

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II
NO. 43717-1-II
APPEAL FROM CLALLAM COUNTY NO. 12-1-00031-9

STATE OF WASHINGTON,

Respondent,

vs.

RAYMOND ARNDT Jr.,

Appellant.

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE ISSUE

Did the sentencing court correctly identify that some Oregon convictions contained elements substantially similar to Washington's statutory language, or correctly determine that the defendant's statements in his plea agreements would be acceptable in a similar conviction in Washington state, so that an offender score of 8 was correct?

STATEMENT OF THE CASE

On February 15, 2012, the State filed an information charging Raymond Uwe Arndt Jr. with vehicular assault (CP 1). On May 9, 2012, Mr. Arndt pleaded guilty as charged but reserved the right to challenge the State's computation of his offender score (5/9/12 RP 50 *et. seq.*).

Argument about the correct offender score was heard on June 19, 2012. Mr. Arndt challenged whether any Oregon convictions except assault of a peace officer should be included. At the beginning of the hearing, Mr. Arndt testified that the Oregon rape in the third degree conviction was a female less than 16 years of age (RP 70).

The sentencing court then heard argument about whether each of prior convictions would count in the offender score. The State provided a definition from *Dyrdahl v. Department of Transportation*, 204 Or.App. 509, 131 P.3d 770 (2006) to show the DUI convictions were substantially similar. The decision upheld the suspension of Dyrdahl's license in Oregon based

upon an Arizona DUI conviction. Under Oregon law, out-of-state convictions must be upheld for driver's licensing purposes if the out-of-state statute is "essentially the same" or "matched" or is "substantially similar" to the Oregon statute. The Oregon court held that "impaired to the slightest degree" from the Arizona statute is substantially similar to Oregon's "adversely affect that person's mental or physical faculties to some noticeable or perceptible degree." (RP 74). Mr. Arndt argued that Oregon's DUI statute was substantially different and required less proof than Washington's DUI statute (RP 76). He argued that Washington's standard, "a person is under the influence of alcohol if his consumption has lessened his ability to drive to [an] appreciable degree" relates only to a person's ability to drive, while Oregon's statute addresses a person's overall effect from alcohol (RP 75). Because Oregon only required proof that consumption of alcohol has lessened a person's physical or mental faculties "to a noticeable or perceptible degree," a person could be convicted in Oregon but

would not meet the Washington standard.

The sentencing court ruled the difference in language was a “distinction without a difference” and counted the Oregon convictions for DUI (RP 78).

The State next addressed the conviction for unauthorized use of a vehicle (RP 79). The State conceded that the statutory language was not similar, but argued that his statement in his guilty plea statement – “I drove a vehicle I had stolen” – was sufficient to count the conviction (RP 82). The sentencing court counted the conviction (RP 83).

The sentencing court then addressed the rape in the third degree conviction (RP 84). The State conceded the Oregon statute did not have an additional element that there must be a 48-month age difference (RP 84). Oregon only requires the victim be less than 16 years of age. However, the State argued the convictions were substantially similar because the judgment and sentence showed Mr. Arndt’s age at conviction was greater than 48 months more than the victim’s age (RP 84). Mr. Arndt

argued the Oregon statute was different because Oregon does not permit the defendant to assert that the victim misled the defendant about her age (RP 86). The sentencing court stated the 8-year difference would have been sufficient to constitute rape in the third degree in Washington and counted the point (RP 87).

The sentencing court then turned to the conviction for “assault 3” from Oregon (RP 88). The State conceded it was not legally or factually similar (RP 89). The State also conceded the conviction for Failure to Register as a Sex Offender was not legally or factually similar (RP 89).

The sentencing court then turned to convictions for attempted assault, second degree and assault against a public safety officer from 2007 (RP 89). The State focused on Mr. Arndt’s statement that he intentionally attempted to cause serious physical injury to one victim and intentionally caused physical injury to a peace officer (RP 90). Mr. Arndt did not challenge the conviction for assaulting a peace officer but did

not accept that Washington and Oregon law were the same for the attempted second degree assault (RP 91). He argued that, in Oregon, one only must have a general intent to commit a crime; in Washington one must have a specific intent to commit a crime (RP 91). Therefore, it is possible to commit a crime in Oregon that would not be a crime in Washington (RP 91). Mr. Arndt conceded that his plea statement said he “intentionally attempted to cause physical injury to” the victim but argued that it was unclear whether “intentionally” modified “attempted” or “cause physical injury.” (RP 91-2).

The sentencing court held the two statutes are not identical but the word “intentionally” in his statement showed a specific intent to cause serious bodily injury to this victim. The sentencing court counted the conviction (RP 93).

The sentencing court then turned to the resisting arrest charge. Both parties indicated to the court the charge was in the matrix simply to show “that it didn’t wash.” (RP 94).

The final two convictions were for Assault in the Third

Degree in Washington State (02-1-00098-9 and 03-1-00114-2) (RP 94). Mr. Arndt conceded these two convictions counted and the offender score, based on the trial court's ruling was 8. RP 94).

ARGUMENT

ISSUE

Did the sentencing court correctly identify that some Oregon convictions contained elements the same or substantially similar to the Washington's statutory language, or comparable language in the plea statement reviewed, so that an offender score of 8 was correct?

RESPONSE

The sentencing court correctly analyzed each Oregon statute to ascertain whether an offense in Oregon would be substantially similar to an offense in Washington state. In situations in which the statutes may be slightly different, the sentencing court correctly looked at the defendant's admitted conduct to determine that his plea would have been an admission to a similar charge in Washington state.

STANDARD OF REVIEW

A sentencing court may not count an offender's out-of-state conviction in the offender score unless the State proves by a preponderance of the evidence that the conviction would be a

crime under Washington law. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

ANALYSIS

To determine if a foreign conviction is comparable to a Washington offense, the sentencing court looks to the elements of the foreign crime to determine whether the offense is comparable to a Washington offense. If the foreign conviction is comparable, it is counted. If it is not identical, or if the foreign statute is broader than the Washington counterpart, the sentencing court may look at the defendant's conduct 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). "The key inquiry is under what Washington statute could the defendant have been convicted if he or she *had committed the same acts in Washington.*" *State v. Morley, id.*, quoting from *State v. Morkle*, 88 Wn.App. 485, 495, 945 P.2d 736 (1977) (emphasis in *Morley*).

Morley was applied in *In re the Personal Restraint*

Petition of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005).

There, the Supreme Court stated:

In cases in which the elements of the Washington crime and the foreign crime are not *substantially similar*, we have held that the sentencing court may look at the defendant's conduct, as evidenced by the indictment of information, to determine if the conduct itself would have violated a comparable Washington statute.

(emphasis added). *Lavery, id.* at 255.

The term "substantially similar" was employed by this court in *State v. Sublett*, 156 Wn.App. 160, 187, 231 P.3d 231 (2010), *review denied*, ___ Wn.2d ___, ___ P.3d ___ (2012). The term guides the analysis about whether the crimes are comparable. They need to be "substantially similar."

The State was unable to locate any Washington cases that defined the term "substantially similar." However, the term appears often in Washington cases. *See, e.g., Automotive United Trades Organization v. State*, 175 Wn.2d 214, 223, 285 P.3d 52 (2012) ("Because CR 19 is based on and is substantially similar to Fed.R.Civ.P. 19, we may look to the

abundant federal cases interpreting that rule for guidance.”)

A second example is found in *State v. Gresham*, 173 Wn.2d 405, 422, 269 P.3d 207 (2012). There, the Supreme Court quoted *State v. DeVincentis*, 150 Wn.2d 11, 19-21, 73 P.3d 119 (2003) to say “that while the prior act and charged crime must be markedly and substantially similar, the commonality need not be ‘a unique method of committing the crime.’”

Perhaps the clearest example of what “substantially similar” may mean came from a decision the State cited to the sentencing court. The State cited to *Dyrdahl v. Department of Transportation*, 204 Or.App. 509, 131 P.3d 770 (2005), which held that the terms “substantially similar,” “essentially the same” and “matched.” *Dyrdahl*, 131 P.2d 774 fn. 7). The Oregon court opined that the three terms meant essentially the same thing. Between *DeVincentis*’ statement that the offenses need not be uniquely the same and *Dyrdahl*’s assessment that “substantially similar” means the same as “essentially the same

or “matched,” the sentencing court did not err in any assessment of the Oregon convictions.

State v. Sublett, supra, provides guidance in assessing whether the Oregon statutes are substantially similar. Rather than look just at the language, the court compared the elements of the California and Washington statutes proved the same thing. The court held that the two statutes were “essentially identical” because both require the same five concepts. The court found the two statutes were “substantially equivalent.” *Sublett*, 156 Wn.App. 189, 231 P.3d (2010).

The “conviction in Washington for the same acts” test also applies to the facts of this case. *Morley*, at 588, 606 952 P.2d 167. Even with the minimal difference in language, the facts of the Oregon prior convictions would have created a conviction in Washington State.

Analysis of each Oregon conviction which the sentencing court accepted shows the statutes are substantially equivalent. Although the language may be slightly different, the overall

effect is the same.

Mr. Arndt challenges inclusion of the Oregon conviction for third degree rape. The State informed the sentencing court that the victim was younger than 16 and that Mr. Arndt was 23 at the time of the rape, so the facts showed at least a 48 month age difference. Mr. Arndt did not challenge the age difference; instead, he indicated he did not know the victim was younger than 16 (RP 86).¹ It is reasonable for a sentencing court to be aware that most people who are married would know their spouse's age. Mr. Arndt claims he did not know her age, but the age difference and facts of the conviction would support the reasonable inference the two were not married. There was no error when the sentencing court found that Mr. Arndt would have been convicted for the same act if it had occurred in Washington.

¹ Like many of the arguments on appeal, Mr. Arndt is presenting argument not presented below. Mr. Arndt did not challenge below that the Oregon statute does not contain an element that the state must prove the defendant and victim were not married. The arguments on appeal should not be before the court. The record supporting the sentencing court is sufficient to show there was no manifest error of constitutional magnitude.

Mr. Arndt challenged the two DUI convictions, contending that Oregon permitted a DUI conviction on less evidence than Washington. The DUI statutes are comparable. The *Dyrdahl* decision quoted *Chartrand v. Coos Bay Tavern*, 298 Or. 689, 699-700, 696 P.2d 513 (1985) to state that a person is under the influence of intoxicating liquor when he or she has consumed enough liquor to *adversely affect that person's mental or physical faculties to some noticeable or perceptible degree.* (emphasis in original). Washington employs a similar standard: A person is under the influence of or affected by intoxicating liquor is his or her ability to drive a motor vehicle is lessened in any appreciable degree. RCW 46.61.502(1) (b). Mr. Arndt admits the two statutes are similar but not coextensive. They are not required to be coextensive. He argues that "noticeable or perceptible" is not substantially similar to "lessened in any appreciable degree." Both terms require a level of impairment that affects their ability to safely drive a motor vehicle. The statutes do not have to read exactly

the same; they are comparable or substantially similar. The statutes pass muster.

Mr. Arndt next contends that the Oregon second degree assault statute is not similar to Washington's second degree assault statute because Washington employs the term "substantial bodily harm," while Oregon uses the term "serious physical injury" "which creates a substantial risk of death or which causes serious or protracted disfigurement or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."

The question is, would a defendant in Oregon be charged with second degree assault if he committed the same act in Washington state? *State v. Morley, supra*. In Washington, the facts must show substantial disfigurement, or a substantial loss or impairment of the function of any bodily part or organ, or a fracture. In Oregon, the facts must show an assault that creates a substantial risk of death, serious and protracted impairment of

health or protracted loss or impairment of the function of any bodily organ. In Washington, the injuries can be temporary but substantial. In Oregon, the injuries must be serious and protracted. "Substantial" equates with "serious." Both share the synonym "significant." Merriam-Webster online Thesaurus. In both states, the statute limits the injuries under consideration to significant injuries. In Oregon, the state must prove the injuries or loss of function is protracted. In Washington, the state need only prove the disfigurement or loss or impairment is substantial. A defendant charged with second degree assault in Oregon would be charged in Washington, while a defendant in Washington may not be chargeable in Oregon if the state cannot prove the injuries are protracted. The charges are substantially similar.

Mr. Arndt secondly points out that the Oregon statute permits conviction upon proof of "protracted impairment of health." Washington requires proof of "substantial loss or impairment of the function of any bodily part or organ,..." The

State cannot conceive of a scenario in which the term “health” can be interpreted more broadly than impairment of the function of *any* bodily part or organ. Lingering pain is generally traceable to a specific impairment of a body part or organ. This is a distinction without a difference.

Finally, Mr. Arndt argues that Washington attempt law is more limited than Oregon’s law. That may be so, but the sentencing court correctly determined that Mr. Arndt’s plea statement on June 6, 2007 met Washington’s more restrictive standard when Mr. Arndt stated “I intentionally attempted to cause serious physical injury” to the victim. State’s supp. CP Appendix E. There is no error.

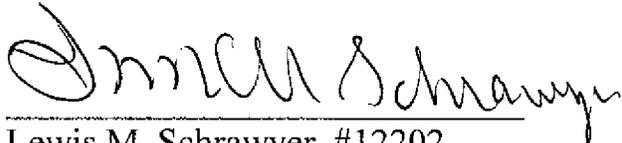
CONCLUSION

The sentencing court had each state’s statutes in mind when it decided the Oregon convictions should be counted. Although the language in each is not the same, a person charged with a crime in Washington would be charged with the same crime in Oregon, except for second degree assault. In Oregon,

the legislature has determined that injuries must be protracted. In Washington, the legislature has set the bar lower, permitting charging when the injuries are temporary. Thus, an Oregon conviction would count in Washington, but not the other way around. The sentencing court correctly determined Mr. Arndt's offender score. This Court should affirm.

Respectfully submitted this 2/1/2013.

DEBORAH KELLY, Prosecutor

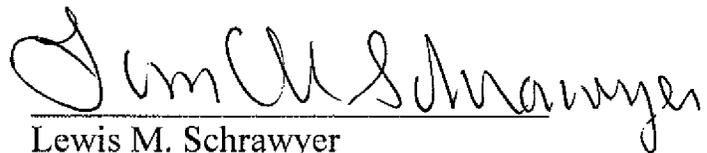


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CERTIFICATE OF DELIVERY

Lewis M. Schrawyer, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to backlundmistry@gmail.com on 2/1/2013.

DEBORAH KELLY, Prosecutor



Lewis M. Schrawyer

CLALLAM COUNTY PROSECUTOR

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