

NO. 41447-3-II

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BY 

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRENT S. UNRUH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 09-1-03681-2

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant preserved the issue below where he failed to challenge his arrest?
2. Whether the defendant waived the issues of comparability of his California convictions, and the calculation of his offender score where he implicitly agreed to them?
3. Whether the State adduced sufficient evidence to prove, beyond a reasonable doubt, all the elements of failure to register as a sex offender?
4. Whether the trial court erred in finding that the defendant's California conviction for assault with intent to rape was comparable to attempted rape in Washington, for offender scoring purposes?

B. STATEMENT OF THE CASE.

1. Procedure

On August 10, 2009, the Pierce County Prosecuting Attorney (State) charged Brent Unruh (the defendant) with one count of failure to register as a sex offender (FTRSO). CP 1. The State later amended the

Information to correct the period of failing to register and to detail the manner in which the defendant failed to comply with the registration statute. CP 18-19.

Trial began on September 8, 2010, before Hon. Brian Tollefson. 9/8/2010 RP 1¹. That trial ended in a mistrial. 9/9/2010 RP 87, CP 24.

The case was reassigned for trial before Hon. Ronald Culpepper on September 29, 2010. RP 5. The defendant decided to waive his right to a jury trial. RP 8, CP 28. He proceeded with a bench trial. After hearing all the evidence, Judge Culpepper found the defendant guilty as charged. 10/4/2010 RP 31, CP 37.

On November 2, 2010, the court sentenced the defendant to 33 months in prison, the low end of the standard range. CP 45. On November 15, 2010, the defendant filed a timely notice of appeal. CP 177.

2. Facts

On September 15, 2008, the defendant pleaded guilty and was sentenced for FTRSO in Pierce County cause # 08-1-03783-7. Exh. 1, RP 9. After he was released from prison on that conviction, the defendant returned to Pierce County and registered as a sex offender. RP 26. The

¹ The VRP of the trial is generally contained in one volume. References to the trial will be designated as RP 5, etc. Where the VRP is from another proceeding, the reference will include the date of the proceeding e.g., 9/9/2010 RP 87.

defendant registered weekly as a transient for the next 9 weeks. RP 30, 33, 36, 38, 41, 45, 47, 48, 50. Each time, he acknowledged his legal duty to register. *Id.*

In May, 2009, the defendant was arrested on a Department of Corrections (DOC) warrant for failing to report to his Community Corrections Officer (CCO). RP 66. A DOC hearings officer found the defendant in violation of the conditions of community custody and imposed an agreed sanction. RP 105. On June 5, 2009, the defendant was released from confinement regarding the violation. RP 105. The defendant did not return to register with the Pierce County Sheriff (PCSD). RP 55.

Mark Merod is a PCSD detective who, among other tasks, checks on the reported residences of registered sex offenders. RP 84. On June 10, 2009, he checked on the defendant's reported residence: 29449 Orting-Kapowsin Highway in rural Pierce County. RP 87. Det. Merod discovered that no such address exists. RP 88, 90. He discovered that the defendant did not live at the two contiguous addresses that did exist in that immediate area. RP 88-89. He reported his findings to the Pierce County Prosecuting Attorney. RP 90. Puyallup Police contacted and arrested the defendant on August 2, 2009, in front of an Alcoholics Anonymous meeting place. RP 96.

C. ARGUMENT.

1. THE DEFENDANT FAILED TO PRESERVE THE ISSUES REGARDING HIS ARREST AND HIS OFFENDER SCORE WHERE HE FAILED TO RAISE THE ISSUES IN THE TRIAL COURT.

a. There is insufficient record to review the legality the police contact or arrest.

Issues not raised in the trial court generally will not be considered on appeal. *State v. Riley*, 121 Wn. 2d 22, 846 P. 2d 1365 (1993); RAP 2.5(a). RAP 2.5(a)(3) does permit a party to raise for the first time on appeal a “manifest error affecting a constitutional right”. However, where the facts necessary for the adjudication of the issue are not in the record, the error is not “manifest”. *Riley*, at 31. In *Riley*, the defendant challenged the search warrant. On appeal, he argued for the first time that his statements should be suppressed also, as fruit of the unlawful search. 121 Wn. 2d at 31. The Supreme Court rejected review of this issue because the record was lacking. The defendant had not raised and argued the “fruits” issue in the trial court. *Id.*

Here, the defendant now argues that his arrest was unlawful, and the discovery of any warrant for his arrest was fruit of the unlawful arrest. App. Br. at 5. But this was clearly not an issue of concern below. In fact, as the defendant points out in his brief (App. Br., at 5-6), the court remarks in passing that, while Puyallup Police Officer Culp arrested the defendant,

Officer Culp never explained, and no one ever asked, the basis of the arrest. 10/4/2010 RP 31. In *Riley*, the defendant moved to suppress the search in the trial court. *Id.* at 27. He also sought to suppress his statements, albeit under the 5th Amendment, not the 4th. *Id.*, at 32 (note 2). However, in the present case, the defendant filed no motions regarding the legality of his arrest or to suppress evidence. Defense counsel did not question Officer Culp about the arrest, nor cross-examine him at all.

There was no objection or record developed below regarding this issue. The court was not requested, and did not make, a ruling. Therefore there is no “error” for this Court to review. The issue was not raised or preserved for review.

- b. The defendant waived his objection to the offender score where he implicitly agreed to it.

Only an illegal or erroneous sentence is reviewable for the first time on appeal. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). While a defendant may not waive his objection to an illegal sentence, he may explicitly or implicitly waive an objection to calculation of his offender score. *In re Personal Restraint of Goodwin*, 146 Wn. 2d 861, 874, 50 P.3d 618 (2002).

Where the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives

the right to challenge the criminal history after sentence is imposed. *State v. Bergstrom*, 162 Wn. 2d 87, 94, 169 P. 3d 816 (2007), citing *In Re the Personal Restraint Petition of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). In *Bergstrom*, the State alleged, but did not prove, the defendant's prior convictions in a sentencing report. Defense counsel agreed with the allegations and score. When the defendant personally argued that some of the priors were same criminal conduct, defense counsel stated that he had examined the issue, implying that he agreed with the State's analysis. 162 Wn. 2d at 90-91. However, out of respect for the defendant, counsel declined to take a position contrary to the defendant's position. *Id.* The Court remanded the case to permit the State to prove the criminal history.

In *State v. Ross*, 152 Wn.2d 220, 226-27, 229-32, 95 P.3d 1225 (2004), the State relied on criminal history, including convictions from other jurisdictions that defense counsel affirmatively acknowledged were properly included in the defendants' offender scores. The Court held that the defendants had waived legal challenges that the State failed to prove their offenses were comparable to Washington crimes. *Id.*, at 232.

In the present case, at the sentencing hearing, the State calculated the defendant's offender score as 8, which required scoring the defendant's California assault with intent to rape as 3 points. 11/2/2010 RP 9. The court had the following colloquy with defense counsel:

THE COURT: [Defense Counsel], does the defense have any argument or anything to add about the offender score calculation?

[DEFENSE COUNSEL]: No argument, Your Honor, but we are not stipulating.

THE COURT: Do you believe there is any error in the State's calculation?

DEFENSE COUNSEL: Your Honor, I don't want to do anything to conflict with Mr. Unruh's desire to not stipulate so I prefer not to answer that. *I have nothing to indicate to the court that it is in error.*

THE COURT: I, of course, want to get the offender score right the first time, so anything you want to add? You contest any of this? You don't have to answer if you can't or are unable to, but do you contest any of the argument that [the prosecuting attorney] makes?

DEFENSE COUNSEL: *I have reviewed his out-of-state convictions, Your Honor. I have nothing to offer to conflict with the State's analysis.*

THE COURT: Nothing to offer, so that's nothing to counter and/or nothing to confirm either way?

DEFENSE COUNSEL: That's correct, Your Honor.

11/2/2010 RP 11-12 (emphasis added).

Despite these repeated invitations to object to the calculation of the offender score, or to challenge the State's comparability analysis, the defense declined. This is more than merely making the State carry its burden as required by *State v. Ford*, 137 Wn. 2d 472, 973 P. 2d 452 (1999) and other cases. Here, unlike the cases of *Bergstrom* and *Ross*, the State proved the prior convictions with certified copies. CP 68-168. The State, and the court, conducted a statutory comparison on the record.

11/2/2010 RP 12-13.

The defense counsel specifically declined to challenge the State's legal argument, had no reason to believe that it was wrong, and agreed to

the offender score. Where the defendant declined ample opportunity to make the argument below, he cannot be heard to make the same argument in this Court.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL OF THE ELEMENTS OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT.

The applicable standard of review for a challenge to sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. The elements of a crime can be established by both direct and circumstantial evidence. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977). Both forms of evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

It is a crime for one who has been convicted of a sex offense to knowingly fail to register with the sheriff of the county in which the offender resides. RCW 9A.44.130(11)(a). A person convicted of a “sex

offense” defined under RCW 9.94A.030(42) must register. “Sex offense” includes a conviction for FTRSO, RCW 9A.44.130 (except for 130(12)). RCW 9.94A.030(42). If a sex offender is without a fixed address, he must register every week. RCW 9A.44.130(6)(b). He must provide:

(i) Name; (ii) date and place of birth; (iii) place of employment; (iv) crime for which convicted; (v) date and place of conviction; (vi) aliases used; (vii) social security number; (viii) photograph; (ix) fingerprints; and (x) where he or she plans to stay.

RCW 9A.44.130(3)(b).

Here, the evidence showed that the defendant had a prior conviction for FTRSO. RP 8, Exh. 1. The defendant, a transient, failed to report after March 18, 2009. RP 55. He was released from custody regarding a DOC violation on June 5, 2009. RP 105. The residence that the defendant gave as his address did not exist. RP 88-90. When the defendant reported weekly from December 31, 2008, through March 18, 2009, the Sheriff’s Dept. notified him of his obligation to report as a sex offender. RP 29-50.

During a violation hearing with DOC, the hearings examiner notified the defendant of his obligation to register with the Sheriff’s Dept. upon release. RP109. The fact-finder could conclude from this evidence that all the elements of the offense were proven beyond a reasonable doubt.

3. THE COURT CORRECTLY CONCLUDED THAT THE DEFENDANT'S CALIFORNIA CONVICTION OF ASSAULT WITH INTENT TO RAPE WAS COMARABLE TO A WASHINGTON ATTEMPTED RAPE.
 - a. The State proved the defendant's prior convictions by a preponderance.

The State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. *See State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999); *State v. Hunley*, -- Wn. App. --, -- P. 3d -- (2011)(2011 WL 1856074). In the present case, the State presented ample evidence of the foreign convictions, unlike the case in *Ford*. Here, the State did not rely on a summary statement of the defendant's priors, as authorized by RCW 9.94A.500, which this Court found unconstitutional in *Hunley*.

In this case, the State provided certified copies of all of the defendant's prior convictions. CP 68-168. These included documents proving the defendant's California assault to commit rape conviction. CP 68-87. Using the statutory language which the State provided in its brief (CP 61-62), the court compared the elements of the California and Washington statutes on the record. 11/2/2010 RP 12-13. The State proved the prior convictions by a preponderance, and the court conducted a comparability analysis. There was no error.

- b. The California assault with intent to rape conviction is comparable to attempted rape in Washington.

The charging document of the 1984 California assault charge² defines the elements of Assault with Intent to Commit Rape as the willful, unlawful and felonious assault of a human being with the intent to commit rape. The 1983 version of the California Penal Code §261 provides:

Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

- (1) Where a person is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent.
- (2) Where it is accomplished against a person's will by means of force or fear of immediate and unlawful bodily injury on the person of another.
- (3) Where a person is prevented from resisting by any intoxicating, narcotic or anaesthetic substance, administered by or with the privity of the accused.
- (4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused.
- (5) Where a person submits under the belief that the person committing the act is the victim's spouse and this belief is induced by any artifice, pretense or concealment practiced by the accused, with the intent to induce the belief.
- (6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury or death.

² Found at the last two pages of Exhibit A of the State's sentencing memorandum, CP 86-87.

Assault was defined by California Penal Code §240 as an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another.

Washington's Rape in the Second Degree statute, RCW 9A.44.050, as it existed in 1983, read³:

- (1) 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:
 - (a) By forcible compulsion
 - (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;
- (2) Rape in the second degree is a class B felony.

“Forcible compulsion” in the 1983 version of RCW 9A.44.010 was defined as “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 or another person will be kidnapped.” Former RCW 9A.44.010(5). “Physically helpless” was defined by former RCW 9A.44.010(4) as meaning “a person who is unconscious or for any other reason is physically unable to communicate unwillingness to act.” “Mental incapacity” was defined by former RCW 9A.44.010(3) as “that condition existing at the time of the

³ 1983 versions of the relevant sections of former RCW 9A.44 were provided to the sentencing court in Exhibits H, I, and J attached to the State's sentencing memorandum. The 1983 versions of the California Penal Code were likewise provided; as Exhibit G.

offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.” California Penal Code section §263, entitled “Rape; essentials, sufficiency of penetration,” states that:

“The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime.”

In Washington, sexual intercourse was defined by former RCW 9A.44.010(1), which stated, in pertinent part: “[s]exual intercourse has its ordinary meaning and occurs upon any penetration, however slight...” Thus, this element is the same for both the Washington and California rape statutes. Notably, the defendant’s California conviction is not for a completed rape, but rather, for assault with the intent to commit rape. The act that the defendant intended to commit but did not, the rape, was not complete; therefore, technically, any of them could have ultimately applied. Because the rape was not completed, the comparable Washington crime would be “attempt” to commit Rape in the Second Degree. Washington’s Criminal Attempt statute, former RCW 9A.28.020, read, in pertinent part:

(1) A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.

In comparing the two rape statutes, the California rape statute compares to Washington's rape in the second degree, particularly when considering the definition of forcible compulsion. In Washington, the commission of rape in the second degree by forcible compulsion equates to most of the subsections of California's rape statute, which require either that the rape be accomplished against the victim's will by use of force or fear of bodily injury (subsection 2), or that the victim be physically helpless (subsection 3 and 4), or that the victim or another person be threatened (subsection 6). Subsection 1 of California's rape statute is comparable to the portion of subsection (b) of Washington's rape in the second degree statute referencing that the victim is mentally incapacitated. In this case, the defendant was found guilty of assault with intent to commit rape, thus excluding subsection 5 of California's statute applies (that the victim believed the defendant was the victim's spouse).

California's rape statute is narrower than Washington's rape statute in that, for example, it sets forth specific means by which a person may be rendered physically helpless, such as the administration of certain substances (subsection 3) or unconsciousness (subsection 4), but this is not required in Washington. All that is required for rape in the second degree is physical helplessness; how that occurred is irrelevant. Therefore, if the defendant is guilty in California because, for instance, he caused the physical helplessness by administering an anesthetic substance, he is also necessarily guilty in Washington. Where another state's statute is

narrower than Washington's, generally speaking, the narrower conduct prohibited by the other state's statute will be encompassed by Washington's broader language. *See, State v. Jordan*, 158 Wn. App. 297, 301-302, 241 P. 3d 464 (2010)(finding Texas' defenses to homicide narrower than those in Washington). *Cf. In re Personal Restraint of Lavery*, 154 Wn.2d 249, 255-256, 111 P. 3d 837 (2005)(holding that a federal bank robbery statute was not comparable because its intent element was broader than the Washington robbery statute).

As stated above, the act that the defendant actually committed in this California conviction is the assault, not the rape itself. In Washington, the defendant would have been found guilty of Attempted Rape in the Second Degree, as the assault would have been considered a substantial step toward the commission of that crime. It is also established through his California conviction that he had the intent to commit rape, thus the element of the attempt statute that a person must have the intent to commit a specific crime, is met. The defendant intended to commit the specific crime of rape and took the substantial step toward that crime by assaulting his victim. The court correctly concluded that the two convictions were legally comparable.

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D. CONCLUSION.

The defendant had ample opportunities to raise and argue a suppression issue and challenge his offender score at the trial level. He cannot raise these issues for the first time on appeal. The State appropriately produced evidence and analysis of the defendant's prior California convictions. The State respectfully requests that the defendant's conviction and sentence be affirmed.

DATED: June 17, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts
Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/17/11 Theresa Kar
Date Signature