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State of Washington
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36709-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ALAN RAY REUKAUF, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. COUNTERSTATEMENT OF ISSUES

- (1) Is the California crime of Rape by Force or Fear comparable to Rape in the Second or Third Degree in Washington?
- (2) Is the provision in RCW 9A.44.128(10)(h) defining a "sex offense" requiring registration as "[a]ny out-of-state conviction for an offense for which the person would be required to register in the state of conviction" an unconstitutional delegation of legislative authority?
- (3) Did the trial court abuse its discretion in refusing to allow defendant to represent himself?
- (4) Was sufficient evidence presented of defendant's out-of-state convictions? If not, is the proper remedy to remand for a new sentencing hearing where new evidence of criminal history may be presented?

II. COUNTERSTATEMENT OF THE CASE

The Statement of the Case of Appellant Alan Ray Reukauf (hereinafter defendant) is substantially correct. The State will develop additional facts from the record as they relate to individual issues.

III. RESPONSE TO ARGUMENT

(A) *The conviction is supported by sufficient evidence as the California crime of Rape by Force or Fear is comparable to Rape in the Second or Third Degree in Washington.*

Defendant first argues his conviction for Failure to Register as a Sex Offender is not supported by sufficient evidence. On a challenge to the sufficiency of the evidence, the court views the evidence in a light most favorable to the State and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003). “We must draw all reasonable inferences in the State’s favor and interpret them most strongly against the defendant.” *Id.* The elements of the crime may be established by either direct or circumstantial evidence and one type of evidence is not more or less trustworthy than the other. *Id.*

Defendant’s argument is based on a claim that his California conviction requiring registration as a sex offender was not comparable to a sex offense in Washington. Defendant was

convicted of Rape by Force or Fear in Santa Cruz, California, with an occurrence date of August 18, 1983 and sentence having been imposed on December 19, 1983. Exhibit 2, page 2; Exhibit 3, page 2. The definition of “sex offense” for purposes of requiring registration includes any out-of-state conviction that would be classified as a sex offense under Washington’s registration law RCW 9A.44.128(10)(h). In making this determination, the court compares the out-of-state statute with comparable laws of the State of Washington to determine whether the out-of-state conviction qualifies as a sex offense. See *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). The court first examines the elements of the out-of-state crime and compares them to the elements of the comparable Washington crime. “If the crimes have similar elements, the analysis is complete.” *State v. Howe*, 151 Wn. App. 338, 344, 212 P.3d 565 (2009). “[T]he key inquiry is under what Washington statute could the defendant have been convicted if he or she had committed the same acts in Washington.” *State v. McCorkle*, 88 Wn. App. 485, 495, 945 P.2d 736 (1997), *aff’d on other grounds*, 137 Wn.2d 490, 973 P.2d 461 (1999).

There appear to be no published Washington opinions addressing whether California's crime of Rape by Force or Fear is comparable to Washington's crime of Rape in the Second Degree. Moreover, while GR 14.1 permits citation to unpublished opinions filed on or after March 1, 2013 as persuasive authority, the State was unable to locate any unpublished opinions addressing that precise question that were issued on or after March 1, 2013. However, a comparison of the elements of the two crimes shows that they are indeed comparable.

Defendant correctly notes at 14 that in 1983, rape in California was defined as:

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 . . .
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 to herself or himself or another person, or in fear that she or he will be kidnapped.”

Defendant notes the reference to resistance in Washington’s rape statute and contends that distinguishes it from the rape statute of California. However, Washington courts have relied on California authority to hold our rape statute has the same meaning as that of California. In *State v. McKnight*, 54 Wn App. 521, 774 P.2d 532 (1989), the court relied heavily on *People v. Barnes*, 42 Cal. 3d 284, 721 P.2d 110, 228 Cal. Rptr. 228 (1986) in finding the Washington statute does not require resistance by physical means in all cases:

We find no rational basis for require resistance to be manifest in all cases by physical means, and in fact, are persuaded that public policy considerations militate against such a requirement. *Barnes*, 721 P.2d at 118-20.

The *Barnes* court, in discussing a legislative amendment dispensing with the resistance requirement in forcible compulsion, noted that the requirement originated as an exaggerated insistence on evidence of nonconsent. This requirement resulted from the historical wariness with which courts and commentators viewed victims of sexual assault. *Barnes*, 721 P.2d at 118. The court noted that the California Legislature has rejected the resistance requirement given what is now known about the realities of sexual assault – different victims respond differently to assault, and some may, in their panic, freeze, effectively offering no resistance. Moreover, studies show that resistance increases the risk that the perpetrator will employ violence or that the victims will receive greater injuries than if no resistance were offered. *Barnes*, 721 P.2d at 118-19. Accordingly, we hold that whether the evidence establishes the element of resistance is a fact sensitive determination based on the totality of the circumstances, including the victim’s words and conduct.

McKnight, 54 Wn. App. at 525-56.

In California, the statute was amended to make clear that resistance by force was not required. In Washington, the court relied on California authority in holding the Washington statute never required resistance by force in the first place. While they took different paths, they arrived at the same destination: Resistance by force is not required in either state.

The California statute continues to require that the act of intercourse be “against a person’s will by means of force or fear of immediate and unlawful bodily injury on the person or another.” Cal. Penal Code § 261(2). One way this could be shown would be by physical force that overcomes non-physical resistance; another would be by express or implied threats that place the victim in fear. Identical evidence may be used to show forcible compulsion in Washington under RCW 9A.44.010(6). While California does not use the term “forcible compulsion,” the statutes are identical in light of the way the Washington statute was interpreted in *McKnight*.

As noted above, the ultimate test is whether the same acts would violate the statutes of both states. *McCorkle*, 88 Wn. App. at 495. The facts of *McKnight* provide a good illustration. 14-year-old C encountered McKnight, 17, near her home. They were vaguely acquainted from riding the same school bus. They decided to walk to C’s apartment. C allowed McKnight into her apartment because she was “bored and lonely.” As the two were sitting on a mattress that served as a living room couch, they began kissing. C testified that she told McKnight to stop kissing her, but instead “he started slowly to push me down onto the couch.” He then “started to pull

on my clothes and I told him to stop it again. And he didn't do anything except kept doing it." Once McKnight had C disrobed, he undid his pants and lay down on top of her. C testified this made her feel "scared." At that point "he got inside me and started rubbing down on top of me. After that I told him it hurt and he still didn't stop." These facts were found sufficient to support a conviction for Rape in the Second Degree in Washington. They would also constitute Rape by Force or Fear in California.

Even if the California statute was not comparable to Washington's Rape in the Second Degree, it would be comparable to Rape in the Third Degree under RCW 9A.44.060. Rape in the Third Degree is also classified as a sex offense that requires registration. The definition of sex offense for registration purposes includes "[a]ny offense defined as a sex offense by RCW 9.94A.030." RCW 9A.44.128(10)(a). RCW 9.94A.030(4*)(iii) encompasses within the definition of sex offense "[a] felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132." This would include Rape in the Third Degree under RCW 9A.44.060, which is committed when: (a) the victim did not consent and the lack of consent was clearly expressed or (b) there is a

threat of substantial unlawful harm to property rights of the victim. There is no requirement of forcible compulsion or resistance. California's requirement that the intercourse be accomplished against the person's will by force, violence or fear would certainly take in Washington's crime of Rape in the Third Degree. An offender's duty to register based on out-of-state conviction continues indefinitely until it is relieved by the court. RCW 9A.44.140(4).

Finally, the definition of sex offense for registration purposes also includes "[a]ny out-of-state conviction for an offense for which the person would be required to register in the state of conviction [.]" RCW 9A.44.128(10)(h). California requires registration by any person convicted or rape in any court of the state since July 1, 1944. Cal. Penal Code § 290(c). Defendant does not dispute that he would be required to register as a sex offender in California, but notes this provision was found to be an unconstitutional delegation of legislative authority by Division One of this court in *State v. Batson*, 9 Wn. App. 2d 546, 447 P.3d 202 (2019). However, the Washington Supreme Court granted review in *Batson* on December 4, 2019. 194 Wn.2d 1009, 452 P.3d 1225 (2019). In

the event this court is not otherwise satisfied that defendant's California conviction meets the definition of a sex offense, the State respectfully requests the court to stay further consideration pending the Supreme Court's decision in *Batson*.

(B) The trial court did not abuse its discretion in refusing to allow defendant to represent himself.

At a pre-trial hearing on March 12, 2019, defendant made a request to represent himself. 03/12/19 RP, at 5. In denying the request, the trial court indicated it had relied on both its colloquy with defendant and the evaluational report from Eastern State Hospital. RP 13. While the evaluation by Dr. Jonathan M. Ryan concluded defendant was competent to stand trial, it opined "Mr. Reukauf may have a mental illness consisting of symptoms of depression and anxiety and a personality disorder." CP 34. Further, "In my opinion, any refusal to assist his counsel [is] likely due to his maladaptive personality traits and not the result of a mental disease or defect." CP 34. The evaluation ended prematurely and abruptly:

We then began discussing possible legal strategies, and it was at this time that Mr. Ruekauf began

strongly insisting that I use the "... art of deception" to convince the court to send him to a secure mental health facility. When it became apparent that his attempts were not successful, he became highly agitated and stated, "So you are one of them. How much do they pay you? Fuck you, I am done." He then stood up, picked up a chair, and threw it at the window. After throwing a second chair, custody staff entered the room and restrained the defendant.

CP 34-35.

The defendant's colloquy with the court was rambling, incoherent and often unresponsive to the court's inquiries:

THE COURT: I will hear from you as to your request to represent yourself.

MR. REUKAUF: Okay. You want to know why I want to represent myself? Is that it?

THE COURT: Yes.

MR. REUKAUF: I don't believe my counsel is acting in my best interests. Do you want to know why?

THE COURT: If you would like to share, sure.

MR. REUKAUF: Yes, I would. I had the feeling that we were not communicating some time ago. And when I came back into court and I immediately spoke right up and said to the judge, I said, "Your Honor, I don't believe this man is

representing me in my best interest and I would like to fire him." And the judge said no. And then counsel spoke up and said, "Your Honor, I would like my client to have a psychiatric evaluation," which effectively postponed my speedy trial for a whole month. I was supposed to be at a trial on February 27th so that as soon as he spoke up that proved what I said about him acting in my best interests. So I am sure you can understand where I am coming from.

THE COURT: So I think what we are going to need to do is set this down for the afternoon so that the court can hear your - -what you are facing and go through an extensive colloquy with you.

MR. REUKAUF: Well, I don't know what a colloquy is.

THE COURT: A question-and-answer session with you when we can have a quieter courtroom and that's not as crowded so that we can make sure that you can hear. So we will recall your case at 1:30.

RP 4-5. The matter resumed at 2:23 p.m.:

THE COURT: Mr. Reukauf, the issue of whether or not your speedy trial rights were violated is separate from the trial itself and can certainly be reviewed by an appellate court if needed to be and it was appealed on this issue. That certainly doesn't justify finding that your attorney is not effectively representing you. I mean, if that was the case and that was continued and it shouldn't have been, then that can be resolved through the Court of Appeals.

MR. REUKAUF: Are you trying to force this man upon me when if have - - it that what you are trying to do?

THE COURT: Well, it's not about trying to force anybody. It's a matter of talking to you about this; so let's talk.

MR. REUKAUF: Oh, okay. Let's talk. Yeah.

THE COURT: Do you understand, sir, that Mr. Stovern is an experience criminal defense attorney?

MR. REUKAUF: No, no, no. That's just not going to happen. How about you let me explain why I tried to fire him. I don't know if you were the guy I stood before. I doubt it. Maybe. I don't know.

RP 6. The defendant proceeded with a monologue of his grievances against persons involved in the criminal justice system, consuming four pages of transcript. RP 6-9. The court finally attempted to redirect him;

THE COURT: . . . Mr. Reukauf, you are talking about - - you are bringing up stuff that has nothing to do with this court's decision on whether or not to let you represent yourself.

MR> REUKAUF: Oh, I thought I had that right.

THE COURT: You don't have a right to just talk about whatever you want to talk about. You have a right to talk about things that are relevant to the issue at hand.

MR. REUKAUF: Are you familiar with the First Amendment?

THE COURT: I am familiar with the First Amendment, Mr. Reukauf.

MR. REUKAUF: That means I have a right.

THE COURT: Mr. Reukauf, let's go down a colloquy here. What is your level of education?

MR. REUKAUF: I have a - - I have a GED.

...

THE COURT: Do you have any type of college credit? Have you ever gone to college?

MR. REUKAUF: No.

THE COURT: Have you ever taken any type of law classes?

MR. REUKAUF: I think it's irrelevant. I can speak English; you can speak English. I haven't studied law.

THE COURT: Are you familiar with the rules of evidence?

MR. REUKAUF: I know how to speak the truth.

THE COURT: I will take that - -

MR. REUKAUF: And I am going to talk.

THE COURT: I will take that as a no.

MR. REUKAUF: And I am going to exercise my First Amendment rights.

THE COURT: Are you familiar with - -

MR. REUKAUF: And I cannot get a fair trial with that man over there in the corner, that woman right there, the guy that just left her [a defense attorney] . . . sent me up for 22 months because I was charged for spitting in a cop's face, and I didn't do it. I did not spit in his face and I did 22 months in prison.

THE COURT: Mr. Reukauf. Mr. Reukauf, again, we are talking about things that have no bearing on this court's decision of –

MR. REUKAUF: I am just saying I can't get a fair trial in this court.

THE COURT: Mr. Reukauf.

MR. REUKAUF: And I am going to represent myself, if I have no - - I would love to have Perry Mason on my team. Yeah, I would love to have the dream team on my team, yes. I would love that. But if it's a choice between me being my own lawyer and him, uh-uh. It's me because it's - - otherwise it's a total kangaroo court.

RP 9-12. The court then confirmed with the assigned counsel that he had no conflict representing defendant; that he would gladly step aside if the court wished to appointed different counsel, but he doubted the situation would improve. RP 12. The court then proceeded:

THE COURT: Well, based on what the - - the colloquy that this court has gone through, and I have also taken a look at the evaluational 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.

MR REUKAUF: Why is that?

THE COURT: And the court has to make that determination that you have the ability to represent yourself before I can find - -

MR. REUKAUF: I have already been interviewed by -
-

THE COURT: 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 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, the court is going to deny your request to discharge Mr. Stovern. The court finds there is no conflict. Certainly from what you are saying and what Mr. Stovern has said, the court finds there is - -

MR. REUKAUF: There is a conflict - - there is a conflict.

THE COURT: - - a difficulty in communicating - - because you are creating that.

MR. REUKAUF: No. I am not creating it. That man in the corner; that man [referring to a deputy prosecutor]. You don't realize how he has -- you don't realize --

THE COURT: Mr. Reukauf, again, you are talking about things that have no bearing on the court's decision.

MR. REUKAUF: Oh, it does, man. You don't understand. See, that's why I got to talk. That's why I have to talk.

THE COURT: The fact that you are unable to listen to --

MR. REUKAUF: This is my life. I am 71 years old. I don't need to go to prison. You show me a victim. Show me a victim. Who did I hurt? Who did I harm? Some person could come forward.

THE COURT: The court is denying your motion to represent yourself. The court finds that you do not have the ability to do that. The court finds --

MR. REUKAUF: I hear you. All right. All right. Yeah, okay. I heard you. Thanks a lot.

THE COURT: -- 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.

MR. REUFAUF: Decorum. Standard decorum. That man is a murderer. That man is a murderer.

THE COURT: So the court would find - -

MR. REUKAUF: He has got hit men.

THE COURT: 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.

MR. REUKAUF: I heard you. You don't have to run it into the ground. You don't have to run it into the ground, sir. I heard you. Denied.

THE COURT: Thank you, Mr. Reukauf. That's all for today.

MR. REUKAUF: Thank you. Yeah. Have a good day. Yeah. Save more lives. It's fake. You people are fake. It's the money it's all about. You need to be prosecuted under the RICO, Racketeer Influenced and Corrupt Organizations, because that's what you are about.

THE COURT: Could you please take him out of the courtroom?

Have a good day, Mr. Reukauf.

MR. REUKAUF: You are just squeezing the blood out of a taxpayer. That's all you are doing, yeah. That's what you are really all about.

(Whereupon the hearing concluded).

RP 9-15.

Our Supreme Court recently stated: "We review the denial of a defendant's request to proceed pro se for abuse of discretion." *State v. Burns*, 193 Wn.2d 190, 202, 438 P.3d 1183 (2019). "A trial court abuses its discretion if the decision is manifestly unreasonable such that no reasonable mind could come to that decision, if the decision is not supported by the facts, or if the judge applied an incorrect legal standard." *Id.* (citation omitted). "Absent an abuse of discretion, we will not reverse a trial court's decision, even if we may have reached a different conclusion on de novo review." *Id.* (citation omitted). Our Supreme Court further stated:

We give great deference to the trial court's discretion because the trial court is in a favorable position to the appellate courts in evaluating a request to proceed pro se. Trial judges have more experience with evaluating request to proceed pro se and have the benefit of observing the behavior, intonation, and characteristics of the defendant during a request.

Id. (citation omitted). Where the request is unequivocal and timely, a trial court then must determine if the request is knowing, voluntary and intelligent. *Id.* at 203. The trial court must engage the defendant in a colloquy on the record, which should generally include a discussion of the nature of the charges against the defendant, the maximum penalty, and the fact that the defendant will be subject to the technical and procedural rules of the court in the presentation of his case. *Id.* Our Supreme Court continued:

In order to give direction to trial courts and create an adequate record for appeal, our cases have suggested several additional, nonexhaustive factors to consider in the colloquy including education, experience with the justice system, mental health, and competency. The trial court may also look to the defendant's behavior, intonation, and willingness to cooperate with the court. . . . So long as a trial court conducted an adequate inquiry into a defendant's request and there is a factual basis for the court's finding that the waiver of counsel was not knowing, intelligent and voluntary, the trial court's discretionary decision will not be disturbed on appeal.

Id. at 203-04 (citations omitted). Competency to stand trial is not all that is necessary to be able to waive the right to counsel; the trial court must also satisfy itself that the waiver is knowing and voluntary. *Id.* at 206. Moreover, the right of self-representation does not exist “to disrupt decorum of court, to abuse the judicial system, to manipulate the trial process, or to serve as a tactic for delay.” *Hummel v. Commonwealth*, 306 S.W.3d 48, 53 (Ky. 2010) (collecting cases).

The instant case is precisely the situating where all deference must be given to the trial judge, who had “the benefit of observing the behavior, intonation, and characteristics of the defendant during a request.” See *Burns*, 193 Wn.2d at 202. As in *Burns*, “[e]ven without the benefit of seeing [the defendant’s] demeanor and hearing his intonations as the judge did, [it is apparent] his statements are not consistent with a defendant who understands the nature and seriousness of the charges against him,” and “the trial court did not abuse its discretion when it denied [the defendant’s] request to represent himself because the trial court record is sufficient to support the conclusion that [the

defendant] did not understand the nature and seriousness of the charges against him and could not knowingly, voluntarily, and intelligently waive his right to counsel.” See *Burns*, 193 Wn.2d at 206. In addition, when the defendant’s courtroom demeanor is coupled with the fact that he twice threw a chair at a widow when being interviewed by the doctor from Eastern State Hospital and had to be restrained by corrections officers, it becomes clear there would have substantial danger of disruption of the judicial process if self-representation had been allowed. As noted above, the right of self-representation does not exist for this purpose. *Hummel*, 306 S.W.3d at 53. There is no showing of abuse of discretion.

(C) Sufficient evidence of defendant’s out-of-state convictions was presented. Even if it were not, the only remedy would be to remand for a new hearing where new evidence of criminal history could be presented.

Defendant next argues the trial court improperly considered his prior out-of-state convictions in his offender score. First, defendant personally requested that his sentencing occur the same day that the jury verdict was returned. RP 198-99. If a contested hearing on criminal history were anticipated, greater preparation

time would have been needed. Given his desire for immediate sentencing, the court was justified in assuming he was not contesting criminal history. The trial court granted defendant's request for an exceptional sentence below the standard range. RP 212-13.

“To prove that an out-of-state conviction is comparable to a Washington felony in cases where the defendant does not challenge the criminal history presented by the State, the State may introduce Washington judgments that used out-of-state convictions to calculate an offender score.” *State v. Labarbera*, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005) (citing *State v. Cabrera*, 73 Wn. App. 165, 168-69, 868 P.2d 179 (1994)). “But if the defendant objects to the use of these documents as proof of the offenses, the State must present additional evidence of the existence and classification of an out-of-state conviction to satisfy its burden of proving the convictions by a preponderance of the evidence. *Id.* (citing *Cabrera*, 73 Wn. App. at 169).

The trial court had before it certified copies of two Washington judgments, admitted as exhibits in the just-completed

trial, which showed the out-of-state convictions. Exhibit 2, page 2; Exhibit 3, page 2. Defendant also signed and filed with the court an acknowledgment of his criminal history, which included those foreign convictions. CP 120. Defendant at sentencing did not object in any way to considering those convictions in his offender score; in fact, his entire argument at sentencing related to his request for an exceptional sentence below the range, which the trial court granted. RP 200-17. Under these circumstances, nothing more was required.

Even if the evidence of criminal history were not adequate, the only remedy would be to remand for a new hearing where the State would be able to present new evidence of criminal history. RCW 9.94A.530(2); *State v. Cobos*, 182 Wn.2d 12, 338 P.3d 283 (2014). If this court were to so find, the State would request such a remand.

(D) Supervision fees may be stricken.

Defendant finally challenges his community custody condition for supervision fees. Given defendant's age and personal circumstances, there is no reasonable possibility that he will ever

be able to pay anything. The State does not object to this provision being stricken.

IV. CONCLUSION

It is respectfully requested that the conviction and sentence of Alan Ray Reukauf be affirmed. In the event the court finds the evidence of criminal history to be insufficient, the State requests remand for a new sentencing hearing where new evidence of criminal history may be presented. Finally, the State does not object to the provision for supervision fees being stricken.

DATED: March 10, 2020.

Respectfully submitted:

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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 10, 2020, Pasco, WA
Marilyn Beasley
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FRANKLIN COUNTY PROSECUTING ATTORNEY'S OFFICE

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