alternative (hereinafter "SSOSA") sentence. RP 932-33. He referenced that he felt SSOSA would be too lenient in light of the facts, that the defendant had denied the abuse under oath, and that the victim was strongly opposed to SSOSA as reasons why he did not believe that the expenditure of resources was necessary. RP 932-34.

At sentencing the trial court gave Carson an exceptional sentence based on the jury found aggravator that he abused a position of trust in committing the offenses. RP 958-60. The judge entered written findings

stating that “The Court finds, based upon the jury special verdict, that the defendant abused a position of trust or authority under RCW 9.94A.535(3)(n). The court finds substantial and compelling reasons to justify an exceptional sentence upward on Counts 1 and II.” CP 262.

## ARGUMENT

### **I. Instruction no. 16 was a proper statement of law and did not relieve the State of its burden of proof.**

Carson claims that jury instruction 16 was an improper comment on the evidence. This Court reviews a challenged jury instruction *de novo*. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). A trial court’s instructions to the jury “shall declare the law.” *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015) (quoting CONST. art. IV, sec. 16). A judge may not comment on the evidence presented at trial and shall not do so through the jury instructions. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). A comment on the evidence is improper when it conveys the judge’s attitude on the merits of the case or permits the jury to infer whether the judge believed or disbelieved certain witnesses’ testimony. *Id.* This “prevent[s] the jury from being unduly influenced by the court’s opinion regarding the credibility, weight, or sufficiency of the evidence.” *State v. Sivins*, 138 Wn.App. 52, 58, 155 P.3d 982 (2007). A jury instruction that does no more than accurately state the law pertaining

to an issue, however, does not constitute an impermissible comment on the evidence by the trial judge. *State v. Woods*, 143 Wash.2d 561, 591, 23 P.3d 1046 (2001). The trial court in Carson's case did not err because the jury instruction was an accurate reflection of the law.

Jury instruction no. 16 read:

In order to convict a person of the crime of child molestation in the first degree or rape of a child in the first degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated.

CP 73. This directly mimics the language of RCW 9A.44.020(1) which states:

In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

RCW 9A.44.020(1). First degree child molestation and first degree rape of a child are both defined in chapter 9A.44 and clearly fall under the scope of RCW 9A.44.020(1). RCW 9A.44.083, RCW 9A.44.073.

Courts have upheld sex offense victim noncorroboration instructions like the one given in this case as correct statements of the law under RCW 9A.44.020(1). *See State v. Chenoweth*, 188 Wn.App. 521, 535–37, 354 P.3d 13, 20–22 (2015); *State v. Zimmerman*, 130 Wn.App. 170, 174–75, 180–83, 121 P.3d 1216, 1218, 1221–23 (2005); *State v. Malone*, 20 Wn.App. 712, 714–15, 582 P.2d 883, 884–85 (1978). In

*Chenoweth, Zimmerman, and Malone*, instructions containing the language from RCW 9A.44.020(1) were held to accurately state the law and were affirmed.

The cases cited by appellant as examples of judicial comments on the evidence are not analogous to this case. *In re Det. Of R.W., Faucett, Thompson, and Mellis* all involve judges making credibility determinations for the jury and none involve instructions that accurately stated the law as instruction no. 16 did here. Telling the jury to give “great weight” to certain witnesses, to be slow to disbelieve State’s witnesses or undermining the defense theory all tell the jury how to interpret the evidence at trial. Instruction no. 16 on the other hand accurately stated the law in Washington that corroboration is not required in a sexual assault case, and did no more. *In re Det. Of R. W.*, 98 Wn.App. 140, 144, 988 P.2d 1034 (1999), *State v. Thompson*, 132 Wn.124, 125-26, 231 P. 461 (1924), *State v. Faucett*, 22 Wn.App. 869, 875, 593 P.2d 559 (1979); *State v. Mellis*, 2 Wn.App. 859, 470 P.2d 558 (1970).

Carson claims that “given the common law history and much different attitudes about sexual assault, no modern jury would be under the misapprehension that the State is required by law to corroborate the statements of the victim.” This assertion is not supported by case law or by

arguments from trial counsel in this case. As the Court explained in *Chenoweth* in 2015,

[T]here is a historical basis for instructing the jury regarding corroboration for sex crimes, including incest. As case law recognizes, corroboration of the complaining witness in a rape case was previously required by statute. After that statute was abolished, courts held that corroboration is not required in incest cases or other sex offenses, recognizing that “[s]uch offenses are rarely[,] if ever[,] committed under circumstances permitting knowledge and observation by persons other than the accused and the complaining witness, and not all such offenses are otherwise capable of corroboration.”

The general nature of sex offenses has not changed; they are still rarely committed in front of witnesses and often do not leave physical evidence. The idea that juries instinctively know that the law does not require corroboration is not borne out in our society or in Carson’s trial lawyer’s arguments in this case.

In closing, the defense attorney argued multiple times that lack of corroboration was reasonable doubt. He argued that one person’s testimony should not be enough to find someone guilty. RP 842, 862, 865. He pointed multiple times to there being “no forensic evidence....no physical evidence....no corroborating evidence from the search warrant” and argued at the end of his closing that, among other things, “the absence of any corroborative proof” was reasonable doubt. RP 849, 864-65.

Instruction no. 16 did not tell the jurors what weight to give the victim's testimony, or that they should not consider any lack of evidence. Instead, it accurately stated the law that corroboration is not required under the law in this state. Thus, it was not a comment on the evidence and Carson's claim fails.

**II. The trial court did not abuse its discretion in denying Carson's request for public funds to obtain a SSOSA evaluation.**

The Special Sex Offender Sentencing Alternative is governed by RCW 9.94A.670, which lists the criteria that a defendant must meet to be considered for the sentencing alternative. If a defendant meets the criteria listed in that statute, a judge may order an examination to determine whether the offender is amenable to treatment. RCW 9.94A.670(3). RCW 9.94A.670(3) states:

If the court finds the offender is eligible for this alternative, the court, on its own motion or the motion of the state or the offender, *may* order an examination to determine whether the offender is amenable to treatment.

RCW 9.94A.670(3) (*emphasis added*). The word "may" is permissive and merely expresses the possibility that a judge may order an evaluation for SSOSA if an individual meets the criteria. The decision to order a SSOSA evaluation is discretionary with the trial court. *State v. Young*, 125 Wash.2d 688, 695–96, 888 P.2d 142 (1995).

Decisions that are within the discretion of the trial court are reviewed for abuse of discretion. *State v. Miller*, 159 Wn.App. 911, 918, 247 P.3d 457, *review denied*, 172 Wn.2d 1010 (2011). The court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). An abuse of discretion exists only when “no reasonable judge would have reached the same conclusion.” *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (citation omitted).

The trial court’s denial of expert funds for a SSOSA evaluation was not an abuse of discretion. Authorization of expert services for an indigent defendant is governed by Washington CrR 3.1. CrR 3.1(a), (d), (f); see also *State v. Mines*, 35 Wash.App. 932, 935, 671 P.2d 273 (1983), *review denied*, 101 Wash.2d 1010 (1984). The rule provides, in part, that:

- (1) Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court.
- (2) Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court ... shall authorize counsel to obtain the services on behalf of the defendant.

CrR 3.1(f). Whether expert services are necessary for an indigent defendant's adequate defense lies within the sound discretion of the trial court and shall not be overturned absent a clear showing of substantial

prejudice. *Young*, 125 Wash.2d at 691 (citing *Mines*, 35 Wash.App. at 935, 671 P.2d 273).

The general rule is that CrR 3.1(f) does not mandate appointment of an expert at public expense unless such services are necessary to an adequate defense. *Id.* (citing *State v. Melos*, 42 Wash.App. 638, 713 P.2d 138, review denied, 105 Wash.2d 1021 (1986)). Whether a SSOSA evaluation is “necessary to an adequate defense” was addressed by Division One of the Court of Appeals in *State v. Hermanson*, 65 Wash.App. 450, 829 P.2d 193 (1992). In *Hermanson*, two different defendants appealed denial of public funds for SSOSA evaluations. One was not statutorily eligible but the state had offered to reduce the charges to make him eligible. The other was already eligible for SSOSA. In finding an abuse of discretion for the first defendant and not for the second, the Court distinguished between the reduction in liability that the first defendant faced if he received a favorable evaluation. Because the state offered to reduce charges, the first defendant would face reduced liability and therefore the services were deemed ‘necessary’. The second defendant, Heath, did not face the possibility of such reduction of liability, and the Court therefore found that the requested evaluation was not ‘necessary’ for his defense and the denial of funds was not an abuse of discretion. The Court found:

Because Heath is already eligible for SSOSA, he is seeking the sexual deviancy evaluation solely for sentencing purposes. The evaluation cannot possibly diminish the scope of Heath's criminal liability.

*Id.* at 455.

Carson is situated similarly to the second defendant because he was not facing reduced liability based on the evaluation. The second defendant in *Hermanson* was in fact in a more favorable position than Carson because in his case the state had agreed to recommend SSOSA. Here, the State opposed sentencing Carson to SSOSA and the trial court made findings that it would not be imposing SSOSA due to the defendant's denial on the stand, concern that the SSOSA would be too lenient given the facts, and the victim's wishes. The SSOSA evaluation was not necessary to an adequate defense and the trial court did not abuse its discretion in denying the request. For those reasons, Carson's claim fails.

**III. The trial court did not abuse its discretion in denying Carson's request for new counsel for sentencing where there was no breakdown in communication.**

Appellate courts review a trial court's decision not to appoint new counsel under the abuse of discretion standard. *In re Stenson*, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). An abuse of discretion occurs when "no reasonable person would adopt the trial court's view." *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) (citations omitted).

Preliminarily, “[m]ultiple requests to dismiss assigned counsel, without more, does not justify substitution of new counsel.” *State v. Schaller*, 143 Wn.App. 258, 260, 177 P.3d 1139 (2007). Nor may a defendant “rely on a general loss of confidence or trust alone to justify appointment of a substitute new counsel.” *Id.* at 268. Similarly, a defendant’s desire to have a “particular advocate” cannot, by itself, form the basis for the substitution of counsel. *Id.* at 267. And more specifically, “indigent defendants with appointed counsel do not have the right to their counsel of choice.” *State v. Hampton*, 184 Wn.2d 656, 662-63, 361 P.3d 734 (2015) (citing *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)).

Instead, “[t]o warrant substitution of counsel the defendant must show “‘good cause,’ such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication,” significant enough “as to prevent presentation of an adequate defense.” *State v. Davis*, 3 Wn.App.2d 763, 790, 418 P.3d 199 (2018) (citations and internal quotations omitted). The test for determining whether a trial court erred in denying a motion for substitution of counsel based on an alleged irreconcilable conflict has three factors that look to “(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.” *Stenson*, 142 Wn.2d at 723-24.

A. EXTENT OF THE CONFLICT

Inquiring into the alleged conflict requires an examination of “both the extent and nature of the breakdown in communication between attorney and client and the breakdown’s *effect on the representation the client actually receives*.” *Id.* at 724 (emphasis added). If the representation “is adequate, prejudice must be shown.” *Schaller*, 143 Wn.App. at 270. Moreover, because the “purpose of providing assistance of counsel is to ensure that criminal defendants receive a fair trial, the appropriate inquiry focuses on the adversarial process, not on the accused’s relationship with his lawyer as such.” *Stenson*, 142 Wn.2d at 725 (citing *Wheat v. U.S.*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)). Furthermore, whether a defendant renews his or her motion to substitute counsel during the trial can be utilized in determining the extent of the conflict or the severity of the breakdown in communication between counsel and the defendant. *Id.* at 731.

Here, Carson filed a letter on September 19, 2019 seeking to discharge trial counsel, Mr. Baldwin. CP 47, RP 879. Mr. Sowder was then appointed to handle sentencing. CP 88, RP 880. Carson then filed a motion to discharge Sowder on October 15, 2019. CP 89-90. In his motion Carson asserted that Sowder was “too busy to properly represent him and ...did not speak with Defendant's wife for a sufficiently long period of time

while in court.” CP 90. A letter from Carson’s wife was given to the Court which alleged that Sowder was not going to be able to give the case sufficient time. CP 278-80. Sowder also indicated that he had a two-week homicide trial coming up that would take precedence over Carson’s case, however by the time the motion for new counsel was heard that trial had been moved. CP 90, RP 893. There was no claim of an actual breakdown in communication. Instead, Carson and his wife had concerns about the amount of time that Sowder would dedicate to the case and if he would prioritize it given that he was not retained. CP 278-80. The issue of possible delay due to Sowder’s homicide trial was resolved by the time the motion was heard. RP 893. The motion was denied. RP 894. Carson’s sentencing went forward on December 18, 2019 and he did not renew his motion to substitute counsel in the interim or during sentencing. RP 896-967. Sowder filed multiple motions on Carson’s behalf for sentencing including a Motion for Special Sex Offender Sentencing Alternative Evaluation, Motion and Memorandum in Support of SSOSA, and Motion for a New Trial or in the Alternative Arrest of Judgement. CP 94-96, CP 117-35, CP 97 -106.

Carson’s decision not to renew his motion is evidence that the extent of the conflict between he and Sowder, if there indeed was a conflict, was not substantial. *Stenson*, 142 Wn.2d at 731. And no evidence

exists to suggest that the conflict between Carson and his attorney, even assuming one still existed by sentencing, had a negative “effect on the representation the client actually receive[d]”. *Id.* at 724.

B. ADEQUACY OF THE TRIAL COURT’S INQUIRY

When a defendant files a motion to substitute counsel, the trial court has an “obligation to inquire thoroughly into the factual basis of the defendant’s dissatisfaction.” *State v. Thompson*, 169 Wn.App. 436, 462, 290 P.3d 996 (2012) (citation and internal quotation omitted). The purpose of the inquiry is to provide the trial court with a “sufficient basis for reaching an informed decision.” *Id.* (citation and internal quotation omitted). Accordingly, a trial court’s inquiry is adequate when it allows “the defendant and counsel to express their concerns fully.” *Schaller*, 143 Wn.App. at 271. In fact, a formal inquiry is not even necessary “where the defendant otherwise states his reasons for dissatisfaction on the record.” *Id.* at 271-72 (citation omitted).

Here the trial court, in response to Carson’s motion to substitute counsel, allowed Carson the opportunity to express his concerns regarding his appointed attorney and the purported communication issues. RP 890. Carson did not take that opportunity, relying instead on the three-page letter that his wife wrote and the filed motion. RP 890. Though he declined to take it, he was given the opportunity to express his

dissatisfaction. That Carson was not loquacious when given the chance to address the court is irrelevant in determining whether the trial court inquired thoroughly enough to make an informed decision on his request. *Thompson*, 169 Wn.App. at 462.

The trial court's inquiry was sufficient because in addition to reviewing Carson's written pleadings prior to the hearing, reviewing the letter from Carson's wife, and giving Carson the opportunity to address the Court, the trial court also got input from Sowder on the issues Carson raised before denying his motions. RP 892-93. Nothing more is required by the law.

C. TIMELINESS OF THE MOTION

Where a motion for substitution of counsel "comes during the trial, or on the eve of trial" a trial court may reject the motion as untimely. *Stenson*, 142 Wn.2d at 731-32. On the other hand, that granting a motion for substitution of counsel would result in the continuance of a trial date does not necessarily mean that the motion is untimely. *U.S. v. Moore*, 159 F.3d 1154, 1161 (9th Cir. 1998).

Here, we do not contend that Carson's motion was untimely because it occurred on the scheduled sentencing date. While the substitution of counsel likely would have required a continuance, this fact does not weigh heavily against Carson.

When looking at the extent of the conflict, the adequacy of the inquiry, and the timeliness of the motion the trial court correctly concluded that there had not been a complete breakdown in communication and that an “irreconcilable conflict” did not exist. *See Schaller*, 143 Wn.App. at 271-72. Accordingly, the trial court did not abuse its discretion when it denied Carson’s motion to substitute counsel.

**IV. The trial court entered written findings justifying the exceptional sentence based on the jury found aggravator of abuse of trust.**

RCW 9.94A.537(3) directs that “[t]he facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory.” RCW 9.94A.537(6) provides that if a jury unanimously finds beyond a reasonable doubt the existence of “one or more of the facts alleged by the state in support of an aggravated sentence,” the court may impose an exceptional sentence “if it finds, considering the purposes of this chapter, that the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence.” *State v. Sage*, 1 Wn.App.2d 685, 708, 407 P.3d 359, *review denied*, 191 Wn.2d 1007 (2018).

As *Sage* explains, “[t]he only permissible “finding of fact” by a sentencing judge on an exceptional sentence is to confirm that the jury has entered by special verdict its finding that an aggravating circumstance has

been proven beyond a reasonable doubt.” *Id.* The judge’s role is to make the legal, not factual, determination whether those aggravating circumstances are sufficiently substantial and compelling to warrant an exceptional sentence. *Id.* That is precisely what the trial court did here in its written findings. CP 262.

The second case cited by appellant, *State v. Friedlund*, 182 Wn.2d 388, 394, 341 P.3d 280, 282 (2015), is not analogous as it involved a complete failure to make written findings. Additionally, the block quote of the trial court’s findings in appellant’s brief is incorrect, the judge did not find that, “[t]he exceptional sentence is not supported by the required findings, and it must be vacated.” Appellant’s Brief 20. The trial court entered written findings stating that the jury found the aggravating factor and that the “Court finds substantial and compelling reasons” to impose the exceptional sentence. The trial court did enter written findings and the findings are in line with the requirement set out in *Sage*. Appellant has not offered any authority to this Court that anything additional is required. The trial court entered written findings as required and Carson’s claim therefore fails.

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## CONCLUSION

Jury instruction no. 16 was an accurate statement of law and not a comment on the evidence, therefore it was not error to give it in this case. Furthermore, the trial court did not abuse its discretion in denying the funds for a SSOSA evaluation or denying appellant's request for new counsel where there did not appear to be a breakdown in communication. The trial court did enter written findings justifying the exceptional sentence. Accordingly, Carson's conviction and sentence should be affirmed.

DATED this 21<sup>st</sup> day of September, 2020.

Respectfully submitted:

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**September 21, 2020 - 3:31 PM**

**Transmittal Information**

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**Appellate Court Case Number:** 54136-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Kevin Carson, Appellant  
**Superior Court Case Number:** 18-1-02757-8

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