

65943-0

65943-0

NO. 65943-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH K. VINCENT,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

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I. ISSUES

1. The defendant was convicted of first-degree sexual assault in Hawaii. The offense requires a defendant to register under Hawaii law. After moving to Washington, the defendant knowingly failed to register. At the time he committed the crime, Washington additionally required that the out-of-state conviction triggering registration be comparable to a Washington sex offense.

First-degree sexual assault in Hawaii includes “strong compulsion” as an element. “Strong compulsion” has three definitions. Two of these definitions match those of Washington’s “forcible compulsion,” an element of second-degree rape. The third definition matches the use of a “deadly weapon” or “other instrument,” an element of first-degree rape. The trial court accordingly found the Hawaii crime legally comparable to either Washington offense. Did it err in doing so?

II. STATEMENT OF THE CASE

A. DEFENDANT’S KNOWING FAILURE TO REGISTER.

The defendant, Elijah K. Vincent (appellant here), was convicted as a juvenile of three sex offenses in Hawaii on January 2, 2007. 1 CP 67-68. 80-82. These offenses (described in more detail below) required the defendant register as a “covered

offender” in Hawaii. Hawaii Revised Statutes (“HRS”) § 846E-1 (definitions of “sex offense” and “covered offender”); HRS § 846E-2 (registration requirement).

Once in Washington, the defendant repeatedly acknowledged receipt of notification requirements and repeatedly signed notices that he agreed to abide by these requirements. 1 CP 60-66 (on January 16, 2009), 1 CP 53-59 (on January 29, 2009), 1 CP 46-52 (on March 5, 2009), 1 CP 39-45 (on March 31, 2009) and 1 CP 32-38 (on November 5, 2009); all summarized at 1 CP 29. During this period the defendant registered at four addresses, in addition to registering as homeless. 1 CP 31.

On November 5, 2009 the defendant registered at 10927 47th Ave. SE in Everett. 1 CP 31; see 1 CP 32-38. He was only to stay there a few days, and in fact moved out on November 8, 2009. 1 CP 30. Some two months later, the resident there told police of this. 1 CP 27, 29-30. Meanwhile, the defendant did not re-register. 1 CP 27, 29; see also 1 CP 4-6 (findings and conclusions after stipulated bench trial).

The State filed a charge of failure to register. 1 CP 108-111. Because the defendant’s whereabouts were unknown, a bench warrant issued. 1 CP 92.

On June 10, 2010, a resident at 3419 91st St. SE in Everett called police, saying she believed her roommate was not complying with his sex-offender registration requirements. 1 CP 89. Her roommate was the defendant. Id. Police responded and arrested him. The defendant initially gave them a false name (by using his middle name as a surname). 1 CP 89, 92.

Prosecution ensued. The defendant agreed to a stipulated bench trial based upon the police reports and Hawaii conviction materials. 1 CP 21 (jury waiver), 4-6 (findings and conclusions), 25 (stipulation), 26-93 (stipulated materials); 2 CP __ (trial minutes, sub 24); 8/26/10 Verbatim Report of Proceedings (hereafter "RP") 10-12 (colloquy).

The sole issue was whether the Hawaii convictions were comparable to a sex offense or offenses in Washington. 1 CP 94-107 (State's briefing with attachments), 22-24 (defense briefing), RP 2-10 (argument). The trial court found that the most serious Hawaii offense, first-degree sexual assault, was comparable to either first- or second-degree rape in Washington. 1 CP 4-6; RP 10. The defendant was then convicted per the stipulation, 1 CP 4-6, RP 13, and sentenced within the standard range (60 days), 1 CP 7-20; 8/26/10 RP 14-15.

B. THE HAWAII OFFENSES.

The defendant was convicted of three offenses in Hawaii. Although filed under one court cause number (Family Court, First Circuit, State of Hawaii, #0073886), each bore a separate incident number. All occurred on July 30, 2005. They were as follows:

<u>Incident #</u>	<u>Crime (w/subsection and elements)</u>	<u>Alleged Facts:</u>
05-324105	sexual assault 1^o HRS 707-730(1)(a) -- knowingly subjects -- another person -- to act of sex. penetr. -- by "strong compulsion"	knowingly subjected A.A. to act of sexual penetratn. by "strong compulsion" (digital-genital penetratn.)
05-336291	sexual assault 3^o HRS 707-732(1)(b) -- knowingly subjects -- another person -- less than 14 yrs old -- to sexual contact	knowingly subjected J.P., < 14 yrs old, to sex contact (hand on breast)
05-388927	sexual assault 3^o HRS 707-732(1)(f) -- knowingly has -- sexual contact -- with another person -- by "strong compulsion"	knowingly subjected A.A. to act of sexual contact by "strong compulsion" (hand on genitals)

1 CP 73-74 (statutes), 80-82 (Family Court petitions). A decree of the Family Court, referencing all three incident numbers, stated:

After full consideration of the evidence the Court finds that the material allegations of the petition(s) have been proved beyond a reasonable doubt and that the

minor is a law violator within the purview of HRS Section 571-11(1).

1 CP 67-68 (decree). (The decree and petitions are attached.)

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY FOUND THAT HAWAII'S CRIME OF FIRST-DEGREE SEXUAL ASSAULT WAS COMPARABLE TO A SEX OFFENSE IN WASHINGTON.

1. Elements Of Former "Failure To Register" Statute; Comparability Analysis And Its Applicability Here.

Any person convicted of a sex offense must register with the sheriff of the county in which he resides. RCW 9A.44.130(1)(a). A person who has a duty to register because of a felony sex offense and knowingly fails to do so is guilty of a class C felony (unless he or she has two prior convictions for failing to register, in which case the crime is elevated to a class B felony). RCW 9A.44.132. At the time of this offense, the definition of "sex offense" included "any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense under this subsection." Former RCW 9A.44.130(10)(a)(iv).¹ Thus, at the time of this offense, the State

¹ LAWS 2010 c. 267 §§ 2, 15 effective June 10, 2010, removed this provision. Compare former RCW 9A.44.130(10)(iv) (required foreign crime be comparable) with RCW 9A.44.128(6) (requires foreign crime have triggered duty to register in convicting state, but need not have Washington equivalent).

was required to prove, as an element of the offense, that the foreign offense triggering a duty to register was comparable to a Washington sexual offense. Id.

Determining whether an out-of-state conviction is comparable to a Washington offense entails a two-part test. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); State v. Morley, 134 Wn.2d 588, 605-606, 952 P.2d 167 (1998). First, under the “legal” prong, the court compares the elements of the out-of-state crime with the comparable Washington crime. If the elements are comparable or substantially similar, analysis is complete and inquiry ends without examining the second prong. Lavery, 154 Wn.2d at 254; Morley, 134 Wn.2d at 606; State v. McIntyre, 112 Wn. App. 478, 483, 49 P.3d 151 (2002).

However, if the elements of the out-of-state crime are different, or if the foreign statute is broader, under the “factual” prong the court then examines the facts of the defendant’s crime, as evidenced in the indictment or information, and as proved to the fact finder or admitted by the defendant, to determine whether that conduct violates the comparable Washington statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255; State v. Thomas, 135 Wn. App. 474, 480, 144 P.3d 1178 (2006). In examining the factual

prong, the reviewing Washington court cannot engage in additional fact finding of its own, nor draw inferences, nor consider any facts other than those admitted to or proved in the convicting foreign court. State v. Larkins, 147 Wn. App. 858, 866, 199 P.3d 441 (2008), citing Lavery, 154 Wn.2d at 258. Factual-prong inquiry is thus limited because the accused may not have had any incentive to attempt to prove that he did not commit the narrower Washington-equivalent offense. Lavery at 257.

It does not matter, however, if it is the Washington crime that is broader. See Morley, 134 Wn.2d at 606. And comparability turns on the elements of the crimes, not on the available defenses. State v. Jordan, 158 Wn. App. 297, 299, 301-04, 241 P.3d 4464 (2010).

Comparability analysis primarily arises in the sentencing context, to determine whether or not foreign convictions count in the offender score, and/or count as a “strike” in determining if a defendant is a persistent offender. E.g., Lavery, 154 Wn.2d at 252 (persistent offender status); Jordan, 158 Wn. App. at 299-300, 304 (offender score). But until statutory amendments effective June 2010 removed the provision (see n.1 above), the crime of failure to register required the triggering predicate foreign offense be

comparable to a Washington crime, and thus the same analysis and caselaw carried over. State v. Howe, 151 Wn. App. 338, 342-46, 212 P.3d 565 (2009); State v. Werneth, 147 Wn. App. 549, 554, 197 P.3d 1195 (2008).

B. THE TRIAL COURT CORRECTLY FOUND THAT AT LEAST ONE HAWAII OFFENSE WAS COMPARABLE TO A SEX OFFENSE IN WASHINGTON.

1. Standard Of Review.

“When facing a challenge to the sufficiency of the evidence – here, characterized as the State's failure to prove an element of the crime charged – [the reviewing court asks] whether, *after viewing the evidence in a light most favorable to the State*, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.” Howe, 151 Wn. App. at 343 (same context of proving comparable crime as element of failure to register) (emphasis added). A challenge to the sufficiency of the evidence admits the truth of the States' evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). And evidence and inferences favoring the defendant are not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971), State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

2. Comparability Is At Issue, But The Convictions Are Not.

In his briefing to this Court, the defendant appears to argue that the State did not even furnish evidence of a finding of guilt or an admission. BOA 4-5, 10, 12-13.; see 1 CP 67-68, 80-82 (petitions and decree, attached). This argument is without merit.

This was a matter in Hawaii Family Court. 1 CP 67, 80-82. Family Courts in Hawaii hear matters regarding children and domestic relations, including the adjudication of crimes committed by juveniles. HRS § 571-11(1); see generally www.courts.us/state/hi/courts.php; Hawaii State Judiciary website at www.courts.state.hi.us, and HRS § 571-22.5. Criminal adjudications are initiated by petition, HRS § 571-21, and are heard without a jury, HRS § 571-41(a). The standard at trial is proof beyond a reasonable doubt. HRS § 571-41(c).

The defendant takes issue with the petitions filed for each crime, questioning whether they mean anything. BOA 5 n.1. But that is how juvenile prosecutions are commenced in Hawaii. HRS § 571-21. He repeatedly notes the absence of any admission or guilty plea, or evidence of a trial. BOA 4-5, 10, 12-13. But the stipulated record includes a Family Court decree indicating that:

[a]fter full consideration of the evidence the [Family] Court finds that the material allegations of the petition(s) have been proved beyond a reasonable doubt and that the minor is a law violator within the purview of HRS Section 571-11(1).

1 CP 67-68. This was at a hearing inquiring “into the validity of [the] allegation(s).” Id. The defendant ignores the Family Court decree in his argument. See BOA 4-5, 10, 12-13. But its wording, and its specifying the burden of proof, confirms this was fact finding at trial. 1 CP 67-68 (attached); see HRS § 571-41(c) (burden of proof at trial). (As noted above, Hawaii, like Washington, tries juveniles without a jury. HRS § 571-41(a).)

Comparability is certainly at issue here. But the fact of conviction is not.

3. Hawaii’s Crime Of First-Degree Sexual Assault, Under The Alternative Charged Here, Is Comparable To Either First- Or Second-Degree Rape In Washington.

As shown in the chart above, material facts were alleged in the petitions for each alleged Hawaii crime. These matched the elements of each charged offense. While there are multiple ways to commit sexual assault under Hawaii law, in each instance here only one specific alternative was charged.

Per HRS § 707-730(1)(a), a person commits first degree sexual assault under this alternative when he or she

knowingly subjects another person to an act of sexual penetration by strong compulsion.

“Strong compulsion” as defined as HRS § 707-700:

means the use of or attempt to use one or more of the following to overcome a person:

- (1) A threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped;
- (2) A dangerous instrument; or
- (3) Physical force.

HRS § 707-700; 1 CP 102-03.

A person commits the crime of second-degree rape in

Washington when:

Under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

- (a) By forcible compulsion.

RCW 9A.44.050(1)(a). Forcible compulsion means:

physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that he or she or another person will be kidnapped.

RCW 9A.44.010(6).

Washington’s definition of “sexual intercourse” at RCW

9A.44.010(1) is broader, not narrower, than “sexual penetration” in

Hawaii; thus, there is no problem with that element. Instead, the focus is on any differences between Hawaii's definition of "strong compulsion" and Washington's of "forcible compulsion."

"Physical force" to "overcome a person" (Hawaii) is the same as "physical force which overcomes resistance" (Washington). That part of the two definitions is the same. Similarly, "a threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped" (Hawaii) is virtually identical to "a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that he or she or another person will be kidnapped" (Washington).

Under either of these two identical components within the definitions of "forcible" or "strong" compulsion, the elements of Hawaii's crime of first-degree sexual assault, HRS § 707-730(1)(a), and Washington's crime of second-degree rape, RCW 9A.44.050(1)(a), are the same.

That leaves the use of a "dangerous instrument" to overcome resistance in Hawaii's definition of "strong compulsion." There is nothing in Washington's definition of "forcible compulsion" that says the same or very similar thing. The defendant concludes

this means the Hawaii statute is broader and cannot be comparable. BOA 8, 9.

But analysis does not end there. A person commits the crime of first-degree rape in Washington

when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory – (a) *uses or threatens to use a deadly weapon or what appears to be a deadly weapon*[.]

RCW 9A.44.040(1)(a) (emphasis added). One then compares the italicized phrase with Hawaii’s “use or attempt to use . . . a dangerous instrument” variant of “strong compulsion.”

Hawaii defines “dangerous instrument” as:

any firearm, whether loaded or unloaded, and whether operable or not, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

HRS § 707-700. Washington defines “deadly weapon” as

any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a “vehicle” as defined in this section, 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). These two definitions are comparable. An inoperable firearm is still a “firearm,” and thus still a “deadly

weapon.” State v. Wade, 133 Wn. App. 855, 873, 138 P.3d 168 (2006), review denied, 160 Wn.2d 1002 (2007); State v. Berrier, 110 Wn. App. 639, 645, 41 P.3d 1198 (2002). Thus, under the remaining “dangerous-instrument” definition of “strong compulsion,” Hawaii’s crime of first-degree sexual assault is comparable to first-degree rape in Washington.

The Family Court decree and the petitions establish that “strong compulsion,” *in at least one of its three variants*, was proved beyond a reasonable doubt as an element of first-degree sexual assault. 1 CP 67-68, 80-82. Two of those three definitions (threat and physical force) fit within the elements of second-degree rape at RCW 9A.44.050(1)(a) and RCW 9A.44.010(6). The third definition (dangerous instrument) fits within the elements of first-degree rape at RCW 9A.44.040(1)(a). No matter which of the three definitions of “strong compulsion” was proved, the Hawaii offense of first-degree sexual assault was legally comparable to a Washington sex offense, either first- or second-degree rape. The trial correctly so found. 1 CP 4-6; RP 10. Because the crimes are legally comparable, inquiry under the factual “prong” is not necessary. See Lavery, 154 Wn.2d at 254; Morley, 134 Wn.2d at 606;

McIntyre, 112 Wn. App. at 483. The trial court's finding of comparability should be affirmed.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on June 17, 2011.

MARK K. ROE
Snohomish County Prosecutor

by: 

CHARLES FRANKLIN BLACKMAN, #19354
Deputy Prosecuting Attorney
Attorney for Respondent

Appendices:

- 1 CP 67-68 (Family Court decree)
- 1 CP 80-82 (Family Court petitions)

APPENDIX

HAWAII FAMILY COURT DECREE

1 CP 67-68

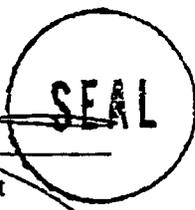
PROSECUTOR'S

- 4. The minor/parent(s)/guardian(s) are ordered to return to Court for an in-person review hearing on January 18, 2007 at 08:30 a.m. before the presiding judge.
- 5. All prior consistent orders shall remain in full force and effect.

Dated: Honolulu, Hawaii, January 2, 2007.



Judge of the Above-Entitled Court
WILLIAM K. WALLACE III



Copies distributed:
ELIJAH K. VINCENT III
Krisie M. Noble III
Elijah K. Vincent, Jr.
ABIGAIL S. DUNN
KEAOKALANI MATTOS

[1 0068] 43

APPENDIX

HAWAII FAMILY COURT PETITIONS

1 CP 80-82

() Mo. () Minor () Atty
() Fa. () DPA () Ltr.

STATE OF HAWAII FAMILY COURT FIRST CIRCUIT	PETITION HRS CHAPTER 571 Section: <input type="checkbox"/> 11(1) <input type="checkbox"/> 44 <input type="checkbox"/> 11(2) <input type="checkbox"/> 48	CASE NUMBER FC-J NO. 0073886
IN THE INTEREST OF Elijah Kahoohuli VINCENT III		POLICE REPORT NO. 05-324105 003
		PETITION PREPARED BY <input type="checkbox"/> PROBATION OFFICER <input checked="" type="checkbox"/> POLICE OFFICER <input type="checkbox"/> OTHER
		CHILD'S BIRTHDATE 12-09-91

CHILD'S ADDRESS
94-099 Manawa Place #N206, Waipahu, HI 96797

FATHER'S NAME AND ADDRESS

MOTHER'S NAME AND ADDRESS

OTHER'S NAME, ADDRESS AND RELATIONSHIP
Clyde and Alberta MIRA (Grandparents/Legal Guardians)
94-099 Manawa Place #N206, Waipahu, HI 96797

PROSECUTOR'S COPY

The undersigned Petitioner states on information and belief under penalty of perjury that the statements made in this petition are true and correct.

The above-named child appears to come within the purview of the HRS Section indicated above, in that the child allegedly violated or attempted to violate the law in the following manner:

On or about the 30th day of July, 2005, in the City and County of Honolulu, State of Hawaii, Elijah Kahoohuli VINCENT III did knowingly subject Ariel ARIBAL to an act of sexual penetration by strong compulsion, by inserting his finger into her genital opening, thereby committing the offense of Sexual Assault in the First Degree, in violation of Section 707-730(1)(a) of the Hawaii Revised Statutes.

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FIRST CIRCUIT COURT
STATE OF HAWAII
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Handwritten initials: [1 CP 80]

() Mo. () Minor () Atty
() Fa. () DPA () Ltr.

STATE OF HAWAII FAMILY COURT FIRST CIRCUIT	PETITION HRS CHAPTER 571 Section: <input type="checkbox"/> 11(1) <input type="checkbox"/> 44 <input type="checkbox"/> 11(2) <input type="checkbox"/> 48	CASE NUMBER FC-J NO. 0073886
IN THE INTEREST OF Elijah Kahoohuli VINCENT III	POLICE REPORT NO. 05-336291 005	
	PETITION PREPARED BY <input type="checkbox"/> PROBATION OFFICER <input checked="" type="checkbox"/> POLICE OFFICER <input type="checkbox"/> OTHER	
	CHILD'S BIRTHDATE 12-09-91	

CHILD'S ADDRESS

94-099 Manawa Place #N206, Waipahu, HI 96797

FATHER'S NAME AND ADDRESS

MOTHER'S NAME AND ADDRESS

OTHER'S NAME, ADDRESS AND RELATIONSHIP

Clyde and Alberta MIRA (Grandparents/Legal Guardians)
94-099 Manawa Place #N206, Waipahu, HI 96797

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- The above-named child appears to come within the purview of the HRS Section indicated above, in that the child allegedly violated or attempted to violate the law in the following manner:

On or about the 30th day of July, 2005, in the City and County of Honolulu, State of Hawaii, Elijah Kahoohuli VINCENT III did knowingly subject to sexual contact, Jacqueline PUCKETT, who was less than fourteen years old or did cause Jacqueline PUCKETT to have sexual contact with Elijah Kahoohuli VINCENT III, by placing his hand on her breast, thereby committing the offense of Sexual Assault in the Third Degree, in violation of Section 707-732(1)(b) of the Hawaii Revised Statutes.

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FIRST CIRCUIT COURT
STATE OF HAWAII
N. MIYATA
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[Signature]

1 CP 81

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() Mo. () Minor () Atty
() Fa. () DPA () Ltr.

STATE OF HAWAII FAMILY COURT FIRST CIRCUIT	PETITION HRS CHAPTER 571 Section: <input type="checkbox"/> 11(1) <input type="checkbox"/> 44 <input type="checkbox"/> 11(2) <input type="checkbox"/> 48	CASE NUMBER FC-J NO. 0073886
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IN THE INTEREST OF

Elijah Kahoohuli VINCENT III

POLICE REPORT NO.
05-388927 007

PETITION PREPARED BY
 PROBATION OFFICER
 POLICE OFFICER
 OTHER

CHILD'S BIRTHDATE
12-09-91

CHILD'S ADDRESS
94-099 Manawa Place #N206, Waipahu, HI 96797

FATHER'S NAME AND ADDRESS

MOTHER'S NAME AND ADDRESS

OTHER'S NAME, ADDRESS AND RELATIONSHIP
Clyde and Alberta MIRA (Grandparents/Legal Guardians)
94-099 Manawa Place #N206, Waipahu, HI 96797

PROSECUTOR'S COPY

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The above-named child appears to come within the purview of the HRS Section indicated above, in that the child allegedly violated or attempted to violate the law in the following manner:

On or about the 30th day of July, 2005, in the City and County of Honolulu, State of Hawaii, Elijah Kahoohuli VINCENT III did knowingly, by strong compulsion, have sexual contact with Ariel ARIBAL or did cause Ariel ARIBAL to have sexual contact with Elijah Kahoohuli VINCENT III, by placing his hand on her genitalia, thereby committing the offense of Sexual Assault in the Third Degree, in violation of Section 707-732(1)(f) of the Hawaii Revised Statutes.

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FIRST CIRCUIT COURT
STATE OF HAWAII
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H. MIRA
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