No. 47781-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ARTURO SPENCER MARTIN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-00649-2
The Honorable Frank Cuthbertson, Brian Tollefson,
Jerry Costello and Stanley Rumbaugh, Judges

OPENING BRIEF OF APPELLANT

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2. The trial court erred when it denied Arturo Martin's motion to dismiss for violation of his right to a speedy trial.

3. The trial court erred when it included Arturo Martin's 1983 second degree burglary conviction in California in his offender score calculation because it is not factually comparable to second degree burglary in Washington.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was Arturo Martin's constitutional right to a speedy trial violated when the 15 month wait was caused in significant part by the State's delay in bringing Martin to Washington for trial and by the trial court's decision to repeatedly grant lengthy continuances over Martin's personal objection? (Assignments of Error 1 & 2)

2. Where California's second degree burglary statute was legally broader than Washington's second degree burglary statute; where Washington's burglary statute requires proof

that the defendant entered a building; and where the California charging document merely lists an address but does not specify if that address is a building, did the trial court err when it ruled that the convictions are factually comparable and when it included the California conviction in Martin's offender score calculation? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Arturo Martin and Lisa Jacobs were introduced by mutual friends in December of 2011. (4RP 48-49; 6RP 43)[1] Jacobs, who had suffered a work-related injury, was taking a variety of prescription medications and medical marijuana, and was visited daily by an in-home caregiver. (4RP 46-47, 48-49, 71-75) Within a week of their introduction, Martin began staying overnight in the home Jacobs shared with her four-year old daughter. (4RP 47, 51) According to Jacobs, their relationship quickly became intimate. (4RP 52) But, according to Jacobs, Martin was controlling and did not like that she had dogs and smoked. (4RP 52-53) Nevertheless, Jacobs agreed to use her medical marijuana

[1] The transcripts labeled volumes I through VIII will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding.

prescription to begin, with Martin's assistance, to grow marijuana in her garage for both her personal use and to sell to dispensaries. (4RP 80-82)

On the night of December 12, 2011, Jacobs and Martin went to bed around midnight. (4RP 56) Jacobs testified that Martin became upset when she tried to snuggle with him because she had recently touched the dogs but did not wash her hands afterwards. (4RP 56, 84) Tired of Martin's high standards, Jacobs told him to leave her home. (4RP 56-57) According to Jacobs, this upset Martin and he punched her in the face with his fist. (4RP 57)

Jacobs responded by saying, "Dude, what are you doing?" (4RP 57) This upset Martin more because he felt the term "dude" was disrespectful. (4RP 57) Jacobs testified that Martin proceeded to punch her in the face about 10 more times. (4RP 57-58)

Later, after Jacobs took a shower, Martin directed her to use bleach to clean up any blood that had splattered on the bed or carpet. (4RP 59, 61) Jacobs' daughter came out of her bedroom several times during this time, but Martins ordered her back to bed. (4RP 60-61)

According to Jacobs, Martin asked if she was going to "snitch" on him, and she told him no in order to keep him calm.

(4RP 64) She testified that Martin told her that he would kill her and her daughter if she "snitched." (4RP 64)

The next morning, Jennifer Dickenson, a substitute caregiver, arrived to help Jacobs. (4RP 65; 5RP 31) Dickenson noticed that Jacobs' face was swollen and bruised. (4RP 65-66; 5RP 32) Jacobs showed Dickenson around the house, but did not mention what had happened with Martin. (4RP 65-66; 5RP 33-34) Dickenson testified that there was obvious tension in the house, and that Jacobs and Martin did not speak to each other. (5RP 33)

After Martin left and Jacobs returned from taking her daughter to the school bus, Dickenson asked if Martin had caused her injuries. (4RP 67; 5RP 34-35) Jacobs answered affirmatively, and asked Dickenson to help change the bandage she had placed over a cut on her face. (4RP 67; 5RP 34-35) Dickenson eventually convinced Jacobs to seek medical care. (4RP 67; 5RP 35)

The doctors who examined Jacobs noted swelling around her eyes and jaw and lacerations on her nose and eyelid. (5RP 62; 6RP 21) A CT scan showed a fracture on Jacobs' nasal bridge. (5RP 63; 6RP 22) Jacobs received seven stitches to close the lacerations, and was in pain for some time afterwards. (4RP 68; 5RP 65)

Pierce County Sheriff's Deputy Gerald Tiffany interviewed Jacobs at the hospital. (5RP 11-12) He also noted that her eyes were bruised and swollen and that she had lacerations on her nose and under her eye. (5RP 13) Jacobs did not want to tell Deputy Tiffany what happened, but eventually she explained that Martin had hit her and caused her injuries. (5RP 13)

Sheriff's Deputy Tanya Terrones contacted Jacobs several days later at a hotel room where Jacobs and her daughter were staying. (5RP 22) Jacobs' face and eyes were still bruised and swollen, and Jacobs appeared to be in significant pain. (5RP 22) Jacobs told Deputy Terrones that Martin had caused her injuries. (5RP 23) Deputy Terrones tried unsuccessfully to locate Martin. (5RP 24) She issued a bulletin to other law enforcement agencies that included his photograph and a list of suspected charges and sent the file to the prosecutor's office for processing. (5RP 24-25)

Martin testified that he and Jacobs were never romantic, and that he had rejected her advances because he was married. (6RP 45, 46, 49) He saw Jacobs as a friend and business partner, because they agreed to grow and sell marijuana in her garage. (6RP 49-50, 56-58)

On the night of the assault, Martin was in Port Orchard with

his friends, Molly and Maggie, and he spent the night at Maggie's house. (6RP 64, 69, 71-72) The next morning, he went to Jacobs' house and saw that she had a bandage over her eye. (6RP 72, 74) He asked Jacobs what was going on, and Jacobs told him he should not be there. (6RP 74) Jacobs told him that her family members visited and expressed their displeasure, in racially derogatory terms, that Martin had been staying with Jacobs and helping her grow marijuana. (6RP 63) Jacobs told Martin that they had threatened to kill Martin, and that he should leave for a few weeks. (6RP 75) After confirming that Jacobs was okay, Martin left. (6RP 77) Martin also noted that, at the time, the marijuana plants in Jacobs' garage were worth at least $5,000.00 and could produce up to $87,000.00 worth of harvested marijuana. (6RP 62-63)

Martin adamantly denied assaulting Jacobs. (6RP 77)

B. PROCEDURAL FACTS

The prosecutor filed an Information on February 23, 2012, charging Martin with one count of second degree assault with a domestic violence aggravator (RCW 9A.36.021(1)(a); RCW 9.94A.535(3)(h)), one count of felony harassment (RCW 9A.46.020) and one count of interfering with the reporting of

domestic violence (RCW 9A.36.150). (CP 1-3) A bench warrant was issued on February 24, 2012. (CP 471, 472)

On December 21, 2012, the State of Wyoming filed charges alleging that Martin committed several crimes in that State on October 7, 2011. (CP 300-03) Martin entered a guilty plea on March 26, 2013 and was sentenced on October 18, 2013, to a term of 3-5 years confinement in a Wyoming Department of Corrections facility. (CP 306-13)

On January 9, 2014, Martin sent a notice to the Pierce County Prosecutor, pursuant to the Interstate Agreement on Detainers statute, requesting disposition of the outstanding charges filed against him. (CP 64, 113) Martin was eventually returned to Washington state, and on May 7, 2014 was arraigned in Pierce County Superior Court. (CP 65, 473) The trial date was set for June 30, 2014. (CP 473) Counsel was appointed and filed a notice of appearance on May 8, 2014. (CP 474)

At a hearing on June 12, 2014, defense counsel indicated that he needed more time to investigate and prepare the case and for the parties to obtain certified copies of Martin's out-of-sate convictions. (06/12/14 RP 2-4) Over Martin's objection, the trial court granted the request and set a new trial date for September

18, 2014. (06/12/14 RP 3-4; CP 475)

On August 5, 2014, the State filed a persistent offender notice. (CP 13) On August 12, 2014, Martin told the court that he was unhappy with his appointed counsel, and felt he had not been doing enough to prepare for trial. (08/12/14 RP 5-6) Martin was also upset because he felt his speedy trial rights were being violated due to the delay in transporting him from Wyoming to Washington coupled with the earlier continuance. (08/12/14 RP 6-7)

On September 3, 2014, defense counsel again requested more time to prepare to defend Martin against the substantive charges and the persistent offender allegation. (09/03/14 RP 2-4) Over Martin's objection, the trial court granted the request and set a new trial date for January 29, 2015. (09/03/14 RP 3, 4-5; CP 476)

On January 29, 2015, defense counsel and the prosecutor both requested another continuance, this time because the State had recently located Jacobs, and interviews were scheduled for the coming Monday. (01/29/15 RP 3) Because of his frustration with what he saw as a lack of effort and cooperation by defense counsel, Martin requested that he be allowed to represent himself. (01/29/15 RP 4-16; CP 26) After a lengthy colloquy, the court

granted Martin's request, and set a new trial date for February 19, 2015. (01/29/15 RP 17; CP 477)

On February 12, 2015, Martin filed a motion to dismiss, alleging the trial delays violated both the time-for-trial provision of the Interstate Agreement on Detainers statute and his constitutional right to a speedy trial. (CP 53-57; 02/12/15 RP 7) At the same time, the State requested another continuance so that the court could "supplement the record" of its order allowing Martin to act pro se. (CP 27-52; 02/12/15 RP 2-3) Martin objected to the continuance, but the trial court found good cause for the continuance and set a new trial date for February 26, 2015. (CP 478; 02/12/15 RP 8)

At Martins' request, his defense counsel was re-appointed to act as standby counsel. (02/20/15 RP 11, 19-20; 02/25/15 RP 3) On February 25, 2015, the court denied Martin's motion to dismiss for violation of his speedy trial rights, finding that all of the prior continuances had been for good cause. (02/25/15 RP 3-5) On February 26, 2015, the trial court granted another continuance, this time at the request of both the prosecutor (deputy in trial in another case) and the defense (more time to prepare). (CP 479) The court set a new trial date for April 9, 2015. (CP 479)

On April 9, 2015, Martin asked the court to allow him to be represented by counsel, but by someone other than his current standby counsel, who he still felt was not adequately assisting him in preparing a defense. (1RP 6-9) The court told Martin that he could either be fully represented by current standby counsel or continue pro se, so Martin decided to accept full representation. (1RP 9, 15) The court heard motions in limine beginning on April 14, 2015 and the first witness was called to testify on April 16, 2015. (2RP 17; 4RP 46)

The jury found Martin guilty of second degree assault but not guilty of harassment and interfering with the reporting of domestic violence. (7RP 55-56; CP 179, 182, 184) The jury found that the assault was an aggravated domestic violence offense and that Martin and Jacobs were members of the same family or household. (CP 180-81; 7RP 56)

At sentencing, the court undertook an analysis of the comparability of Martin's out of state convictions to Washington offenses. (8RP 5-26) The court found that some convictions were comparable to Washington felonies, and others were not. (8RP 5-26) As a result, Martin is not a persistent offender. (8RP 36) But the court imposed an exceptional sentence based on the jury's

finding of the domestic violence aggravator and based on the court's finding that Martin's unscored misdemeanor or foreign criminal history results in a presumptive sentence that is clearly too lenient. (CP 449, 480-83; 8RP 37) Martin timely appealed. (CP 464)

IV. ARGUMENT & AUTHORITIES

A. THE 15 MONTH DELAY IN THE START OF ARTURO MARTIN'S TRIAL VIOLATED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The Interstate Agreement on Detainers (IAD) is an interstate compact designed to address issues that arise when an individual is incarcerated in one jurisdiction while also facing charges in another jurisdiction. RCW 9.100.010 (Art. I); State v. Welker, 157 Wn.2d 557, 563, 141 P.3d 8 (2006). Under the IAD, when Washington has charges pending against a prisoner held in another jurisdiction, it may file a detainer with that authority requesting that the prisoner not be released before resolution of the Washington charges. State v. Simon, 84 Wn. App. 460, 464, 928 P.2d 449 (1996) (citing State v. Anderson, 121 Wn.2d 852, 861, 855 P.2d 671 (1993); RCW 9.100). After the detainer is filed, the prisoner may demand that Washington bring him/her to trial commencing within 180 days of the demand. Simon, 84 Wn. App. at 464; RCW

9.100.010, Art. 3; Anderson, 121 Wn.2d at 861.

Washington's Criminal Rule 3.3(b) also guarantees defendants a right to speedy trial within a specific time frame. Both the IAD and CrR 3.3 allow the trial court in the prosecuting jurisdiction to grant continuances beyond the speedy trial limit for good cause. RCW 9.100.010, Art. 3 ("for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance"); CrR 3.3(f) ("the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense"). A continuance to allow defense counsel to prepare for trial, or due to an unavoidable scheduling conflict, is generally justified under the IAD and CrR 3.3(f). *See* State v. Ollivier, 178 Wn.2d 813, 825, 312 P.3d 1 (2013); State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); State v. Palmer, 38 Wn. App. 160, 162-63, 684 P.2d 787 (1984); State v. Heredia-Juarez, 119 Wn. App. 150, 153-55, 79 P.3d 987 (2003).

However, in addition to these time-for-trial rules, Article I, section 22 of the Washington Constitution and the Sixth

Amendment to the United States Constitution both guarantee a criminal defendant the right to a speedy public trial.[2] The rights provided by the two constitutions are equivalent. State v. Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009); Ollivier, 178 Wn.2d at 826. An allegation that these rights have been violated is reviewed *de novo*. Iniguez, 167 Wn.2d at 280.

Some pretrial delay is inevitable. Iniguez, 167 Wn.2d at 282. Thus, when raising a constitutional speedy trial claim, the burden lies with the appellant to demonstrate that the delay between the initial accusation and the trial has gone from ordinary to unreasonable and has created a "presumptively prejudicial" delay. Iniguez, 167 Wn.2d at 280-81. Once this showing is made, the reviewing court considers several nonexclusive factors in order to determine whether the appellant's constitutional speedy trial rights were violated. Iniguez, 167 Wn.2d at 280-81; Ollivier, 178 Wn.2d at 827. These factors include the length and reason for the delay, whether the defendant has asserted his right, and the ways in which the delay caused prejudice. Barker v. Wingo, 407 U.S. 514,

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[2] Article I, section 22 of the Washington Constitution provides that "[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial." And The Sixth Amendment of the United States Constitution reads in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1982); Iniguez, 167 Wn.2d at 292; Ollivier, 178 Wn.2d at 827. No one of these factors alone is either sufficient or necessary to establish a violation. Iniguez, 167 Wn.2d at 283 (citing Barker, 407 U.S. at 533). But they assist in determining whether a particular defendant has been denied the right to a speedy trial.

1. *The length and reasons for the delay of this non-complex case meets the threshold showing of a presumptively prejudicial delay*

In order to trigger a speedy-trial analysis, "an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (*quoting* Barker, 407 U.S. at 530-31). Then, if this showing is made, a court has to consider, "as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." Doggett, 505 U.S. at 652. Thus, "the length of the delay is both the trigger for analysis and one of the factors to be considered." United States v. Colombo, 852 F.2d 19, 24 (1st Cir. 1988).

Although the Washington Supreme Court has expressly

rejected the adoption of a bright line rule, it has been suggested that the "bare minimum," though factually contingent, runs somewhere between eight months and slightly over one year. Wayne R. Lafave, CRIMINAL PROCEDURE, § 18.2(b), at 119 (3rd ed.2007); *accord* Iniguez, 167 Wn.2d at 293 (holding that under the facts of that case, eight plus months' delay was only just beyond the bare minimum required to trigger a Barker inquiry).

This inquiry is necessarily dependent upon the specific circumstances of each case. Iniguez, 167 Wn.2d at 283. Several factors to be considered in this initial inquiry include not only the length of the delay, but the complexity of the charges and reliance on eyewitness testimony. Iniguez, 167 Wn.2d at 292. For example, as the Barker Court noted, a tolerable delay for trial on "an ordinary street crime is considerably less than for a serious, complex conspiracy charge." 407 U.S. at 531.

In this case, the charges were filed on February 23, 2012, and Martin filed his IAD request for trial on January 9, 2014. Trial began on April 14, 2015, over three years from the filing of the Information and over 15 months after Martin first made his demand for a speedy trial. This delay meets the presumptively prejudicial standard. This case was not complex. Martin did not dispute that

Jacobs was assaulted, so the only question was whether Martin committed the assault. And this determination rested entirely on the jury's assessment of credibility. Other than Jacobs, there was no eyewitness testimony, and no complex physical evidence implicating or exonerating Martin.

The length of the delay is beyond the bare minimum and beyond what is tolerable for a case of this type, which means that Martin has met his burden of demonstrating presumptive prejudice. This court must now consider whether his speedy trial rights were violated using the nonexclusive Barker factors.

2. *Application of the Barker factors shows that Martin's constitutional speedy trial rights were violated.*

The first factor in the Barker inquiry, the length of the delay, focuses on the extent to which the delay stretches past the bare minimum needed to trigger the Barker analysis. Iniguez, 167 Wn.2d at 283-84 (*citing* Doggett, 505 U.S. at 652). The delay in this noncomplex case was 15 months, which is well over the eight month "bare minimum" needed to trigger the Barker analysis. This is extreme considering how few witnesses there were and the lack of physical or scientific evidence.

The second factor to be considered is the reason for the

delay. Iniguez, 167 Wn.2d at 294. This inquiry requires the reviewing court to consider each party's level of responsibility for the delay and assign differing weights to the reasons for the delay. Iniguez, 167 Wn, 2d at 294.

In this case, the Pierce County Prosecutor received Martin's IAD notice on January 13, 2014, but the State did not transport Martin back to Washington until May 6, 2014. (CP 64-65) So this initial delay of nearly four months is attributable entirely to the State of Washington. Subsequently, the trial court (over Martin's objection) granted defense counsel continuances totaling approximately seven months, after counsel stated he needed more time to prepare. (06/12/14 RP 2-4; 09/03/14 RP 2-4; 01/29/15 RP 3; CP 475, 476, 477, CP 479)

The State was primarily responsible for two additional continuances, on February 12 and February 26, 2015, because the deputy prosecutor wanted the trial court to supplement the record regarding its order allowing Martin to act pro se and because the prosecutor was in trial on another matter. (CP 27-52, 478, 479; 02/12/15 RP 2-3; 02/12/15 RP 8) These requests delayed trial an additional two months. Thus, of the 15 months between Martin's disposition request and the start of trial, the State was responsible

for nearly half of the delay. And Martin objected to the delays requested by defense counsel. (CP 475-79; 06/12/15 RP 3-4; 09/03/14 RP 3; 02/12/15 RP 8) This factor therefore weighs in favor of Martin.

The third factor to consider is whether the defendant asserted his constitutional right to a speedy trial, and the extent to which the assertion was made. Barker, 407 U.S. at 528–29. The court should take into account facts such as the frequency and force of the objections, and the reasons why the defendant demands or fails to demand a speedy trial. Iniguez, 167 Wn.2d at 294-95. When a defendant asserts his constitutional speedy trial right, "strong evidentiary weight" is given. Iniguez, 167 Wn.2d at 295.

Martin personally and vigorously asserted his speedy trial right on multiple occasions. Martin objected orally and in writing to what he saw as a violation of his speedy trial rights. (CP 53-57; 08/12/14 RP 6-7; 02/12/15 RP 7; 02/25/15 RP 3-5) He also repeatedly informed the court of his concerns that his appointed counsel was not prioritizing his case or making a genuine effort to prepare for trial. (08/12/14 RP 5-6; 01/29/15 RP 4-16; 1RP 6-9; CP 11-12, 26) Accordingly, this factor also weighs in Martin's favor.

Finally, this court must consider whether Martin suffered any prejudice by the delay. Iniguez, 167 Wn.2d at 295. The court should judge this by looking at whether the following interests protected by the speedy trial right have been effected: (1) preventing harsh pretrial incarcerations; (2) minimization of defendant's anxiety and worry; and (3) limiting defense impairments. Iniguez, 167 Wn.2d at 295. Since impairment to the defense by the passage of time is the most serious form of prejudice, and due to the difficulty a defendant has in showing it, prejudice is presumed when the delay is lengthy. Barker, 407 U.S. at 532. Thus, an appellant need not show actual impairment to demonstrate a constitutional speedy trial violation. Barker, 407 U.S. at 532. However, where actual impairment is shown, it weighs in favor of the appellant. Iniguez, 167 Wn.2d at 295.

Martin's ability to defend the case was likely prejudiced by the delay in bringing this matter to trial. Martin claimed he was not home when Jacobs was assaulted, but was instead at a gathering with friends in Port Orchard. (6RP 64, 69, 77) Martin hoped to call two of those friends to confirm his alibi. (2RP 12-14; 5RP 7) But Martin's exhaustive attempts to locate them, which included contacting their now-former employer, were unsuccessful. (1RP

19-21; 2RP 12-14; 5RP 7; 6RP 7-16)

When taken as a whole, the circumstances of this case establish that Martin's constitutional speedy trial rights were violated.

B. MARTIN'S 1983 SECOND DEGREE BURGLARY CONVICTION IN CALIFORNIA IS NOT FACTUALLY COMPARABLE TO A SECOND DEGREE BURGLARY CONVICTION IN WASHINGTON.

Out-of-state convictions are included in a Washington defendant's offender score if the foreign crime is comparable to a Washington felony offense. RCW 9.94A.525(3). But an out-of-state conviction may not be used to increase a defendant's offender score unless the State proves it is equivalent to a felony in Washington. State v. Weiand, 66 Wn. App. 29, 31-32, 831 P.2d 749 (1992).

The State bears the burden of establishing the comparability of offenses, typically by proving that the out-of-state conviction exists and by providing the foreign statute to the court. State v. Ford, 137 Wn.2d 472, 479-482, 973 P.2d 452 (1999). If the State provides sufficient evidence, the sentencing court must conduct the comparison on the record. State v. Labarbera, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005). If the State fails to establish a sufficient record, then the sentencing court lacks the necessary

evidence to determine if the out-of-state conviction should be included in the offender score. Ford, 137 Wn.2d at 480-81.

A foreign conviction is equivalent to a Washington offense if there is either legal or factual comparability. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). A foreign offense is legally comparable if "the elements of the foreign offense are substantially similar to the elements of the Washington offense." State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

If the elements of the two statutes are not identical or if the foreign statute is broader than the Washington definition of the particular crime, the trial court must then determine whether the offense is factually comparable. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). It may then be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense. Ford, 137 Wn.2d at 479 (citing Morley, 134 Wn.2d at 606).

In this case, the State presented copies of seven out-of-state convictions that it asserted were comparable to Washington felonies and should be counted in Martin's offender score. (CP

353-438) Martin objected to the inclusion of several of these prior convictions, including a 1983 second degree burglary conviction from California. (CP 429-437; 8RP 5-8) The court reviewed the statutes and court documents, and found that five of the seven convictions were comparable and should be included in Martin's offender score. (RP 5-25; CP 449) But the 1983 California burglary conviction is not comparable and should not have been included in Martin's offender score.

In 1983, the crime of burglary was defined in California Penal Code section 459 as follows:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, … house car, … inhabited camper, … vehicle … when the doors of such vehicle are locked, aircraft … 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.

Cal. Penal Code § 459 (1983 Ed.) (CP 372). Any burglary "of an inhabited dwelling house or trailer coach … or the inhabited portion of any other building" was first degree burglary. Cal. Penal Code § 460 (1983 Ed.). All other burglaries were considered second degree. Cal. Penal Code § 460 (1983 Ed.) (CP 372).

In 1983, a person was guilty of second degree burglary in Washington 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." RCW 9A.52.030 (1983 Ed.) (CP 373).

The State conceded that the 1983 California burglary statute was broader than the 1983 Washington burglary statute, and therefore not legally comparable. (CP 355) But the State asserted that Martin's conduct, as alleged in the criminal complaint, would have violated Washington's second degree burglary statute and was therefore factually comparable. (CP 355; 8RP 6)

The criminal complaint filed in California, to which Martin pleaded guilty, simply stated that Martin "did willfully and unlawfully enter 800 Admiral Callaghan Lane, Vallejo, California, with the intent to commit theft." (CP 212, 213, 217) The complaint does not specify that 800 Admiral Callaghan Lane is a building, as required to support a Washington burglary conviction. (CP 212) And the State did not present any other documents, such as a declaration of probable cause or plea statement, that describes 800 Admiral Callaghan Lane as a building, as opposed to a "tent, vessel, railroad car, trailer coach, … inhabited camper, … [locked] vehicle … aircraft … [or] mine." Cal. Penal Code § 459 (1983 Ed.).

As trial counsel pointed out, "we don't have any information about what was entered other than this address. In fact, it could have been a vacant lot with a tent on it. It could have been a warehouse, a vessel, a motor home. That information is missing from the record." (8RP 7) But the court disagreed, and decided that 800 Admiral Callaghan Lane must be a building because "willfully and unlawfully enters [is] not the language that's used for vacant lots. Enter implies that there is a building or other structure that you are entering into." (8RP 7)

But the court ignored the fact that the California burglary statute specifically criminalized entry into a number of things in addition to a building, such as a tent, a vessel, a locked vehicle, or a mine.[3] And the Washington criminal code also makes it a crime to "enter" any number of other things besides a building, such as "premises" (which includes real property),[4] a motor home or a "vessel … which has a cabin equipped with permanently installed sleeping quarters or cooking facilities,"[5] or a "dwelling" (which means any "structure, though movable or temporary … which is

[3] See Cal. Penal Code § 459 (1983 Ed.).
[4] See RCW 9A.52.080 (second degree criminal trespass); RCW 9A.52.010 (defining premises).
[5] See RCW 9A.52.095 and RCW 9A.52.100 (vehicle prowling).

used … by a person for lodging" and could, by its plain terms, include a tent).[6] Clearly, the term "enter" is not exclusively applied to buildings in our criminal code.

Furthermore, sentencing courts are prohibited from making assumptions regarding the facts underlying a foreign conviction, or from engaging in any factual comparability analysis when the underlying facts were not admitted, stipulated to, or proven beyond a reasonable doubt. Lavery, 154 Wn.2d at 258; State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004). This is "because the judicial determination of the facts related to a prior out-of-state conviction implicates the concerns underlying Apprendi and Blakely, [so] judicial fact finding must be limited." State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006) (referencing Apprendi v. New Jersey, 530 U.S. 466, 491-92, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)). And courts should be wary of "allowing a sentencing court to 'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea[.]'" Descamps v.

[6] See RCW 9A.52.025 (residential burglary); RCW 9A.04.110(7) (defining dwelling).

United States, __ U.S. __, 133 S. Ct. 2276, 2288, 186 L. Ed. 2d 438 (2013) (quoting Shepard v. United States, 544 U.S. 13, 25, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)).

Because the California complaint does not specify that Martin entered a building, and the remaining record is deficient as to this critical point, the State did not carry its burden of proving that this conviction is comparable to a Washington second degree burglary. The court therefore erred when it included this conviction when it calculated Martin's offender score.

Martin's offender score should have been five, not six, which lowers his standard range sentence. "When the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). Accordingly, because it is not clear from the record that the court in this case would have imposed the same sentence using Martin's lower standard range, the remedy is to remand Martin's case for resentencing.

V. CONCLUSION

Martin repeatedly expressed a desire to proceed to trial

promptly and, although some of the delay in trial was attributable to his appointed counsel, nearly half of the 15 month delay was attributable to the State. Martin did not receive the speedy trial guaranteed by the Washington and United States constitutions, and this delay is both presumptively, and likely actually prejudicial given his alibi defense. His conviction should therefore be reversed and dismissed with prejudice. Alternatively, Martin's case must be remanded for resentencing without the inclusion of his 1983 California burglary conviction.

DATED: December 22, 2015

Stephanie Cunningham

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CERTIFICATE OF MAILING

I certify that on 12/22/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Arturo S. Martin #28912, Wyoming State Penitentiary, PO Box 400, Rawlins, WY 82301.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

December 22, 2015 - 12:52 PM

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