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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS HOPSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Roseanne Buckner

No. 07-1-05242-1

Brief of Respondent

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

1. Did the trial court properly include a Wisconsin burglary conviction in the defendant's offender score where the conviction is comparable to Washington burglary in the second degree, but must the matter be remanded for resentencing where the trial court included Wisconsin bail jumping convictions which are not legally comparable to Washington bail jumping?

B. STATEMENT OF THE CASE.

1. Procedure

On January 17, 2008, the State charged THOMAS HOPSON, hereinafter referred to as defendant, by way of an amended information with the crimes of residential burglary and theft in the second degree. CP 5-6.

During pretrial motions, the parties argued whether the court would allow the State to impeach the defendant under ER 609 with a Wisconsin conviction for burglary if defendant chose to testify. RP 4-8, 1/22/08. The defense argued that the conviction was similar to criminal trespass, and that it was not the equivalent of residential burglary in

Washington, and thus should be excluded. RP 6, 1/22/08. The State noted that within the judgment and sentence the defendant admits that he broke into a building to steal things, and did in fact commit the crime of theft. RP 5, 7, 1/22/08. The court concluded that the Wisconsin burglary conviction was the same as the Washington burglary statute and was therefore admissible. RP 7-8, 1/22/08.

The jury convicted defendant as charged. CP 45-56.

On March 28, 2008, the matter came before the Honorable Rosanne Buckner for sentencing. RP 183, 3/28/08. The State handed forward a stipulation of defendant's offender score, but the defense noted that they were not agreeing to the State's calculation of offender score. RP 184, 3/28/08, CP 43-44. The defense conceded the validity of several of the felony convictions, but maintained its argument that the burglary from Wisconsin was not comparable to Washington burglary, and that the Wisconsin bail jumping charges were also not comparable. RP 184-86. Defendant addressed the court, arguing that the "burglary in Wisconsin is not a Class B or A. It's a Class C – it's more like a B burglary, is what it was, and I don't think it would be equivalent to a Class C burglary here." RP 188-89, 3/28/08. The State argued that because the defendant admitted

that he forcibly entered a building through the back door and stole things, that the State had met its burden of showing that it is equivalent to a burglary conviction in Washington. RP 189, 3/28/08.

The court adhered to its pretrial ruling, concluding that the burglary charge was equivalent to Washington burglary. The court made the same ruling with respect to the bail jumping charges. Defendant was sentenced as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE	SENTENCED IMPOSED
I	7	43-57	57 months
II	6	12+ - 14	14 months

CP 49-53.

This timely appeal follows. CP 59.

2. Facts

The State adopts the facts as recited in the opening brief of appellant.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INCLUDED THE WISCONSIN BURGLARY IN THE OFFENDER SCORE WHERE THE BURGLARY IS COMPARABLE TO WASHINGTON; HOWEVER, THE TRIAL COURT ERRED IN INCLUDING A WISCONSIN BAIL JUMP IN THE OFFENDER SCORE AND REMAND FOR RESENTENCING IS APPROPRIATE.

Under the Sentencing Reform Act (SRA), the sentencing court calculates the defendant's offender score based on his criminal history in order to determine the standard sentencing range. RCW 9.94A.525(3); *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). An appellate court reviews a challenge to the sentencing court's offender score calculation de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

The State has the burden of proving by a preponderance of evidence the existence and comparability of a defendant's out-of-state conviction. *Ford*, 137 Wn.2d at 479-80; RCW 9.94A.525(3)¹. The State

¹ (3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

may prove the existence of the conviction through introduction of a certified copy of the judgment and sentence, or through other comparable documents of record, including the indictment or the information. *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). *Cabrera*, 73 Wn. App. at 168. “Although facts at sentencing need not be proved beyond a reasonable doubt, fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” *Ford*, 137 Wn.2d at 481.

The sentencing court must then classify the conviction “according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3); *Ford*, 137 Wn.2d at 479. Thus, the sentencing court must: (1) identify the comparable Washington offense; (2) classify the comparable Washington offense; and (3) treat the out-of-state conviction as if it were a conviction for the comparable Washington offense. *State v. Jackson*, 129 Wn. App. 95, 104, 117 P.3d 1182 (2005), *review denied*, 156 Wn.2d 1029 (2006). “[I]f the foreign statute is broader than the Washington definition of the particular crime, ‘the sentencing court may look at the defendant’s conduct, as evidenced by the indictment or information, to determine whether the conduct would

have violated the comparable Washington statute.” *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998) (quoting *State v. Mutch*, 87 Wn. App. 433, 437, 942 P.2d 1018 (1997)). Where facts alleged in the charging document are tied directly to the elements, a court may assume those facts have been proved or admitted. *State v. Bunting*, 115 Wn. App. 135, 143, 61 P.3d 375 (2003). If the classification of out-of-state convictions results in an unlawful sentence, then the State is held to the existing record and an appellate court will excise the unlawful portion of the sentence and remand for resentencing without allowing further evidence to be adduced. *Ford*, 137 Wn.2d at 485.

a. Burglary.

Here, under Washington law, “[a] person is guilty of burglary in the second degree if, with intent² to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.” RCW 9A.52.030(1). Burglary in the second degree is a class B felony. RCW 9A.52.030(2).

² It is the intent to commit a crime not the actual commission of a crime which is an element of residential burglary. *State v. Bergeron*, 105 Wn.2d 1, 15-17, 711 P.2d 1000 (1985).

In Wisconsin, a person is guilty of burglary if the person:

Enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class F felony:

- (a) *Any building or dwelling*; or
- (b) An enclosed railroad car; or
- (c) An enclosed portion of any ship or vessel; or
- (d) A locked enclosed cargo portion of a truck or trailer; or
- (e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or
- (f) A room within any of the above.

Wis. Stat. sec. 943.10(1m) (emphasis added).

Comparing the statutes on their face, Wisconsin's burglary statute is arguably more broad because it punishes any person who enters with "intent to steal or commit a felony," as contrasted with Washington's more specific requirement, "with intent to commit a crime against a person or property therein." *Compare* Wis. Stat. 943.10(1m), with RCW 9A.50.030 (1).

However, an examination of the facts, and the specific portion of the statute defendant pled guilty to, shows that the Wisconsin conviction is factually comparable to Washington's second degree burglary statute, making the crime a Class B felony. Below, the parties examined the certified record.³ RP 4-8, 1/22/08. Included in the record was the fact that defendant's particular burglary conviction was for entering a "building," with "intent to steal." RP 6-7, 1/22/08, RP 186, 189, 3/28/08. RP 189, 3/28/08. This conduct would violate the Washington burglary statute under RCW 9A.52.030(2).

Contrary to defendant's argument, the record before the court does not support a finding that defendant acted only with the intent to commit a felony, as opposed to a crime against person or property. Acting with intent to steal - is acting with intent to commit a crime against property, and therefore the Wisconsin conviction is saved under the factual comparability analysis.

³ The parties examined the certified record during an argument regarding whether the Wisconsin burglary conviction was admissible under ER 609 for impeachment purposes. RP 7, 1/16/08, RP 4-8, 1/22/08. The defense agreed during sentencing that it believed the court's file had a certified copy of the burglary conviction, and counsel argued that they were renewing their argument as to the classification of that conviction and that "at best, it's akin to a criminal trespass." RP 186, 3/28/08. The State could not locate a copy of the certified judgment in the record below.

If this court cannot determine the comparability of the offenses due to the failure to make the certified copies of the judgment and sentence part of the record, then the State asks that this court remand to the trial court to examine only those documents that were before it at the time of the original determination was made, and make the factual determination part of the record. *See Ford*, 137 Wn.2d at 485.

b. Bail Jumping.

The State concedes that it failed to prove below that the Wisconsin bail jumping statute is comparable to the Washington bail jumping statute.

Compare RCW 9A.76.170⁴ with Wis. Stat. sec. 946.49⁵. The Wisconsin statute is more broad, and the State did not prove whether the underlying charge for which the defendant violated his terms of bail was a misdemeanor or felony. For that reason, the State concedes error and remand for removal of this conviction as part of his offender score is the appropriate remedy.

⁴ § 9A.76.170. Bail jumping

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(3) Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

(⁵) 946.49. Bail jumping.

(1) Whoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond is:

(a) If the offense with which the person is charged is a misdemeanor, guilty of a Class A misdemeanor.

(b) If the offense with which the person is charged is a felony, guilty of a Class H felony.

(2) A witness for whom bail has been required under s. 969.01 (3) is guilty of a Class I felony for failure to appear as provided.

D. CONCLUSION.

The State agrees that this matter should be remanded for resentencing based on the trial court's erroneous inclusion of a Wisconsin bail jumping charge in the offender score.

DATED: October 28, 2008.

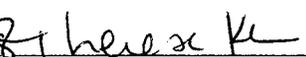
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Certificate of Service:

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/respondent a true and correct copy/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.

10-28-08 
Date Signature

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