IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AVERY PIERRE CLAY, Appellant.	No. 39745-5-II (consolidated with 39685-8-II) UNPUBLISHED OPINION

Penoyar, C.J. — Following a bench trial, the trial court found Avery Pierre Clay guilty of two counts of second degree child rape and one count of second degree rape—victim under the age of 15. After a jury trial involving a separate incident and a separate victim, the jury found Clay guilty of one count of second degree rape.

In these consolidated cases, Clay appeals his loss of voting rights under Washington's felon disenfranchisement law. Referencing his bench trial, Clay argues that sufficient evidence does not support the finding of fact relating to the forcible compulsion element of second degree rape. He also raises several arguments in his statement of additional grounds (SAG).[1] We affirm Clay's convictions and also hold that Clay did not properly raise the voting rights issue for our review.

FACTS

On or about April 30, 2007, 13-year-old CS and her friend ran into Clay, a friend of CS's mother, on the stairs of an apartment complex. Clay called CS by name, so she walked over and talked to him. CS's friend went home. Eventually, Clay and CS went to Clay's friend's

[1] RAP 10.10.

apartment, because CS had to use the bathroom.

Clay followed CS into the bathroom. After they had both used the bathroom, CS walked out of the room and Clay grabbed her around her stomach and carried her into a bedroom. She sat on a chair in the bedroom and Clay locked the door and turned off the light. A series of sexual assaults ensued.

The State charged Clay with three counts of second degree child rape[2] and one count of second degree rape—victim under the age of 15.[3] Clay waived his right to a jury trial and requested a bench trial. At trial, Clay testified that he had sex with CS, but he believed, at the time, that she was 18 years old. He also testified that she never indicated that she did not want to have sex, that he did not threaten her, that he did not force her to have sex with him, and that he did not force her to stay with him. The trial court found Clay guilty of two counts of second degree child rape and one count of second degree rape—victim under the age of 15.[4] Clay appeals.

ANALYSIS

I. Washington's Felon Disenfranchisement Law

Clay argues that he was "improperly disenfranchised when he lost his right to vote under Washington's felon disenfranchisement law, which has been found to violate the Federal Voting Rights Act." Appellant's Br. (39745-5) at 1. Under article VI, section 3 of the Washington State

[2] In violation of RCW 9A.44.076.

[3] In violation of RCW 9A.44.050(1)(a); RCW 9.94A.837; former RCW 9.94A.712 (2006), *recodified as* RCW 9.94A.507.

[4] In his other trial, involving a separate incident and a separate victim, a jury found Clay guilty of one count of second degree rape. With regard to that trial, Clay only alleges that he was improperly disenfranchised when he lost his right to vote.

Constitution "[a]ll persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise." An "infamous crime" is a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility. RCW 29A.04.079.

Clay asserts that "[t]his portion of the Judgment and Sentence should be stricken and the trial court should issue an order restoring [his] voting rights." Appellant's Br. (39685-8) at 12. It is not, however, the voting rights statement in Clay's judgment and sentence that deprives Clay of his voting rights. It is the Washington Constitution, as enforced by the executive branch, that deprives him of that right.

Under RCW 29A.08.520, the secretary of state compares the list of registered voters to a list of felons who are not eligible to vote. If a registered voter is not eligible to vote, the secretary of state or county auditor confirms the match and suspends the voter registration from the official state voter registration list. RCW 29A.08.520. The secretary of state then sends the person a notice of the proposed cancellation and an explanation of the requirements for provisionally and permanently restoring the right to vote and reregistering. RCW 29A.08.520.

The judgment and sentence merely provides notice of the deprivation. If Clay had not signed the acknowledgment of his loss of voting rights, he still would have been removed from the list of registered voters under the state constitution. Since the trial court merely provided Clay with a notification required by law and took no legal action affecting Clay's voting rights, there is nothing on this subject for us to review.[5]

[5] Clay relies solely on *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010), *depublished by* 603 F.3d 1072 (9th Cir. 2010). But the Ninth Circuit reheard this case en banc and no longer favors Clay's argument. *See Farrakhan v. Gregoire*, 623 F.3d 990, 993-94 (9th Cir. 2010).

II. Sufficiency of the Evidence

Clay next argues that sufficient evidence does not support his second degree rape conviction, because the evidence presented at his bench trial does not support the trial court's finding of fact relating to the element of forcible compulsion. We disagree.

A. Standard of Review

When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). We draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Circumstantial evidence is as equally reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the factfinder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Corbett*, 158 Wn. App. 576, 587, 242 P.3d 52 (2010).

We determine whether substantial evidence supports a trial court's challenged findings of fact and, in turn, whether the findings support the conclusions of law. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1974).

B. Second Degree Rape

"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

. . . [b]y 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 or another person will be kidnapped." RCW 9A.44.010(6). Forcible compulsion does not require a showing that the victim offered physical resistance. *State v. McKnight*, 54 Wn. App. 521, 525, 774 P.2d 532 (1989).

Clay argues that substantial evidence does not support the trial court's finding of fact 5, which states:

> Once inside the bedroom, the defendant turned off the lights, threw C.S. to the ground and shortly thereafter forcibly removed C.S.'s clothing. C.S. told the defendant that she did not wish to have sex with him. The defendant forced C.S. to perform oral sex on him, placing his penis into her mouth. He additionally forced his penis inside C.S.'s vagina and then forced his penis inside C.S.'s anus. He told her that he would break her face if she did not submit to his demands for sex. The threats made by the defendant to harm C.S. and the physical force he used to restrain C.S. in the bathroom and to bring her to the bedroom and to throw her to the floor and to remove her clothes overcame her resistance to having sexual intercourse with the defendant.

Clerk's Papers (CP) (39685-8) at 38-39.

Clay first argues that substantial evidence does not support the trial court's finding that Clay "threw C.S. to the ground and shortly thereafter forcibly removed C.S.'s clothing." CP (39685-8) at 38. CS testified that Clay pushed her onto the floor, grabbed her pants, pulled off her pants and underwear, and got on top of her. CS also testified that she told Clay to get off of her and that she did not want to have sex with him. That the trial court used the word "threw" instead of "pushed"' in the finding is immaterial, as either action shows forcible compulsion. Substantial evidence supports this finding and the trial court's finding that Clay forcibly removed

CS's clothing.

Clay also challenges the portion of the trial court's finding that states, "[Clay] told her that he would break her face if she did not submit to his demands for sex." CP (39685-8) at 38-39. CS testified that she started to cry, and Clay told her that if she "didn't shut up, he would break the side of [her] face." 4 Report of Proceedings (RP) (39685-8) at 68. CS started crying when she told Clay to get off of her and he did not listen to her. We conclude that substantial evidence also supports this portion of the trial court's findings.

Finally, Clay challenges the portion of the finding that Clay forced CS to perform oral sex by placing his penis into her mouth. Although CS did not explicitly assert that Clay placed his penis in her mouth, she did testify that Clay told her to perform oral sex. She testified that she told Clay that she could not, that she was going to get sick and throw up, but he told her that he "didn't care." 4 RP (39685-8) at 71. CS then testified that she "tried" to perform oral sex, but she gagged. 4 RP (39685-8) at 71. We conclude that substantial evidence also supports this portion of the finding. Substantial evidence supports the trial court's finding of fact 5, the finding pertaining to the element of forcible compulsion for his second degree rape conviction.

III. Statement of Additional Grounds

A. Right to Counsel

Clay asserts that the trial court erred by denying his request to allow defense counsel to withdraw and appoint substitute counsel. We disagree.

"The determination of whether an indigent's dissatisfaction with his court appointed counsel warrants appointment of substitute counsel rests within the sound discretion of the trial court." *State v. Stark*, 48 Wn. App. 245, 252, 738 P.2d 684 (1987). The trial court should

consider the reasons for the defendant's dissatisfaction, the competence of existing counsel, and the effect of substitution on the scheduled proceedings. *Stark*, 48 Wn. App. at 253.

Clay requested the removal of defense counsel "because I know and I feel that he is not working in my favor. He is not getting anything done. . . . I know that prosecutors and attorneys are not supposed to be friendly during trial. . . . There is no deals being brought upon or anything like that." 2 RP (39685-8) at 33. We agree with the trial court that there was no legal basis to replace defense counsel.

B. Clay's Testimony

Clay also argues that his counsel told him to "get on the stand and testify," and he did not want to take the stand. SAG at 1. To the extent he is arguing that his trial counsel was ineffective for insisting that he testify, this was a reasonable tactic by defense counsel. To the extent he is arguing that he was forced to testify, Clay has not established that he was forced or coerced into waiving his right against self-incrimination. Clay's assertion that he did not want to testify and that his counsel told him to do so relies on matters outside the record, which we cannot address on appeal. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

C. Ineffective Assistance of Counsel

Finally, Clay appears to argue that he received ineffective assistance of counsel, asserting that counsel "came to me[, Clay,] with no deals at all." SAG at 1. Clay fails to show that his counsel was responsible for the lack of any offers. The record does not support Clay's claim.

Clay also appears to argue that his counsel was ineffective for waiving closing argument in Clay's bench trial. Generally, opening statements and closing arguments are considered trial tactics and the court will not second guess counsel's trial tactics. *See State v. Lord*, 117 Wn.2d

829, 885, 822 P.2d 177 (1991). Additionally, Clay has failed to show he suffered any prejudice from the waiver.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.