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Court of Appeals
Division III
State of Washington

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WASHINGTON STATE
SUPREME COURT

94073-8
Supreme Court No. ___________
Court of Appeals No. 33183-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JD MILLER,

Defendant/Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Opinion filed December 20, 2016, affirming his conviction and sentence. A copy of the Court's partially published opinion is attached as Appendix B. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW.

1. Did the trial court abuse its discretion in allowing irrelevant evidence of other acts contrary to ER 401, ER 403 and ER 404(b)?

2. Was Mr. Miller improperly sentenced as a persistent offender under the Persistent Offender Accountability Act (POAA) where his prior Idaho conviction for aggravated assault was not legally or factually comparable to a Washington most serious offense?

IV. STATEMENT OF THE CASE.

JD Miller was charged and convicted by a jury of first degree assault for stabbing Christopher Bennett with a knife. CP 1, 43, RP[1] 73. On the evening of the incident, Bennett and his ex-wife, Stacy, noticed a

[1] Citations to the record designated "RP" refer to the transcript of the trial and sentencing. Citations to other hearings will include the date of the hearing.

white BMW parked in front of the next-door residence with the motor running and someone sitting in the driver's seat. RP 132-33. The next-door residence was a single-wide trailer in great disrepair and filthy with a ramshackle fence and an unkempt yard full of weeds. RP 125-26. There were frequent comings and goings of visitors who stayed only briefly, indicating the owner, Welch, was a possible drug dealer. RP 132, 169. The Bennett's relationship with Welch had been rocky at best. RP 131-32.

When Chris Bennett saw the BMW, he figured it was another drug deal going down. He walked over to the car and confronted the driver, later identified as Dustin Pearson. He asked Pearson what he was doing there and told him to leave or he would call the police. RP 172-73. After an exchange of yelling and profanities, Bennett testified he walked over to his truck, retrieved his cell phone, and walked back toward Pearson's car. RP 173-74. Pearson then drove away. Pearson testified he thought Bennett had a gun or knife in his hand. RP 206-07.

At that point, Miller came out onto the porch of the trailer. He had heard and seen the altercation between Bennett and Pearson and had also seen Bennett walk over to his truck and head back toward Pearson's car. RP 174, 368-69. Miller yelled at Bennett who yelled back telling Miller to

go back inside the trailer. Miller thought Bennett seemed aggressive and hostile like he'd been drinking. RP 369-70.

Miller came down off the porch and Bennett walked quickly towards Miller. Miller said he was scared so he pulled out a utility knife from his pocket that he had used earlier that day installing a car stereo. Miller thought Bennett had grabbed a gun out of his truck earlier. Bennett came at Miller as if to grab or punch him so Miller stabbed Bennett with the utility knife. RP 368-72. Bennett denied making any threatening or aggressive movements. RP 174. Bennett stopped and walked back to Stacy's house thinking he had been punched in the stomach. He didn't realize he had been stabbed until he was inside the house. RP 174-76.

Miller left the trailer, called a friend to come pick him up and went home. He was unable to get hold of Pearson. RP 374-77.

Police located the white BMW that same evening and arrested Pearson. RP 80-88, 227-30. The Court overruled Miller's objection under ER 403 and ER 404(b) to evidence of Pearson's arrest as well as weapons found inside the BMW. RP 208-16, 228. Miller also objected to reference to the weapons found in Pearson's car and why Pearson needed them during the prosecutor's opening statement. RP 57-58. The items found in

the car included a tire iron, a Buck knife, a second knife, brass knuckles, and a starter pistol. RP 208-16.

Pearson was called as a State's witness. RP 194. At the start of the morning session after Pearson's testimony, the Court reversed its prior ruling admitting the weapons found in Pearson's car (the white BMW) finding any relevance was outweighed by undue prejudice. The Court indicated it would advise the jury not to consider the presence of weapons in the car. RP 255-56. Miller then moved for a mistrial. He argued the jury had already seen and even handled the weapons so it would be guilt by association. RP 256-57. After hearing argument back and forth, the Court denied the motion for a mistrial and said it would allow the State to finish its case before deciding whether or not to admit evidence of the weapons. RP 257-61.

Ultimately, the Court stuck to its earlier ruling admitting evidence of the weapons over continued objections by Miller. RP 208-16, 321-29. The State argued its theory of the case was that Miller and Pearson went to Welch's residence to settle a drug debt or to take something and the presence of the weapons bolstered that theory. RP 257-58. In closing argument, the prosecutor argued this same theory. RP 424-32.

The Court also allowed testimony of a TV found in the bushes in the backyard of Welch's residence and a note Welch left for Stacy Bennett stating Welch thought Miller was in the process of stealing his TV. Miller moved to exclude this evidence prior to trial and objected to its admission during the trial. As an offer of proof, Miller elicited testimony from Welch outside the presence of the jury that Welch later learned someone other than Miller was responsible for removing his TV. RP 144-45, 268-77, 288-89, 317-18; 8/21/14 RP 20-21. Welch was away from his residence the night of the assault. RP 271.

Miller was sentenced as a persistent offender to life without possibility of parole. CP 170. At issue was whether a prior Idaho conviction for aggravated assault was comparable to Washington's second degree assault to count as a strike. RP 480-90. The Court found the Idaho conviction was legally comparable to the second degree assault. RP 493-95.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court (RAP 13.4(b)(1)), and involves a

significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)).

1. The trial court abused its discretion in allowing irrelevant evidence of other acts contrary to ER 401, ER 403 and ER 404(b).

ER 404(b) prohibits evidence of other crimes to show that the defendant acted in conformity with that character--had a propensity to commit this crime. But evidence of other crimes may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). To admit evidence of other crimes under ER 404(b), the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify, as a matter of law, the purpose of the evidence; (3) conclude that the evidence is relevant to prove an element of the crime charged; and, finally, (4) balance the probative value of the evidence against its prejudicial effect. *State v. Williams*, 156 Wn. App. 482, 490, 234 P.3d 1174 (2010). A trial court's decision to admit evidence of a defendant's [other] acts will be reversed upon showing an abuse of the court's discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

a. Evidence of the details of Pearson's arrest and the weapons found in Pearson's BMW should not have been admitted pursuant to ER 404(b).

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401; *State v. Lough*, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Under this definition, Pearson's arrest is irrelevant. Pearson was not present when the assault occurred and had no involvement in the assault. He had already driven away. He did not pick up Miller after the incident and Miller did not go to the house where Pearson was arrested. Pearson was not a co-defendant in this case. Thus, the fact that Pearson was hiding from the police is not evidence of flight or any other incriminating activity pertaining to Miller's case.

The only purpose of this evidence, was to show Pearson, and Miller by association, were criminal types, which is exactly the type of character evidence prohibited by ER 404(b) and ER 403.

Even more egregious was the Court's ruling admitting the weapons found inside the BMW. Again, this evidence was totally irrelevant to this offense. The prosecutor argued this evidence was relevant to show Pearson had no reason to be scared of Bennett. RP 216. But the relevant mental state is that of Miller not Pearson. Even assuming Miller was aware of the weapons in the BMW, both Pearson and the weapons were

gone before the assault occurred. Therefore, the weapons have no relevance to the assault charge.

The State also argued the presence of the weapons bolstered its theory of the case that Miller and Pearson went to Welch's residence to settle a drug debt or to take something. However, no evidence of drugs was presented at trial and Miller was not charged with burglary or theft of the TV. Moreover, the alleged assault occurred as a result of a confrontation between Miller and Bennett. It was not the result of Bennett catching Miller in the act of stealing something or committing some other crime. Therefore, the weapons have no relevance to the assault charge.

b. Evidence of the TV and Welch's note should not have been admitted pursuant to ER 404(b).

Since Miller was not charged with burglary or theft, this evidence was irrelevant to any element of the assault charge and there was insufficient evidence to implicate Miller in that regard. Welch was away from his residence the night of the assault. RP 271. While Welch testified he wrote a note stating he thought Miller was in the process of stealing his TV, he later learned someone else was responsible and Miller had nothing to do with it. RP 268-70. Therefore, this evidence is of no consequence to the assault and only shows criminal propensity prohibited by ER 404(b).

c. Admitting the improper evidence was not harmless error.

It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for nonconstitutional error. *State v. Gresham*, 173 Wash. 2d 405, 433, 269 P.3d 207, (2012). The question is whether, " 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " *Id.*

Here, the erroneous admission of evidence regarding the details of Pearson's arrest, the weapons found in the BMW, the TV, and the note from Welch was not harmless error. Without that evidence, this case boils down to a credibility contest between Miller and Bennett. Miller thought Bennett had grabbed a gun out of his truck earlier and said Bennett came at Miller as if to grab or punch him. RP 368-72. Bennett denied making any threatening or aggressive movements. RP 175. The jury could have easily been swayed in favor of Miller's version had it not been influenced by the erroneously admitted 404(b) evidence.

Based on the admission of the 404(b) evidence, the State was able to argue in closing that Miller and Pearson went to Welch's residence to commit a crime. RP 424-32. The State would not have been able to make that argument if the Court had properly excluded the 404(b) evidence. It is within reasonable probabilities, had the error not occurred, the outcome of

the trial would have been materially affected. Therefore, the error was not harmless.

2. Miller was improperly sentenced as a persistent offender under the Persistent Offender Accountability Act (POAA) because his prior Idaho conviction for aggravated assault is not legally or factually comparable to a Washington most serious offense.

Under the Persistent Offender Accountability Act (POAA), codified at RCW 9.94A.570, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release. RCW 9.94A.570. A "persistent offender," as applicable in the present case, is an individual who has been convicted of three most serious felony offenses. RCW 9.94A.030(38).

Washington convictions for most serious offenses will be applied toward a sentencing court's analysis of criminal history for purposes of sentencing under the POAA. However, foreign convictions from another state or federal court may only count as a most serious offense if the Court is able to find that the offense is legally or factually comparable to a Washington most serious offense. *In re: Personal Restraint of Lavery*, 154 Wn.2d 249, 254, 111 P.3d 837 (2005).

To determine whether a foreign conviction is legally comparable to a Washington most serious offense, courts employ a two-part test: first, the court must examine whether the elements of the foreign offense are substantially similar to a Washington most serious offense. *Id.* at 255. Offenses are not legally comparable if the foreign offense covers a broader range of illegal activity than the Washington offense. *State v. Latham*, 183 Wn. App. 390, 397, 335 P.3d 960 (2014). If the foreign offense is legally comparable, then the inquiry ends and the foreign offense is counted as if it were a Washington offense. *State v. Jordan*, 180 Wn.2d 456, 461, 325P.3d 181 (2014).

If, however, the elements of the foreign conviction are not substantially similar, or if the Washington offense is defined more narrowly than the foreign offense, it is necessary to look to the factual record of the foreign conviction to establish factual comparability. *Latham*, 183 Wn. App. at 397, *citing*, *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999), *abrogated by statute on other grounds at* RCW 9.94A.530(2).

It is the State who bears the burden of proving by a preponderance of the evidence that the record supports the existence and classification of out-of-state convictions. *Ford*, 137 Wn.2d at 480. Information provided in support of the State's burden must have some minimum indicia of

reliability beyond mere allegation and must have some basis in the record. *Id.* at 481-82. The defendant has no burden of disproving the State's assertions which are unsupported by evidence. *Id.*

a. Idaho's aggravated assault is not a class A felony because Idaho has no subdivided classifications of felonies.

The POAA includes "Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony" within the list of crimes considered to be most violent offenses. RCW 9.94A.030(33)(a). Under Idaho law, only two types of crimes exist: felonies and misdemeanors. Idaho Code 18-110. Felonies are not divided into further subcategories of levels, classes or other type; instead, each felony statute provides for individual maximum sentences. *See eg.* Idaho Code 18-906 (Appendix A).

An aggravated assault is punishable under Idaho law by no more than five years of incarceration and/or a fine of no more than $5000.00. Idaho Code 18-906. This punishment is analogous to a class C felony in Washington. RCW 9A.20.021(c). Because there are no class A felonies under Idaho law, and because the maximum penalties are far less severe than a Washington class A felony, the Idaho crime of aggravated assault cannot be found to be defined under any law as a class A felony.

Therefore, the Idaho conviction for aggravated assault is not a prior most serious offense as a class A felony.

b. Idaho's aggravated assault is not legally comparable to assault in the first or second degree under Washington Law because the Idaho offense is substantially broader than the Washington offenses, and Idaho's definition of assault is significantly different.

Idaho's charge of aggravated assault is not legally and/or factually comparable to the Washington crime of assault in the second degree. Idaho law defines aggravated assault as "an assault (a) with a deadly weapon or instrument without intent to kill; or (b) by any means or force likely to produce great bodily harm.[; or] (c) with any vitriol, corrosive acid, or a caustic chemical of any kind…." Idaho Code 18-905.

To be legally comparable, the elements of the Idaho offense must be substantially similar to the Washington offense, and cannot be broader. *Latham*, 183 Wn. App. at 397.

Washington's Second Degree Assault is defined as follows:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
> (c) Assaults another with a deadly weapon; or

> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
> (e) With intent to commit a felony, assaults another; or
> (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
> (g) Assaults another by strangulation or suffocation....

RCW 9A.36.021.

Washington's second degree assault statute is far more narrowly-tailored than Idaho's aggravated assault statute, since very specific acts are required to violate the Washington statute. The Idaho statute, by contrast, covers a far broader range of activities, including those "likely" to produce great bodily harm—no actual bodily harm is required by the statute. Additionally, while Washington's statute requires assault "with a deadly weapon," Idaho's statute more broadly includes a deadly weapon "or instrument." The statutory language is unclear as to the definition of a deadly weapon or instrument: ""Deadly weapon or instrument" as used in this chapter is defined to include any firearm, though unloaded or so defective that it cannot be fired." Idaho Code 18-905(d).

One cannot assume that the "deadly weapon" alluded to in the Idaho charging document is sufficiently similar to the "deadly weapon" under Washington law. Such assumptions are not founded in law. Thus,

the Court should not assume "a large butcher knife" must be longer than 3 inches, making it *per se* a deadly weapon under Washington law. See RP 486; CP 56, 62.

Further muddying the waters, Idaho has separate offenses of "assault" and "battery" which do not exist in Washington. Washington adheres to the common law definition of assault:

> An assault is an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

WPIC 35.50 (West, 2014). By contrast, Idaho defines assault as:

> (a) An unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another; or

> (b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Idaho Code 18-901 (Appendix A).

Idaho defines "battery" as:

> (a) Willful and unlawful use of force or violence upon the person of another; or
> (b) Actual, intentional and unlawful touching or striking of another person against the will of the other; or
> (c) Unlawfully and intentionally causing bodily harm to an individual.

Idaho Code 18-903 (Appendix A).

Idaho considers an assault to be either an attempt or a threat and a battery the completed act, whereas Washington includes actual battery in its definition of assault. Furthermore, Idaho does not require that the fear of injury be "reasonable," merely "well-founded," and requires only fear that "violence is imminent," not that "bodily injury" is imminent.

Thus, any assault committed under Idaho law does not include an actual battery. Although this may sometimes be sufficient to constitute assault in the second degree in Washington, an actual battery and resulting injury is required where the seriousness of the injury is a necessary element of the offense. RCW 9A.36.021(1)(a).

Finally, the second, alternative act constituting the crime of aggravated assault includes *any* means or force likely to produce great bodily harm. This is far more expansive than the Washington crime of assault in the second degree, which sets forth very specific means of force that can constitute the crime, and requires a completed act resulting in some form of injury in most alternative methods of commission of the offense. In short, a person could be convicted of aggravated assault in Idaho based on actions which would not amount to assault in the second degree in Washington. In fact it is plausible that some activities covered by the Idaho statute would amount to a fourth degree assault in Washington.

c. Idaho's aggravated assault is not legally comparable to assault in the first or second degree because the Idaho offense contains a substantially different mens rea.

Idaho's aggravated assault contains two different possible means of committing the crime: either an assault with a deadly weapon or instrument, or by any means or force likely to produce great bodily harm. Idaho Code Ann. § 18-905 (Appendix A). The "deadly weapon or instrument" act contains an absurdly broad *mens rea*. So long as the individual is acting "without intent to kill," he or she has committed the crime. This would presumably include recklessness, negligence or even

strict liability. By contrast, Washington requires that an assault be an "intentional" act. *See* RCW 9A.36.021.

Thus, Washington's most serious offense requires a far more specific intent than Idaho's aggravated assault. When the *mens rea* of a foreign offense is less than Washington's required *mens rea*, the offenses are not legally comparable. *See, e.g., Latham*, 183 Wn. App. at 402. Idaho requires no specific intent, only a lack of one particular type of intent.

Because the *mens rea* for Idaho's aggravated assault is vastly broader, it is not legally comparable to Washington's most serious offenses.

d. Mr. Miller's Idaho conviction may not be considered as a most serious offense because no finding of facts or admission of facts was entered in that case.

If a foreign offense is not legally comparable to a Washington offense, the Court must examine whether the offenses are factually comparable. *Latham*, 183 Wn. App. at 397. Offenses are factually comparable "if the defendant's conduct constituting the foreign offense *as evidenced by the undisputed facts in the record* would constitute the Washington offense." *Id.*, (emphasis added). In the examination of factual comparability, a court may only consider those facts which were

proved to a finder of fact beyond a reasonable doubt in the foreign conviction, or those to which the defendant admitted or stipulated. *Id.* The State must prove factual comparability by a preponderance of the evidence. *Id.* The key consideration for a sentencing court is whether a defendant could have been convicted under the Washington statute had the same acts occurred in Washington. *State v. Thomas*, 135 Wn. App. 474, 485, 144 P.3d 1178 (2006). While the sentencing court can look to the charging document for evidence of comparability, the focus of the analysis is always the elements of the crime as set forth in statute. *Id.* Where facts alleged in the charging document are not directly related to the elements of the offense under statute, the sentencing court may not assume that all facts necessary for comparability have been proven or admitted. *Id.* at 486.

Here, the documents provided by the State at sentencing did not prove by a preponderance of the evidence that the Idaho conviction for aggravated assault was factually comparable to Washington's assault in the first or second degree. The State provided only a charging document and the Idaho equivalent of a judgment and sentence; no findings of fact, statement on plea of guilty or other factual bases for the conviction were

provided to the sentencing court for the necessary findings of factual comparability. RP 485-90.

The Idaho statute would allow Mr. Miller to plead guilty to aggravated assault based on a set of facts completely unrelated to the charging document. It is entirely possible that the Idaho Court could have found Mr. Miller guilty under a set of facts supporting the non-weapon alternative of aggravated assault, which is far broader than Washington's second degree assault statute. Since the State provided no established, admitted set of facts, it was impossible for the sentencing court to fully know the factual basis of Mr. Miller's plea. This Court should find the State has not met its burden of proving the comparability of the Idaho offense by preponderance of the evidence.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted January 18, 2017,

s/David N. Gasch
Attorney for Petitioner
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on January 18, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the petition for review:

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APPENDIX A

I.C. § 18-905. Aggravated assault defined

An aggravated assault is an assault:

(a) With a deadly weapon or instrument without intent to kill; or

(b) By any means or force likely to produce great bodily harm.[; or]

(c) With any vitriol, corrosive acid, or a caustic chemical of any kind.

(d) "Deadly weapon or instrument" as used in this chapter is defined to include any firearm, though unloaded or so defective that it can not be fired.

CreditsS.L.
1979, ch. 227, § 2.

Idaho Code Ann. § 18-905 (West)

I.C. § 18-901. Assault defined

An assault is:

(a) An unlawful attempt, coupled with apparent ability, tocommit a violent injury on the person of another; or

(b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

CreditsS.L.
1979, ch. 227, § 2.

Idaho Code Ann. § 18-901 (West)

I.C. § 18-906. Aggravated assault—Punishment

An aggravated assault is punishable by imprisonment in the state prison not to exceed five (5) years or by fine not exceeding five thousand dollars ($5,000) or by both.

CreditsS.L.
1979, ch. 227, § 2.

Idaho Code Ann. § 18-906 (West)

I.C. § 18-903§. Battery defined

A battery is any:

(a) Willful and unlawful use of force or violence upon the person of another; or

(b) Actual, intentional and unlawful touching or striking of another person against the will of the other; or

(c) Unlawfully and intentionally causing bodily harm to an individual.

CreditsS.L.
1979, ch. 227, § 2.

Idaho Code Ann. § 18-903 (West)

I.C. § 18-110. Grades of crime

Crimes are divided into:

1. Felonies; and

2. Misdemeanors.

Credits
S.L. 1972, ch. 336, § 1.I.C. § 18-110, ID ST § 18-110
Current through end of the 2015 First Regular and First Extraordinary Sessions of the 63rd Legislature

Idaho Code Ann. § 18-110 (West)

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CASE # 331831
State of Washington v. JD Miller
ASOTIN COUNTY SUPERIOR COURT No. 141000563

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and <u>two copies</u> of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. G. Scott Marinella
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FILED
DECEMBER 20, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 33183-1-III
Respondent,	)	
	)	
v.	)	
	)	
J D MILLER,	)	OPINION PUBLISHED IN PART
	)	
Appellant.	)	

KORSMO, J. — JD Miller challenges his conviction for first degree assault and ensuing persistent offender sentence. We affirm the conviction and sentence, but remand for reconsideration of the legal financial obligations (LFOs).

FACTS

The charge arose from a confrontation outside the home of Markham Welch in Clarkston. Christopher Bennett and his ex-wife, Stacy Bennett, drove to her home on the evening of May 20, 2014, and noticed a white BMW idling in her neighbor Welch's driveway. The Bennetts suspected Welch of drug dealing and had seen the BMW at the location before. Welch was not home at the time; the building was dark.[1] Christopher Bennett went over to the BMW to confront the driver.

[1] Power to the building had been shut off earlier that day.

Demanding to know what the driver, Dustin Pearson, was doing there, Christopher Bennett threatened to call the police. While Bennett went to retrieve his cell phone, Pearson drove away. Mr. Miller then emerged from Welch's house. He and Bennett exchanged words. Miller then struck Bennett once in the abdomen, stabbing him with a utility knife. Stacy Bennett drove Christopher to the hospital where he underwent emergency surgery.

Miller was arrested at a residence in Lewiston, Idaho, two days later. Pearson was arrested on May 20 at his girlfriend's house where he had been hiding in the basement crawlspace. Pearson eventually testified as a witness for the prosecution. When he testified that he fled the Welch property because he feared that Bennett was returning with a weapon, the prosecutor entered into evidence several items found in the back seat of Pearson's vehicle that he admitted keeping for protection—a tire iron with a taped handle, two knives, brass knuckles, and a starter pistol. The items were admitted over defense relevance and undue prejudice objections.

Welch testified for the prosecution that JD Miller's cousin lived in the house with him. A television from his house was discovered outside the home after the incident. When Welch testified that Mr. Miller had not taken the television, he was impeached with a note he had written to Stacy Bennett indicating that he believed the Bennetts had interrupted a burglary of his house. He testified to the jury that while he initially believed that Miller had burglarized the house, he later learned someone else had done so.

Mr. Miller testified on his own behalf that he had gone to Welch's house to see his cousin on her birthday. He walked into the house and discovered that no one was home. He did not remove the television or anything else. After the brief visit, he walked out and saw Pearson drive away from Christopher Bennett. Bennett came at him and Miller pulled his knife and stabbed Bennett once. The injured man backed off and the fight was over.

The prosecutor argued that Mr. Bennett's version of the events was more credible and that Mr. Miller should be found guilty of first or second degree assault. The defense argued that Mr. Miller had permission to be on the property and was merely defending himself. The jury subsequently returned a guilty verdict on the charge of first degree assault.

The only contested issue at sentencing was whether a prior Idaho conviction for aggravated assault was the equivalent of Washington's second degree assault. The trial court concluded that the two offenses were legally equivalent. The court then sentenced Mr. Miller to life in prison as a persistent offender. The court also imposed total legal financial obligations of $2,150; mandatory assessments constituted $800 of that figure.

Mr. Miller timely appealed to this court. A panel considered the case without argument.

ANALYSIS

This appeal presents two primary issues.[2] In the published portion we consider Mr. Miller's contention that the court erred in determining that the Idaho aggravated assault conviction was the equivalent of a Washington second degree assault. He also contends that the trial court erred in admitting irrelevant and prejudicial testimony. Finally, he argues that the court erred in imposing LFOs without making a sufficient inquiry into his ability to pay. We address first the equivalency argument before addressing his other claims.

Equivalency

The sole issue argued at sentencing concerned the legal equivalency of the prior Idaho conviction for aggravated assault. We agree with the trial court that the Idaho offense was legally comparable to Washington's second degree assault.

Washington law requires that a persistent offender be sentenced to a term of life imprisonment without the possibility of release. RCW 9.94A.570. A persistent offender is one who has been convicted on at least three separate occasions, whether in

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[2] Mr. Miller filed a pro se statement of additional grounds that does not present any meritorious issues. He contends first that the attorneys and judge conducted a chambers hearing that was not recorded, but can point to nothing in the record supporting the claim, nor can he show that any error occurred. He also argues that his CrR 3.3 timely trial right was violated, but presents no argument establishing why the trial court erred in granting the two continuances (one to each side) reflected in the record. Accordingly, we do not further consider the issues. RAP 10.10(c).

Washington or elsewhere, of felonies that under the laws of Washington would be considered most serious offenses. RCW 9.94A.030(38)(a). A "most serious offense" includes class A felonies, assault in the second degree, robbery in the second degree, and other assorted violent crimes. RCW 9.94A.030(33).

Foreign convictions from another state or federal court may only count as a most serious offense if the sentencing court is able to find the offense is legally or factually comparable to a Washington most serious offense. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 254, 111 P.3d 837 (2005). An appellate court reviews de novo whether an out-of-state conviction is comparable to a Washington crime. *State v. Sublett*, 176 Wn.2d 58, 87, 292 P.3d 715 (2012).

To determine comparability, we "first consider if the elements of the foreign offense are substantially similar to the Washington counterpart. If so, the inquiry ends." *Id.* If, however, the elements of the foreign conviction are not substantially similar, or if Washington defines the offense more narrowly than the foreign jurisdiction, it is necessary to look to the factual record of the foreign conviction to establish factual comparability. *State v. Latham*, 183 Wn. App. 390, 397, 335 P.3d 960 (2014). Offenses are factually comparable "if the defendant's conduct constituting the foreign offense, as evidenced by the undisputed facts in the foreign record, would constitute the Washington offense." *Latham*, 183 Wn. App. at 397-98. The State must prove factual comparability by a preponderance of the evidence. *Id.* at 398.

Idaho defines assault as "[a]n intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." IDAHO CODE §18-901(b). An aggravated assault is an assault with "a deadly weapon or instrument without intent to kill." IDAHO CODE §18-905(a). In Idaho, a knife is a deadly weapon. *State v. Cudd*, 137 Idaho 625, 627-28, 51 P.3d 439 (Ct. App. 2002); *State v. Hernandez*, 120 Idaho 653, 659, 818 P.2d 768 (Ct. App. 1991).

Washington defines assault according to the common law and recognizes three alternative means for committing assault: battery, attempted battery, and creating an apprehension of bodily harm. 13A SETH A. FINE & DOUGLAS J. ENDE, WASHINGTON PRACTICE: CRIMINAL LAW § 305, at 41 (1998). The third definition is at issue here. Under that definition, an actor commits assault by "'putting another in apprehension of harm, whether or not the actor actually intends to inflict'" the harm. *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972) (quoting *United States v. Rizzo*, 409 F.2d 400, 403 (7th Cir. 1969). The actor, however, must act with the intent to create that apprehension. *State v. Krup*, 36 Wn. App. 454, 458-59, 676 P.2d 507 (1984). The conduct must go beyond mere threats; there must be some physical action that, under all the "circumstances of the incident, are sufficient to induce a reasonable apprehension by the victim that physical injury is imminent." *State v. Maurer*, 34 Wn. App. 573, 580, 663 P.2d 152 (1983).

In Washington, assault in the second degree occurs when a person (among other things) "[a]ssaults another with a deadly weapon." RCW 9A.36.021(c). "Deadly weapon" means "any . . . weapon, device, instrument, [or] article . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6).

A comparison of the major elements of the two statutes:

	Idaho: Aggravated Assault Idaho Code 18-905(a)	**Washington: Assault in the second degree RCW 9A.36.021(c)**
Intent of actor	Intend to threaten violence but do not intend to kill	Intend to create apprehension of harm
Result in victim	Create a well-founded fear that violence is imminent	Induce a reasonable apprehension that violence is imminent
Additionally...	With a deadly weapon or instrument	With a deadly weapon

The trial court concluded that the two crimes were equivalent and, therefore, did not address the question of whether Mr. Miller's conduct would factually have constituted second degree assault in Washington.[3] As the above chart suggests, we agree that the offenses are equivalent.

Both crimes share the same intent. Idaho's "threaten violence" standard is equivalent to Washington's "create apprehension of harm." Both states use the common law definitions of assault that include both assault and battery. As critical here, both

[3] The Idaho charging document alleged that Mr. Miller threatened a woman with a large butcher knife. Clerk's Papers at 77.

states recognized that threatened use of force constitutes an assault. The Idaho statute is somewhat narrower in that the threat need not rise to the level of a threat to kill, while Washington's includes no limitation. The level of threatened harm in the two states is equivalent.

Similarly, both definitions require that the victim apprehend the threat and be affected by it. In Idaho, the victim needs to have a well-founded fear that violence is imminent. In Washington, the threat needs to induce a reasonable apprehension of imminent violence. We believe a well-founded fear of imminent violence is the equivalent of a reasonable apprehension of imminent violence.

Finally, both offenses must be committed with a "deadly weapon." While Idaho's assault statute encompasses "instruments" along with a deadly weapon, Washington's definition of deadly weapon also includes an "instrument." RCW 9A.04.110(6). A knife, Mr. Miller's weapon of choice in both cases, constitutes a deadly weapon in both states. Again, this element is shared by the two statutes.

The two statutes are virtually identical. An aggravated assault in Idaho, which constitutes an assault with a deadly weapon, is the equivalent of Washington's second degree assault by means of an assault with a deadly weapon. Both statutes use the same definition of assault and the same definition of deadly weapon. In each instance, the statutes require that the victim have either a "well-founded fear" or "reasonable apprehension" of imminent violence.

Agreeing with the trial court, we hold that an Idaho aggravated assault is the legal equivalent of Washington's second degree assault. The trial court properly characterized the prior Idaho conviction as a "strike" when it sentenced Mr. Miller as a persistent offender.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Evidentiary Arguments

Mr. Miller contends that the trial court erred in admitting into evidence information about Pearson's flight from the police and the weapons found in his car, as well as erred in admitting evidence that the television was found in the bushes outside Welch's house and that Welch initially suspected Miller of burglary. The defense challenged this evidence at trial on the basis of ER 401 and ER 403.

Properly preserved evidentiary objections are largely governed by the Rules of Evidence and are subject to well understood standards of review. Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401. Relevant evidence is generally admissible at trial, but can be excluded where its value is outweighed by other considerations such as misleading the jury or wasting time. ER 402; ER 403. Trial court decisions to admit or

exclude evidence are entitled to great deference and will be overturned only for manifest abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court also abuses its discretion when it applies the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

The failure to raise an evidentiary objection to the trial court waives the objection. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); *State v. Boast*, 87 Wn.2d 447, 451-52, 553 P.2d 1322 (1976). As explained in *Guloy*:

> A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review.

Guloy, 104 Wn.2d at 422 (citation omitted).

With that background, it is time to turn to Mr. Miller's arguments. Pearson testified at trial without objection that he had seen police cars with flashing lights and had pulled over to hide from one of them. Officers then testified, without objection, that they had knocked at the house where he was hiding and been told that he was not there. Counsel objected on ER 401 and ER 403 grounds when the prosecutor asked what happened next. The court permitted the testimony to complete the story and for

impeachment purposes. When officers started to impound his car, Pearson's girlfriend had admitted that he was present and he came out of the house.

On appeal, Mr. Miller now argues that this testimony violated ER 404(b). Since he did not raise that argument at trial, he cannot do so now. *Guloy*, 104 Wn.2d at 422. The initial testimony about the "flight" and concealment at the house went unchallenged, so any claim is now waived. *Id.* The "what happened next" testimony completed the story; the trial court also admitted it as impeachment evidence that conflicted somewhat with how the officers described the encounter. This was a tenable basis to admit the evidence. While it was of minor relevance, it also was not prejudicial to Miller.

Of more significant concern was the discussion of the various weapons found in Pearson's car. The defense challenged this evidence on the basis of ER 401 and ER 403 and received a standing objection on those grounds to each of the items introduced. Pearson had described his encounter with Bennett to the jury. Pearson denied that Bennett had said anything about calling the police and was "concerned" about whatever Bennett had in his hand as he returned to the car. While Pearson admitted he would have defended himself if on foot, he further testified that he fled solely because his car gave him the ability to escape safely. The trial court admitted the various items found in the car to impeach Pearson's claim that he fled due to concerns for his safety rather than because of fear of arrest. This was a tenable basis for admitting the evidence. Bennett's and Pearson's versions of their encounter conflicted; the fact that Pearson was well-

armed contradicted his claim that he needed to flee for personal safety purposes. It presented the jury with opposing explanations for Pearson disappearing and leaving his friend Miller to face Bennett alone. To the extent it reflected whose version should be believed, the evidence was relevant to the respective credibility of Pearson and Bennett.

Mr. Miller also argues on appeal that evidence of the television found in the bushes and Mr. Welch's note to Stacy Bennett should not have been admitted. At trial, he again challenged both pieces of evidence on the basis of relevance and undue prejudice, citing to ER 401 and 403. The trial court found the evidence relevant. The relevancy was particularly obvious in light of Welch's apparent backtracking on the witness stand. While he initially had told Ms. Bennett that he had been the victim of a burglary, he claimed that he later learned from his cousin[4] that she had given permission for JD Miller to be there and that someone other than Miller or Pearson had put his television outside the house. Mr. Miller was there helping remodel the building.

The relevancy of the note was obvious. It conflicted with Mr. Welch's testimony that Mr. Miller had permission to be at the house and was authorized to remodel the building. The presence of the television in the backyard was consistent with the State's theory that Miller was present to burglarize the deserted house. The challenged evidence was relevant. Use of the note to impeach Welch was somewhat prejudicial to Mr. Miller

[4] Welch testified that through marriage his roommate was both his cousin and Mr. Miller's cousin, but the two men were not themselves related.

in that it alleged burglary, but the note only became admissible once Welch told a different story that supported Miller. The presence of television in the backyard was not unfairly prejudicial to Mr. Miller merely because it supported the State's case.

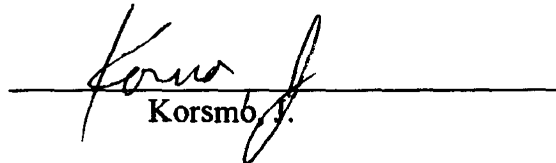
The trial court had tenable grounds for admitting the evidence and did not err in its determination that the evidence was not unfairly prejudicial. Mr. Miller did not raise ER 404(b) at trial as a basis for excluding the evidence. He cannot do so now.

There was no evidentiary error.

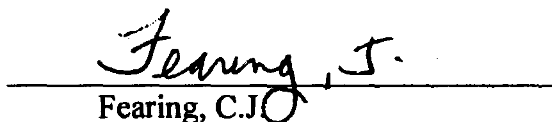
Legal Financial Obligations

Mr. Miller also requests that we remand for consideration of his LFOs due to the failure of the trial court to conduct the inquiry dictated by *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). In light of our decision upholding Mr. Miller's persistent offender status, we exercise the discretion accorded us in *Blazina* to remand for consideration of the discretionary LFOs. The court may either strike them or conduct a sentencing hearing on that issue.

Affirmed and remanded.


Korsmo, J.

WE CONCUR: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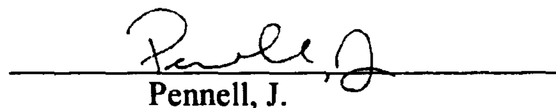
Pennell, J.