IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRENT S. UNRUH, Appellant.	No. 41447-3-II UNPUBLISHED OPINION

Worswick, A.C.J. — Brent Unruh appeals his 2010 conviction for failure to register as a sex offender and his 33-month sentence, arguing that (1) the arresting officer unlawfully arrested Unruh before discovering his outstanding arrest warrant, (2) the State presented insufficient evidence to sustain his conviction, and (3) the sentencing court considered insufficient factual information on his prior out-of-state conviction to determine whether it was comparable to a Washington crime includable in his offender score. We affirm.

FACTS

In September 2008, Unruh pleaded guilty in Pierce County Superior Court to one count of failure to register as a sex offender and was sentenced to 32 days in jail followed by 36 to 48 months of community custody. Unruh's 2008 conviction for failure to register stems from a 1984 California conviction for assault with intent to rape. But Unruh's 2008 conviction for failure to register as a sex offender is itself a felony sex offense that requires Unruh to register as a sex

offender.

After Unruh's release from jail, he registered as required with the Pierce County Sheriff's Department as a transient for nine consecutive weeks from December 31, 2008 through February 25, 2009. Then, after failing to register for three weeks, Unruh registered as a transient sex offender in Pierce County for the last time on March 18, 2009. Each week that Unruh registered, he signed paperwork stating that he understood the registration law and received a six-page copy of Washington's sex offender registration law. Unruh knew of and understood his duty to register.

Unruh was in custody in the Kitsap County Jail for violating his community custody conditions from May 12 through June 4, 2009. When he was released from custody on June 4, Unruh read aloud and signed paperwork summarizing the conditions of his release, stating that he was required to register with the Pierce County Sheriff's Department within one business day of his release. But Unruh neither registered with the Pierce County Sheriff's Department nor requested that Pierce County transfer his supervision to another county.

Because Unruh did not register within one business day of his June 4 release, his community corrections officer issued an arrest warrant five or six days later. On June 10, Pierce County Sheriff's Department Detective Mark Merod went to look for Unruh at the address he listed when he was released from custody on June 4, but Detective Merod discovered that no such address existed. Although Detective Merod inquired at neighboring properties, he did not find Unruh.

Then, on August 2, Puyallup Police Department Officer Adam Culp responded to a call from the Meeker Fellowship asking officers to check on a man who had been outside their Alcoholics Anonymous meeting for several days. Officer Culp testified that Unruh was sitting at a picnic table with bags of clothing and that "as soon as [he] started talking to [Unruh] . . . [he could obviously] smell intoxicants." Report of Proceedings (RP) (Sept. 30, 2010) at 96. Officer Culp believed Unruh was intoxicated and transient and he arrested Unruh. Although not explicit in the record, it appears that Officer Culp discovered Unruh's outstanding arrest warrant after arresting him outside of Meeker Fellowship. The State charged Unruh with failing to register as a sex offender.

Unruh waived his right to a jury trial, and the case proceeded to a bench trial. At trial, the State did not elicit testimony from Officer Culp on his reason for arresting Unruh; the defense declined to cross examine Officer Culp. Indeed, the record contains no information on the reason for which Officer Culp arrested Unruh. The trial court stated, "[N]obody asked [Officer Culp] why [Unruh] was arrested. I don't know exactly why he was arrested, but [police] discovered [Unruh] failed to register." RP (Oct. 4, 2010) at 33.

The trial court found that Unruh knew and understood his duty to register as a sex offender stemming from his September 2008 conviction for failure to register and that he knowingly failed to register from June 4 to August 2, 2009. Thus, the trial court found Unruh guilty as charged.

The trial court agreed with the State that Unruh had an offender score of eight. Because Unruh had out-of-state convictions, the State and the trial court analyzed the statute upon which

Unruh's 1984 California assault with intent to commit rape conviction was based and found that it was legally comparable to attempted second degree rape in Washington. The State specifically stated that "the Washington statute is broader because where the California statute sets up all the specific ways it can be committed[,] in Washington it's broader and tends to encompass anything that could have happened in California." RP (Nov. 2, 2010) at 8. The trial court agreed and Unruh's 1984 California conviction resulted in three points toward his offender score. Then, the State and the trial court found Unruh earned five more points towards his offender score for other convictions.

During sentencing, the court engaged in a lengthy dialogue with Unruh's counsel:

> The Court: [Counsel], does the defense have any argument or anything to add about the offender score calculation?
> Counsel: No argument, your Honor, but we are not stipulating.
> The Court: Do you believe there's any error in the State's calculation?
> 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 [c]ourt 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? . . . .
> 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?
> Counsel: That's correct, Your Honor.
> . . . .
> The Court: So, I concur with the State's analysis. [Counsel], anything else you want to add?
> Counsel: I have nothing to add.

RP (Nov. 2, 2010) at 11-12, 17. The trial court maintained Unruh's offender score at eight and sentenced Unruh to 33 months in prison followed by 36 months of community custody. Unruh

appeals his 2010 conviction and sentence.

ANALYSIS

I. Conviction

Unruh argues that Officer Culp unlawfully arrested him on August 2, 2009, and discovered Unruh's arrest warrant as a fruit of that unlawful arrest. In making this argument, Unruh implies that his outstanding arrest warrant itself was evidence tainted by his unlawful arrest. Because Unruh did not argue his arrest was unlawful below, he did not preserve the issue for review, and we must first determine if Unruh has shown manifest constitutional error such that he may raise that issue for the first time on appeal. Unruh further argues that, absent the tainted evidence of his arrest warrant, the State presented insufficient evidence to convict him.

A. *Manifest Constitutional Error*

In general, a party must raise any issue at trial that they wish to preserve for appeal, unless that party can show existence of a "manifest error affecting a constitutional right." RAP 2.5(a); *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). Thus, Unruh may challenge the lawfulness of his arrest if he can show that it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Fenwick*, 164 Wn. App. 392, 399, 264 P.3d 284 (2011).

We apply a two-part analysis to determine whether the trial court made a manifest error affecting a constitutional right. *State v Bertrand*, 165 Wn. App. 393, 400, 267 P.3d 511 (2011). First, a manifest error affecting a constitutional right must actually be a constitutional error. *Bertrand*, 165 Wn. App. at 400, n. 8. Here, because Unruh argues that Officer Culp unlawfully arrested him and, thus, unlawfully discovered Unruh's outstanding Department of Corrections

arrest warrant, Unruh alleges an error affecting a constitutional interest. Wash. Const. art. I, § 7; *See State v. Eserjose*, 171 Wn.2d 907, 912-14, 259 P.3d 172 (2011).

Second, we determine if the constitutional error is manifest. *Bertrand*, 165 Wn. App.at 400. In order for a constitutional error to be manifest, the defendant must show that he was actually prejudiced by the error. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Thus, the defendant bears the burden of showing that the constitutional error had "practical and identifiable consequences in the trial . . . ." *O'Hara*, 167 Wn.2d at 99 (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)) (internal quotation marks omitted). But we can neither determine whether an alleged constitutional error had identifiable consequences nor evaluate the merits of the claim if the record on appeal is not adequately developed. *O'Hara*, 167 Wn.2d at 99. Thus, if the record does not include the facts necessary for the court to evaluate the constitutional error, a criminal defendant cannot show actual prejudice. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *Fenwick*, 164 Wn. App. at 400; *O'Hara*, 167 Wn.2d at 99. Without actual prejudice, any constitutional error is not manifest and a criminal defendant cannot raise it for the first time on appeal. *O'Hara*, 167 Wn.2d at 99.

Here, even though the arresting officer testified at trial, neither the State nor Unruh asked Culp his reasons for making the arrest. Unruh's trial counsel specifically declined to cross examine Officer Culp. Nothing in the record allows us to evaluate regarding whether or not Officer Culp had probable cause to arrest Unruh. Because the record contains no information to allow us to evaluate whether Officer Culp lawfully arrested him, Unruh cannot show that this alleged error actually prejudiced him. Thus, Unruh's claim that Officer Culp unlawfully arrested

him and unlawfully discovered his outstanding Department of Corrections arrest warrant are not manifest error. Since Unruh does not raise a manifest error affecting a constitutional right, we do not consider the lawfulness of his arrest for the first time on appeal.

B. *Sufficiency of the Evidence*

Unruh next argues that, absent the tainted evidence of his arrest warrant, the State presented insufficient evidence to convict him of failing to register as a sex offender.[1] Because we hold that Unruh failed to show manifest error affecting a constitutional right, we consider all the evidence presented at trial when we analyze this issue.

We review challenges to the sufficiency of the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant admits the truth of all of the State's evidence and all reasonable inferences that can be drawn from it by challenging its sufficiency. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007).

A person commits the crime of failure to register as a sex offender if he or she has a duty to register for a prior felony sex offense and he or she knowingly fails to comply with the registration requirements. RCW 9A.44.132(1).

Under our deferential review in challenges to the sufficiency of the evidence, the State met

[1] We note that Unruh's outstanding arrest warrant was not itself evidence upon which his conviction was based. Although Officer Culp discovered Unruh's arrest warrant while arresting Unruh, it was Unruh's identity, not the warrant, that led to his conviction for failing to register as a sex offender.

its burden of proof. *See Hosier*, 157 Wn.2d at 8. The State established that (1) Unruh was convicted in 2008 of a crime that triggered his duty to register as a sex offender; (2) Unruh understood his duty to register; and (3) Unruh failed to register weekly, as required, between June 4 and August 2, 2009. Thus, his argument fails.

II. Sentence

Unruh further argues that the State presented insufficient evidence to support his sentence because the State did not provide the factual record of his 1984 California assault with intent to commit rape conviction for the trial court to consider in its comparability analysis. We disagree.

The State must prove prior convictions by a preponderance of the evidence in order for the trial court to consider them in calculating an offender score. *State v. Labarbera*, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005). Because the State presented certified copies of each of Unruh's Washington and out-of-state convictions, the State proved their existence by a preponderance of the evidence.

However, where a criminal defendant has out-of-state convictions, the sentencing court must conduct a comparability analysis to determine if the out-of-state conviction is either the legal or factual equivalent of a Washington crime. *State v. Calhoun*, 163 Wn. App. 153, 160, 257 P.3d 693 (2011). An out-of-state conviction is legally equivalent to a Washington crime if both have the same required elements. *Calhoun*, 163 Wn. App. at 160. But if the elements required to convict are different, the sentencing court must determine if the crimes are factually equivalent by reviewing the out-of-state conviction record to ascertain whether the defendant's conduct establishes he committed the comparable Washington crime. *State v. Jackson*, 129 Wn. App. 95,

104-05, 117 P.3d 1182 (2005). We review the trial court's classification of out-of-state crimes and the trial court's calculation of the offender score de novo. *Labarbera*, 128 Wn. App. at 348; *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

The trial court conducted the required analysis and found that Unruh's 1984 California assault with intent to rape conviction was the legal equivalent of the Washington crime of attempted second degree rape. The court considered the applicable California and Washington statutes.

In 1984, California law defined rape as:

> [A]n act of *sexual intercourse* . . . 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 or another.
>
> (3) Where a person is prevented from resisting by any intoxicating, narcotic, or [anesthetic] 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 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.

Cal. Penal Code (CPC) § 261 (Deering 1983) (emphasis added). But in Washington in 1984, "A person is guilty of rape in the second degree when . . . the person engages in *sexual intercourse* with another person: (a) By forcible compulsion; or (b) When the victim is incapable of consent

by reason of being physically helpless or mentally incapacitated." Former RCW 9A.44.050(1) (1983) (emphasis added). Thus, prong (b) of the Washington statute is sufficiently broad to make it the legal equivalent of prongs (1) and (3) of the California statute.

Moreover, Washington law defined forcible compulsion 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) (1983). Thus, rape by forcible compulsion under prong (a) of the Washington statute has the breadth to cover prongs (2), (3), (4), and (6) of the California statute.[2] Importantly, both the California and Washington laws required sexual intercourse for a conviction for rape or second degree rape and both California and Washington defined sexual intercourse as "any penetration, however slight." CPC § 263; Former RCW 9A.44.010(1) (1983).

However, Unruh was not convicted of rape in California. Instead, Unruh was convicted of *assault with intent to commit rape*, violating CPC § 220, which stated: "Every person who *assaults* another with intent to commit . . . rape . . . is punishable by imprisonment in the state prison for two, four, or six years." (Emphasis added). California law defined assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." CPC § 240. Moreover, because Unruh did not actually commit rape, the trial court

[2] The State argues in its briefing to us that prong (5) of the California statute does not apply because Unruh's conviction for assault with intent to commit rape precludes the victim's belief that Unruh was her spouse. We agree because Unruh's conviction is for assault with intent to commit rape, not rape, and it is inconceivable that Unruh assaulted someone intending to convince that person that they were spouses.

also considered Washington's criminal attempt statute, which stated: "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." Former RCW 9A.28.020(1) (1983).

Therefore, the elements required to convict for attempted second degree rape in Washington were (1) taking a substantial step (2) toward committing rape by forcible compulsion or (3) when the victim is unable to consent; these elements are broad enough to include each of the elements required to convict a person of *assault* with intent to rape in California. Because the elements required to convict in Washington are broader than the more specific elements required in California, any California assault with intent to commit rape conviction would necessarily satisfy the Washington requirements.[3] Accordingly, Washington's attempted second degree rape is the legal equivalent of California's assault with intent to rape.

In order to include an out-of-state conviction in an offender score, the court must compare the out-of-state conviction to a Washington offense and determine that they are *either* legally or factually equivalent. *Calhoun*, 163 Wn. App. at 160. Because assault with intent to commit rape is the legal equivalent to attempted second degree rape, there is no need to look into the facts behind Unruh's 1984 California conviction, despite the "unusual circumstances" notation on the sentencing paperwork. Therefore, the State presented sufficient evidence that Unruh's 1984 California was the legal equivalent of attempted second degree rape to count it in calculating his offender score.

[3] Again, except for California's prong (5), but it does not apply here.

We affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Van Deren, J.

Johanson, J.