FILED
4-30-15
Court of Appeals
Division I
State of Washington

72428-2

No. 72428-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLAYTON HARRISON RUSSELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Tanya L. Thorp

BRIEF OF APPELLANT

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a constitutionally protected right to a unanimous jury. In order to insure jury unanimity where the State alleges several acts, each of which may constitute the charged offense, the prosecutor must either elect the act upon which it relied, or the court must instruct on jury unanimity. Here, the State proved two acts of theft, one in the storage closet which arguably constituted a burglary, and one from the carport which did not. In addition, the prosecutor did not elect which act constituted the act upon which she relied, nor did the court instruct on jury unanimity. Was Mr. Russell's right to jury unanimity violated requiring reversal of his second degree burglary conviction?

2. Does a carport constitute a "building" for the purposes of the second degree burglary statute?

3. Under the Sentencing Reform Act (SRA) and the Due Process Clause, the State bears the burden of proving the comparability of an out-of-state conviction by a preponderance of the evidence. Here, the State presented evidence of California burglary convictions, but the California statute is broader than Washington's burglary statute, and the State did not present evidence that Mr. Russell admitted the facts necessary to find his past conduct fell within Washington's burglary statute or that those facts were proved to a jury beyond a reasonable doubt. Did the sentencing court err in including the California burglary convictions in Mr. Russell's offender score?

C. STATEMENT OF THE CASE

Kristian Kane and Christian Bell were in the process of ending their marriage, and in the process, were completing a move out of their joint residence. RP 108-09, 130-32. On September 7, 2013, there were a few things left when they decided to return the rental truck they had used for moving. RP 117, 132. They left some garden tools, a box of pictures, a computer printer, and some children's toys in the carport next to their home. RP 115, 132-33. Mr. Bell stated he owned a compound bow and arrow which he kept in a storage closet inside the

carport. RP 133. The doors on this storage closet were closed when Mr. Bell and Ms. Kane left. RP 135.

The two were gone approximately 45 minutes, and when they returned, the items were gone. RP 118, 137. Ms. Kane contacted a neighbor who claimed to have observed a red Jeep backing up to the driveway while Mr. Bell and Ms. Kane were gone. RP 104-06, 119. Ms. Kane called the police while Mr. Bell drove to nearby pawn shops to determine if any of their items had been brought in. RP 118, 139. Lacking success with the pawn shops, Mr. Bell began driving around the neighborhood looking for a red Jeep. RP 140.

As Mr. Bell drove past a house, he noticed a child's toy similar to the one taken from his carport. RP 141. He also noticed a red Jeep in the driveway of the home. RP 141. Mr. Bell got out of his car and confronted the appellant, Clayton Russell, outside the house. RP 142. Mr. Russell immediately apologized, went into the home, and brought items out, including the compound bow and arrow. RP 143-44. Mr. Russell promised to return the items. RP 144-45.

Mr. Russell returned to the Bell/Kane house and contacted Ms. Kane. RP 232. Mr. Russell was very apologetic and returned a box of children's toys and a box of pictures. RP 232-33. Mr. Russell asked

Ms. Kane not to call the police, and when she said she already had, Mr. Russell immediately left. RP 234.

The police found the red Jeep with some of Bell/Kane items inside. RP 167-68. Mr. Russell was later stopped by the police and identified in a show-up by Mr. Bell. RP 146, 184-86, 190. Mr. Russell was arrested and the police searched the Jeep, finding the garden tools. RP 151, 212. Ms. Kane claimed the computer printer was never recovered. RP 236.

Mr. Russell was charged with residential burglary. CP 1. The jury could not agree on a verdict on residential burglary, but found Mr. Russell guilty of the lesser degree offense of second degree burglary. CP 62-63.

At sentencing, the trial court found Mr. Russell's prior California first and second degree burglary convictions to be factually comparable to Washington prior convictions and included them in Mr. Russell's offender score. 8/1/2014RP 8-10.

D. ARGUMENT

1. **The trial court failed to ensure the jury verdict was unanimous thus requiring reversal of Mr. Russell's conviction.**

a. *A criminal defendant has a right to a unanimous verdict.*

A criminal conviction requires that a unanimous jury conclude the defendant committed the criminal act charged in the information. Art. I, § 21; *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where the State alleges multiple acts resulting in a single charge, the prosecutor must either elect which act she is relying on as the basis for the charge, or the trial court must instruct the jurors that they must unanimously agree the State proved a single act beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). *See also State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) ("[w]hen the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, *either the State must elect which of such acts is relied upon for a conviction* or the court must instruct the jury to agree on a specific criminal act.") (emphasis added). If the State fails to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error stemming from the possibility that some jurors

may have relied on one act or incident while other jurors may have relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).[1] Whether the trial court was required to instruct the jury on unanimity is reviewed by this Court *de novo*. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

The failure to elect an act or give a unanimity instruction is presumed prejudicial and subject to harmless error analysis. *Coleman*, 159 Wn.2d at 512; *Kitchen*, 110 Wn.2d at 403. This harmless error test turns on whether a rational trier of fact could have a reasonable doubt as to whether each act established the charged offense beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 405-06.

b. *The carport was not a "building," thus any taking of property from did not constitute burglary.*

A person is guilty of second degree burglary if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

[1] Mr. Russell did not propose a unanimity instruction at trial. But appellate courts may review for the first time on appeal a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). The right to a unanimous verdict is part of the fundamental constitutional right to a jury trial which may be raised for the first time on appeal. *State v. Bobenhouse*, 166 Wn.2d 881, 912, 214 P.3d 907 (2009).

RCW 9A.52.030(1). The jury could have based Mr. Russell's burglary conviction on the removal of items from the carport or from the storage unit. Theft from a carport is not entry into a building for purposes of proving second degree burglary.

The statutory definition of "building" is:

> 'Building,' in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

RCW 9A.04.110(5).

In addressing whether a locomotive is a "carport" and, therefore, a "building" as defined in RCW 9A.04.110(5), this Court reviews the meaning of a statutory definition *de novo*, as an issue of law. *State v. Wentz,* 149 Wn.2d 342, 346, 68 P.3d 282 (2003). When a statutory term is undefined, absent a contrary legislative intent, courts give the words of a statute their ordinary meaning, and may look to a dictionary for such meaning. *State v. Gonzalez,* 168 Wn.2d 256, 263–64, 226 P.3d 131, *cert. denied,* 131 S.Ct. 318 (2010). A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee,* 122 Wn.2d 783, 787, 864 P.2d 912 (1993).

Webster's defines a carport as "[a]n open-sided roofed automobile shelter that is usu[ally] formed by extension of the roof from the side of a building." Webster's Third New International Dictionary at 342 (1993). In addition, Merriam-Webster defines a carport as "a shelter for a car that has open sides and that is usually attached to the side of a building[.]" http://www.merriam-webster.com/dictionary/carport. *See also Small v. State*, 710 So.2d 591, 593 (Fla.Dist.Ct.App. 1998) ("With no walls enclosing it, save for the single wall shared with the house, the instant carport is little more than a large awning.").

In this case, the carport area was simply a covered breezeway between the residence and contained the storage unit. The carport was not a structure "used for lodging." RCW 9A.04.110(5). The carport also was not a structure used for the purpose of carrying on a business or for the deposit of goods, thus it did not qualify as a "building."

A unanimity instruction is required in a multiple acts case. *State v. Furseth,* 156 Wn.App. 516, 520, 233 P.3d 902 (2010). A case is a multiple acts case when "'several acts are alleged and any one of them could constitute the crime charged.'" *Furseth,* 156 Wn.App. at 520, *quoting Kitchen,* 110 Wn.2d at 411. Each of the multiple acts alleged

must be "capable of satisfying the material facts required to prove" the charged crime. *State v. Bobenhouse,* 166 Wn.2d 881, 894, 214 P.3d 907 (2009). Here, only one of the acts constituted a crime. Since without a special verdict it is unclear upon which act the jury relied, the court erred in failing to instruct the jury on unanimity.

c. *The trial court's failure to instruct on unanimity was not harmless.*

The error in failing to instruct on unanimity is presumed prejudicial. *Coleman,* 159 Wn.2d at 512. The error is harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Kitchen,* 110 Wn.2d at 405-06.

The trial court's failure to give a unanimity instruction cannot be considered harmless here, because one of the acts alleged does not constitute burglary as a matter of law. The State presented evidence of two acts - entry into the carport and entry into the storage unit—and argued that either supported Mr. Russell's conviction for burglary. Thus, taking from within the carport could not be the basis of the burglary conviction. Mr. Russell's burglary conviction must be reversed, and the matter remanded for a new trial. *See State v. Brooks,* 77 Wn.App. 516, 521, 892 P.2d 1099 (1995) (reversing and remanding

for new trial based on absence of unanimity instruction where evidence of one act supported offenses other than the burglary charged).

2. **The inclusion in Russell's offender score of California convictions for burglary, which is broader than the Washington crime of burglary, violated Mr. Russell's rights under the Sixth and Fourteenth Amendments and the Sentencing Reform Act.**

    a. *Out-of-state convictions may not be included in a defendant's offender score if the foreign statute prohibits a broader swath of conduct than the analogous Washington statute.*

The SRA creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant's offender score. RCW 9.94A.505, .510, .520, .525; *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525. This Court reviews de novo the sentencing court's calculation of the offender score. *State v. Rivers*, 130 Wn.App. 689, 699, 128 P.3d 608 (2005).

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). A foreign conviction for a crime that is *not* comparable to a Washington felony may not be

included in the offender score. *State v. Thomas*, 135 Wn.App. 474, 477, 144 P.3d 1178 (2006); *see also In re Personal Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005) (conviction for foreign crime that is broader than analogous Washington statute may not be counted as a "strike" for purposes of sentencing).

The State bears the burden of proving criminal history, including comparability of out-of-state convictions, as a matter of due process. U.S. Const. amend. XIV; *State v. Hunley*, 175 Wn.2d 901, 917, 287 P.3d 584 (2012). Furthermore, "fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." *Ford*, 137 Wn.2d at 481.

To determine whether a prior out-of-state conviction may be included in a defendant's offender score, the sentencing court must compare the elements of the foreign crime with the elements of the similar Washington crime. If the elements are the same, or if the foreign crime is narrower than the Washington felony, the foreign conviction may be included in the offender score. *Lavery*, 154 Wn.2d at 255.

b. *The trial court cannot look at the facts of the prior conviction unless the statute is divisible.*

If the out-of-state statute is "divisible," in the sense that it sets forth alternative elements, the sentencing court may engage in a limited factual inquiry to determine under which prong of the foreign statute the defendant was convicted. *See Descamps v. United States*, ___ U.S. 133 S.Ct. 2276, 2284, 186 L.Ed.2d 438 (2013). In *Descamps*, the United States Supreme Court explained the constitutional limits of comparability analysis while addressing whether a defendant's prior California conviction for burglary could be counted as a "prior violent felony" that would increase his sentence under the federal Armed Career Criminal Act ("ACCA"). *See id, citing* 18 U.S.C. § 924(e). Prior crimes do not count under the ACCA unless they are comparable to the so-called "generic offense." *Descamps*, 133 S.Ct. at 2283. The Court explained its "modified categorical approach" for addressing whether a prior conviction obtained under a "divisible statute" is comparable to the generic offense:

> That kind of statute sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building *or* an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents,

> such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction.

Descamps, 133 S.Ct. at 2281.

Thus, for example, if a person had a prior conviction under Washington's harassment statute, which sets forth alternative means and is therefore divisible, the sentencing court could perform a limited factual inquiry to determine whether the defendant was convicted under subsection (2)(a) or (2)(b). *See* RCW 9A.46.020 (setting forth alternative elements for misdemeanor harassment and felony harassment). If the person had been convicted of a felony under subsection (2)(b), the conviction would count as a point in the offender score (assuming it had not washed out). RCW 9.94A.525. If the person had been convicted of misdemeanor harassment under subsection (2)(a), the conviction could be used to interrupt the wash-out period but would not count as a point. *See id.*

If the out-of-state statute under which the defendant was convicted is not divisible and simply prohibits a broader swath of conduct than the relevant Washington felony statute, the prior foreign conviction may not be counted as a felony in the defendant's offender score. A sentencing court may not consider the underlying facts of a

prior conviction to determine whether the defendant *could have* been convicted under the narrower Washington statute. *Descamps*, 133 S.Ct. at 2281-82; *Lavery*, 154 Wn.2d at 256-57; *State v. Ortega*, 120 Wn.App. 165, 174, 84 P.3d 935 (2004).

The United States Supreme Court has explained why this type of factual inquiry violates the Sixth and Fourteenth Amendments. Because the Constitution guarantees the rights to due process and a jury trial, any fact that increases the prescribed range of penalties must be either admitted by the defendant or found by a jury beyond a reasonable doubt. U.S. Const. amends. VI, XIV; *Alleyne v. United States*, __U.S. __, 133 S.Ct. 2151, 2162-63, 186 L.Ed.2d 314 (2013), *citing*, interalia, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Although the fact of a prior conviction may be an exception to the above rule, there is no exception allowing courts to find facts *underlying* prior convictions. *Descamps*, 133 S.Ct. at 2288. "The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt." *Id.* A sentencing court may not "rely on its own finding about a non-elemental fact" to increase a defendant's sentence. *Id.* at 2289.

The Washington Supreme Court already recognized as much in *Lavery*:

> In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. All a sentencing court needs to do is find that the prior conviction exists. No additional safeguards are required because a certified copy of a prior judgment and sentence is highly reliable evidence. While this is also true of foreign crimes that are identical on their face, it is not true for foreign crimes that are *not* facially identical. In essence, such crimes are *different* crimes.

Lavery, 154 Wn.2d at 256-57 (internal citations omitted) (emphases in original). Similarly, Division Three in *Ortega* recognized that "*Apprendi* prohibits a sentencing court's consideration of the underlying facts of a prior conviction if those facts were not found by the trier of fact beyond a reasonable doubt." *Ortega*, 120 Wn.App. at 174.

c. *Because the California burglary statute prohibits broader conduct than does the Washington statute, Mr. Russell's prior California convictions may not be included in his offender score.*

In *Descamps*, the Court held a prior California burglary could not be used to increase a defendant's sentence because the California burglary statute is broader than generic burglary: it does not require breaking and entering. *Descamps*, 133 S.Ct. at 2293. The Court

emphasized, "[w]hether Descamps *did* break and enter makes no difference." *Id.* at 2286. "A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense." *Id.* at 2289; *accord Lavery*, 154 Wn.2d at 257 ("Where the foreign statute is broader than Washington's, … there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense"). Because a conviction for generic burglary requires proof of an element that does not exist in the California burglary statute, the prior California burglary could not be counted. *Descamps*, 133 S.Ct. at 2293.

If the statutory formulation of the out-of-state crime did not contain one or more of the elements of the Washington crime on the date of the offense, it means that the out-of-state court or jury did not have to find each fact that must be found to convict the defendant of the essential elements of liability under the Washington counterpart crime. *Id.* at 140. "Because [the defendant] pled guilty to armed robbery, the only acts he conceded were *the elements of the crime* stated in the indictment." *Lavery*, 154 Wn.2d at 143. Thus, in *Lavery*, the court held the Illinois conviction could not be used to increase the sentence to life without parole. *Id.* at 143.

Convictions under broader statutes similarly could not be used to increase the penalties in *Lavery* (prior federal bank robbery), and *Thomas*, 135 Wn.App. 474 (prior California burglary). The bottom line is that "[w]here the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable." *Lavery*, 154 Wn.2d at 258.

This Court's decision in *Thomas* controls here. In *Thomas*, this Court concluded the California burglary statute was broader than Washington's because it does not require the entry be unlawful. 135 Wn.App. at 485-86 *citing* Cal.Penal Code § 459. Thus, "the foreign conviction cannot truly be said to be comparable," *Lavery*, 154 Wn.2d 258, and "the inquiry is over." *Descamps*, 133 S.Ct. at 2286.

Further, the fact Mr. Russell admitted in California to allegations that would constitute a felony in Washington does not matter. Because such facts would have been irrelevant to whether Mr. Russell committed a crime in that state, they may not be considered. *Descamps*, 133 S.Ct. at 2281-82; *Lavery*, 154 Wn.2d at 256-57; *Ortega*, 120 Wn.App. at 174.

In addition, the California burglary statute is not divisible; it is simply broader. A divisible statute is one that "'comprises multiple, alternative versions of the crime,' at least one of which 'correspond[s] to the generic offense.'" *Alvarado v. Holder,* 759 F.3d 1121, 1126 (9th Cir. 2014) (alteration in original), *quoting Descamps,* 133 S.Ct. at 2284-85. There are not separate subsections enumerating alternative means of committing the crime:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Cal.Penal Code § 459. Further, the California statute has defined the elements of burglary within the plain meaning of the statute. See

People v. Young, 65 Cal. 225, 226, 3 P. 813 (1884) (Since the 1858 amendment of the burglary statute, California cases have concluded that entry into any type of room with the requisite intent constitutes a burglary). Thus the California statute is not divisible; the elements of the statute are simply broader. Cal. Penal Code § 459. Accordingly, the crime is not comparable and "the inquiry is over." *Descamps*, 133 S.Ct. at 2286.

d. *The remedy for erroneously including a foreign prior conviction in the defendant's offender score.*

"[T]he remedy for a miscalculated offender score is resentencing using the correct offender score." *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004), *citing Ford*, 137 Wn.2d at 485.

The trial court improperly looked to the facts of the California prior burglary convictions to determine whether they were comparable to Washington felony offenses. Mr. Russell's sentence must be reversed and remanded for resentencing without the prior California burglary convictions.

E. CONCLUSION

For the reasons stated, Mr. Russell asks this Court to reverse his conviction and remand for a new trial, or reverse his sentence and remand for resentencing.

DATED this 30th day of April 2015.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. CLAYTON RUSSELL, Appellant.	)))))))))	NO. 72428-2-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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