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No. 36709-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

ALAN RAY REUKAUF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Judges Samuel Swanberg and Alexander Ekstrom

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT.....1

B. ASSIGNMENTS OF ERROR.....2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

D. STATEMENT OF THE CASE.....2

E. ARGUMENT.....9

Issue 1: Whether the evidence was insufficient to find Mr. Reukauf guilty of failure to register as a sex offender, where the State failed to prove that the California conviction underlying the failure to register charge was a sex offense under Washington law.....9

Issue 2: Whether the trial court violated Mr. Reukauf’s constitutional right to represent himself by denying his request to proceed pro se.....20

Issue 3: Whether the trial court erred in including three out-of-state convictions in Mr. Reukauf’s offender score without a comparability analysis.....26

Issue 4: Whether the trial court erred in imposing a condition of community custody requiring Mr. Reukauf to pay supervision fees as determined by DOC.....29

F. CONCLUSION.....31

TABLE OF AUTHORITIES

Washington Supreme Court

<i>In re Pers. Restraint of Rhome</i> , 172 Wn.2d 654, 260 P.3d 874 (2011).....	22, 23, 25
<i>In re Postsentence Review of Leach</i> , 161 Wn.2d 180, 163 P.3d 782 (2007).....	30
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007)..	30
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	30
<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017 (1993)..2	3
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)..	10
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999)..	26, 27, 30
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	10
<i>State v. Hahn</i> , 106 Wn.2d 885, 726 P.2d 25 (1986)..	22
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	11
<i>State v. Jones</i> , 182 Wn.2d 1, 338 P.3d 278 (2014).....	29
<i>State v. Lucero</i> , 168 Wn.2d 785, 230 P.3d 165 (2010).....	27, 28, 29
<i>State v. Madsen</i> , 168 Wn.2d 496, 229 P.3d 714 (2010).....	20, 21, 22, 23, 24, 25
<i>State v. Mendoza</i> , 165 Wn.2d 913, 205 P.3d 113 (2009)..	29
<i>State v. McCorkle</i> , 137 Wn.2d 490, 973 P.2d 461 (1999)..	26
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	10
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003)..	23, 25
<i>State v. Ross</i> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	26, 27, 29

<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)..	10
<i>State v. Smith</i> , 155 Wn.2d 496, 120 P.3d 559 (2005).....	11
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)..	10, 11

Washington Courts of Appeal

<i>State v. Abarca</i> , No. 51673-0-II, 2019 WL 5709517 (Wash. Ct. App. Nov. 5, 2019).....	31
<i>State v. Arndt</i> , 179 Wn. App. 373, 320 P.3d 104 (2014).....	26
<i>State v. Ellison</i> , No. 33215-2-III, 2016 WL 3401993 (Wash. Ct. App. June 14, 2016).....	19, 20
<i>State v. Evatt</i> , No. 34963-2-III, 2017 WL 2457104 (Wash. Ct. App. June 6, 2017).....	22, 25
<i>State v. Fateley</i> , 18 Wn. App. 99, 566 P.2d 959 (1977).....	11
<i>State v. Howe</i> , 151 Wn. App. 338, 212 P.3d 565 (2009)....	11, 12, 13, 14, 17
<i>State v. Lawrence</i> , 166 Wn. App. 378, 395, 271 P.3d 280 (2012)..	23, 25
<i>State v. Lundstrom</i> , 6 Wn. App. 2d 388, 429 P.3d 1116 (2018).....	30
<i>State v. McKnight</i> , 54 Wn. App. 521, 774 P.2d 532 (1989).....	15
<i>State v. O’Cain</i> , 144 Wn. App. 772, 184 P.3d 1262 (2008).	30
<i>State v. Reamer</i> , Nos. 78447-1-I, 78506-1-I, 2019 WL 3416868 (Wash. Ct. App. July 29, 2019).....	31
<i>State v. Richmond</i> , 3 Wn. App. 2d 423, 415 P.3d 1208 (2018).....	27, 28, 29
<i>State v. Ritola</i> , 63 Wn. App. 252, 817 P.2d 1390 (1991)..	15, 17
<i>State v. Rundquist</i> , 79 Wn. App. 786, 905 P.2d 922 (1995).....	23, 25
<i>State v. Sweany</i> , 162 Wn. App. 223, 256 P.3d 1230 (2011).....	11

<i>State v. Taylor</i> , Nos. 51291-2-II, 51301-3-II, 2019 WL 2599184 (Wash. Ct. App. June 25, 2019).....	31
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254 (1980)..	10
<i>State v. Vanwinkle</i> , No. 31318-2-III, 2015 WL 2067296 (Wash. Ct. App. Apr. 30, 2015).....	22, 25

Washington Statutes

RCW 9.94A.030(47)(a)(v) (2018).....	18
RCW 9.94A.030(47)(d) (2018).....	14
RCW 9.94A.525(3).....	26
RCW 9.94A.703(2)(d)..	30
RCW 9A.44.010(6).....	15, 17
RCW 9A.44.050(1)(a)..	13, 17
RCW 9A.44.128(10).....	12, 14
RCW 9A.44.128(10)(a)..	18
RCW 9A.44.130(1)(a)..	11, 12
RCW 9A.44.132(1).....	13
RCW 10.01.160(3).....	30
RCW 10.101.010(3)(a)-(c).....	30, 31

Washington Court Rules

GR 14.1(a).....	19, 23, 25, 31
RAP 2.5(a)(2).....	11

Federal Authorities

Faretta v. California, 422 U.S. 806,
95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).....20

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..10

Other Authorities

Cal. Penal Code § 261(2).....13, 17

People v. Griffin, 33 Cal. 4th 1015, 94 P.3d 1089 (2004).. 15, 16, 17

People v. Young, 190 Cal. App. 2d 248, 235 Cal. Rptr. 361 (1987).....16

A. SUMMARY OF ARGUMENT

Alan Ray Reukauf was charged with one count of failure to register as sex offender, based upon his failure to check-in weekly with the Franklin County Sheriff's Office, as a transient offender. Mr. Reukauf's failure to register as a sex offender charge was based upon a 1983 felony rape conviction from California.

A competency evaluation was conducted, and the trial court found Mr. Reukauf competent to stand trial. At the pretrial hearing, Mr. Reukauf made a motion to represent himself. The trial court denied his motion, based upon the competency evaluation report and on the basis that it would be "materially harmful to the administration of justice" to allow Mr. Reukauf to proceed pro se.

Mr. Reukauf proceeded to trial represented by counsel, and the jury found him guilty as charged. At sentencing, the trial court counted three out-of-state convictions in Mr. Reukauf's offender score.

Mr. Reukauf now appeals, arguing there is insufficient evidence to support his conviction, because the State failed to prove his 1983 California rape conviction was a sex offense under Washington law. In the alternative, Mr. Reukauf argues he is entitled to a new trial because the trial court erred in denying his motion to represent himself. Mr. Reukauf also challenges the inclusion of the three out-of-state convictions in his offender score and the

imposition of a condition of community custody requiring him to pay supervision fees as determined by DOC.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to find Mr. Reukauf guilty of failure to register as a sex offender, where the State failed to prove that the California conviction underlying the failure to register charge was a sex offense under Washington law.
2. The trial court violated Mr. Reukauf's constitutional right to represent himself by denying his request to proceed pro se.
3. The trial court erred in including three out-of-state convictions in Mr. Reukauf's offender score without a comparability analysis.
4. The trial court erred in imposing a condition of community custody requiring Mr. Reukauf to pay supervision fees as determined by DOC.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the evidence was insufficient to find Mr. Reukauf guilty of failure to register as a sex offender, where the State failed to prove that the California conviction underlying the failure to register charge was a sex offense under Washington law.

Issue 2: Whether the trial court violated Mr. Reukauf's constitutional right to represent himself by denying his request to proceed pro se.

Issue 3: Whether the trial court erred in including three out-of-state convictions in Mr. Reukauf's offender score without a comparability analysis.

Issue 4: Whether the trial court erred in imposing a condition of community custody requiring Mr. Reukauf to pay supervision fees as determined by DOC.

D. STATEMENT OF THE CASE

Alan Ray Reukauf is registered with the Franklin County Sheriff's Office as a transient sex offender. (RP¹ 79-85, 88; Pl.'s Ex. 4). As a transient, Mr.

¹ The report of proceedings consists of three separately paginated volumes: one volume, containing two pretrial hearings, reported by Katie DeVoir; one volume, containing one pretrial hearing, reported by Michelle Gianguialano; and one volume, containing the jury trial and

Reukauf is required to check-in weekly with the Franklin County Sheriff's Office. (RP 84-85, 91-92, 94-95, 104, 108, 110, 119; Pl.'s Ex. 4).

Mr. Reukauf checked in with the Franklin County Sheriff's Office, as required, on August 7, 2018. (RP 85-88; Pl.'s Ex. 4). Mr. Reukauf did not check-in weekly from August 15, 2018 to September 20, 2018. (RP 88-91, 110).

The State charged Mr. Reukauf with one count of failure to register as a sex offender, in violation of RCW 9A.44.132(1)(b). (CP 3-5). The charging document alleged:

That the said **ALAN RAY REUKAUF** in the County of Franklin, State of Washington, on or between August 15, 2018 and September 20, 2018, then & there, did have a duty to register under RCW 9A.44.130 for a felony sex offense and having been convicted of two or more felony failure to register as a sex offender in this state or another, to wit: *State of Washington v. Alan Reukauf*, Benton County Cause No. 11-1-00364-1, and *State of Washington v. Alan Reukauf*, Skamania County Cause No. 10-1-00072-9, did knowingly fail to comply with any of the requirements of RCW 9A.44.130, to wit: while registering as transient, did fail to check in weekly as required.²

(CP 3).

On motion of defense counsel, the trial court ordered a competency evaluation for Mr. Reukauf. (CP 16-23; RP (Jan. 29, 2019) 5-8). Following a competency evaluation, which was discontinued prematurely by Mr. Reukauf, the

sentencing, reported by Renee Munoz. References herein to "RP" refer the volume reported by Renee Munoz. References to the other two volumes include the hearing date.

² The State also alleged a failure to comply with a second registration requirement under RCW 9A.44.130. (CP 3-5). However, the State did not submit this basis to the jury; therefore, it is not relevant on appeal. (CP 55; RP 58-60, 169-170).

evaluator opined that “Mr. Reukauf has the capacity to understand the nature of the proceedings against him and assist in his defense, if he elects to do so.” (CP 24-36).

In his report, the evaluator stated:

In my opinion, Mr. Reukauf may have a mental illness consisting of symptoms of depression and anxiety and a personality disorder. However, his symptoms of mental illness do not pose a barrier to competency at this time. Therefore, it is my opinion that Mr. Reukauf has the capacity to understand the nature of the proceedings against him and to assist in his own defense, *should he elect to do so*. In my opinion, any refusal to assist his counsel is likely due [sic] to his maladaptive personality traits and not the result of a mental disease or defect.

....

In summary, the available information suggests that Mr. Reukauf is very familiar with the legal system and has demonstrated sufficient factual and rational understanding during his previous two competency evaluations.

(CP 34-35).

On agreement of the parties, the trial court issued an order finding Mr. Reukauf competent to proceed. (CP 37-38; RP (Feb. 19, 2019) 10).

At the pretrial hearing, Mr. Reukauf made a motion to represent himself. (RP (Mar. 12, 2019) 3-15). Mr. Reukauf stated he did not believe his attorney is acting in his best interests, because after he asked the trial court to fire his attorney, his attorney requested a competency evaluation and delayed his trial. (RP (Mar. 12, 2019) 4-7).

The trial court conducted a colloquy with Mr. Reukauf. (RP (Mar. 12, 2019) 10 -12). Mr. Reukauf stated he has a GED, and has not gone to college or

studied law. (RP (Mar. 12, 2019) 10-11). He stated “if it’s a choice between me being my own lawyer and [defense counsel] . . . It’s me” (RP (Mar. 12, 2019) 12).

The trial court asked defense counsel if he had a conflict that would prevent him from representing Mr. Reukauf. (RP (Mar. 12, 2019) 12). Defense counsel responded any other attorney would have the same conflict, and Mr. Reukauf agreed. (RP (Mar. 12, 2019) 12).

The trial court denied Mr. Reukauf’s motion to represent himself, stating:

Well, based on what the - - the colloquy that this court has gone through, and I have also taken a look at the evaluation report from Eastern State Hospital on this matter, Mr. Reukauf, the court is finding in this situation that you do not have the ability to represent yourself.

. . . .

The court finds, if I allow you to represent yourself, you would not be able to effectively do that in any way, shape, or sense of the nature of what that requires. In addition, the court believes that based on the situation that you are in, that it would actually be materially harmful to the administration of justice of being able to get through the trial itself if you were allowed to represent yourself on this matter. Therefore, at this time the court is going to deny your request to discharge [defense counsel]. The court finds there is no conflict.

. . . .

The court is denying your motion to represent yourself. The court finds you do not have the ability to do that. The court finds . . . from your conduct that you are not willing to follow the court rules. You are not willing to abide by even standard decorum of what a normal person would be -- would abide by. . . . So the court would find . . . that the record speaks for itself as far as the comments that you have been making and the fact of -- they have no basis as far as what you are asking for.

(RP (Mar. 12, 2019) 12-15).

The case proceeded to a jury trial. (RP 62-198). On the morning of trial, Mr. Reukauf stated he did not want defense counsel to represent him, and “[i]f I don’t get an honest lawyer, I’d rather defend myself pro se.” (RP 25, 28-29, 34, 38, 40-41). The trial court declined to reconsider its previous ruling denying Mr. Reukauf’s request to proceed pro se. (RP 25).

Witnesses testified consistent with the facts stated above. (RP 62-168). In addition, Sheryl Trujillo, sex offender registration coordinator for Franklin County, testified Mr. Reukauf is a sex offender, and he has a felony sex offense out of California from 1983. (RP 77, 80, 83).

The State offered into evidence, as exhibits, two certified copies of Washington felony judgment and sentences for two counts of failure to register as a sex offender. (RP 68-73 ; Pl.’s Ex. 2, 3).

The first Washington felony judgment and sentence is for a conviction of one count failure to register as a sex offender in Skamania County, based upon a guilty plea entered on December 2, 2010. (Pl.’s Ex. 2).

The second Washington felony judgment and sentence is for a conviction of one count failure to register as a sex offender in Benton County, based upon a guilty plea entered on July 13, 2011. (Pl.’s Ex. 3). This judgment and sentence includes a notice of a sex offender registration requirement. (Pl.’s Ex. 3).

Terri Watson, a clerk in the Franklin County Corrections Department records division, testified regarding some California documents. (RP 63-68; Pl.’s

Identification No. 1³). Ms. Watson testified the documents set forth a felony sex offense for Mr. Reukauf. (RP 66-68).

Gordon Thomasson, a patrol sergeant for the Franklin County Sheriff's Office testified Mr. Reukauf was required to register in Franklin County, based on a felony conviction from California. (RP 100, 109-110).

Mr. Reukauf testified in his own defense. (RP 138-168). Mr. Reukauf testified as follows regarding his California rape conviction:

...I was on probation - - no, parole in California for this rape deal. 1983. The only time in my entire life I've ever been accused of any sexual misconduct. I took it to trial. I lost. They sentenced me to six years in prison. . . . So, out of a six-year sentence I did three years.

(RP 145).

Mr. Reukauf testified he left Franklin County because he was scared that an individual who was prosecuted for stabbing him in 2017 was going to kill him.

(RP 146-151, 153-155, 161).

The jury was instructed that in order to convict Mr. Reukauf of failure to register as a sex offender, it had to find the following elements beyond a reasonable doubt:

- (1) Prior to August 15, 2018, [Mr. Reukauf] was convicted of a felony sex offense;
- (2) That due to that conviction, [Mr. Reukauf] was required to register in the State of Washington, County of Franklin as a sex offender between August 15, 2018 and September 20, 2018; and

³ These documents were marked, but not admitted into evidence. There are, however, part of the record herein. *See* Pl.'s Identification No. 1.

(3) That during that time period, [Mr. Reukauf] knowingly failed to comply with a requirement of sex offender registration while registered as a Transient, did fail to check in weekly as required.

(CP 55; RP 177-178).

In closing argument, the State argued Mr. Reukauf was convicted of a felony sex offense, rape in California in 1983. (RP 181).

The jury found Mr. Reukauf guilty. (CP 62; RP 196-197). The jury also returned a special verdict form finding Mr. Reukauf was previously convicted on at least two occasions of felony failure to register as a sex offender. (CP 63; RP 197).

At sentencing, the State asserted Mr. Reukauf's offender score was 10, and requested the trial court impose a sentence to the bottom of the standard range. (RP 200-201). Mr. Reukauf requested a mitigated exceptional sentence below the standard range. (RP 201-206).

Mr. Reukauf did not object to the State's calculation of his offender score. (RP 201-206). Mr. Reukauf signed a criminal history document. (CP 120). The document stated "[u]nless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete." (CP 120). Mr. Reukauf signed the document below the phrase "I agree that the above criminal history is true and accurate." (CP 120). The document included the following three out-of-state convictions:

Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult or Juvenile	Type of Crime
Failure to Register as a Sex Offender	08/07/2012	09/25/2012	Hood River, OR	A	NVSex
Failure to Register as a Sex Offender	03/05/1995	04/07/1995	California	A	NVSex
Rape by Force	08/18/1983	12/19/1983	California	A	VSex

(CP 120).

The trial court imposed a mitigated exceptional sentence below the standard range, of 36 months confinement. (CP 105-121; RP 211-214). The trial court calculated Mr. Reukauf’s offender score as 9+, counting the three out-of-state convictions listed above. (CP 107).

The trial court also imposed a term of community custody with conditions, including requiring Mr. Reukauf to pay supervision fees as determined by DOC [Department of Corrections]. (CP 109-110; RP 209).

Mr. Reukauf appealed. (CP 84-102; RP 214-215). An order of indigency was entered for purposes of appeal. (CP 80-83; RP 214).

E. ARGUMENT

Issue 1: Whether the evidence was insufficient to find Mr. Reukauf guilty of failure to register as a sex offender, where the State failed to prove that the California conviction underlying the failure to register charge was a sex offense under Washington law.

The trial court erred in finding Mr. Reukauf guilty of failure to register as a sex offender, because the State failed to prove that the California conviction

underlying the failure to register charge was a sex offense under Washington law. Mr. Reukauf's conviction for failure to register as a sex offender should be reversed and the charge dismissed with prejudice.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

“In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *see also State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court “defer[s] to the trier of fact on

issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

A defendant may always challenge the sufficiency of the evidence supporting his conviction for the first time on appeal. *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *affirmed*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (a party may raise “failure to establish facts upon which relief can be granted” for the first time in the appellate court). “A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is ‘manifest’.” *Id.*

“The duty to register arises only after conviction for a previous sex offense.” *State v. Howe*, 151 Wn. App. 338, 343, 212 P.3d 565 (2009). Relevant here, “[a]ny adult . . . residing whether or not the person has a fixed residence . . . in this state who has been found to have committed or has been convicted of any sex offense . . . shall register with the county sheriff for the county of the person's

residence” RCW 9A.44.130(1)(a). Also relevant here, for purposes of the registration statutes, “sex offense” is defined as:

(a) Any offense defined as a sex offense by RCW 9.94A.030;

. . . .

(h) Any out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction; or, if not required to register in the state of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection;

RCW 9A.44.128(10).

In *Howe*, the defendant was convicted of two counts of failure to register as a sex offender, with each count based on a separate California conviction. *Howe*, 151 Wn. App. at 341-42. On appeal, the defendant challenged the sufficiency of the evidence for both convictions, arguing the State failed to prove the two California convictions supporting the failure to register charges were sex offenses under Washington law. *Id.* at 342-43. The court agreed, finding the California convictions fail a comparability test. *Id.* at 345-49. The court reversed and vacated both convictions, and remanded for dismissal. *Id.* at 350-52.

The court explained that “[t]o determine whether an out-of-state conviction qualifies as a ‘sex offense,’ a trial court compares the out-of-state statute with comparable laws of this state. *Id.* at 343. The court further explained this comparability analysis:

This is a two step process, addressing both the legal definitions of the crimes and the facts underlying the convictions. First, the trial court must examine the elements of the out-of-state crime and compare them to the elements of the comparable Washington

crime. If the crimes have similar elements, the analysis is complete. But, [i]f the elements are not identical, or the foreign statute is broader than the Washington definition of the particular crime, then, as a second step, the trial court may examine the facts of the out-of-state crime as evidenced by the indictment or information.

Id. at 343-44 (internal quotation marks omitted) (internal citations omitted)

(alteration in original).

The court applied the comparability analysis to both underlying California convictions. *Id.* at 345-49. For the first California conviction, lewd acts upon a child, the court found “the California statute is broader than the Washington statute; the statutes are not legally comparable.” *Id.* at 348. The court then turned to the second step of the comparability analysis, factual comparability. *Id.* Because the State did not introduce any documents setting out facts underlying the lewd acts upon a child conviction, the court found that nothing in the record supported a finding of factual comparability. *Id.*

For the second California conviction, failure to register as a sex offender, the court found “[b]ecause the California failure to register conviction encompasses underlying acts that are a crime in California but are not necessarily a crime in Washington, this conviction also fails a comparability test.” *Id.* at 349.

Here, in order to find Mr. Reukauf guilty of failure to register as a sex offender, the jury had to find that he was convicted of a “felony sex offense.” (CP 55; RP 177-178); *see also* RCW 9A.44.132(1) (failure to register as a sex offender). Mr. Reukauf’s failure to register as a sex offender count was based

upon a felony rape conviction from California. (RP 63-68, 77, 80, 83, 100, 109-110, 145, 181; Pl.’s Identification No. 1). Therefore, in order for this out-of-state conviction to qualify as a felony sex offense for purposes of a failure to register as a sex offender conviction, the jury had to find that his California rape conviction was comparable to a sex offense in Washington. *See* RCW 9A.44.128(10)⁴; RCW 9.94A.030(47)(d) (2018); *see also* *Howe*, 151 Wn. App. at 343-44.

In 1983, rape in California was defined as follows, in relevant part:

Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . where it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another.

Cal. Penal Code § 261(2).

Second degree rape in Washington is defined as follows, in relevant part:

A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . By forcible compulsion[.]

RCW 9A.44.050(1)(a).

Forcible compulsion “means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury

⁴ There is a second grounds under this statute, defining sex offense as “[a]ny out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction. . . .” RCW 9A.44.128(10)(h). However, this portion of the statute was invalidated, as an unconstitutional delegation of legislative authority. *See State v. Batson*, 9 Wn. App. 2d 546, 549-54, 447 P.3d 202 (2019).

to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010(6).

“Forcible compulsion requires more force than the force normally used to achieve sexual intercourse or sexual contact.” *State v. Ritola*, 63 Wn. App. 252, 254, 817 P.2d 1390 (1991). “[F]orcible compulsion is not the force inherent in any act of sexual touching, but rather is that ‘used or threatened to overcome or prevent resistance by the female.’” *Id.* at 254-55, 817 P.2d 1390 (1991) (quoting *State v. McKnight*, 54 Wn. App. 521, 527, 774 P.2d 532 (1989)).

The California Supreme Court held resistance by the victim is not a required element of rape. *People v. Griffin*, 33 Cal. 4th 1015, 1025, 94 P.3d 1089 (2004). In *Griffin*, a prosecution for forcible rape, among other charges, the court held “the trial court was under no duty to instruct the jury sua sponte on the commonly understood definition and usage of the term ‘force’ as it is used in the rape statute (§ 261, subd. (a)(2)).” *Id.* at 1019. The court reasoned “[a] plain reading of section 261 in its entirety supports a conclusion that the Legislature did not intend the term ‘force,’ as used in the rape statute, to be given any specialized legal definition.” *Id.* at 1023. The court stated “it has long been recognized that ‘in order to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the

will of the [victim].” *Id.* at 1023-24 (alteration in original) (quoting *People v. Young*, 190 Cal. App. 2d 248, 257-58, 235 Cal. Rptr. 361 (1987)).

The court explained that in 1980, the California legislature amended section 261 to delete most references to resistance. *Id.* at 1024. The court acknowledged the law “now allows the jury to convict of rape by force or fear under section 261, subdivision (2), without proof of victim resistance.” *Id.* (internal citation marks omitted) (citations omitted). Following the 1980 amendment to section 261, “the jury no longer evaluates the element of force in terms of whether it physically prevents the victim from resisting or thwarting the attack.” *Id.* at 1025. The court explained “‘force’ plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will.” *Id.* (internal citation marks omitted) (citations omitted).

The court stated “[t]he gravamen of the crime of forcible rape is a sexual penetration *accomplished against the victim's will* by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury.” *Id.* at 1027. The court found “[t]he question for the jury in this case was simply whether defendant used force to accomplish intercourse with [the victim] against her will, not whether the force he used overcame [the victim’s] physical strength or ability to resist him.” *Id.* at 1028.

A conviction for second degree rape in Washington requires physical force

which overcomes resistance. RCW 9A.44.050(1)(a); RCW 9A.44.010(6). The statute also requires a defendant to use more force than that used to achieve sexual intercourse. *Ritola*, 63 Wn. App. at 254-55.

In contrast, a conviction for rape in California does not require physical force which overcomes resistance. Cal. Penal Code § 261(2); *Griffin*, 33 Cal. 4th at 1024-1025, 1027-1028. Resistance by the victim is not a required element of rape in California. *Griffin*, 33 Cal. 4th at 1024-1025.

Because a defendant can commit rape in California without the use of physical force that overcomes resistance, the California statute is broader than the Washington statute. *See Howe*, 151 Wn. App. at 348. Therefore, the statutes are not legally comparable. *See id.* Further, because the State here did not introduce any documents setting out facts underlying Mr. Reukauf's 1983 California rape conviction, nothing in the record supports a finding of factual comparability. *See id.*

Mr. Reukauf's 1983 California rape conviction fails a comparability test. His conviction for failure to register as a sex offender must be reversed and the charge dismissed with prejudice. *See Howe*, 151 Wn. App. at 350-52 (setting forth this remedy).

Mr. Reukauf did have a duty to register as a sex offender based upon his July 2011 conviction for failure to register as a sex offender in Benton County, because he was convicted of failure to register under RCW 9A.44.132 on one

prior occasion, his December 2010 conviction for failure to register as a sex offender in Skamania County. (Pl.'s Exs. 2, 3); *see also* RCW 9A.44.128(10)(a) (for purposes of the failure to register statute, defining sex offense as “[a]ny offense defined as a sex offense by RCW 9.94A.030[.]”); RCW 9.94A.030(47)(a)(v) (2018) (defining “sex offense” as “[a] felony violation of RCW 9A.44.132(1) (failure to register as a sex offender) if the person has been convicted of violating RCW 9A.44.132(1) (failure to register as a sex offender) or 9A.44.130 prior to June 10, 2010, on at least one prior occasion[.]”).

However, there was insufficient evidence to support Mr. Reukauf's conviction here based upon his July 2011 conviction for failure to register as a sex offender in Benton County as the “felony sex offense.” (CP 55; RP 177-178). The State's case was based solely on his 1983 California rape conviction. (RP 63-68, 77, 80, 83, 100, 109-110, 181; Pl.'s Identification No. 1). The jury had insufficient evidence from which to conclude the July 2011 Benton County conviction for failure to register was a “felony sex offense” supporting a conviction for failure to register as a sex offender.

In addition, use of Mr. Reukauf's July 2011 conviction for failure to register as a sex offender in Benton County cannot be used as the basis for his conviction here, because it is an invalid prior conviction. This prior conviction was based upon Mr. Reukauf's 1983 California rape conviction, which, as explained above, is not comparable to a sex offense under Washington law. (Pl.'s

Ex. 3). Crediting the 1983 rape conviction to support the July 2011 Benton County charge, would compound the error of the lack of comparability of the 1983 rape conviction. *See, e.g., State v. Ellison*, No. 33215-2-III, 2016 WL 3401993, *1-12 (Wash. Ct. App. June 14, 2016).⁵

In *Ellison*, the defendant moved to dismiss a felony failure to register as a sex offender charge, arguing he had no duty to register because his 1995 felony sex crime convictions, committed when he was eleven years old, were void because they were entered without a capacity hearing or capacity finding. *Ellison*, 2016 WL 3401993, at *1-2. He further argued that his 1999 felony sex crime conviction could not serve as the predicate crime for his felony failure to register as sex offender charge, where the State relied on his 1995 sex crime convictions to convict him. *Id.* The trial court dismissed the charge, and the State appealed. *Id.*

On appeal, this Court upheld the dismissal of the failure to register charge. *Id.* at *2-12. This Court stated “[n]o Washington case addresses the narrow issue of whether one charged with failure to register as a sex offender may successfully attack the validity of the underlying sex offense.” *Id.* at *6. This Court held “the 1995 felony convictions and the 1999 felony conviction [of the defendant] cannot be used as predicate crimes to support the charge of felony failure to register as a

⁵ GR 14.1(a) authorizes citation to unpublished opinions of the Court of Appeals as nonbinding authority.

sex offender because of the 1995 juvenile court’s failure to find [the defendant] competent to commit a crime.” *Id.* at *12. The Court acknowledged the defendant was not challenging his 1995 convictions on constitutional grounds, but rather, statutory grounds. *Id.* at *10.

There was insufficient evidence to support Mr. Reukauf’s conviction, because the State failed to prove that the 1983 California rape conviction was a sex offense under Washington law. In addition, Mr. Reukauf’s July 2011 conviction for failure to register as a sex offender in Benton County, based on the 1983 California rape conviction, cannot serve as the predicate felony for his conviction. Mr. Reukauf’s conviction for failure to register as a sex offender should be reversed and the charge dismissed with prejudice.

Issue 2: Whether the trial court violated Mr. Reukauf’s constitutional right to represent himself by denying his request to proceed pro se.

Should this Court reject Mr. Reukauf’s argument in Issue 1 above, then, in the alternative, the trial court erred in denying Mr. Reukauf’s request to represent himself. This denial violated Mr. Reukauf’s constitutional right to represent himself. Therefore, this Court should order a new trial.

“Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States constitution.” *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); *see also Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). “This right is so fundamental that it is afforded despite its

potentially detrimental impact on both the defendant and the administration of justice.” *Id.*

“The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant’s request is equivocal, untimely, involuntary, or made without a general understanding of the consequences.” *Id.* at 504-505. “A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant’s ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel.” *Id.* at 505.

“A court may not deny pro se status merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious.” *Id.* at 509. “[A] criminal defendant’s right to pro se status cannot be denied simply because affording the right will be a burden on the efficient administration of justice.” *Id.*

Our Supreme Court stated:

Although the trial court’s duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice.

Id.

The Court noted there are ways a trial court can ensure orderly administration of justice after pro se status is granted. *Id.* at 509 n.4. The trial court can impose sanctions for improper courtroom behavior; appoint standby counsel; allow hybrid representation; or terminate pro se status “if a defendant is sufficiently disruptive or if delay becomes the chief motive.” *Id.*

“[A]n unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel.” *Id.* at 507.

Furthermore, a court may not deny a motion for self-representation based on concern regarding a defendant’s competency alone. *Id.* at 505. “[I]f the court doubts the defendant’s competency, the necessary course is to order a competency review.” *Id.*

“A defendant whose competency to stand trial has been questioned must knowingly and intelligently waive the right to counsel.” *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 663, 260 P.3d 874 (2011) (citing *State v. Hahn*, 106 Wn.2d 885, 893, 726 P.2d 25 (1986)). “Nevertheless, well settled law respects the right of a mentally ill individual to make a knowing and voluntary decision to represent himself in a criminal trial.” *State v. Evatt*, No. 34963-2-III, 2017 WL 2457104, *7 (Wash. Ct. App. June 6, 2017); *see also State v. Vanwinkle*, No. 31318-2-III, 2015 WL 2067296, *9-11 (Wash. Ct. App. Apr. 30, 2015) (finding the trial court did not abuse its discretion in granting the defendant’s request to represent himself, where the trial court conducted an extensive colloquy, and

nothing suggested the defendant “was incompetent or unable to understand any facts relevant to waiver of counsel.”)⁶

“Trial judges have permissive authority to deny self-representation to those suffering from mental illness.” *State v. Lawrence*, 166 Wn. App. 378, 389, 395, 271 P.3d 280 (2012). However, there is not “a heightened standard for waiver of counsel and pro se representation when there are mental health issues present.” *Rhome*, 172 Wn.2d at 666; *see also Lawrence*, 166 Wn.2d at 392-95 (declining to create a new requirement for trial courts to consider a defendant’s mental illness before accepting a waiver of counsel).

The trial court’s denial of a defendant’s request to represent himself is reviewed for an abuse of discretion. *Madsen*, 168 Wn.2d at 496. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *Id.* (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

The remedy for the unjustified denial of the right to self-representation is a new trial. *Madsen*, 168 Wn.2d at 503, 510.

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Here, the trial court denied Mr. Reukauf's request to represent himself, based upon the report from his competency evaluation and because it would be "materially harmful to the administration of justice[.]" (RP (Mar. 12, 2019) 12-15). The trial court abused its discretion in denying Mr. Reukauf's request. The trial court applied the wrong legal standard to deny the right of self-representation. *See Madsen*, 168 Wn.2d at 504-505. The trial court could deny Mr. Reukauf's request only if his request was "equivocal, untimely, involuntary, or made without a general understanding of the consequences." *Id.*

Mr. Reukauf's request was timely made at the pretrial hearing, and was unequivocal. (RP (Mar. 12, 2019) 3-15). He renewed his unequivocal request on the morning of trial. (RP 25, 28-29, 34, 38, 40-41).

In addition, Mr. Reukauf's competency evaluation report did not demonstrate that his request was involuntary, or without an understanding of the consequences. (CP 24-36). To the contrary, the evaluator found "Mr. Reukauf is very familiar with the legal system" and that he "has the capacity to understand the nature of the proceedings against him and to assist in his own defense" (CP 34-35). Likewise, nothing in the trial court's colloquy with Mr. Reukauf demonstrated his request was involuntary, or without an understanding of the consequences. (RP (Mar. 12, 2019) 10-12).

Further, the trial court cannot deny Mr. Reukauf's right to represent himself on the basis that it would be a burden on the efficient administration of

justice. *See Madsen*, 168 Wn.2d at 509. Any difficulty in the administration of justice is outweighed by Mr. Reukauf’s constitutional right to represent himself. *See id.* While the trial court could take measures to ensure the orderly administration of justice after granting Mr. Reukauf pro se status, efficiency is not a basis for denial of the fundamental right to represent himself. *See id.* at 509 n.4. While the trial court may have found Mr. Reukauf obnoxious, this is not a basis to deny his constitutional right to pro se status. *See id.* at 509.

Although Mr. Reukauf’s competency to stand trial has been questioned, nothing in the record suggests he did not knowingly and intelligently waive his right to counsel. *See Rhome*, 172 Wn.2d at 663; *see also Evatt*, 2017 WL 2457104, at *7; *Vanwinkle*, 2015 WL 2067296, at *9-11.⁷ Although the competency evaluation report states Mr. Reukauf “may” have a mental illness, there is not a heightened standard for pro se representation where mental health issues are present. (CP 34-35); *see also Rhome*, 172 Wn.2d at 666; *Lawrence*, 166 Wn.2d at 392-95.

The trial court’s denial of Mr. Reukauf’s motion to represent himself at trial was based on untenable grounds and made for untenable reasons. *Rohrich*, 149 Wn.2d at 654 (quoting *Rundquist*, 79 Wn. App. at 793). The denial was unjustified. *See Madsen*, 168 Wn.2d at 503-510. This Court should order a new trial.

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Issue 3: Whether the trial court erred in including three out-of-state convictions in Mr. Reukauf’s offender score without a comparability analysis.

The trial court erred in including three out-of-state convictions in Mr. Reukauf’s offender score without a comparability analysis. Although Mr. Reukauf acknowledged his offender score, he did not affirmatively acknowledge comparability. Therefore, this case should be reversed and remanded for resentencing to resolve the question of whether the three out-of-state convictions should be included in Mr. Reukauf’s offender score.

“[A] challenge to the classification of out-of-state convictions may be raised for the first time on appeal.” *State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1999) (citing *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999)); *see also State v. Arndt*, 179 Wn. App. 373, 388 n.9, 320 P.3d 104 (2014).

“To properly calculate a defendant's offender score, the SRA [Sentencing Reform Act] requires that sentencing courts determine a defendant's criminal history based on his or her prior convictions and the level of seriousness of the current offense.” *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The SRA also mandates that “[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3). This requires that “the sentencing court must compare the elements of the out-of-state offense with the elements of

potentially comparable Washington crimes.” *Ross*, 152 Wn.2d at 230 (quoting *Ford*, 137 Wn.2d at 479).

“[T]he State bears the burden to prove by a preponderance of the evidence the existence and comparability of a defendant's prior out-of-state conviction.”

Id. “Although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state . . . convictions, we have stated a defendant's *affirmative acknowledgment* that his prior out-of-state . . . convictions are properly included in his offender score satisfies SRA requirements.” *Id.*

(citing *Ford*, 137 Wash.2d at 483 n. 5). However, “a defendant does not ‘acknowledge’ the State's position regarding classification absent an affirmative agreement beyond merely failing to object.” *Ford*, 137 Wn.2d at 483.

“A defendant's mere agreement with the State's offender score calculation and admission of the existence of an out-of-state conviction is insufficient to constitute an affirmative acknowledgment that an out-of-state conviction meets the terms of the comparability analysis.” *State v. Richmond*, 3 Wn. App. 2d 423, 437, 415 P.3d 1208 (2018) (citing *State v. Lucero*, 168 Wn.2d 785, 789, 230 P.3d 165 (2010)).

In *Richmond*, at sentencing, the defense counsel agreed that an Idaho conviction should be included in his offender score. *Id.* at 430. On appeal, the defendant argued the Idaho conviction should not have been included in his

offender score, because it was not comparable to a Washington felony offense.

Id. at 436.

This court held “[t]he record before us does not warrant finding an affirmative acknowledgement.” *Id.* This court reasoned that “[a]lthough defense counsel recognized [the defendant] had an Idaho felony conviction and ultimately accepted the State’s offender score calculation, neither defense counsel nor [the defendant] ever affirmatively acknowledged that the Idaho conviction was legally comparable to a Washington offense.” *Id.* at 436-37. This court found that “[u]nder the circumstances here, the State was not relieved of its burden to prove the facts justifying inclusion of the Idaho conviction in [the defendant’s] offender score.” *Id.* at 437. This court remanded the case for resentencing on the comparability issue. *Id.*

Likewise, in *Lucero*, our Supreme Court held remand for resentencing was required, where the defendant did not “‘affirmatively acknowledge’ that his California convictions were comparable to Washington crimes.” *Lucero*, 168 Wn.2d at 789.

Here, Mr. Reukauf agreed with the State’s offender score calculation and admitted the existence of three out-of-state convictions. (CP 120; RP 201-206). However, this is insufficient to constitute an affirmative acknowledgement that each of these three out-of-state convictions was legally comparable to a Washington State offense. *See Richmond*, 3 Wn. App. 2d at 436-37; *see also*

Lucero, 168 Wn.2d at 789; *cf. Ross*, 152 Wn.2d at 230 (where two defendants affirmatively acknowledged their prior out-of-state and/or federal convictions were comparable to Washington State crimes, the convictions were properly included in their offender score). Therefore, remand for resentencing on the comparability issue is required. *See Richmond*, 3 Wn. App. 2d at 437; *see also State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113 (2009) (setting forth this remedy); *State v. Jones*, 182 Wn.2d 1, 5-11, 338 P.3d 278 (2014) (finding that on remand, both parties can present additional evidence of the defendant's criminal history).

Because the trial court erred in including three out-of-state convictions in Mr. Reukauf's offender score without a comparability analysis, this case should be reversed and remanded for resentencing.

Issue 4: Whether the trial court erred in imposing a condition of community custody requiring Mr. Reukauf to pay supervision fees as determined by DOC.

The trial court erred in imposing a condition of community custody requiring Mr. Reukauf to pay supervision fees as determined by DOC, because this fee is a discretionary legal financial obligation (LFO), and the trial court found Mr. Reukauf indigent. This condition should be stricken from his judgment and sentence.

Mr. Reukauf challenges these community custody conditions for the first time on appeal. (CP 109-110; RP 209). Sentencing errors may be raised for the

first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”) (quoting *Ford*, 137 Wn.2d at 477).

A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Where the trial court lacked authority to impose a community custody condition, the appropriate remedy is to remand to strike the condition. *See, e.g., State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The trial court erred in imposing a condition of community custody requiring Mr. Reukauf to pay supervision fees as determined by DOC. The community custody supervision fee is a discretionary LFO, because it can be waived by the sentencing court. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018); *see also* RCW 9.94A.703(2)(d) (allowing the sentencing court to impose, or to waive, a condition of community custody requiring an offender to “[p]ay supervision fees as determined by the department[.]”).

Discretionary LFOs cannot be imposed on a defendant who is indigent at the time of sentencing. *See* RCW 10.01.160(3); *see also* RCW 10.101.010(3)(a)-

(c) (defining indigent). Mr. Reukauf was found indigent at sentencing. (CP 80-83; RP 214).

Therefore, the condition of community custody requiring Mr. Reukauf to pay supervision fees as determined by DOC should be stricken. *See State v. Taylor*, Nos. 51291-2-II, 51301-3-II, 2019 WL 2599184, *4 (Wash. Ct. App. June 25, 2019) (holding that because the defendant was found indigent at sentencing, the community custody supervision fee must be stricken under RCW 10.01.160(3)); *see also State v. Reamer*, Nos. 78447-1-I, 78506-1-I, 2019 WL 3416868, *5 (Wash. Ct. App. July 29, 2019) (directing the trial court to strike this condition on remand); *but see State v. Abarca*, No. 51673-0-II, 2019 WL 5709517, *10-11 (Wash. Ct. App. Nov. 5, 2019) (concluding that a community custody supervision assessment is discretionary, but it is not a cost requiring an inquiry into the defendant's ability to pay; nonetheless encouraging the trial court to reconsider the imposition of this assessment on remand).⁸

F. CONCLUSION

Mr. Reukauf's conviction should be reversed and the charge dismissed with prejudice, because insufficient evidence supports the conviction, where the State failed to prove that the California conviction underlying the charge here was a sex offense under Washington law. In the alternative, this Court should order a

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new trial for Mr. Reukauf, because the trial court violated his constitutional right to represent himself.

In addition, this case should be reversed and remanded for resentencing to resolve the question of whether the three out-of-state convictions should be included in Mr. Reukauf's offender score.

The trial court also erred by imposing conditions of community custody requiring Mr. Reukauf to pay supervision fees as determined by DOC. This condition should be stricken.

Respectfully submitted this 2nd day of December, 2019.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

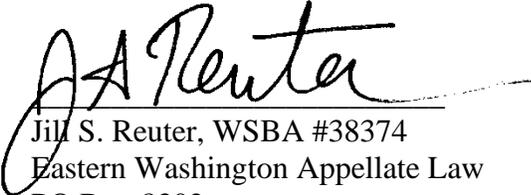
STATE OF WASHINGTON) COA No. 36709-6-III
Plaintiff/Respondent)
vs.) Franklin Co. No. 19-1-50009-2
)
ALAN RAY REUKAUF) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 2, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Alan Ray Reukauf, DOC No. 849038
Washington Corrections Center
PO Box 900
Shelton, WA 98584

Having obtained prior permission, I also served a copy on the Respondent at appeals@co.franklin.wa.us using the Washington State Appellate Courts' Portal.

Dated this 2nd day of December, 2019.


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