

NO. 42047-3-II

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

STATE OF WASHINGTON, Respondent

v.

THOMAS JAMES MCCOY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-00835-3

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

- I. The defendant's California conviction for assault with a deadly weapon is comparable to Washington's assault in the second degree statute. Therefore, the trial court did not err when it found the defendant's out-of-state conviction qualified as a predicate serious offense, the evidence was sufficient to convict the defendant of Unlawful Possession of a Firearm in the First Degree, and the trial court properly included the defendant's out-of-state conviction in his offender score.

B. STATEMENT OF THE CASE

I. Procedural History

The appellant ("defendant") was charged by Information with Count One: Manufacture of a Controlled Substance – Marijuana, Count Two: Possession of a Controlled Substance With Intent to Deliver – Marijuana, Count Three: Possession of a Controlled Substance – Over 40 Grams of Marijuana, and Count Four: Unlawful Possession of a Firearm in the First Degree. Trial commenced on April 11, 2011. (RP 25). The jury rejected the defendant's affirmative defense that he was a licensed medical marijuana user and convicted him of all charges. (CP 37, 40, 43, 45). The defendant was sentenced on April 27, 2011 to 41 months confinement. (CP 46, 49).

II. Summary of Facts

a. Predicate Serious Offense

The defendant's criminal history includes a 1981 California conviction for assault with a deadly weapon. (CP 87-88, 99). Prior to trial, the State filed with the court a certified copy of the Information and Judgment and Sentence for the defendant's assault with a deadly weapon conviction (Superior Court of California, County of Fresno, cause no. 231606-5). (CP 87-88, 99). The Information showed the State of California charged the defendant in 1978 with Count One: assault with a deadly weapon, to wit: a shotgun, in violation of California Penal Code Section 245(a). (CP 87). The State of California also alleged, as a sentencing enhancement, that the defendant "personally used" the shotgun in the commission of the assault, in violation of California Penal Code Section 12022.5. (CP 87). The defendant was also charged with Count Two: unlawful possession of a firearm, in violation of California Penal Code Section 12020(a). (CP 87-88). The Judgment and Sentence stated the defendant pled guilty to Count One: assault with a deadly weapon, on My 27, 1981. (CP 99). The Judgment and Sentence also stated the sentencing enhancement for Count One ("personally using" the shotgun in the commission of the assault) was "charged and found." (CP 99, sec. 1, "Enhancements").

The trial court found the defendant's California conviction for assault with a deadly weapon was comparable to the crime of assault in the second degree in Washington. (RP 133, 574-575). Consequently, the court found the defendant's out-of-state conviction qualified as a predicate "serious offense" for the purposes of Count Four: Unlawful Possession of a Firearm in the First Degree. (RP 574-575).

b. Evidence at Trial

On May 16, 2006, the Clark – Skamania County Drug Task Force executed a search warrant at the defendant's residence, located at 10012 North East Sandpiper Circle, in Clark County, Washington. (RP 370, 373). Inside the defendant's residence, officers located over 300 marijuana plants, which were in various stages of development. The marijuana plants that were discovered included 35 one-inch to three-inch marijuana clones, 132 two-inch to four-inch green marijuana plants, 49 six-inch to one-foot marijuana plants, 63 one-foot to two-feet marijuana plants, and 68 three-feet to four-feet budding marijuana plants. (RP 214, 201, 211, 226). Officers also discovered a brown paper bag containing wet marijuana, a shoe box containing dried marijuana, a jar containing marijuana residue, and marijuana stems and roots boiling in a pot of water on the stove. (RP 199-200, 215, 217, 411).

The defendant's bedroom was converted into a nursery for cloning marijuana plants. (RP 390). Two other rooms in the defendant's house, as well as the garage and a shed, were also converted into grow rooms. (RP 211-212, 388).

Officers discovered growing materials inside the grow rooms, including fluorescent light fixtures, shielded lights, five ballasts for one-thousand watt light bulbs, plant-starting materials, a cloning tarp, lava rock, bottles of chemicals associated with indoor grow operations, small grow cubes, and at least four oscillating fans. (RP 182, 187, 201, 223, 386, 390, 407, 419). Officers also discovered packaging materials including a bin of plastic bags, a hanging scale, a digital scale, a triple-beam scale, and pre-packaged marijuana inside the defendant's residence. (RP 199- 200, 416). Officers discovered \$64.00 in cash in the defendant's wallet and \$198.00 in cash in the defendant's wife's wallet. (RP 228, 230).

The defendant admitted the grow operation inside his home belonged to him. (RP 375). The defendant said he was a licensed medical marijuana user. (RP 379). The defendant said he was licensed to use one-eighth to one-quarter ounce of marijuana per day (totaling 15 ounces for a 60 day supply). (RP 403). The defendant's 68 budding marijuana plants, alone, would yield approximately 4 ounces of marijuana, per plant (272

ounces, total). (RP 369, 438). The defendant said he gave the excess marijuana to his friend, to his brother, and to a marijuana dispensary in Portland, Oregon. (RP 377-378).

The defendant admitted he owned a firearm. (RP 404). The defendant also admitted he had been convicted of a felony twenty years prior. (RP 530-531). The defendant said he owned the firearm because he was concerned about people breaking into his house. (RP 404). The defendant said he would rather be “tried by twelve than carried by six.” (RP 404). Officers discovered a loaded Davis Industries .380 semi-automatic pistol inside a box in the defendant’s living room. (RP 199, 223). The box also contained ammunition for the firearm as well as a taser. (RP 221).

c. Sentencing

In addition to his 1981 California conviction for Assault with a Deadly Weapon, the defendant had a 1987 California conviction for sale of cocaine (cause no. 365032-2). (CP 58). At the sentencing hearing, the State provided the court and defense counsel with certified copies of the Information and the Judgment and Sentence for each out-of-state conviction. (RP 691-692). The trial court found the defendant’s California convictions for Assault with a Deadly Weapon and sale of

cocaine were both comparable to Class B felonies in Washington. (RP 705). Both convictions were included in the defendant's offender score. (CP 46).

C. ARGUMENT

I. The defendant's California conviction for Assault with a Deadly Weapon is comparable to Washington's Assault in the Second Degree statute.

The defendant claims his California conviction for Assault with a Deadly Weapon is not comparable to Washington's Assault in the Second Degree statute. Consequently, the defendant claims the trial court erred when it found his out-of-state conviction qualified as a predicate serious offense for the charge of Unlawful Possession of a Firearm in the First Degree and that, as a result, the evidence was insufficient to convict him of this charge. *See* Br. of Appellant at 4. The defendant also claims the trial court erred when it included his California conviction for Assault with a Deadly Weapon in his offender score. *See* Br. of Appellant at 15.

The State must prove the existence of a prior conviction by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). An appellate court reviews de novo whether a prior conviction qualifies as a predicate serious offense for the purposes of RCW 9.41.040 (Unlawful Possession of a Firearm in the First Degree).

State v. Swekcer, 154 Wn.2d 660, 665, 115 P.3d 297 (2005). The court also reviews de novo whether an out-of-state conviction is properly included in a defendant's offender score. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

Under RCW 9.41.040, a person is prohibited from possessing firearms if he or she has "previously been convicted...in this state or elsewhere of any serious offense as defined in this chapter." A serious offense includes any "crime of violence." RCW 9.41.010(16)(a). A crime of violence includes the crime of Assault in the Second Degree. RCW 9.41.010(3)(a). Assault in the Second Degree is a Class B felony. RCW 9A.36.021.

Under RCW 9.94A.525(3), out-of-state convictions for offenses "shall be classified according to the comparable offense definitions and sentences provided by Washington law." In order to determine whether a defendant's out-of-state conviction qualifies as a comparable serious offense for the purposes of RCW 9.41.040, or for the purposes of calculating a defendant's offender score, the court employs a two-part comparability analysis. *State v. Johnson*, 150 Wn. App. 663, 676, 208 P.3d 1265. First, the court determines whether the elements of the foreign conviction are substantially similar to a comparable serious offense in Washington. *Johnson*, 150 Wn. App. at 676. If the elements of the

foreign conviction are substantially similar to the elements of a serious offense in Washington, then the foreign conviction is “legally comparable” and it is properly included as a predicate serious offense or in the defendant’s offender score. *See State v. Morely*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the elements of the foreign conviction are broader than a comparable serious offense in Washington, then the court must determine whether the conviction is “factually comparable,” “i.e., whether the conduct underlying the foreign offense would have violated the comparable Washington statute.” *Johnson*, at 676. If the offense is factually comparable, then it is properly included as a predicate offense under RCW 9.41.040 and it is properly included in the defendant’s offender score. *See id.*, at 677.

- a. The defendant’s out-of-state conviction is legally comparable to its Washington counterpart.

When determining legal comparability, the court compares the elements of the out-of-state offense with the elements of potentially-comparable Washington offenses, as they were defined on the date the out-of-state offense was committed. *State v. Cameron*, 80 Wn. App. 374, 378, 909 P.2d 309 (1996).

In 1978, Washington defined Assault with a Deadly Weapon (Assault in the Second Degree) as follows:

(1) Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he:

...

(c) shall knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm...

Former RCW 9A.36.020 (1975). Washington recognizes three common law definitions of assault: (1) an attempt to inflict bodily injury upon another with unlawful force, (2) an unlawful touching with criminal intent, and (3) putting a person in apprehension of harm with or without the intent or present ability to inflict harm. *State v. Baker*, 136 Wn. App. 878, 883, 151 P.3d 237 (2007).

In 1978, California defined Assault with a Deadly Weapon as follows:

[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily harm shall be punished by imprisonment in the state prison for two, three, or four years...

Former Cal. Penal Code Cal. Penal Code §245(a) (amended 1982).

California defines assault as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Cal. Pen. Code §240. California’s Assault with a Deadly Weapon statute is legally comparable to Washington’s Assault with a Deadly Weapon statute (using

Washington's second common law definition of assault) because the statutory elements of both crimes are substantially similar. Both statutes require proof of (1) an unlawful attempt, (2) to cause bodily injury, (3) with a deadly weapon.

1. Here, the distinction between "general intent" and "specific intent" is a distinction without a difference.

The defendant claims California's Assault with a Deadly Weapon statute is not legally comparable to Washington's Assault in the Second Degree statute (hereafter, "Assault with a Deadly Weapon" statute) because Washington requires proof of the non-statutory element of "specific intent" to cause bodily injury, whereas California requires proof of "general intent" to commit an act, the natural and probable result of which is bodily injury. *See* Br. of Appellant at 8-9. The State does not dispute that Washington classifies Assault with a Deadly Weapon (under the second common law definition of assault) as a "specific intent crime;" whereas, California classifies Assault with a Deadly Weapon as a "general intent crime." To determine legal comparability, however, a court considers the language in the statute as well as the judiciary's interpretation of non-statutory elements. *State v. Russell*, 104 Wn. App. 422, 445, 16 P.3d 664 (2001) (finding Arizona robbery statute is legally comparable to its Washington counterpart because "Arizona courts, like

Washington's, require proof of the [non-statutory element of] intent to deprive the victim"). A closer inspection of the California judiciary's interpretation of "general intent" reveals this non-statutory element is, in fact, substantially similar to Washington's "specific intent" requirement.

Washington's Assault with a Deadly Weapon statute, under the second common law definition of assault, criminalizes conduct based on what *might* have happened, as opposed to what *actually* happened. Therefore, the State proves the defendant specifically intended to cause bodily injury by proving the defendant (1) committed a violent act; (2) intentionally; (3) the direct result of which would have been bodily injury, unless stopped. Proof of the defendant's specific intent to cause bodily injury inheres in the act itself. For example, in *State v. Smith*, the reviewing court found the evidence was sufficient to prove the defendant intended to cause bodily injury when the State proved the defendant aimed a gun at three people sitting in a vehicle and moved her hand as if to release the safety device. *Smith*, 124 Wn. App. 417, 427, 102 P.3d 158 (2004) (finding, from these intentional violent acts, the jury could reasonable infer the defendant intended to shoot the victims); *see also State v. Frasquillo*, 161 Wn. App. 907, 255 P.3d 813 (2011) (finding evidence was sufficient to prove defendant intended to cause bodily injury

to all victims in a house when defendant intentionally shot into the house where victims were located).

The Ninth Circuit recently conducted a comprehensive analysis of the cases in which the California judiciary has interpreted the Assault with a Deadly Weapon statute. *United States v. Grajeda*, 581 F.3d 1186 (9th Cir. 2009). Based on its analysis, *Grajeda* found, even though California persistently classifies the Assault with a Deadly Weapon statute as a “general intent crime,” the courts clearly require proof of the defendant’s specific intent. 581 F.3d at 1192, 1195-96. Specifically, *Grajeda* found, in order to prove Assault with a Deadly Weapon in California (similar to Washington), the State must prove the defendant (1) committed an act that is sufficiently “violent” in nature; (2) intentionally; (3) the direct result of which would be bodily injury, unless stopped. *Id.*, citing *People v. Aguilar*, 16 Cal. 4th 1023, 68 Cal. Rptr. 2d 655, 945 P.2d 1204, 1207 (Cal. 1997) (finding the Assault with a Deadly Weapon statute necessarily requires proof of a violent act when California defines a deadly weapon as any object “used in such a manner as to be cable of producing and likely to produce, death of great bodily injury”); *People v. Colantuono*, 7 Cal. 4th 206, 26 Cal. Rptr. 2d 908, 865 P.2d 704, 712 (Cal. 1994) (finding the necessary mental state is “intent” to do a violent act); and *People v. Williams*, 26 Cal. 4th 779, 111 Cal. Rptr. 2d 114, 29 P.3d 197, 202 (Cal.

2001) (finding a defendant is only guilty of an assault if he intends to commit an act which would be indictable as a battery).

For each of these reasons, it is clear that the statutory elements, as well as the non-statutory elements of California's Assault with a Deadly Weapon statute are substantially similar to its Washington counterpart. Therefore, the crimes are legally comparable.

2. *The legal comparability of the defendant's out-of-state conviction is not undermined by the fact that different defenses may be available in Washington.*

The defendant claims California's Assault with a Deadly Weapon statute is not legally comparable to its Washington counterpart because there are different defenses available for the crime of Assault with a Deadly Weapon in Washington. *See* Br. of Appellant at 10-11. The defendant cites to citing to *In re Pers. Restraint of Lavery* as authority. *See* Br. of Appellant at 10-11, *citing Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005). The State does not dispute that different defenses may be available for the crime of Assault with a Deadly Weapon in Washington; however, the difference in available defenses does not render California's Assault with a Deadly Weapon statute legally incomparable to its Washington counterpart. In *Lavery*, it was not the difference in available defenses that rendered Washington's robbery statute legally incomparable

Court on this issue. *Wheeler* and *Berry* should control here.² This Court should find the defendant's California conviction for Assault with a Deadly Weapon is legally comparable to Washington's Assault with a Deadly Weapon statute (Assault in the Second Degree), which is a serious offense.

- b. The defendant's out-of-state conviction is factually comparable to its Washington counterpart.

To determine factual comparability, the court considers facts admitted or stipulated by the defendant or proved beyond a reasonable doubt. *Lavery*, at 256-58 (finding defendant's out-of-state conviction was not factually comparable because the defendant never admitted or stipulated to facts that would establish the specific intent element required to prove the comparable offense in Washington). The reviewing court

² In *In re Pers. Restraint of Carter*, this Court held California's assault statute is not legally comparable to Washington's assault in the second degree statute because California's statute only requires proof of the defendant's "general intent." *Carter*, 154 Wn. App. 907, 923, 230 P.3d 181 (2010). *Carter* should not control here because (1) as explained above, "general intent" versus "specific intent" is a distinction without a difference; (2) the defendant does not cite to *Carter* as authority; (3) the California assault statute that was at issue in *Carter* (Assault Against a Peace Officer) is different than the California assault statute that is at issue in this case (Assault with a Deadly Weapon); and (4) the precedential value of *Carter* is questionable when the Washington Supreme Court reversed and remanded this Court's original decision and when this Court subsequently issued an unpublished opinion, in which it found the defendant was not entitled to relief under any ground. *Carter*, 172 Wn. 2d 917, 934, 263 P.3d 1241 (2011); *Carter* LEXIS No. 37048-4-II (January 31, 2012).

may also look at the defendant's conduct, as evidenced by the indictment or information, to determine whether his conduct would have violated the comparable statute in Washington. *State v. Mutch*, 87 Wn. App. 433, 437, 942 P.2d 1018 (1997) (finding defendant's out-of-state conviction was factually comparable to its Washington counterpart because the record of the defendant's conviction and the indictment demonstrated the defendant's actual conduct satisfied the elements of Washington's robbery statute).

Here, even if this Court finds the defendant's California conviction for Assault with a Deadly Weapon is not *legally* comparable to Assault with a Deadly Weapon in Washington, the Court should find the defendant's out-of-state conviction is *factually* comparable to its Washington counterpart based on the defendant's conduct, as evinced by the record. The defendant was not only charged with committing Assault with a Deadly Weapon (to wit: a shotgun), in violation of California Penal Code §245(a). (CP 87). He was also charged with a sentencing enhancement for "personally using" the shotgun in the commission of the assault, in violation of California Penal Code §12022.5. (CP 87). The enhancement is reflected in the Judgment and Sentence because the sentencing court checked a box, under the title "enhancements," in which

the court indicated the enhancement under Cal. Penal Code §12022.5 was “charged and proven” for Count One. (CP 99, sec. 1).

The meaning of “using” a firearm, for the purposes of Sec. 12022.5, is derived from case law. In *People v. Chambers*, the Court stated, by employing the term “uses” in Cal. Pen. Code Sec. 12022.5, instead of “while armed,” “the legislature require[d] something more than being armed.” *People v. Chambers*, 7 Cal. 3d 666, 672, 498 P.2d 1024 (1972). The Court held, to qualify as “use” under Sec. 12022.5, there must be “conduct which actually produces a fear of harm or force by means or display of a firearm.” *Id.* (finding defendant “used” a firearm in the commission of a robbery, for the purposes of former Sec. 12022.5, when he pointed a gun at the victim and demanded money because the gun was utilized to accomplish the taking of personal property by “means of force or fear”).

The addition of this sentencing enhancement to California’s Assault with a Deadly Weapon statute elevates Assault with a Deadly Weapon from a “general intent” crime to a “specific intent” crime. Proof of Assault with a Deadly Weapon no longer requires proof that the defendant simply “generally intended” to commit an act, the natural consequence of which is injury. Rather, proof of this offense requires

proof that the defendant “specifically intended” to commit an act that created fear or apprehension of harm in another, by use of a firearm.

The addition of this sentencing enhancement to the California crime of Assault with a Deadly Weapon makes the crime factually comparable to the crime of Assault with a Deadly Weapon in Washington, using the third common law definition of assault (to wit: putting a person in apprehension of harm with or without the intent or present ability to inflict harm). Proof of both crimes requires proof of the same elements: (1) intentionally causing fear and apprehension of harm in another, (2) by use of a firearm, (3) whether or not the defendant actually intends to cause the harm. *See State v. Thompson*, 13 Wn. App. 1, 4, 533 P.2d (1975) (finding the Assault in the Second Degree statute “serves to punish the infliction of fear and apprehension in another by use of a weapon or other harmful instrument having the apparent capability to cause bodily injury” whether or not the defendant actually intends to cause harm).

In the defendant’s case, the California sentencing court found the sentencing enhancement of “personally using a firearm” was “charged and proven” for Count One (Assault with a Deadly Weapon). (RP 99). From this record, it is clear the defendant admitted or stipulated that he “personally used” a firearm in the commission of Count One as part of his plea agreement. Therefore, the defendant admitted or stipulated to facts

that elevated his particular crime to an offense that is substantially similar to the crime of Assault with a Deadly Weapon in Washington. This Court should find the defendant's California conviction for Assault with a Deadly Weapon is factually comparable to Washington's Assault in the Second Degree statute, which is a serious offense.

D. CONCLUSION

Because the defendant's California conviction for Assault with a Deadly Weapon is either legally or factually comparable to Washington's Assault in the Second Degree statute, the trial court did not err when it found the defendant's out-of-state conviction qualified as a predicate serious offense for the crime of Unlawful Possession of a Firearm in the First Degree. For this same reason, the evidence was sufficient to convict the defendant of Unlawful Possession of a Firearm in the First Degree. Also, the trial court properly included the defendant's California conviction for Assault with a Deadly Weapon in the defendant's offender score.

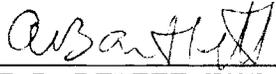
The defendant's convictions, including his conviction for Unlawful Possession of a Firearm in the First Degree, should be affirmed. The defendant's sentence should also be affirmed.

DATED this 6 day of February, 2012.

Respectfully submitted:

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