

No. 40003-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

ALLAN R. SIMMONS,

Appellant.

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Anne Hirsch, Judge

Cause No. 09-1-00693-1

PATRICIA A. PETHICK, WSBA NO. 21324
Attorney for Appellant

P.O. Box 7269
Tacoma, WA 98417
(253) 475-6369

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not dismissing Simmons's conviction for assault in the second degree with sexual motivation (Count II) where the assault in the second degree with sexual motivation was incidental to, a part of, or coexistent with his conviction for rape in the first degree (Count I).
2. The trial court erred in not finding that Simmons's convictions for rape in the first degree (Count I) and assault in the second degree with sexual motivation (Count II) constituted the same or similar criminal conduct for purposes of calculating his offender score.
3. The trial court erred in allowing Simmons to be represented by counsel who failed to argue that his conviction for rape in the first degree (Count I) and assault in the second degree with sexual motivation constituted the same or similar criminal conduct for purposes of calculating his offender score.
4. The trial court erred in finding that Simmons's conviction for robbery from Illinois was comparable to a most serious offense in Washington and sentencing Simmons under the POAA statute to life with out the possibility of parole.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in not dismissing Simmons's conviction for assault in the second degree with sexual motivation (Count II) where the assault in the second degree with sexual motivation was incidental to, a part of, or coexistent with his conviction for rape in the first degree (Count I)? [Assignment of Error No. 1].
2. Whether the trial court erred in not finding that Simmons's convictions for rape in the first degree (Count I) and assault in the second degree with sexual motivation (Count II) constituted the same or similar criminal conduct for purposes of calculating his offender score? [Assignment of Error No. 2].

3. Whether the trial court erred in allowing Simmons to be represented by counsel who failed to argue that his conviction for rape in the first degree (Count I) and assault in the second degree with sexual motivation constituted the same or similar criminal conduct for purposes of calculating his offender score? [Assignment of Error No. 3].
4. Whether the trial court erred in finding that Simmons's conviction for robbery from Illinois was comparable to a most serious offense in Washington and sentencing Simmons under the POAA statute to life with out the possibility of parole? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure

Allan R. Simmons (Simmons) was charged by second amended information filed in Thurston County Superior Court with one count of rape in the first degree or in the alternative rape in the second degree (Count I), and one count of assault in the second degree with sexual motivation. [CP 12-13].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Simmons was tried by a jury, the Honorable Anne Hirsch presiding. Simmons had no objections and took no exceptions to the court's instructions, which instructions included his proposed instruction on self defense to the charge of assault in the second degree with sexual motivation (Count II). [CP 16-18, 19-21, 25-53; Vol. II RP 325]. The jury found Simmons guilty of rape in the first degree (Count I) and guilty

of assault in the second degree (Count II) entering a special verdict finding that Count II was committed with sexual motivation. [CP 54, 55, 56, 57; Vol. II RP 391-395].

At sentencing, Simmons conceded that he had prior convictions for theft in the second degree from Thurston County Washington, and aggravated assault from Illinois which is comparable to a most serious offense in Washington, but challenged his robbery conviction from Illinois as being comparable to a most serious offense in Washington. [CP 58-92, 93-103, 104-110, 111-121, 122-143; 11-19-09 RP 3-29]. After, hearing argument from Simmons and the State, the court found that Simmons's robbery conviction from Illinois was a most serious offense in Washington then sentenced Simmons as a persistent offender to life without the possibility of parole having found that Simmons's robbery in Illinois was comparable to a most serious offense in Washington. [CP 58-92, 93-103, 104-110, 111-121, 122-143, 159-168; 11-19-09 RP 23-27].

A timely notice of appeal was filed on November 19, 2009. [CP 144-154]. This appeal follows.

2. Facts

On April 11, 2009, G.S.¹, an assistant stage manager with Harlequin Productions theater company, was celebrating the closing of the company's production of "The Elephant Man" at the cast party. [Vol. I RP 31-34]. In the early morning hours of April 12, 2009, after the cast party ended, G.S. and her friend, Darren, walked back to the theater where their cars were parked. [Vol. I RP 35-36]. Darren drove, but G.S. stopped to have a cigarette before driving home. [Vol. I RP 36]. While she was smoking her cigarette, a man (Simmons) came over to G.S. and started speaking with her. [Vol. I RP 36-37]. The two spoke for quite awhile, but when G.S. realized that it was after 4 AM she decided to go home. [Vol. I RP 37-38]. Simmons asked G.S. for a ride home to which G.S. agreed. [Vol. I RP 38-40].

When G.S. got to the street where Simmons said he lived, G.S. stopped the car; Simmons gave her a hug offering her some money for gas, and then opened the car to get out of the car. [Vol. I RP 40-41]. Suddenly, Simmons turned back to G.S. and started punching her in the face. [Vol. I RP 41-42]. G.S. fought back, but Simmons took off G.S.'s boots, pants, and underwear and engaged in sexual intercourse (penile-

¹ This case involves a sexual offense—rape in the first degree. As such out of courtesy to the victim, her initials will be used throughout this brief.

vaginal) with G.S. while she begged him not to kill her. [Vol. I RP 43-44]. After Simmons was finished, G.S. realized that her car was in a ditch and that someone else had arrived at the scene and was trying to help get her car out of the ditch. [Vol. I RP 44-45]. Simmons then said that he was going to get help and ran off never returning to the scene. [Vol. I RP 45]. G.S. was taken to the hospital where a rape kit was performed. [Vol. I RP 46-50, 57-59, 177-180, 218-229]. G.S.'s injuries included a swollen face, fractured and cut nose requiring stitches, several chipped teeth, cuts on her eyebrows, and black eyes completely swollen shut. [Vol. I RP 53-56, 183-192].

Stacey Green (Green), Simmons's girlfriend, testified that Simmons told her that he had been with friends from work on the night of April 11, 2009, and the earlier morning hours of April 12, 2009. [Vol. I RP 155-156, 164]. Green did not see Simmons until 5:30 AM on April 12, 2009, when he knocked on her bedroom window; Simmons had a scratch on his face and blood on his knuckles. [Vol. I RP 156-159]. After his arrest, Simmons sent Green a letter in which he denied raping G.S. and explaining that he had consensual sex with G.S.. [Exhibit No. 34-A, Supp. CP; Vol. I RP 144-145, 165-166; Vol. II RP 301-302].

On April 13, 2009, Simmons was contacted by law enforcement officers and told them he had been with his girlfriend (Green) on April 11-

12th. [Vol. II RP 279-282]. On April 14, 2009, Simmons was contacted at his workplace by law enforcement officers in order to obtain a court ordered DNA sample at which time he told the officers that he had been with his friend Tyrone on April 11-12th not his girlfriend (Green). [Vol. II RP 290-293]. On April 15, 2009, Simmons was again contacted by law enforcement officers at his workplace but ran away and had to be apprehended with the use of a taser. [Vol. II RP 261-267, 293-294].

Marion Clark, a forensic scientist with the Washington State Patrol Crime Lab, testified that she tested G.S.'s rape kit for DNA and found both G.S.'s DNA and Simmons's DNA in the sample. [Vol. II RP 240-248].

Simmons did not testify.

D. ARGUMENT

- (1) SIMMONS MAY NOT BE CONVICTED OF ASSULT IN THE SECOND DEGREE WITH SEXUAL MOTIVATION (COUNT II) WHERE THE ASSAULT WAS INCIDENTAL TO, A PART OF, OR COEXISTENT WITH HIS CONVICTION FOR RAPE IN THE FIRST DEGREE (COUNT I).

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are

concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, *reviewed denied*, 143 Wn.2d 1009 (2001) (*citing* RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998)). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. State v. Calle, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (*citing* State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the rape in the first degree nor the assault in the second degree with sexual motivation statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.44.040; RCW 9A.36.021 and RCW 9.94A.385.² The offenses at issue here are thus not automatically immune from double jeopardy analysis. In re Burchfield, 111 Wn. App. at 896.

² RCW 9A.44.040, under which Simmons was charged in Count I, provides in pertinent part:

(1) A person is guilty of rape in the first degree when such a person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

...

(c) Inflicts serious physical injury, including but not limited to physical injury that renders the victim unconscious....

RCW 9A.36.021, under which Simmons was charged in Count II, provides in pertinent part:

(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....

Count II also carried an allegation that the assault was committed with a sexual motivation under RCW 9.94A.835. In fact, the jury specifically found that the assault was sexually motivated given the special verdict finding the same. [CP 57].

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Id.* The statute(s) under which Simmons was convicted of rape in the first degree requires forcible sexual intercourse and serious physical injury. RCW 9A.44.040. The sexually motivated assault in the second degree statute(s) requires substantial bodily harm done for the purpose of sexual gratification. RCW 9A.36.021; RCW 9.94A.835; Instruction No. 21 [CP 48]. In other words, both of these crimes require physical injury with sexual overtones with Count I (rape in the first degree) requiring actual sexual intercourse. These offenses appear to contain the same elements and, therefore, may be established by the “same evidence.” Thus the prohibition against double jeopardy may be violated here by applying the same evidence test.

The “same evidence” test, however, is not always dispositive. In re Burchfield, 111 Wn. App. at 897; In re Personal Restraint of Percer, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003). This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id. This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. State v. Calle, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, *which is separate and distinct from and not merely incidental to the crime of which it forms the element.* [Emphasis Added]. State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, G.S. was punched by Simmons repeatedly while he stripped her of her boots, pant, and underwear then proceeded to forcibly engage in sexual intercourse with her. This court should construe this as evidence that the first crime (rape in the first degree) was not completed as the second crime (sexually motivated assault in the second degree) was in progress, then the sexually motivated assault *was incidental to, a part of, or coexistent with the rape in the first degree*, with the result that the second conviction (sexually motivated assault in the second degree (Count II)) will not stand under the reasoning in State v. Johnson, *supra*.

The Washington Supreme Court has observed that “[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” State v. Adel, 136 Wn.2d at 635. Accordingly, if this court determines that the sexually motivated assault in the second degree (Count II) “was incidental to, a part of, or coexistent” with the rape in the first degree (Count I), then Simmons’s conviction in Count II cannot be sustained on these facts and must, therefore, be reversed.

Recent caselaw from our State Supreme Court supports this conclusion. Formerly, as set forth in State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978), the State Supreme Court rejected an argument that a defendant cannot be convicted of both felony murder and the underlying

felony. The court upheld both convictions by considering statutory merger and due process finding neither was principle violated. However, recently in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the State Supreme Court apparently reversed this decision by analyzing the issue in terms of double jeopardy.

In Womac, the defendant was charged in three separate counts and convicted of homicide by abuse, felony murder based on criminal mistreatment, and assault. The trial court accepted all three convictions, but imposed sentence only on the homicide by abuse. On appeal, the appellate court remanded the case for resentencing on the homicide by abuse and conditionally dismissed the felony murder and assault convictions so long as the homicide by abuse conviction withstood further appeal. The State Supreme Court vacated the felony murder and assault convictions on double jeopardy grounds holding Womac had in actuality committed a single offense against a single victim yet was held accountable for three crimes in violation of double jeopardy prohibition against multiple punishments for a single offense. In doing so, the State Supreme Court engaged in the three-part analysis set forth above. The State Supreme Court determined that double jeopardy was violated even though Womac received no sentence on the felony murder and assault convictions as “conviction” in itself, even without imposition of sentence,

carries an unmistakable onus which has a punitive effect. In sum, the court held:

As this court noted in Calle, “[i]t is important to distinguish between charges and convictions—the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, *even though convictions may not stand* for all offenses where double jeopardy protections are violated.

[Citations omitted]. State v. Womac, 160 Wn.2d at 657-58.

That is what exactly what has happened here. The State properly filed an information charging multiple counts (the rape in the first degree charge as well as a sexually motivated assault in the second degree charge), obtained convictions on these multiple counts and even obtained a sentence on both convictions, but all the convictions cannot stand given double jeopardy principles for the reasons set forth above. This court should reverse Simmons's conviction on Count II.

- (2) SIMMONS’S CONVICTIONS FOR RAPE IN THE FIRST DEGREE (COUNT I) AND HIS CONVICTION FOR SEXUALLY MOTIVATED ASSAULT IN THE SECOND DEGREE (COUNT II) ENCOMPASSED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an

offender score. State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

“RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant’s offender score.” State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), *reviewed denied*, 143 Wn.2d 1010 (2001) (*quoting* State v. Tili, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

For purposes of RCW 9.94A.589(1)(a), intent is not defined as the specific intent required as an element of the crime charged. Rather, the inquiry focuses on the extent to which criminal intent, as objectively viewed, changed from one crime to the next. Whether one crime furthered the other may be relevant but generally does not apply when the crimes occurred simultaneously. State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). Moreover, our courts have held that separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. *See e.g.*, State v. Porter, 133 Wn.2d 177, 183, 942

P.2d 974 (1997); State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Here, as set forth above, Count II was “incidental to, a part of, or coexistent” with Count I and of note both occurred at the same time (the early morning hours of April 12, 2009) and place (in G.S.’s car), and were against the same victim (G.S.) in each count, and involved the same intent (sexual assault). Thus, the trial court erred in not finding that these offenses encompassed the same course of criminal conduct for purposes of calculating Simmons’s offender score.

(3) SIMMONS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO ARGUE THAT COUNTS I AND II ENCOMPASSED THE SAME OR SIMILAR CRIMINAL CONDUCT.

Should this court determine that counsel has failed to preserve the above-argued issue by failing to argue that Counts I and II encompassed the same or similar criminal conduct for purposes of calculating Simmons’s offender score, then Simmons received ineffective assistance of counsel. A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but

for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Here, both prongs of ineffective assistance are met. First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to argue for a lower offender score, and had counsel done so, the trial court would have found that Simmons's two convictions did constitute the same or similar criminal conduct.

Second, the prejudice is self evident. Had counsel properly argued sentencing issues, Simmons would have received a proper sentence much lower than that to which he is currently serving.

- (4) SIMMONS’S SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE UNDER THE POAA SHOULD BE REVERSED AND THE MATTER REMANDED FOR SENTENCING WITHIN THE STANDARD RANGE AS SIMMONS’S CONVICTION FROM ILLINOIS WAS NOT LEGALLY OR FACTUALLY COMPARABLE TO A WASHINGTON “STRIKE” OFFENSE.

In sentencing Simmons to life without the possibility of parole under the POAA, the trial court relied on a foreign conviction from Illinois for robbery as a prior “strike.” [CP 58-92, 93-103, 104-110, 111-121, 122-143; 11-19-09 RP 3-29]. Simmons objected to the court considering this Illinois conviction for robbery as the conviction was not comparable to a most serious offense in Washington. [CP 58-92, 93-103, 104-110, 111-121, 122-143; 11-19-09 RP 3-29]. The trial court determined that Simmons’s Illinois robbery conviction was comparable to a most serious offense in Washington and sentenced him to life without the possibility of parole as a POAA. [CP 58-92, 93-103, 104-110, 111-121, 122-143, 159-168; 11-19-09 RP 23-27].

Our State Supreme Court discussed the two-part analysis for determining whether foreign convictions can be considered as “strikes” for purposes of sentencing under the POAA—legal comparability and factual comparability. In re Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005).

To establish legal comparability, the elements of the out-of-state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the elements of the out-of-state conviction are comparable to the elements of a Washington strike offense on their face, the out-of-state crime counts. [Emphasis added]. Id.

Here, the Illinois robbery statute is not legally comparable to Washington's robbery statute as found by the trial court and thus can not be counted as a "strike" (most serious offense) for purposes of sentencing Simmons under the POAA. Washington requires for every robbery the specific intent of intent to deprive/steal, RCW 9A.56.190, RCW 9A.56.200, RCW 9A.56.201; *see also* WPICs 37.02 and 37.04, while the Illinois robbery statute has no such specific intent as an element merely requiring a general intent that can be satisfied by an intentional, or knowing, or reckless act (*see* Illinois Criminal Code ch. 38, par. 18-1— Illinois's robbery statute that does not create absolute liability; and Illinois Criminal Code ch. 38, pars. 4-3 through 4-6, and 4-9—that holds if a criminal statute does not create absolute liability then the mental states of intent, knowledge, or recklessness satisfies the mental state for the crime), thus the two statutes are not legally comparable on their face. *See Lavery, supra*, *citing* State v. Freeburg, 120 Wn. App. 192, 84 P.3d 292, *review*

denied, 152 Wn.2d 1022, 101 P.3d 108 (2004); State v. Bunting, 115 Wn. App. 135, 61 P.3d 375 (2003); People v. Jamison, 197 Ill.2d 135, 161, 258 Ill. Dec. 514, 756 N.E.2d 788 (2001) (robbery is proven if the prohibited result may reasonably be expected to follow from the offender's voluntary act even without any specific intent by the offender); Carter v. United States, 530 U.S. 255, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000). Given these differences, the trial court should not have considered the Illinois robbery as a "strike" and should have sentenced Simmons to a standard range sentence.

To establish factual comparability, in cases where the elements of the Washington crime and the foreign crime are not substantially similar, the sentencing court may look at the defendant's conduct, as evidenced by an indictment or information, to determine if the conduct itself would have violated a comparable Washington statute. State v. Morley, 134 Wn.2d at 606. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial. Id.

In Lavery, the State Supreme Court recognized this standard, and applied Apprendi (any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and

proved beyond a reasonable doubt) to the determination of whether a foreign conviction was a “strike” under the POAA holding:

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

In re Lavery, *supra*; *see also*, State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004) (noting where a foreign statute is broader than Washington’s, examining the underlying facts may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense nor any incentive to assert defenses available in Washington under the narrower statute but unavailable with regard to the broader foreign statute); and Shepard v. United States, ___ U.S. ___, 125 S. Ct. 1254, ___ L. Ed. 2d ___ (2005).

Applying Lavery, here, Simmons’s Illinois robbery conviction is not factually comparable to a Washington robbery conviction and should not have been considered by the trial court as a “strike.” The Illinois robbery conviction was charged as having been committed “knowingly,” [CP 88-89]. Simmons pleaded guilty and the transcript from the plea hearing establishes nothing more than a knowing act—Simmons was never questioned regarding his thoughts and intentions. [CP 90, 123-143].

The record presents no facts upon which the trial court could have found that Simmons's robbery conviction from Illinois was committed with the specific intent required for a comparable Washington robbery conviction. Based on the record, the trial court in finding that Simmons's Illinois robbery conviction was factually comparable to a Washington robbery conviction and a most serious/"strike" offense for sentencing purposes improperly engaged in judicial fact-finding prohibited by Appendi and condemned by Lavery, and in doing so by only a mere preponderance of the evidence rather than by proof beyond a reasonable doubt. Given these circumstances, the trial court should not have considered the Illinois robbery as a "strike" and should have sentenced Simmons to a standard range sentence.

E. CONCLUSION

Based on the above, Simmons respectfully requests this court to reverse and dismiss his conviction for assault in the second degree with sexual motivation and remand the matter for resentencing within the standard range.

DATED this 18th day of May 2010.

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 18th day of May 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Allan R. Simmons
DOC# 335092
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

Carol La Verne
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502
(and the transcript)

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DEPUTY

Signed at Tacoma, Washington this 18th day of May 2010.

Patricia A. Pethick
Patricia A. Pethick