

No. 43717-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Raymond Arndt, Jr.**

Appellant.

---

Clallam County Superior Court Cause No. 12-1-00031-9

The Honorable Judge S. Brooke Taylor

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... ii**

**ASSIGNMENTS OF ERROR ..... 1**

**ISSUE PERTAINING TO ASSIGNMENTS OF ERROR..... 1**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2**

**ARGUMENT..... 2**

**Mr. Arndt’s sentence must be vacated because the sentencing judge erroneously counted Oregon convictions in the offender score. 2**

- A. The prosecution is required to prove the existence and comparability of any out-of-state conviction. .... 2
- B. Mr. Arndt’s Oregon rape conviction should not have been included in the offender score because Oregon defines the offense more broadly than the corresponding Washington felony and the state failed to prove factual comparability. .... 5
- C. Mr. Arndt’s Oregon DUI convictions should not have been included in the offender score because Oregon defines DUI more broadly than Washington and the state failed to prove that his conduct would have been criminal under RCW 46.61.502. .... 6
- D. Mr. Arndt’s Oregon conviction for attempted assault in the second degree should not have been included in the offender score because Oregon defines second-degree assault more broadly than Washington and the state failed

to prove that his conduct would have been punishable as a  
Washington felony..... 9

**CONCLUSION ..... 12**

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435  
(2000)..... 4

Blakely v. Washington. 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403  
(2004)..... 4

**WASHINGTON STATE CASES**

In re Cadwallader, 155 Wash.2d 867, 123 P.3d 456 (2005) ..... 6, 9, 11

In re Detention of Hawkins, 169 Wash.2d 796, 238 P.3d 1175 (2010) ..... 6

In re Pers. Restraint of Lavery, 154 Wash. 2d 249, 111 P.3d 837 (2005).. 4

Lindeman v. Kelso Sch. Dist. No. 458, 162 Wash.2d 196, 172 P.3d 329  
(2007)..... 7

State v. Christensen, 153 Wash.2d 186, 102 P.3d 789 (2004)..... 7

State v. Ford, 137 Wash.2d 472, 973 P.2d 452 (1999)..... 3, 4, 6

State v. Hayes, 165 Wash. App. 507, 265 P.3d 982 (2011)..... 4

State v. Larkins, 147 Wash. App. 858, 199 P.3d 441 (2008)..... 4

State v. Lilyblad, 163 Wash.2d 1, 177 P.3d 686 (2008) ..... 7

State v. Morley, 134 Wash.2d 588, 952 P.2d 167 (1998) ..... 3

State v. Thomas, 135 Wash. App. 474, 144 P.3d 1178 (2006) ..... 4

State v. Williams, 171 Wash.2d 474, 251 P.3d 877 (2011)..... 6

**WASHINGTON STATUTES**

RCW 46.61.502 ..... 6, 7

RCW 9.94A.500..... 2

RCW 9.94A.525..... 2, 3

RCW 9A.04.110..... 9, 10

RCW 9A.28.020..... 11

RCW 9A.36.021..... 9, 10

RCW 9A.44.079..... 5

**OTHER AUTHORITIES**

Dictionary.Com, based on The Random House Dictionary, Random  
House, Inc. (2012) ..... 7

Dyrdahl v. Dep't of Transp., Driver & Motor Vehicle Services Div., 204  
Or.App. 509, 131 P.3d 770 (2006) ..... 7

ORS 161.015..... 9, 10

ORS 161.405..... 11

ORS 163.355..... 5

ORS 813.010..... 7

State v. Moody, 201 Or.App. 58, 116 P.3d 935 (2005) on reconsideration,  
207 Or.App. 304, 140 P.3d 1171 (2006) ..... 7

WPIC 92.10..... 7

### **ASSIGNMENTS OF ERROR**

1. The sentencing judge erred by sentencing Mr. Arndt with an offender score of eight.
2. The prosecution failed to prove the comparability of Mr. Arndt's out-of-state convictions.
3. The sentencing judge erred by including Mr. Arndt's Oregon third-degree rape conviction in the offender score.
4. The sentencing judge erred by including Mr. Arndt's Oregon DUI convictions in the offender score.
5. The sentencing judge erred by including Mr. Arndt's Oregon conviction for attempted second-degree assault in the offender score.
6. The sentencing judge erred by concluding that Mr. Arndt's Oregon convictions were comparable to Washington offenses.

### **ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

An out-of-state conviction may not be included in the offender score unless the prosecution proves comparability to a Washington offense. Here, Mr. Arndt objected to inclusion of his Oregon convictions for rape, DUI, and attempted second-degree assault. Did the trial court err by including these Oregon convictions in the offender score without proof that each was comparable to the corresponding Washington offense?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Raymond Arndt, Jr. pled guilty to one count of vehicular assault. CP 5. At sentencing, he disputed the offender score alleged by the state. At issue were a number of offenses from Oregon, including unauthorized use of a motor vehicle, two DUIs, third-degree rape, and attempted assault in the second degree. RP 68-94; see also Ex. 1-6, Supp. CP.

The trial court found each of these disputed offenses comparable to a Washington offense. CP 7. Concluding that Mr. Arndt had an offender score of eight, the court sentenced him to 62 months in prison, and Mr. Arndt appealed. CP 4, 8.

## **ARGUMENT**

### **MR. ARNDT'S SENTENCE MUST BE VACATED BECAUSE THE SENTENCING JUDGE ERRONEOUSLY COUNTED OREGON CONVICTIONS IN THE OFFENDER SCORE.**

- A. The prosecution is required to prove the existence and comparability of any out-of-state conviction.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist.” RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile

felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

Out-of-state convictions are provided for in RCW 9.94A.525(3), which reads (in relevant part) as follows:

Out-of-state 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.

RCW 9.94A.525(3). Where the state alleges a defendant's criminal history contains out-of-state convictions, the prosecution bears the burden of proving the existence and comparability of those convictions. *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999). An out-of-state conviction may not be used to increase an offender score unless the state proves comparability. *Id.*

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Morley*, 134 Wash.2d 588, 606, 952 P.2d 167 (1998). "If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of

the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.” Ford, at 479 (citing Morley, at 606).

Other than the fact of a prior conviction, any fact used to increase the penalty for an offense must be proved to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Reliance on facts related to prior out-of-state conviction “implicates the concerns underlying *Apprendi* and *Blakely*,” accordingly, judicial fact finding must be limited.” *State v. Thomas*, 135 Wash. App. 474, 482, 144 P.3d 1178 (2006).

Because of this, the defendant’s underlying conduct may only be established with reference to “the undisputed facts from the record of the foreign conviction.” *State v. Larkins*, 147 Wash. App. 858, 863, 199 P.3d 441 (2008); see also *State v. Hayes*, 165 Wash. App. 507, 522, 265 P.3d 982 (2011). In light of *Apprendi* and *Blakely*, “[a]ny 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.” *In re Pers. Restraint of Lavery*, 154 Wash. 2d 249, 258, 111 P.3d 837 (2005).

- B. Mr. Arndt's Oregon rape conviction should not have been included in the offender score because Oregon defines the offense more broadly than the corresponding Washington felony and the state failed to prove factual comparability.

Mr. Arndt was convicted of third-degree rape in Oregon. Ex. 1, Supp. CP. Under ORS 163.355, "A person commits the crime of rape in the third degree if the person has sexual intercourse with another person under 16 years of age." In Washington, third-degree rape of a child requires proof of two additional facts: that the victim is "not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." RCW 9A.44.079.

Accordingly, the Oregon offense is broader than the corresponding Washington offense: in Oregon, the prosecution need not allege or prove the relative age of the parties or their marital status. Because the Oregon offense is broader, comparability analysis requires examination of the facts to which Mr. Arndt admitted in his Oregon guilty plea.

The record does not contain a copy of Mr. Arndt's plea form, or any other indication of the facts established in the Oregon proceeding. Ex. 1, Supp. CP; see CP and RP, generally. Mr. Arndt testified at sentencing, admitting certain facts relating to the Oregon conviction; however, his

testimony did not establish that he was 48 months older than the victim or that he was not married to her at the time of the offense.<sup>1</sup> RP 70-72.

Because the record does not contain evidence proving comparability, the Oregon rape conviction should not have been included in Mr. Arndt's offender score. Ford, at 480. Mr. Arndt's sentence must be vacated.

Because the state failed to sustain its burden even in the face of Mr. Arndt's comparability objection, the prosecution is held to the existing record on remand. In re Cadwallader, 155 Wash.2d 867, 878, 123 P.3d 456 (2005). The case must be remanded with instructions to exclude the Oregon rape from the offender score. Id.

C. Mr. Arndt's Oregon DUI convictions should not have been included in the offender score because Oregon defines DUI more broadly than Washington and the state failed to prove that his conduct would have been criminal under RCW 46.61.502.

A statute that involves a deprivation of liberty must be strictly construed. In re Detention of Hawkins, 169 Wash.2d 796, 801, 238 P.3d 1175 (2010). In interpreting a statute, the court's duty is to "discern and implement the legislature's intent." State v. Williams, 171 Wash.2d 474,

---

<sup>1</sup> The Oregon charging document alleges that the victim's date of birth was June 7, 1985, and the defendant's date of birth is given (in the Judgment) as January 18, 1978; however, nothing in the record indicates that Mr. Arndt stipulated to either of these particular dates to establish that the victim was under 16 at the time of the offense. Ex. 1, Supp. CP.

477, 251 P.3d 877 (2011). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wash.2d 186, 194, 102 P.3d 789 (2004). Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad*, 163 Wash.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wash.2d 196, 202, 172 P.3d 329 (2007).

In Washington, a person is "under the influence of or affected by intoxicating liquor" if her or his "ability to drive a motor vehicle is lessened in any appreciable degree." RCW 46.61.502(1)(b); WPIC 92.10. The word "appreciable" means "sufficient to be readily perceived or estimated; considerable." Dictionary.Com, based on *The Random House Dictionary*, Random House, Inc. (2012) (emphasis added).

In Oregon, by contrast, "a person is under the influence of intoxicating liquor or a controlled substance when the person's physical or mental facilities are adversely affected to a noticeable or perceptible degree." *State v. Moody*, 201 Or.App. 58, 63-64, 116 P.3d 935 (2005) on reconsideration, 207 Or.App. 304, 140 P.3d 1171 (2006) (citing ORS 813.010). The "noticeable or perceptible" standard requires only proof that the person is affected in "the slightest degree." See *Dyrdahl v. Dep't*

of Transp., Driver & Motor Vehicle Services Div., 204 Or. App. 509, 515-16, 131 P.3d 770 (2006).

The two statutes are similar, but not coextensive. The Washington statute focuses on a person's actual "ability to drive," and requires proof of an "appreciable" effect, while the Oregon statute permits conviction whenever "physical or mental facilities" are affected in even "the slightest degree." Because a person's "physical or mental facilities" can be affected in "the slightest degree" without any appreciable effect on her or his ability to drive a motor vehicle, Oregon law permits conviction for conduct that would not be criminal in Washington.

Because of this, it is necessary to delve into the facts underlying Mr. Arndt's Oregon DUI convictions. To establish the two convictions, the prosecution submitted an Indictment for each offense, a plea form (covering both offenses), and two "Judgment of Conviction and Sentence" documents (one for each offense). Exhibit 3, Supp. CP; see also Appendices A-C, attached to Memorandum Regarding Defendant's Offender Score, Supp. CP. Each document indicates that Mr. Arndt drove "under the influence;" however, none of them establish any facts showing that his ability to drive a motor vehicle was lessened to an appreciable degree. It is possible, therefore, that he was convicted based on evidence

that his physical or mental facilities were impacted in only the slightest degree, and that his conduct would not merit conviction in Washington.

Accordingly, the prosecution failed to prove comparability in this case. Because the state failed to sustain its burden even in the face of Mr. Arndt's comparability objection, the prosecution is held to the existing record on remand. *Cadwallader*, at 878. The sentence must be vacated and the case remanded for a new sentencing hearing with instructions to exclude the two Oregon DUIs from the offender score. *Id.*

D. Mr. Arndt's Oregon conviction for attempted assault in the second degree should not have been included in the offender score because Oregon defines second-degree assault more broadly than Washington and the state failed to prove that his conduct would have been punishable as a Washington felony.

In Washington, a person commits second-degree assault if she or he intentionally assaults another person and thereby recklessly causes substantial bodily harm, defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.36.021; RCW 9A.04.110. The corresponding Oregon crime requires only proof of "serious physical injury," defined as "physical injury which creates a substantial risk of death or which causes serious and protracted

disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.” ORS 161.015.

There are two significant differences between the statutes. First, unlike Washington Oregon does not require proof that the assault caused “substantial” impairment. Accordingly, protracted but insubstantial impairments qualify for conviction of the offense in Oregon but not in Washington.<sup>2</sup>

Second, Oregon permits conviction for impairment of a person’s “health;” the Washington offense contains no comparable provision. Thus, in Oregon, a person could be convicted of second-degree assault where the victim suffers a protracted impairment of health; similar conduct would not result in conviction under RCW 9A.36.021 unless the impairment of health consisted of “substantial loss or impairment of the function of any bodily part or organ [or] a fracture of any bodily part.” RCW 9A.04.110. It is possible to imagine injuries to a person’s health that do not involve fracture, or substantial impairment of function of a bodily part or organ. For example, a person who suffers lingering pain from an assault could be said to have impaired health, even if the pain does not result in any limitations on function of a bodily part or organ.

---

<sup>2</sup> By contrast, a second-degree assault causing “serious” disfigurement under Oregon law likely qualifies as second-degree assault in Washington. ORS 161.015.

An additional problem relates to the definition of attempt. In Washington, conviction for attempt requires proof of “intent to commit a specific crime,” accompanied by a substantial step toward the commission of that crime. RCW 9A.28.020. Oregon law allows conviction without proof of specific intent; instead, an attempt is complete whenever a person “intentionally engages in conduct which constitutes a substantial step toward commission of the crime.” ORS 161.405.

For all these reasons, an attempt to commit second-degree assault in Oregon does not necessarily qualify as a felony in Washington. As a result, it is necessary to examine the underlying facts. Here, the prosecution provided the court with an Indictment, a plea form, and a Judgment. Exhibit 2, Supp. CP; Appendices E-G, attached to Memorandum Regarding Defendant’s Offender Score, Supp. CP. None of these documents are sufficient to establish factual comparability. The Indictment contains the only hint of the underlying conduct for the attempted assault (originally charged as a completed assault). In Count I, the Indictment recites that Mr. Arndt “did unlawfully and knowingly cause serious physical injury to [another], by striking and grabbing her...” Exhibit 2, Supp. CP.

The prosecutor’s failure to prove comparability requires reversal of Mr. Arndt’s sentence. The case must be remanded with instructions to

exclude the attempted assault from his offender score. Cadwallader, at 878.

**CONCLUSION**

For the foregoing reasons, Mr. Arndt's sentence must be vacated and the case remanded for a new sentencing hearing.

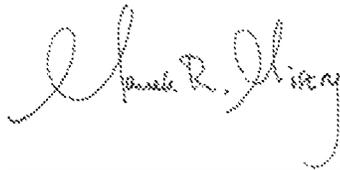
Respectfully submitted on January 9, 2013,

**BACKLUND AND MISTRY**



---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



---

Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Raymond Arndt, Jr. DOC #846892  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326

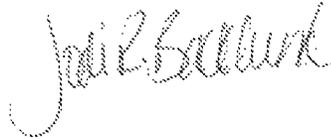
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clallam County Prosecuting Attorney  
lschrawy@co.clallam.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 9, 2013.



---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**January 09, 2013 - 8:23 AM**

## Transmittal Letter

Document Uploaded: 437171-Appellant's Brief.pdf

Case Name: State v. Raymond Arndt Jr.

Court of Appeals Case Number: 43717-1

**Is this a Personal Restraint Petition?**  Yes  No

### The document being Filed is:

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Answer/Reply to Motion: \_\_\_\_\_
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: [backlundmistry@gmail.com](mailto:backlundmistry@gmail.com)

A copy of this document has been emailed to the following addresses:  
[lschrawyer@co.clallam.wa.us](mailto:lschrawyer@co.clallam.wa.us)