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COURT OF APPEALS

06 JUL 25 PM 1:47

STATE OF WASHINGTON
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NO. 34178-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LAWRENCE LABARBERA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 02-1-05813-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that additional "evidence" was adduced at the remand hearing when the State submitted copies of the relevant California and Washington statutes to the court?

2. Has defendant failed to show any error in the court's comparability determination when the court assessed the elements of the California crime of robbery against the Washington statute and found they matched and when prior decisional law has held these crime are comparable?

B. STATEMENT OF THE CASE.

This is the second time this case has been before the court on appeal of sentencing issues.

Appellant, LAWRENCE LEE LABARBERA, hereinafter "defendant," was found guilty following a stipulated facts bench trial; the court found defendant guilty of two counts of rape in the first degree and found that defendant had been armed with a firearm at the time of the commission of Count II. CP 15-18.

At the original sentencing hearing, the State filed certified copies of judgments for a California conviction for robbery in the second degree and Washington convictions for assault in the second and third degree.

6/18/04 RP 26. The Washington judgment also reflected additional Washington convictions for possession with intent to deliver and unlawful possession of a firearm in the first degree. CP 86-95. On the first appeal the Court of Appeals held that the State had presented sufficient evidence to prove the existence of all the convictions, but the court had failed to conduct any analysis of the comparability of the California conviction to a Washington offense. Id. Such an analysis was necessary before the out-of-state conviction could be included in the offender score. Id.

On remand, both the State and defense presented sentencing memoranda to the court and included copies of the relevant California and Washington statutes. CP 96-100, 101-128. Defendant contended, however, that the statutory language was "additional evidence" that the court could not consider. CP 102. The court compared the elements of the California crime against the definition of robbery in RCW 9A.56.190 and found that the crimes were comparable offenses. 12/9/05 RP 6-11. The court entered an order stated that it was not changing the previously entered judgment and sentence. CP 129.

From entry of this order, defendant timely appealed. CP 130-131.

C. ARGUMENT.

1. THE STATE DID NOT ADDUCE ADDITIONAL EVIDENCE BY PROVIDING THE TEXT OF RELEVANT STATUTES TO THE TRIAL COURT.

It is fundamental to our legal system that a judge determines questions of law and that the trier of fact, usually a jury, determines questions of fact. Article 1, section 21 of the Washington Constitution gives power to juries "to weigh the evidence and determine the facts" Sofie v. Fibreboard Corp., 112 Wn.2d 636, 646, 771 P.2d 711 (1989) (citing James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). The Washington Constitution also provides that the court "shall declare the law." Const. article IV, section 16. The Washington Supreme Court articulated the reason behind this tenet:

> Legal questions are decided by the court, not the jury, for good reason. By arguing to the court, the lawyers have the opportunity to argue canons of construction; applicable law, including case precedent; and all the other traditional elements that make up legal argument. A judge trained in law then decides whether or not the proposition is legally correct.

State v. Clausing, 147 Wn.2d 620, 629, 56 P.3d 550 (2002). A court is not limited to considering only the authority cited by the attorneys before it. The Legislature, perhaps recognizing that an experienced judge may have a greater depth of knowledge than the attorneys arguing in his court, enacted RCW 5.24.010 and 5.24.020, which allow the courts of this state

the freedom to consider all relevant law and authority in rendering decisions. RCW 5.24.010 provides:

> Every court of this state shall take judicial notice of the Constitution, common law, civil law, and statutes of every state, territory and other jurisdiction of the United States.

Thus, if a court is aware of pertinent authority regarding an issue before it, it may employ that law in its decision even if the litigants do not cite it. See Gross v. Lynnwood, 90 Wn.2d 395, 397, 583 P.2d 1197 (1978). Conversely, if a court is unaware of specific authority, but concludes that there might be relevant authority in existence, RCW 5.24.020 gives the court the authority to research the issue itself or to employ counsel in that search. That statute provides:

> The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

RCW 5.24.020.

Whether the elements of a foreign conviction are comparable to a Washington offense is a question of law. See State v. Wilson, 113 Wn. App. 122, 136, 52 P.3d 545 (2002)(inclusion of foreign conviction in offender score is reviewed de novo); see also State v. Jackovick, 56 Wn.2d 915, 355 P.2d 976 (1960), cert. denied, 375 U.S. 854, 84 S. Ct. 115, 11 L. Ed. 2d 81 (1963), overruled on other grounds, State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983)(in habitual criminal proceeding trial court acted properly in instructing the jury that defendant's out-of-state

convictions were felonies in Washington rather that submitting this determination to the jury).

In this case, the Court of Appeals had remanded the matter to the trial court for a comparability analysis of defendant's 1992 conviction for robbery in California. CP 86-95. On remand, the State filed a sentencing memorandum, in which it cited the text of the relevant California and Washington robbery statutes. CP 96-100. Defendant's attorney also filed a sentencing memorandum; attached to this pleading were copies of the relevant California and Washington statues. CP 101-128. Defendant contends that by presenting the text of the relevant statutes to the court that the State violated the terms of this court's opinion in the first appeal as this was adducing additional "evidence" at the resentencing hearing.

The State disputes defendant's basic premise. Presenting legal authority to the court is not adducing "evidence," as this term is generally used to refer to information presented to resolve factual issues. See State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005)(citing Black's Law Dictionary definition of "evidentiary hearing" as a "hearing at which evidence is presented, as opposed to a hearing at which only legal argument is presented."). Under the above cited authority, once a court determines that certain statutes are relevant to the legal issue before it, it may take judicial notice of these statutes without any input from the parties. All of the evidence that proved defendant had a prior conviction from California, and that established which particular section of the

California penal code he violated, was presented at the first sentencing hearing. CP 135-145; 6/18/04 RP 26. It was also considered at the resentencing hearing. 12/9/05 RP 6, 9-10. This evidence established the facts necessary to the comparability determination. At that point the judge needed to consider the elements of the California and Washington crimes and could take judicial notice of these elements if he knew them, research these elements himself or direct counsel to provide them. Defendant's claim that the State adduced additional evidence on remand is without merit.

2. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT'S CALIFORNIA ROBBERY CONVICTION WAS COMPARABLE TO THE WASHINGTON CRIME OF ROBBERY IN THE SECOND DEGREE.

In order to include an out-of-state in a defendant's criminal history, the State must prove not only the existence of the conviction, but also that the out-of-state felony is comparable to a Washington felony. State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). The State may prove the classification of out-of-state convictions as being comparable to a Washington felony by introducing Washington judgments that have used out-of-state convictions to calculate an offender score. State v. Cabrera, 73 Wn. App. 165, 168-169, 868 P.2d 179 (1994). However, if the defendant objects to this form of proof, the State is required to "present additional evidence of the classification of the out-of-

state convictions in order to carry its burden of proving the convictions by a preponderance of the evidence. Id. at 169.

To determine if a prior out-of-state conviction is comparable to a Washington conviction, a trial court must compare elements of the out-of-state crime to the elements of a Washington crime in effect when the foreign crime was committed. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the elements of the out-of-state crime are comparable to the elements of a Washington crime on their face, prior foreign convictions count toward the offender score. Id. If the elements requirement is met, there is no need to look to the facts of the crime. Id.

In this case, the Court of Appeals had remanded the matter to the superior court for it to make a comparability determination of defendant's 1992 conviction for robbery in California with Washington offenses. Defendant does not dispute that the State provided sufficient evidence to prove the existence of defendant's California robbery conviction. The documentation packet regarding the California conviction included the charging document for the robbery, defendant's plea statement, a probation officers recommendation, a minute order and an abstract of judgment. CP 135-145. The charging language stated:

> On or about June 25, 1991, in the above named Judicial District, the crime of SECOND DEGREE ROBBERY, in violation of PENAL CODE SECTION 211, a Felony, was committed by LAWRENCE LEE LA [BARBERA], who

> did willfully, unlawfully and by means of force and fear take personal property from the person, possession, and immediate presence of CHRISTOPHER BATES. It is further alleged that the above offense is a serious felony within the meaning of Penal Code Section 1192.7(c)(19).
>
> It is further alleged that in the commission of the above offense, the said defendant(s), LAWRENCE LEE LA [BARBERA], with intent to inflict such injury, personally inflicted great bodily injury upon CHRISTOPHER BATES, not an accomplice to the above offense, within the meaning of Penal Code Section 12022.7 and also causing the above offense to be a serious felony within the meaning of Penal Code Section 1192.7(c)(8).

CP 141-142. The defendant's plea statement, the court's minute order, and the abstract of judgment reflect that defendant acknowledged his guilt of the robbery and the enhancement for great bodily injury and was sentenced accordingly. CP 135-145.

The language of the California robbery statute has not changed since its enactment in 1872. CP 127. The crime of robbery is defined in Cal. Penal Code sec. 211 as:

> ROBBERY DEFINED. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will accomplished by means of force or fear.

CP 127. Robbery in Washington is defined as:

> *A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.* Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the

> taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190 (emphasis added). This statutory language has not changed since it took effect in 1976. The elements in both statues are facially identical. Both require the taking of personal property of another, against that person's will, and by the use of force or fear. Therefore, there is no need to look to the facts of the crimes; the crimes are comparable and the trial court properly included defendant's this prior California robbery conviction in his criminal history and offender score.

In State v. Luckett, 73 Wn. App. 182, 188, 869 P.2d 75 (1994), this court held that section 211 of the California penal code, enacted in 1872, was comparable to the Washington crime of robbery in the second degree, RCW 9A.56.190 and .210, enacted in 1975. See also State v. Mutch, 87 Wn. App. 433, 942 P.2d 1018 (1997)(Division I of the Court of Appeals finds that California Penal Code § 211 is comparable to robbery in Washington under statutes in effect in 1966), review denied, 134 Wn.2d 1016 (1998), overruled in part on other grounds, In re PRP of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005). The conviction was properly classified as a robbery in the second degree under the authority of Luckett. See also State v. Berry, 141 Wn.2d 121, 5 P.3d 658 (2000)(court upholds persistent offender sentence based, in part, on a 1985 California robbery conviction);

State v. Parra, 96 Wn. App. 95, 977 P.2d 1272 (1999)(persistent offender sentence based, in part, on a California robbery conviction); State v. Morley, 134 Wn.2d at 605-06 (holding a courts-martial offense, which had wording similar to the California statute, to be comparable to robbery in Washington). The State could find no Washington case which has held that the elements of Section 211 of the California Penal Code were not comparable, at least, to the crime of robbery in Washington.

Defendant asserts that the California conviction is not comparable because Section 211 of the California Penal Code does not include an intent to steal or to deprive the victim of his property. The California Supreme Court held that the common law animus furandi for robbery - that is the intent to steal or feloniously to deprive the owner permanently of his property - is present in Penal Code §211 by use of the phrase "felonious taking" and is an element of robbery in California. People v. Tufunga, 21 Cal. 4th 935, 987 P.2d 168 (1999). Thus, the element defendant claims is missing from the California robbery provision to make it comparable to Washington's robbery is, in fact, there.

Defendant has failed to demonstrate any legal error in the trial court's comparability determination. The court found that the elements of the California statute were equivalent to Washington's robbery statute. 12/9/05 RP 6-11.

> COURT: I believe robbery in the second degree is the same in California as Washington. The elements of the crime in California include taking of personal property

> from another person by willfully, unlawfully, means of force [sic]. I believe that's pretty much the same as our definition of robbery under [RCW] 9A.56.190.

12/9/05 RP 11. This decision is consistent with Luckett and the other cases cited above. The decision below should be affirmed.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the sentence imposed by the trial court below.

DATED: July 26, 2006

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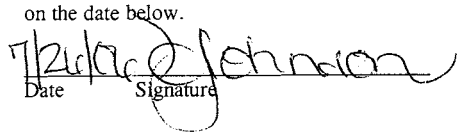
Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant ~~and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



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