No. 97019-0
COA No. 50370-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL McCASLAND

Petitioner.

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

PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

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

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Nathaniel McCasland*, No. 50370-1-II (February 26, 2019). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Prior out-of-state convictions may be included in the offender score if they are found to be comparable to Washington offenses. The court must determine whether the offenses are legally comparable by examining the elements, and if not legally comparable, whether they are factually comparable by looking at the facts underlying the foreign conviction that have been admitted to, stipulated to, or proven beyond a reasonable doubt. The court here found Mr. McCasland's two Oregon convictions for first degree sodomy comparable the Washington felony offense of second degree child rape. A review of the facts admitted by Mr. McCasland proved the Oregon convictions are comparable to the

Washington offense of first degree incest. Where a foreign offense can be comparable to two or more Washington offenses, is the determination of which offense applies an issue of substantial public interest requiring reversal of Mr. McCasland's sentence?

2. Due process requires the State prove each essential element of the offense beyond a reasonable doubt. Sexual contact is an element of child molestation, which requires proof that the contact was the for the purpose of sexual gratification. Mr. McCasland admitted that he allowed D.M. to touch his penis but stated he did so to educate D.M. about the male anatomy. Is a significant issue under the United States and Washington Constitutions presented entitling Mr. McCasland to reversal of his conviction with instructions to dismiss where the State failed to prove an essential element of child molestation?

3. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Is a significant issue under the United States and Washington Constitutions presented where a judge, not a jury, found by a preponderance of the evidence that Mr. McCasland had a prior most

serious offense, thus elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

4. When an out-of-state conviction is based upon a non-divisible statute, the Sixth and Fourteenth Amendments bar a factual inquiry by the trial court in order to determine whether the prior conviction is comparable to a Washington felony offense. Here, the trial court ruled Mr. McCasland's prior Oregon convictions were not legally comparable to a Washington felony offense where the Oregon statute prohibited broader conduct than the Washington offense. Is significant issue under the United States and Washington Constitutions presented where Mr. McCasland's Sixth and Fourteenth Amendment rights were violated when the trial court conducted a factual inquiry into the out-of-state priors to determine comparability in order to find him to be a persistent offender?

D. STATEMENT OF THE CASE

Nathaniel McCasland was the father of seven year old D.M. RP 738. Mr. McCasland and D.M.'s mother, Aubrey Holmquist, lived together in New Mexico when D.M. was born. RP 738. For the first two years of D.M.'s life, Mr. McCasland was a stay-at-home dad. RP 1081. In 2011, when D.M. was two years old, Mr. McCasland and Ms.

Holmquist ended their relationship and Mr. McCasland moved to Washington while D.M. remained in New Mexico with her mother. RP 738, 1079.

In 2012, Mr. McCasland met and married Shelly McCasland and the two lived together on a five acre farm in Bush Prairie. RP 589-90. In June 2015, Ms. Holmquist thought it would be a good idea for D.M. to spend some time with her father. RP 741. On June 6, 2015, D.M. arrived for an extended visit with the McCaslands. RP 591.

During the first week of her visit, D.M. was very happy to be reconnecting with her father. RP 593. On June 12, 2015, Ms. McCasland left Mr. McCasland and D.M. alone for approximately two hours. RP 594, 1099. During this period, Mr. McCasland gave D.M. a bath. RP 1106. As he was toweling D.M. off, D.M. asked to see Mr. McCasland's underwear. RP 1106. Although uncomfortable and nervous, Mr. McCasland pulled down the top of his shorts to show D.M. the top band of his underwear. RP 1106. D.M. pointed to the front of Mr. McCasland's shorts and asked him if that was where his privates were. RP 1107. She asked to see his privates and Mr. McCasland pulled his underwear down and showed D.M. his penis. RP 1107. Mr. McCasland immediately pulled his shorts back up. RP 1107

D.M. asked again to see Mr. McCasland's penis, and he again showed it to her. RP 1107-08. D.M. asked to touch his penis and Mr. McCasland allowed her to. RP 1108. D.M. grabbed Mr. McCasland's penis and pulled a few times. RP 1109. Mr. McCasland immediately flinched and it appeared D.M. became scared. RP 1109. D.M. asked Mr. McCasland if the pulling on his penis hurt. RP 1109. Because of her reaction and to comfort her, Mr. McCasland told D.M. it did not hurt, but that sometimes the act of pulling on it can make it feel good. RP 1110. Mr. McCasland did not have an erection during this incident. RP 1113.

After her bath, D.M. seemed normal. RP 1113. Mr. McCasland did not tell his wife about the incident that night. RP 1115.

The next evening, D.M. disclosed to Ms. McCasland that Mr. McCasland had shown her his "privates." RP 596. D.M. also disclosed Mr. McCasland had said that "[t]his feels good" and made a motion with her hand. RP 596. Ms. McCasland questioned further and discovered the incident happened in the bathroom. RP 596.

Ms. McCasland, with D.M. in tow, confronted Mr. McCasland. RP 597, 1117. D.M. repeated what she had said to Ms. McCasland,

including the hand motion. RP 598, 1117. Mr. McCasland denied that anything happened. RP 598, 1117.

D.M. was subsequently placed into the custody of Child Protective Services (CPS). RP 603. Later, Mr. McCasland admitted to his wife D.M. had asked to see his "privates," and, at first he declined, then he showed them to her. RP 604. When she grabbed his penis, Mr. McCasland said he pulled her had away and, when she asked why, he told her, "Because that's what we do to make it feel good." RP 604.

Following an investigation, Mr. McCasland was charged with first degree child molestation. CP 5. The State also alleged the aggravating factor that Mr. McCasland used his position of trust to facilitate the commission of the offense. CP 5.

The jury found Mr. McCasland guilty as charged, including the aggravating factor. CP 128-29. At sentencing, the State alleged Mr. McCasland had two 1991 convictions from Oregon for first degree sodomy. RP 1337-38. Based on the prior convictions and Mr. McCasland's current conviction, the State sought a finding that he is a persistent offender and should be sentenced to life imprisonment without the possibility of parole. RP 1336-41.

The State acknowledged, and the trial court found, that the Oregon sodomy statute was not legally comparable to a Washington felony offense. RP 1349-51. But, based upon Mr. McCasland's admission in the Petition to Enter Plea of Guilty in Oregon, the court found the Oregon prior convictions to be comparable to the Washington felony offense of second degree child rape. CP 228, RP 1352. The court imposed a sentence of life imprisonment without the possibility of parole. CP 220, RP 1363.

The Court of Appeals subsequently rejected the issues raised by Mr. McCasland on appeal and affirmed his conviction and persistent offender sentence.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. The trial court erred in concluding Mr. McCasland is a persistent offender based upon prior Oregon sodomy convictions which are not comparable to a qualifying offense.

When engaging in the comparability analysis, the sentencing court must compare the elements of the prior out-of-state offense with the elements of the potentially comparable current Washington offenses. *In re the Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the crimes are comparable, a sentencing court must

treat the defendant's out-of-state conviction the same as a Washington conviction. *Lavery,* 154 Wn.2d at 254. If, on the other hand, the comparison reveals that the prior offense did not contain one or more elements of the current crime as of the date of the offense (legal comparability), it is then necessary to determine from the out-of-state record whether the out-of-state conviction encompassed each fact necessary to liability for the Washington crime (factual comparability). *Morley,* 134 Wn.2d at 605-06.

"In making its factual comparison [the court] may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." *State v. Thiefault,* 160 Wn.2d 409, 415, 158 P.3d 580 (2007), *citing Lavery,* 154 Wn.2d at 258.

Mr. McCasland was convicted of two counts of first degree sodomy involving his brother. CP 209. Mr. McCasland's admission regarding the counts was: "During July 1991 I sucked the penis of my 12 year old brother and I caused him to place his penis in my anus." CP 213.

ORS 163.405 (1989) provided:

> "A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:

> . . .
> (c) The victim is under 16 years of age and is the actor's brother or sister, of the whole or half blood, the son or daughter of the actor or the son or daughter of the actor's spouse
>
> "Deviate sexual intercourse" is:
>
> "[s]exual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another."

ORS 163.305(1); *State v. Ketchum*, 66 Or.App. 52, 56, 673 P.2d 555, 557 (1983).

Thus, Mr. McCasland admitted committing the offense with his half-brother, an element of the Oregon offense. The comparable Washington offense is not child rape, but rather, first degree incest.

The elements of first degree incest are:

> A person is guilty of incest in the first degree if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

RCW 9A.64.020(1)(a). The elements of the Oregon statute as admitted by Mr. McCasland match up with Washington's first degree incest statute. Both require sexual intercourse and both require the victim be a whole or half sibling, here Mr. McCasland's younger half-brother.

The Court of Appeals agreed with the trial court's conclusion that Mr. McCasland's Oregon conviction was comparable to the Washington offense of second degree child rape, which requires "sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(a). Decision at 10-11.

This Court should grant review to determine the test when, as here, a foreign conviction is factually comparable to two or more Washington offenses. The issue is one of substantial public interest because trial courts and practitioners are without guidance regarding how to analyze the issue, especially as here given the grave importance of making the right decision.

2. There was insufficient evidence presented to prove Mr. McCasland had sexual contact with D.M.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence

in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The State has the burden to show sexual gratification as part of its burden to prove sexual contact for the purposes of proving first degree child molestation. In order to prove "sexual contact," the State must establish the defendant acted with a purpose of sexual gratification. *State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006).

Here, it was undisputed that Mr. McCasland allowed D.M. to see, then touch, his penis. But, the evidence failed to establish the touching was done for the purpose of satisfying Mr. McCasland's sexual gratification. Mr. McCasland did not have an erection during D.M.'s observation or D.M.'s touching. Mr. McCasland described his actions essentially as a misguided attempt at sex education for his young daughter.

D.M. asked to see Mr. McCasland's penis, which at first he refused. RP 1106-07. On second thought, he believed it would be better that her father showed her as opposed to a stranger. RP 1107-08. Thus,

focusing on the totality of the evidence as this Court must, there was no evidence that D.M.'s touching was for the purpose of Mr. McCasland's sexual gratification. As a consequence, the State failed to prove this element of the charged offense and Mr. McCasland's conviction must be reversed.

This Court should grant review, determine the State failed to prove sexual gratification beyond a reasonable doubt, and reverse Mr. McCasland's conviction with instructions to dismiss.

3. The judicial finding that Mr. McCasland had suffered a qualifying conviction which rendered him a Persistent Offender violated his rights to a jury trial and to due process.

The Due Process Clause of the Fourteenth Amendment ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 111-15, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); *Blakely v. Washington*, 542 U.S. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi*, 530 U.S. at 476-77.

The Supreme Court has recognized this principle applies equally to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant or the mandatory minimum. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 304. *Blakely* held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. *Id*. at 304-05; *see Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (invalidating death penalty scheme where jury did not find aggravating factors). In *Apprendi*, the Court found a statute unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by only the preponderance of the evidence. 530 U.S. at 492-93.

In *Alleyne*, the Supreme Court ruled the facts underlying the imposition of a mandatory minimum sentence must be found beyond a reasonable doubt by a jury, ruling that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." 570 U.S. at 111.

In these cases, the Court rejected the notion that arbitrarily labeling facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi*, 530 U.S. at 476. A judge may not impose punishment based on judicial findings. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 304-05.

Finally, this Court in *State v. Allen*, 192 Wn.2d 526, 539, 431 P.3d 117 (2018), ruled that aggravating factors, such as those codified in RCW 10.95.020, are elements for Sixth Amendment purposes, thus they must be submitted to the jury and proved beyond a reasonable doubt.

Further, this Court has embraced the principle that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Since prior convictions are elements of the crime rather than aggravating factors, *Roswell* states that the prior conviction exception in *Apprendi* does not apply. *Id.* at 193 n.5. Thus, under *Alleyne, Blakely, Apprendi* and *Roswell*, the judicial finding of Mr. McCasland's

prior conviction and the fact he qualified as a persistent offender violated his right to due process and right to a jury trial.[1]

This Court should grant review and rule that the prior convictions are elements for Sixth Amendment purposes which must be submitted to the jury and proved beyond a reasonable doubt where those prior convictions increase the maximum sentence beyond the standard range for the underlying offense. Mr. McCasland's persistent offender sentence must be reversed and remanded for entry of a standard range sentence.

4. Engaging in a factual inquiry to determine comparability of his out-of-state prior convictions violated Mr. McCasland's rights under the Sixth and Fourteenth Amendments.

The United States 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

[1] *But see State v. Witherspoon*, 180 Wn.2d 875, 892, 329 P.3d 888 (2014) ("Like *Blakely*, nowhere in *Alleyne* did the Court question *Apprendi's* exception for prior convictions. It is improper for us to read this exception out of Sixth Amendment doctrine unless and until the United States Supreme Court says otherwise. Accordingly, Witherspoon's argument that recent United States Supreme Court precedent dictates that his prior convictions must be proved to a jury beyond a reasonable doubt is unsupported.").

beyond a reasonable doubt. U.S. Const. amends. VI, XIV; *Alleyne*, 570 U.S. at 115-16; *Allen*, 192 Wn.2d at 537-39.

There is no exception allowing courts to find facts *underlying* prior convictions. *Descamps v. United States*, 570 U.S. 254, 268-70, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). "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 270.

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*, 570 U.S. at 257-58. In *Descamps*, the U.S. 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."

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*, 570 U.S. at 257-58.

The trial court here engaged in the forbidden factual inquiry. By engaging in this factfinding regarding Mr. McCasland's prior convictions pursuant to a broader statute, the trial court violated Mr. McCasland's rights under the Sixth and Fourteenth Amendments and the SRA. *Descamps*, 570 U.S. at 268-71. The Oregon convictions may not be counted as a qualifying felony for purposes of finding Mr. McCasland's to be a persistent offender. *See id.*

This Court should grant review to find the trial court's factual inquiry violated the Sixth and Fourteenth Amendments and reverse Mr. McCasland's sentence.

F. CONCLUSION

For the reasons stated, Mr. McCasland asks this Court to grant review and reverse his conviction for first degree child molestation with instructions to dismiss. Alternatively, Mr. McCasland asks that the Court grant review and reverse his sentence and remand for a standard range sentence.

DATED this 27th day of March 2019.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Petitioner

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

February 26, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NATHANIEL McCASLAND, Appellant.	No. 50370-1-II UNPUBLISHED OPINION

JOHANSON, J. — Nathaniel Wesley McCasland appeals his conviction and sentence for first degree child molestation. He argues that (1) the State produced insufficient evidence of sexual gratification, (2) the trial court erred in rejecting McCasland's sentencing argument that incest was more "factually comparable" than second degree rape, and (3) the trial court violated his equal protection, due process, and jury trial rights at sentencing. Br. of Appellant at 3. We affirm.

FACTS

I. PRETRIAL

The State charged McCasland with one count of first degree child molestation with a special allegation of domestic violence after five-year-old D.M. disclosed that McCasland had sexually assaulted her. The State also alleged that McCasland used his "position of trust, confidence, or fiduciary responsibility to facilitate the commission of the [child molestation] offense." Clerk's Papers (CP) at 3.

Pretrial, the State moved to admit statements that D.M. made to Kim Holland, Shelly McCasland, Kymberly Adams, Aubrey Holmquist, Dr. Jack Stump, and Lena Maynard under the child hearsay statute, RCW 9A.44.120, and other hearsay exceptions. After a hearing, the trial court concluded that D.M.'s statements were admissible under the child hearsay statute.

II. TRIAL

At trial, witnesses testified to the following relevant facts. D.M. was in the bathroom with McCasland, and he was dressing her for the day when she saw McCasland's "private parts." V Report of Proceedings (RP) at 716. D.M. could not open the door because McCasland closed and locked it. McCasland told her not to tell anyone what he did and that he was trying to keep what happened a secret. McCasland had her hold and stroke his privates. McCasland said, "'This feels good.'" 4 RP at 596.

McCasland denied exposing himself to D.M. But McCasland admitted that he showed D.M. his privates after D.M. asked to see them. McCasland says he did not know why he let D.M. see his privates. He said that D.M. "reached out [and] grabbed [my] penis and pulled on it." 4 RP at 604. He "pulled [D.M.] away and told her not to [pull on his penis 'b]ecause that's what we do to make it feel good.'" 4 RP at 604.

Luz Escobar, a nurse at the hospital, testified that McCasland said he felt suicidal because he exposed his penis to D.M. and he did not want to go to jail. Dawn Tec Yah, a counselor at the hospital, testified that she evaluated McCasland, and he told her that D.M. came into the bathroom while he was using it and that he was worried about D.M. telling someone she saw his penis. Detective Monica Hernandez testified that McCasland demonstrated the motion that D.M. made

when describing the incident by forming a circle with his hand and "moving it diagonal up and down" during an interview with Detective Hernandez. 6 RP at 880.

At trial, McCasland testified that he was going to the bathroom when D.M. walked in, and he closed the door and locked it behind her. McCasland said that D.M. asked to see his underwear after he gave her a bath. He showed her his underwear and then D.M. asked if she could see his privates, and he "said sure," pulled down his underwear, and showed her his penis. 8 RP at 1107. D.M. asked if she could touch McCasland's penis; he said no and pulled up his underwear.

D.M. immediately asked if she could see his penis again; he agreed and showed her his penis again. D.M. asked if she could touch McCasland's penis, and he said yes. When he pulled his pants down the second time, he "figured she'd poke it." 8 RP at 1109. Instead, McCasland said D.M. "grabbed a hold of [his penis]" with her hand in a circle and "pulled on it a couple of times" moving her hand up and down. 8 RP at 1109. D.M. asked McCasland if it hurt; McCasland said no and told D.M. "sometimes it can make it feel good." 8 RP at 1112.

McCasland denied making or asking D.M. to touch his penis. He testified that he did not let D.M. touch his penis for sexual gratification, that he did not have an erection or ejaculate when D.M. pulled on his penis, and that it did not feel good. Instead, McCasland said he let D.M. touch his penis to satisfy her curiosity. McCasland said he knew that having a child touch his penis was inappropriate. McCasland was concerned that D.M. would tell someone what happened.

The jury returned a guilty verdict on the child molestation charge and found that (1) McCasland and D.M. were "members of the same family or household" and (2) McCasland "use[d] a position of trust to facilitate the commission of the crime." CP at 142-43.

III. SENTENCING

At sentencing, the State argued that McCasland's offender score was 6 and based on two prior Oregon convictions, he must be sentenced under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570.[1] In 1991, McCasland pleaded guilty to two counts of first degree sodomy in Oregon. The State compared the first degree sodomy convictions under former Or. Rev. Stat. § 163.405 (1989) with Washington's second degree child rape statute in effect at the time of the offenses, RCW 9A.44.076.

The State conceded that former Or. Rev. Stat. § 163.405 was not legally comparable to RCW 9A.44.076 because the Oregon statute was broader than the Washington statute. But it argued that McCasland's Oregon first degree sodomy convictions were factually comparable to Washington convictions for second degree child rape. The State argued that McCasland was a persistent offender under former RCW 9.94A.030(37) (2012)[2] based on his current conviction for first degree child molestation and his two prior out-of-state convictions.

The State provided the sentencing court with the Oregon indictment, guilty plea, order entering the plea, sentencing report, judgment of conviction and sentence, and information on statutes prohibiting marriage between siblings in Oregon and Washington. An Oregon grand jury

[1] McCasland "changed his name from Jonathan Wesley Tewes to Nathaniel Wesley McCasland . . . on February 17, 2000." CP at 145. The two 1992 first degree sodomy convictions are under the name Jonathan Wesley Tewes. McCasland admitted that he was convicted of the two first degree sodomy counts.

[2] The State cited to RCW 9.94A.030(38) but at the time of McCasland's crime the correct subsection was (37). The legislature amended RCW 9.94A.030 in 2015, which changed the subsection numbering. LAWS OF 2015, ch. 287, §1. We will cite the version of the statute in effect at the time of McCasland's crime.

accused McCasland of, as relevant here, two counts of first degree sodomy under former Or. Rev. Stat. § 163.405.

McCasland entered a guilty plea to both counts admitting that in July 1991, he had oral and anal sex with his 12-year-old half-brother. McCasland was 19 in 1991 when the offenses were committed. The Oregon sentencing court accepted McCasland's plea and entered a judgment of conviction on both counts. The Oregon sentencing court also found aggravating factors of threats of violence and actual violence toward the victim and that the offense involved multiple incidents. The sentencing report considered each conviction a "Most Serious Offense." CP at 169.

McCasland argued in response that his prior first degree sodomy convictions were not "strike[s]" under the POAA because those offenses "most closely resemble" the second degree incest offense in Washington (former RCW 9A.64.020 (1985)), which is not legally comparable to the first degree sodomy offense in former Or. Rev. Stat. 163.405. CP at 204, 206.

The sentencing judge concluded that Oregon's first degree sodomy statute was not legally comparable to Washington's second degree child rape statute because it was broader than Washington's statute. However, the judge found that the first degree sodomy convictions were factually comparable to second degree child rape in Washington.

The superior court sentenced McCasland to life without the possibility of parole as a persistent offender under RCW 9.94A.570. The sentencing court based the persistent offender sentence on the first degree child molestation offense and the prior first degree sodomy convictions, which the court found were comparable to a qualifying offense under "RCW

9.94A.030(33)(b)(i)."[3] CP at 218. McCasland had an offender score of 6, and the standard range sentence for the first degree child molestation conviction was 98 to 130 months. McCasland's criminal history included the two prior Oregon first degree sodomy convictions.

ANALYSIS

I. SUFFICIENCY OF EVIDENCE

McCasland argues that there was insufficient evidence of sexual contact. We disagree.

A. LEGAL PRINCIPLES

Evidence is sufficient if, "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Johnson*, 188 Wn.2d 742, 751, 399 P.3d 507 (2017) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

When challenging the evidence as insufficient, a defendant admits that the State's evidence is true and admits all reasonable inferences that arise therefrom. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). Circumstantial and direct evidence are given equal weight. *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017). We do not review the fact finder's credibility determinations. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

In order to convict a person of first degree child molestation, the State must show beyond a reasonable doubt that the individual "knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the

[3] The judgment and sentence cites to RCW 9.94A.030(33)(b)(i). The subsection (33) in effect at the time of McCasland's crime does not contain subsections. It appears that the correct subsection is former RCW 9.94A.030(37) (2012).

perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1).

"Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). "Sexual gratification is not an essential element of [first degree child molestation], but is a definitional term clarifying the meaning of the essential and material element of sexual contact." *State v. T.E.H.*, 91 Wn. App. 908, 915, 960 P.2d 441 (1998). Courts require evidence of sexual gratification to prove sexual contact because absent that evidence, the contact may have been "inadvertent" rather than sexual in nature. *T.E.H.*, 91 Wn. App. at 916.

In determining whether the State proved sexual contact beyond a reasonable doubt, we look to the totality of the facts presented. *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). Sexual contact includes touching "that a person of common intelligence could fairly be expected to know . . . was improper." *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321 (2008). We may infer that contact was sexual in nature based on evidence that the victim grabbed a defendant's private parts and that the defendant tried to conceal that conduct. *See Tilton*, 149 Wn.2d at 786.

B. SUFFICIENT EVIDENCE OF SEXUAL GRATIFICATION

Here, McCasland challenges only the sexual contact element of first degree child molestation. He argues that the State did not establish sexual contact because the touching was not for the purpose of sexual gratification. McCasland contends that the incident was "a misguided attempt at sex education" and emphasizes that he "did not have an erection." Br. of Appellant at 11. These arguments fail.

McCasland took D.M. into the bathroom, closed and locked the bathroom door, showed her his penis twice, and showed her how to touch his penis before asking her to touch it. McCasland had her "hold and stroke his privates." V RP at 718. Multiple witnesses testified that D.M. demonstrated the way she touched McCasland's penis by forming a circle with her hand and making an up and down motion. McCasland testified that D.M. "grabbed a hold of [his penis]" with her hand in a circle and "pulled on it a couple of times" while moving her hand up and down. 8 RP at 1109. Multiple witnesses, including McCasland, also testified that McCasland told D.M. that the way she touched his penis either did or could make it "feel good." 4 RP at 604; 8 RP at 1112, 1183.

Based on the totality of the facts presented, the contact described was sexual because it was contact that "a person of common intelligence could fairly be expected to know . . . was improper." *Jackson*, 145 Wn. App. at 819. The facts surrounding the physical touching combined with the evidence that McCasland tried to conceal the contact further supports an inference establishing sexual contact. *See Tilton*, 149 Wn.2d at 786. McCasland told D.M. not to tell anyone and that he was trying to keep what happened a secret.

While McCasland testified that he did not let D.M. touch his penis for sexual gratification and that it did not feel good, the jury was free to disbelieve his account of the event. Additionally, the fact that McCasland told Shelly McCasland that he did not know why he let D.M. see his privates, is inconsistent with his argument that he allowed the touching for educational purposes. Moreover, McCasland testified that he knew that having a child touch his penis was inappropriate at the time of the contact. That testimony also supports a finding that the contact was sexual

because it indicates that the contact was the type "a person of common intelligence could fairly be expected to know . . . was improper." *Jackson*, 145 Wn. App. at 819.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, a rational trier of fact could have found beyond a reasonable doubt that the State proved that McCasland had sexual contact with D.M. for his sexual gratification. Therefore, we hold that sufficient evidence of sexual contact supports McCasland's conviction.

II. COMPARABILITY OF OUT-OF-STATE CONVICTIONS

McCasland argues that Washington's first degree incest offense is *more* factually comparable than Washington's second degree rape offense is to Oregon's first degree sodomy offense. Then he contends that first degree incest is not a qualifying offense under the POAA, and thus the trial court erred.[4] We reject McCasland's more "factually comparable" argument. Br. of Appellant at 3.

A. LEGAL PRINCIPLES

Persistent offenders include defendants convicted of first degree child molestation who have prior out-of-state convictions for offenses that are comparable to the offenses listed in former RCW 9.94A.030(37)(b)(i). Former RCW 9.94A.030(37)(b)(i)(A), (ii). The enumerated offenses include second degree child rape. Former RCW 9.94A.030(37)(b).

[4] In his reply brief, McCasland argues that Oregon's first degree sodomy convictions are more "factually comparable" to Washington's first degree *sodomy* offense, which is not a qualifying offense under the POAA. Reply Br. of Appellant at 2. Because we do not consider arguments made for the first time in a reply brief, we do not address whether sodomy is a "more comparable" offense. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Chen*, 178 Wn.2d 350, 358 n.11, 309 P.3d 410 (2013).

We review the classification of out-of-state convictions for sentencing purposes de novo. *State v. Jackson*, 129 Wn. App. 95, 106, 117 P.3d 1182 (2005). Whether a prior out-of-state conviction is comparable to a qualifying Washington offense listed under former RCW 9.94A.030(37)(b)(i) generally involves a two-part test. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014). First, the sentencing court determines whether the offenses are legally comparable and if not, then the court determines whether the offenses are factually comparable.[5] *Olsen*, 180 Wn.2d at 472-73.

B. FACTUAL COMPARABILITY

Notably, McCasland does not argue that the trial court erred because Washington's second degree child rape is not factually comparable to Oregon's first degree sodomy. Instead, he argues only that incest is "more comparable" than Washington's second degree child rape offense. McCasland fails to cite any authority that the trial court must use the "most comparable" offenses when sentencing under the POAA.

Contrary to this argument, the POAA simply provides that the definition of persistent offender includes defendants convicted of first degree child molestation who have prior out-of-state convictions for offenses that are comparable to the offenses listed in former RCW 9.94A.030(37)(b)(i). Former RCW 9.94A.030(37)(b)(i)(A), (ii). Thus, it is immaterial whether Washington's incest offense may be *more* factually comparable to Oregon's first degree sodomy convictions than second degree child rape. Because McCasland does not argue that second degree

[5] The parties agree that Oregon's first degree sodomy statute is broader than Washington's second degree rape statute. Thus, as the parties do, we address only the factual comparability prong.

child rape is not factually comparable to Oregon's first degree sodomy, McCasland has not shown that the trial court erred. Accordingly, McCasland's argument fails.

III. EQUAL PROTECTION

McCasland argues that the sentencing court violated his constitutional rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution by sentencing him as a persistent offender. We reject McCasland's equal protection argument.

A. PRINCIPLES OF LAW

We review equal protection claims de novo. *See State v. Hirschfelder*, 170 Wn.2d 536, 550-52, 242 P.3d 876 (2010). Our Supreme Court applies rational basis scrutiny when defendants sentenced under the POAA assert equal protection claims under article I, section 12 and the Fourteenth Amendment based on alleged disparate treatment under the POAA's provisions. *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1996); *State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996).

We previously held that the State has a rational basis for treating sentencing factors under the POAA differently than elements of a crime and that the POAA does not violate equal protection. *State v. McKague*, 159 Wn. App. 489, 517-19, 246 P.3d 558, *aff'd*, 172 Wn.2d 802, 262 P.3d 1225 (2011). Both Division One and Division Three of this court have agreed. *State v. Williams*, 156 Wn. App. 482, 496-98, 234 P.3d 1174 (2010); *State v Langstead*, 155 Wn. App.

448, 453-57, 228 P.3d 799 (2010). McCasland has not presented any compelling reason to disregard this authority.[6]

We hold that having the trial court find by a preponderance of the evidence that he had a prior strike offense under the POAA did not violate McCasland's right to equal protection.

IV. RIGHT TO A JURY TRIAL AND DUE PROCESS

McCasland argues that the trial court violated his rights to a jury trial and due process because the sentencing judge, and not a jury, found the existence of qualifying prior convictions under the POAA. However, he acknowledges that controlling precedent has rejected arguments asserting a right to a jury trial on prior convictions under the POAA and that proof of "the fact of a prior conviction may be an exception" to *Apprendi*[7] and its progeny. Br. of Appellant at 29-30. As McCasland seems to acknowledge, his argument fails.

In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Whether a defendant had a prior strike offense under the POAA is a fact of a prior conviction.

Our Supreme Court has stated that based on *Apprendi* "[w]e have consistently held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt." *Olsen*, 180 Wn.2d at 473. And our Supreme Court has expressly stated that the "argument

[6] McCasland relies on *State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008), but *Roswell* is inapplicable because it addressed an essential element of a crime and not a sentencing factor under the POAA.

[7] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

that recent United States Supreme Court precedent dictates that his prior convictions must be proved to a jury beyond a reasonable doubt is unsupported." *State v. Witherspoon*, 180 Wn.2d 875, 892, 329 P.3d 888 (2014). Thus, McCasland's argument fails.

McCasland also argues that under the Sixth and Fourteenth Amendments a sentencing court cannot constitutionally review whether out-of-state and Washington offenses are factually comparable if the offenses are not legally comparable. We reject McCasland's argument.

McCasland cites *Descamps v. United States*, 570 U.S. 254, 268-70, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), to argue that the trial court violated his constitutional "rights under the Sixth and Fourteenth Amendments" by conducting a factual comparability analysis. Br. of Appellant at 32. However, he also acknowledges that "*Descamps*' Sixth Amendment implications do not call into question Washington's comparability analysis under the [Sentencing Reform Act of 1981, ch. 9.94A RCW]." Br. of Appellant at 32 n.5 (quoting *Olsen*, 180 Wn.2d at 476).

In *Descamps*, the United States Supreme Court held that sentencing courts could not rely on certain documents to determine whether a defendant violated an indivisible statute covering a qualifying prior offense under the Armed Career Criminal Act of 1984 (ACCA).[8] 570 U.S. at 258; *Olsen*, 180 Wn.2d at 474-75. *Descamps* premised its holding on the concern that the sentencing court should not resolve factual disputes "'about what the defendant and state judge must have understood as the factual basis of the prior plea,' or what the jury in a prior trial must have accepted as the theory of the crime." 570 U.S. at 269 (quoting *Shepard v. United States*, 544 U.S. 13, /125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)).

[8] 18 U.S.C. § 924(e).

In *Olsen*, our Supreme Court held that the factual prong of the comparability analysis for prior convictions under the POAA survived *Descamps*. 180 Wn.2d at 474. Thus, this argument fails.

We hold that having the trial court find by a preponderance of the evidence that he had a prior strike offense under the POAA did not violate McCasland's right to a jury trial or due process rights. 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.

Johanson, J.

JOHANSON, J.

We concur:

Maxa, C.J.

MAXA, C.J.

Lee, J.

LEE, J.

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 – Division Two** under **Case No. 50370-1-II**, 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:

☒ respondent Rachael Rogers, DPA
[prosecutor@clark.wa.gov]
Clark County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 27, 2019

WASHINGTON APPELLATE PROJECT

March 27, 2019 - 3:17 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50370-1
Appellate Court Case Title:	State of Washington, Respondent v. Nathaniel McCasland, Appellant
Superior Court Case Number:	16-1-00035-5

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