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State of Washington

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WASHINGTON STATE
SUPREME COURT

No. 92893-2
COA No. 72428-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLAYTON HARRISON RUSSELL,

Petitioner.

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

The Honorable Tanya L. Thorp

PETITION FOR REVIEW

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A. <u>IDENTITY OF PETITIONER</u>

Clayton Russell asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. <u>COURT OF APPEALS DECISION</u>

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Clayton Harrison Russell*, No. 72428-2-I (January 11, 2016). A copy of the decision is in the Appendix.

C. <u>ISSUES PRESENTED FOR REVIEW</u>

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. Is a significant question of law under the Washington Constitution presented where Mr. Russell's right

to jury unanimity was 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. Is a significant question of law under the United States and Washington Constitutions presented where the sentencing court included Mr. Russell's prior California burglary convictions in his offender score?

D. STATEMENT OF THE CASE

Kristian Kane and Christian Bell were 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.

The Court of Appeals affirmed Mr. Russell's conviction and sentence, finding that Mr. Russell's acts were a continuing course of conduct and that the trial court did not err in including Mr. Russell's California burglary conviction in his offender score. Decision at 5-9.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. The lack of a unanimity instruction violated Mr. Russell's right to a unanimous jury.

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).

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).

Based upon the proof at trial and the State's closing argument, and contrary to the State's conclusion, the jury here could have based Mr. Russell's burglary conviction on the removal of items from the carport *or* from the storage unit, thus constituting multiple acts. 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."

Without a special verdict it is unclear upon which act the jury relied, the court erred in failing to instruct the jury on unanimity. This Court should accept review and find the jury could have relied on either Mr. Russell's entry into the carport *or* his entry into the closet in finding him guilty of second degree burglary. Since entry into the carport cannot constitute burglary, Mr. Russell asks this Court to reverse the Court of Appeals decision and remand for a new trial.

2. The inclusion in Russell's offender score of California convictions for burglary violated Mr. Russell's rights under the Sixth and Fourteenth Amendments and the Sentencing Reform Act.

"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." *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999).

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.

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.

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.

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.

As the Court of Appeals conceded, the parties agreed the California burglary statute is broader the Washington's. Decision at 7. But, 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.

This Court should accept review and find including Mr. Russell's California prior burglary convictions in his offender score

violated his Sixth and Fourteenth Amendment rights. Mr. Russell asks this Court to reverse his sentence and remand for resentencing.

F. CONCLUSION

For the reasons stated, Mr. Russell asks this Court to accept review and reverse the Court of Appeals decision.

DATED this 8th day of February 2016.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CLAYTON HARRISON RUSSELL, Appellant.	)))))))))	No. 72428-2-I DIVISION ONE UNPUBLISHED OPINION FILED: January 11, 2016

SPEARMAN, C.J. — Clayton Russell was accused of taking items from the carport and storage closet of a residence. A jury convicted him of second degree burglary. Russell appeals, asserting that the trial court violated his right to a unanimous verdict by failing to give a unanimity instruction. He further argues that the trial court erred in including prior California convictions in his offender score. Finding no error, we affirm.

FACTS

Christian Bell and Kristin Kane owned a home with an attached carport. The house formed the back wall of the carport. Two storage closets were built into this wall and opened into the carport. The carport had a partial or "privacy" wall on the side facing the neighbor. Bell and Kane used the carport for parking and for storage. They kept computer equipment, Christmas supplies, and other personal items in the closets. They also stored the recycling and garbage bins in the closets.

Bell and Kane separated and they put the house up for sale. They rented a U-Haul truck to finish moving their belongings out of the house. After hauling the larger belongings, only a few personal items remained. These included: a box of photographs; a bin of toys; a black punching bag; a compound bow and arrow; a printer; and garden tools including a ladder, hedge trimmer, leaf blower, and extension cords. Bell and Kane decided to return the U-Haul and then load their remaining belongings in their cars. They stacked most of the items in the back corner of the carport and covered the stack with a towel. Bell put the bow and arrow in the left storage closet and closed the closet door. They left the punching bag on the porch by the front door.

While Bell and Kane were gone, their neighbor, Wilma Goodspeed, saw "a car that looked like a red Jeep" drive up Bell and Kane's driveway. Verbatim Report of Proceedings (VRP) at 104. The car backed down the driveway and turned around. It then backed up the driveway so that the back of the vehicle was partially inside the carport.

When Bell and Kane returned, the items they had left in the carport and front porch were gone. Kane talked to Goodspeed who told her about seeing the red car. Kane called the police. Bell drove around the neighborhood looking for a red car that fit the description provided by Goodspeed. In one front yard, Bell saw a child playing with a black punching bag. A man was sitting near the child and a red Geo Tracker was parked in the driveway. Bell pulled over and called the police.

Bell got out of his car and confronted the man, later identified as Russell. Russell admitted taking the items. He apologized and said he would return Bell's belongings. Russell brought something towards Bell's car, apparently to return the item to Bell, but Bell yelled at him not to touch his car. Russell then left in the red Geo.

Russell drove to the Bell-Kane house. When Kane saw the red Geo pull into the driveway, she confronted Russell. Russell apologized and returned the punching bag, the bin of toys, and some photos. He asked Kane not to call the police. When Kane told him that she already had, Russell left without returning further items.

Meanwhile, police officers responded to Bell's call and arrived at the house where Bell had met Russell. Bell gave the officer a description of Russell and his car. A police officer later found Russell's car parked at an intersection with the license plates removed. Some of the items taken from the Bell-Kane house were visible inside the car. When police officers located Russell, he told them that he had found the items in the driveway of the Bell-Kane home and he thought they were free for the taking.

Russell was charged with residential burglary. At trial, the court also instructed the jury on the inferior degree offense of burglary in the second degree and on the lesser included crimes of first and second degree criminal trespass. The court instructed the jury regarding the elements of the four crimes. As is relevant here, the jury was advised of the State's burden to prove beyond a reasonable doubt that the defendant unlawfully entered or remained in a

"dwelling" as to residential burglary and in a "building" as to second degree burglary. Clerk's Papers (CP) at 42. The court also instructed the jury on the definitions of these terms.

In closing argument, the State urged the jury to find that the carport and closet were part of a dwelling and Russell thus committed residential burglary. Alternatively, if the jury did not agree that he had entered a dwelling, the State urged the jury to find that Russell had entered a building and committed second degree burglary. Russell conceded that he took items from "this area in the driveway, carport, wherever," but argued that he did not intend to commit theft because he believed the items were abandoned. VRP at 296. Russell also argued that because the carport and storage closet were neither a "dwelling" nor a "building" at most he committed the crime of trespass. Id.

The jury convicted Russell of second degree burglary. At sentencing, the trial court found Russell's prior California convictions for first and second degree burglary to be factually comparable to Washington prior convictions and included them in Russell's offender score. Russell appeals.

DISCUSSION

Russell argues that the trial court erred in failing to instruct the jury in unanimity as required in State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984) overruled by State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007). He asserts that removing items from the carport and from the storage closet are distinct acts, each of which could constitute the crime of burglary. Therefore, he

contends the failure to give a Petrich instruction requires reversal.[1] The State counters that no Petrich instruction was required because the "continuing course of conduct" exception applies. Br. of Respondent at 9. We agree with the State.

We review the adequacy of jury instructions de novo. State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010) (citing State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). Criminal defendants in Washington are entitled to a unanimous jury verdict. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When multiple acts could each constitute the crime charged, the State must elect the specific criminal act on which it is relying for conviction. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (citing State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)). If the State does not make an election, the trial court must instruct the jurors that they must unanimously agree that the same underlying criminal act was proven beyond a reasonable doubt. Id.

However, no Petrich instruction is required if the acts were part of a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989), overruled on other grounds by Kitchen, 110 Wn.2d 403. In determining whether the acts formed a continuing course of conduct, "we evaluate the facts in a commonsense manner, considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and

[1] Russell also contends that the error in failing to give a Petrich instruction was not harmless because the carport does not fall within the statutory definition of "building." Brief of Appellant at 6-8. Because we conclude no Petrich instruction was necessary, we do not reach this argument.

ultimate purpose." Brown, 159 Wn. App. at 14 (citing State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996)). Generally, criminal acts that occur at different times and places are distinct acts. Fiallo-Lopez, 78 Wn. App. at 724 (citing Handran, 113 Wn.2d at 17).

In this case, Russell entered the carport, loaded items from the carport and the closet into his car, and drove away. His actions occurred at the same time and in the same place. The acts involved the same parties and the same ultimate purpose. Because Russell engaged in a continuing course of conduct, no Petrich instruction was required. There was no error.

Russell also challenges his sentence, arguing that the trial court erred in including prior California convictions in his offender score. We review the calculation of a defendant's offender score de novo. State v. Olsen, 180 Wn.2d 468, 472, 325 P.3d 187 cert. denied, 135 S. Ct. 287, 190 L. Ed. 2d 210 (2014) (citing State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007)). A defendant's offender score is calculated based on prior convictions. Id. Out-of-state convictions are classified according to the comparable offense definitions and sentences provided by Washington law. Id. (quoting RCW 9.94A.525(3)). The State has the burden to prove the existence and comparability of out-of-state convictions. Id.

In this case, the State met its burden of proving the existence of out-of-state crimes by submitting certified copies of the information charging Russell with crimes in California, Russell's plea statement and sentence, and clerk's minutes memorializing his guilty plea and sentence. However, Russell argues

that his California convictions are not comparable to Washington offenses and should not have been included in his offender score.

In determining whether out-of-state convictions are comparable to Washington convictions, the court conducts a two-part analysis. Olsen, 180 Wn.2d at 472-73. First, the court compares the legal elements of the out-of-state conviction to the relevant Washington crime. Id. If the out-of-state crime is identical to or narrower than the Washington criminal statute, the foreign conviction counts towards the offender score as if it were the Washington offense. Id. at 473. If the out-of-state statute is broader than the Washington statute, the court considers the underlying facts of the conviction to determine whether the defendant's conduct would have violated the comparable Washington statute. Id. In considering the defendant's conduct, the court may look only to those facts "that were admitted, stipulated to, or proved beyond a reasonable doubt." Id. at 473-74 (citing In re Personal Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005)).

Here, the parties agree that the California burglary statute is broader than the Washington statute because the Washington statute criminalizes unlawful entry into a dwelling or building, while the California crime does not require that the entry be unlawful. RCW 9A.52.025; RCW 9A.52.030; Cal. Penal Code Ann. §459. We thus consider whether the conduct Russell admitted in his plea statements would have violated the Washington statute.

In his plea statement, Russell admitted that he "willfully and unlawfully entered an inhabited dwelling with the intent to commit larceny." CP at 154. He

also admitted that he "willfully and unlawfully entered 2 separate commercial structures...with the intent to commit larceny." CP at 154. The conduct Russell admitted would have violated Washington's residential burglary statute and Washington's second degree burglary statute. RCW 9A.52.030(1); RCW 9A.52.030. The trial court properly included the crimes in Russell's offender score.

Russell asserts that under the United States Supreme Court's decision in Descamps v. United States, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), the court is prohibited from looking to the factual basis of his California convictions. He argues that Washington's two-part comparability analysis, as applied in the present case, does not safeguard the Sixth Amendment rights identified in Descamps.

Our Supreme Court has already rejected Russell's argument. The Descamps court emphasized that the Sixth Amendment prohibits a sentencing court from making findings of fact that properly belong to a jury. Descamps, 133 S. Ct. at 2287-88. The Washington Supreme Court accepted review of State v. Olsen to determine whether the Washington comparability analysis adequately protects the Sixth Amendment concerns articulated in Descamps. Olsen, 180 Wn.2d at 474. The Olsen court held that, because the Washington analysis permits consideration only of facts that were admitted or proved, the analysis survives. Id. at 477. The use of the Washington comparability analysis does not violate Russell's Sixth Amendment rights.

Russell also asserts that his case is analogous to State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006), in which this court held that the defendant's California burglary conviction was not factually comparable to the Washington crime. Russell is mistaken. In Thomas, the defendant did not admit to unlawful entry and unlawful entry was not proven. Thomas, at 487. Russell, in contrast, admitted to unlawful entry. The trial court did not err in finding that his prior out-of-state convictions were comparable to Washington burglary convictions.

Affirmed.

Spearman, C.J.

WE CONCUR:

Leach, J.

Jau, J.

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72428-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: February 8, 2016