

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 11 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LAZARO VIZCARA-RAMIREZ,

No. 19-70019

Petitioner,

Agency No. A205-490-234

v.

MEMORANDUM*

ROBERT M. WILKINSON, Acting
Attorney General,

Respondent.

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted December 11, 2020**
Seattle, Washington

Before: McKEOWN, HUNSAKER, and BUMATAY, Circuit Judges.

Lazaro Vizcara-Ramirez, a native of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") denial of his application for cancellation of removal and voluntary departure. The petition is granted.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1. An alien convicted of an aggravated felony, including attempted rape, is ineligible for cancellation of removal and voluntary departure. 8 U.S.C. §§ 1229b(b)(1)(C), 1229c(b)(1), 1227(a)(2)(A)(iii), 1101(a)(43)(A), (U). To determine whether a state conviction is an aggravated felony, we employ the categorical and modified categorical approaches. *Syed v. Barr*, 969 F.3d 1012, 1017 (9th Cir. 2020). The analysis essentially “ask[s] whether the statutory elements of the crime of conviction match the elements of the generic offense.” *Id.* We review the question de novo. *Jauregi-Cardenas v. Barr*, 946 F.3d 1116, 1118 (9th Cir. 2020).

2. In 2013, Vizcara was convicted of attempted third-degree rape in violation of Revised Code of Washington (“RCW”) §§ 9A.28.020, 9A.44.060. At the time of his conviction, RCW § 9A.44.060(1) defined third-degree rape as when:

[A] person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim’s words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

There is no dispute that RCW § 9A.44.060 (2013) is categorically overbroad due to the threat-to-property alternative. *See Castro-Baez v. Reno*, 217 F.3d 1057,

1059 (9th Cir. 2000) (The generic definition of rape requires “non-consensual sexual intercourse with a person.”).

3. Since § 9A.44.060 encompasses conduct beyond federal generic rape, we next need to decide if the statute is divisible. *See Syed*, 969 F.3d at 1017. Divisibility turns on whether a statute’s enumerated alternatives are “elements or means.” *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). A statute is divisible if it “lists elements in the alternative—thereby creating multiple, distinct crimes within a single statute.” *Syed*, 969 F.3d at 1017. If “a jury must unanimously agree on which of the . . . statutory alternatives a defendant committed to return a conviction,” the alternatives are elements; otherwise, they are means. *United States v. Robinson*, 869 F.3d 933, 938 (9th Cir. 2017). To answer the question, we consult state law, including the face of the statute, possible differences in punishment, and state-court precedent. *Mathis*, 136 S. Ct. at 2256.

While Washington state courts have not specifically addressed this issue with respect to third-degree rape, the Washington Supreme Court has held that the similarly structured first- and second-degree-rape statutes present alternative *means* to committing their respective crimes. *See State v. Whitney*, 108 Wash. 2d 506, 510–11 (1987) (en banc) (regarding RCW § 9A.44.040, first-degree rape); *State v. Ortega-Martinez*, 124 Wash. 2d 702, 707 (1994) (en banc) (regarding RCW § 9A.44.050, second-degree rape).

To determine whether a statute describes “several multiple offenses or a single offense which may be committed in different ways,” Washington courts consider: “[1] the title of the act; [2] whether there is a readily perceivable connection between the various acts set forth; [3] whether the acts are consistent with and not repugnant to each other; [4] and whether the acts may inhere in the same transaction.” *Whitney*, 108 Wash. 2d at 510 (alterations in original) (quoting *State v. Arndt*, 87 Wash. 2d 374, 379 (1976) (en banc)). Following this analysis, the Washington Supreme Court concluded that first-degree rape is a “single offense” with “alternative means” of commission by kidnapping or by use or threatened use of a deadly weapon. *Id.* at 510–11. Similarly, the court clearly delineated second-degree rape’s two alternatives—i.e., by “forcible compulsion” or when the victim is incapable of consent by “reason of being mentally incapacitated”—as “means” not requiring juror unanimity. *Ortega-Martinez*, 124 Wash. 2d at 708–09.

Given these cases, we believe that Washington state courts would also determine that third-degree rape’s statutory alternatives are means, not elements. Like in first- and second-degree rape, third-degree rape’s lack-of-consent and threat-to-property alternatives “could inhere in the same incident” and are not “repugnant” to each other. *Whitney*, 108 Wash. 2d at 510. In other words, a case could arise where “substantial evidence” could support both rape by lack of consent *and* by threat to property rights in one single offense and, thus, jury unanimity would not be

required under Washington law. *Id.* at 511. Under this understanding of the law, § 9A.44.060’s alternatives cannot be said to be “elements” and the statute is not divisible.

Washington’s pattern jury instructions for third-degree rape confirm that § 9A.44.060’s alternatives are means, not elements. Such instructions are often a “useful tool in assessing the divisibility of state statutes.” *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1013 (9th Cir. 2015). Here, the instructions at the time of Vizcara’s conviction specifically provided:

To return a verdict of guilty, the jury need not be unanimous as to which of alternatives [lack of consent] or [threat to property] has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

11 Wash. Prac., Pattern Jury Instr. Crim. 42.02 (3d ed. 2008). As jury unanimity is required for any element, *see Robinson*, 869 F.3d at 938, these instructions demonstrate that Washington law views § 9A.44.060’s subsections as forming alternative means to committing a single offense.

We recognize that this court has previously held that § 9A.44.060 is an aggravated felony or subject to the modified categorical approach. *See United States v. Yanez-Saucedo*, 295 F.3d 991, 996 (9th Cir. 2002) (holding that § 9A.44.060(1)(a) fits the generic definition of rape); *United States v. Gallegos-Galindo*, 704 F.3d 1269, 1274–75 (9th Cir. 2013) (applying the modified categorical approach to § 9A.44.060). But these cases were decided before *Descamps v. United States*, 570

U.S. 254 (2013), and *Mathis* and “had no occasion . . . to determine whether [the statute] is divisible” as required by current law. *Robinson*, 869 F.3d at 937. In light of the above analysis, *Yanez-Saucedo* and *Gallegos-Galindo* are “‘clearly irreconcilable with the reasoning or theory’ of *Descamps* and *Mathis*,” and we do not follow them here. *Id.* (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)).

RCW § 9A.44.060 is, thus, indivisible and the BIA was not permitted to resort to the modified categorical approach to determine if Vizcara’s conviction was an aggravated felony. *Cf. Syed*, 969 F.3d at 1017 (“If a statute is not divisible. . . , the conviction will not serve as a basis of removal.”).

* * *

For the foregoing reasons, we **GRANT** Vizcara’s petition and **REMAND** to the BIA.