

NO. 43785-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DONTRAIL MONIQUE LATHAM,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it sentenced the defendant to life in prison under the Persistent Offender Act because the state failed to present admissible evidence that the defendant had two prior qualifying convictions for violent offenses.

Issues Pertaining to Assignment of Error

Does a trial court err if it sentences a defendant under the Persistent Offender Act when the state fails to present admissible evidence that the defendant had two prior qualifying convictions for violent offenses?

STATEMENT OF THE CASE

By information filed November 1, 2011, and twice amended, the state charged the defendant Dontrail Monique Latham with the following seven offenses: I. Second Degree Assault, II. Second Degree Assault, III. Felony Harassment, IV. Third Degree Assault, V. Fourth Degree Assault, VI. Obstructing a Law Enforcement Officer, and VII. Possession of Marijuana. CP 1-3. The state further alleged that the defendant committed the first five offenses against his girlfriend Trista Enriquez and her youngest child out of a continuing set of events occurring on October 27, 2011. *Id.* The state alleged that the defendant committed the last two offenses later that day when the police came to arrest him. *Id.*

This case eventually came on for trial before a jury, during which the state called Trista Enriquez as its first witness, along with twelve other witnesses. RP 132-528.¹ In her testimony, Ms Enriquez claimed that on the date in question, the defendant strangled her, beat her with his fists, stomped on her head after throwing her to the ground, hit her young child who was in her arms, and threatened to kill her. RP 132-230. Following her testimony, the state called two of Ms Enriquez' friends, a number of police officers, and

¹The record on appeal includes five volumes of continuously numbered verbatim reports of a number of pretrial motions, the trial, post-trial motions, and the sentencing hearing. There are referred to herein as "RP [page #]."

an Emergency Room Physician who treated Ms Enriquez. RP 231-528. A number of these witnesses testified to their contact with Ms Enriquez on the day in question and to seeing injuries on Ms Enriquez head, neck and torso consistent with the attacks she described. *Id.*

Following the close of the state's case, the defense called a single witness for brief testimony. RP 530, 535-543. The court then instructed the jury without objection from the defense, after which the parties presented their closing arguments and the jury retired for deliberation. RP 550-573, 573-608. After about an hour of deliberation, the jury returned verdicts of "guilty" on each charge. RP 611-615; CP 101-109.

On July 19, 2012, the court convened for sentencing in this case. RP 641-617. During this hearing, the state argued that the defendant should be sentenced under the Persistent Offender Act because he had two prior Nevada offenses that qualified as equivalent violent offenses under Washington law. These offenses were: (1) battery with substantial bodily harm under NRS 100.481 in the case of *State of Nevada v. Dontrail Monique Latham*, No. C196786 (the battery case), and (2) voluntary manslaughter under NRS 200.040, .050 and .080, in the case of *State of Nevada v. Dontrail Monique Latham*, No. C251961 (the voluntary manslaughter case). *Id.*

In support of this argument, the state moved to admit the following three documents from the defendant's battery case, marked as exhibits 13,

14 and 15:

Exhibit 13: transcript of guilty plea hearing held on December 11, 2003;

Exhibit 14: Guilty Plea Agreement dated December 11, 2003, with a copy of the Information attached as Appendix 1; and

Exhibit 15: Judgment and Sentence, dated February 12, 2004.

Sentencing Exhibits 13, 14, 15.

The state also moved to admit the following three documents from the defendant's voluntary manslaughter case, marked as exhibits 16, 17 and 18:

Exhibit 16: CD of guilty plea hearing held on February 12, 2009, with an accompanying Attestation of Authenticity;

Exhibit 17: Judgment and Sentence dated February 12, 2009; and

Exhibit 18: Guilty Plea Agreement dated February 19, 2009, with a copy of the Information attached as Appendix 1.

Sentencing Exhibits 16, 17, 18.

The defense did not object to the admission of these exhibits and the court granted the state's motion. RP 671. The defense conceded that the defendant was the person named in the documents. CP 110-136. However, the defense argued that the two offenses were neither legally nor factually comparable to Washington strike offenses. CP 110-136; RP 692.

Following consideration of these documents and argument of counsel, the court ruled that the state had proven that the defendant's Nevada

conviction for battery with substantial bodily injury under NRS 200.481(2)(b) was equivalent to the Washington strike offense of second degree assault under RCW 9A.33.021(1)(a) and that the defendant's Nevada conviction for voluntary manslaughter under NRS 200.040, .050 and .080 was comparable to the Washington strike offense of either first or second degree manslaughter under RCW 9A.32.060 or RCW 9A.32.070. RP 692-715. As a result, the court sentenced the defendant to life without the possibility of release on each of his two current convictions for second degree assault. CP 142-157, 158. The defendant thereafter filed timely Notice of Appeal. CP 159

ARGUMENT

THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT TO LIFE IN PRISON UNDER THE PERSISTENT OFFENDER ACT BECAUSE THE STATE FAILED TO PRESENT ADMISSIBLE EVIDENCE THAT THE DEFENDANT HAD TWO PRIOR QUALIFYING CONVICTIONS FOR VIOLENT OFFENSES

Under the Persistent Offender Accountability Act found in RCW 9.94A.570, defendants who qualify as “persistent offenders” must be sentenced to life in prison without the possibility of release. This provision states as follows in part:

Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release

. . . .

RCW 9.94A.570.

Under RCW 9.94A.030(37)(a), the definition of “persistent offender” includes the following elements:

(37) “Persistent offender” is an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted;

RCW 9.94A.030(37)(a).

Under RCW 9.94A.030(32)(b), the term “most serious offense,” is defined to include “assault in the second degree.” Thus, there is no question that the defendant’s current convictions for second degree assault each qualify as a “most serious offense” for the purpose of the RCW 9.94A.570. Rather, in the case at bar, the issue presented on appeal is whether or not the defendant’s Nevada convictions for battery with substantial bodily harm and voluntary manslaughter both qualify as “most serious offenses” sufficient to require application of the Persistent Offender Act. The state argued that they did and the court agreed. As the following explains, the state’s argument and the trial court’s ruling were in error.

The inclusion of foreign convictions in a defendant’s offender score or criminal history is controlled by RCW 9.94A.525(3), which states:

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

RCW 9.94A.525(3) (formerly codified as RCW 9.94A.360(3)).

Washington case law interpreting this statute indicates that in determining the effect of a foreign conviction, the sentencing court must first

compare the elements of the foreign conviction to elements of any comparable Washington statute. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). If the elements are identical, then the analysis ends. *State v. Bush*, 102 Wn.2d 372, 9 P.3d 219 (2000). However, if the foreign statute defines the offense in broader terms, the sentencing court must then look to the actual conduct to determine the equivalent Washington offense. *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998).

Evidence setting out the conduct that led to the foreign conviction can be found in supporting documents such as the Indictment, the Statement of Defendant on Plea of Guilty (if the defendant pled guilty), the Jury Instruction (if the defendant went to a jury trial), or the Judgment and Sentence. Upon determining the conduct proven, the court should then determine what crime, if any, it would constitute under Washington law. *State v. Morley, supra*. The state has the burden of producing sufficient evidence to prove by a preponderance of the evidence that the actual conduct constituted a particular offense in Washington. *State v. Ford, supra*. The appellate courts conduct a de novo review of this determination by the trial court. *State v. McCraw*, 127 Wn.2d 281, 898 P.2d 838 (1995).

For example, in *State v. Cameron*, 80 Wn.App. 374, 909 P.2d 309 (1996), the defendant pled guilty to delivery of heroin. At sentencing, the defendant stipulated that he had a prior federal conviction for conspiracy to

possess marijuana with intent to deliver. However, he argued that it had washed because he subsequently spent more than five consecutive years in the community crime free. The state agreed with the defendant's factual assertion, but argued that the conviction counted toward the defendant's offender score because (1) a ten year wash out period applied, and (2) the defendant had not spent ten years crime free (which fact the defendant conceded). The trial court agreed with the state's analysis, counted the prior federal conviction as three points, and sentenced the defendant to 36 months on a range of 36 to 48 months. The defendant then appealed, arguing that the correct range was from 21 to 27 months in prison.

In its analysis, the Court of Appeals first noted that in determining the applicability of a foreign conviction under RCW 9.94A.360(3) (now RCW 9.94A.525(3)), the court was required to analyze the elements of the foreign offense and compare it to the comparable Washington crime. Upon doing this, the court held that the federal conviction had the same elements as conspiracy to possess marijuana with intent to deliver under RCW 69.50.401(a)(1)(ii), which is a class C felony with a maximum term of five years in prison.

The Court of Appeals then addressed the state's argument that the prior federal conviction was a second drug offense, and that under RCW 69.50.408, the maximum applicable term was doubled to ten years in prison.

The Court of Appeals responded that it agreed with the state's legal analysis. However, it disagreed with the state's factual analysis, finding that the record indicated that the prior federal conviction had not been treated as a subsequent offense. Thus, the court held that the trial court should have applied the five year period, thus washing out the federal conviction. As a result, the court reversed and remanded for resentencing.

In the case at bar the defendant did not dispute the existence of his Nevada convictions for battery with substantial bodily harm and for voluntary manslaughter. Rather, he argued before the trial court that neither conviction was either legally or factually comparable to a Washington strike offense. As the following explains, his argument was correct and the trial court erred when it ruled to the contrary.

(1) The Defendant's Nevada Conviction for Battery with Substantial Bodily Harm Is Neither Legally Nor Factually Comparable to Second Degree Assault under Washington Law.

As was previously mentioned, sentencing exhibit No. 14 was the defendant's guilty plea agreement on the battery case. It included a copy of the information, which alleged as follows:

That DONTRAIL MONIQUE LATHAM, THE Defendant(S) above named, having committed the crime of BATTERY WITH SUBSTANTIAL BODILY HARM (felony - NRS 200.481), on or about the 7th day of October, 2003, within the county of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did then and there wilfully, unlawfully, and

feloniously use force or violence upon the person of another, to-wit: LORNA POLK, by punching the said LORNA POLK about the body numerous times, resulting in substantial bodily harm to the said LORNA POLK.

Sentencing Exhibit 14, Appendix (1) (capitalization in original).

The only other factual claim made concerning the nature of the defendant's conduct was presented during the court's colloquy with the defendant during the guilty plea hearing held on December 11, 2003. This portion of the colloquy went as follows:

The Court: What did you do on or about October 7th that caused you to plead guilty to the crime of battery with substantial battery [sic] harm?

The Defendant: I hit my ex-fiancee.

The Court: That resulted in substantial bodily harm to the victim?

The Defendant: Yes, your Honor.

Sentencing Exhibit 13 (original all capitalized).

As the information sets out, the state charged the defendant with Battery with Substantial Bodily Harm under NRS 200.481. The relevant portions of this statute state as follows:

1. As used in this section:

(a) "Battery" means any willful and unlawful use of force or violence upon the person of another. . . .

2. Except as otherwise provided in NRS 200.485, a person convicted of a battery, other than a battery committed by an adult

upon a child which constitutes child abuse, shall be punished:

(b) If the battery is not committed with a deadly weapon, and either substantial bodily harm to the victim results or the battery is committed by strangulation, for a category C felony as provided in NRS 193.130.

NRS 200.481 (in part).

In order to determine whether or not a conviction under this statute is equivalent to second degree assault as defined in RCW 9A.36.021, it is necessary to determine the definition under Nevada law for two phrases: (1) “willful and unlawful” as used in NRS 200.481(1)(a), and (2) “substantial bodily harm” as used in NRS 200.481(2)(b). Once these definitions are determined, they can be effectively compared to the terms used to define second degree assault in RCW 9A.36.021(1)(a).

Initially, it should be noted that in RCW 9A.08.010(1), the Washington Legislature has defined four descending levels of *mentes reae* in Washington criminal law. This statute states:

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) RECKLESSNESS. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)

In addition, Washington case law is clear that the term “assault” as used in our criminal statutes implicitly carries the requirement of an “intentional” mental state. Indeed, the failure of a charging document to include the language “intentionally” is not fatal to the notice requirement under the constitution because “assaults” are universally known to be “intentional” acts. *State v. Davis*, 119 Wn.2d 657, 835 P.2d 1039 (1992). Even were this not so, second degree assault under RCW 9A.36.021(1)(a) specifically requires proof of intent. This statute states:

(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;

RCW 9A.36.021(1)(a).

Initially, one might argue that the term NRS 200.481 is not the equivalent of RCW 9A.36.021(1)(a) because the former uses the *mens rea* element of “willful” while the latter uses “intentional.” However, this argument is superficial at best as it ignores the right of each state to define the terms it uses as it pleases. In fact, a review of Nevada cases indicates that the term “willful” as used in NRS 200.481 means “intentional” precisely as the term is used in Washington criminal statutes.” *See Langley v. State*, 84 Nev. 295, 439 P.2d 986 (1968) (“willful means intentional”); see also *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000).

However, where as the two statutes use the same initial *mens rea* requirement, they do differ in two essential elements. The first is that under the Nevada statute, there is no *mens rea* element associated with the infliction of injury. By contrast Washington law requires that the injury be inflicted “recklessly.” Second, the Nevada statutes define “substantial bodily injury” to include injury that does not fall within the Washington definition for the same term. The following addresses these arguments.

A careful review of the Nevada statute indicates that a person is guilty of battery with substantial bodily injury if one intentionally assaults another person and “substantial bodily injury” is the result of that assault even if the defendant did not act intentionally, knowingly, recklessly, or with criminal

negligence cause the injury. Once again, subsection (2)(b) of the statute states:

2. Except as otherwise provided in NRS 200.485, a person convicted of a battery, other than a battery committed by an adult upon a child which constitutes child abuse, shall be punished:

(b) If the battery is not committed with a deadly weapon, *and* either *substantial bodily harm to the victim results* or the battery is committed by strangulation, for a category C felony as provided in NRS 193.130.

NRS 200.481 (emphasis added).

The language of the Nevada statute is clear on its face. It only requires a causal link between the battery and the substantial bodily harm. Thus, it has only two elements: (1) an intentional battery, and (2) resultant substantial bodily harm. There is no requirement that the defendant act with any particular mental state in causing the injury. By contrast, to be guilty of second degree assault under RCW 9A.33.021(1)(a), there must be more than a mere causal link between the intentional assault and injury. There must be the culpable mental state of recklessness that results in the injury. Thus, under Washington law, there are two elements with two *mentes reae*: (1) an intentional assault, and (2) “recklessly” caused substantial bodily harm. Thus, it is possible to commit battery with substantial bodily harm under NRS200.481 without committing second degree assault under RCW 9A.33.021(1)(a) because the former statute is more expansive than the latter

and encompasses more conduct. As a result, the two statutes are not legally comparable.

Battery with substantial bodily harm under NRS200.481 is also more expansive than second degree assault under RCW 9A.33.021(1)(a) for a second reason. That reason is that the phrase “substantial bodily harm” under Nevada law includes conditions not included under the Washington definition for the same phrase. In fact, in NRS 0.060, the Nevada Legislature has provided a specific definition for the phrase “substantial bodily harm.”

It is as follows:

Unless the context otherwise requires, “substantial bodily harm” means:

1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
2. Prolonged physical pain.

NRS 0.060.

Thus, under Nevada law, a person may be guilty of battery with substantial bodily harm if he or she intentionally assaults another and thereby causes “prolonged physical pain.” By contrast, under Washington law, one who intentionally assaults another and thereby causes “prolonged physical pain,” (even if inflicted recklessly) can only be found guilty of third degree assault, not second degree assault. The reason is that the phrase “substantial

bodily harm” as defined in Washington does not include “prolonged physical pain.” This definition, found in RCW 9A.04.110(4)(b), states as follows:

(b) “Substantial bodily harm” means 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.04.110(4)(b).

The comparison of the two statutes is interesting indeed because each condition defined in NRS 0.060(1) is contained within RCW 9A.04.110(b)(b). In fact, the Nevada statute is more restrictive because it requires a “substantial risk of death” or “serious, permanent disfigurement” or “protracted loss or impairment of the function of any bodily member or organ,” whereas the Washington statute only requires a “temporary but substantial disfigurement” or a “temporary but substantial loss or impairment of the function of any bodily part.” However, while the Nevada statute is more restrictive in part (1) than is the Washington statute, it is less restrictive than the Washington Statute in part (2) because it includes the infliction of “prolonged physical pain” as an alternative method of causing substantial bodily harm while the Washington Statute does not.

In fact, the infliction of “prolonged physical pain” upon another is specifically defined in Washington as one of the alternative methods of committing third degree assault under RCW 9A.36.031(f). This statute

makes it a crime to intentionally assault another and, with criminal negligence, cause “bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” Thus, it is apparent that it is possible to commit battery with substantial bodily harm under NRS200.481 without committing second degree assault under RCW 9A.36.021(1)(a) because the former statute is more expansive than the latter and encompasses more conduct. As a result, the two statutes are not legally equivalent.

While the Nevada statute of battery with substantial bodily harm under which the defendant was convicted is not legally equivalent to second degree assault in Washington, the two statutes may be factually equivalent if the state meets its burden of proving that the actual conduct under which the defendant was convicted would constitute a second degree assault under Washington law. *See State v. Morley, supra*. However, as was explained previously, the state bears the burden of proving factual comparability. In this case, the state presented only one source of underlying facts related to the defendant’s Nevada conviction for battery with substantial bodily harm. This source was the guilty plea colloquy, wherein the following exchange took place:

The Court: What did you do on or about October 7th that caused you to plead guilty to the crime of battery with substantial battery [sic] harm?

The Defendant: I hit my ex-fiancee.

The Court: That resulted in substantial bodily harm to the victim?

The Defendant: Yes, your Honor.

Sentencing Exhibit 13 (original all capitalized).

This evidence does not prove factual comparability to second degree assault under Washington law because the court and the defendant did not explain what type of substantial bodily harm the defendant caused under NRS 0.060. It might have been “a substantial risk of death,” or injury which caused “serious, permanent disfigurement” or caused “protracted loss or impairment of the function of any bodily member or organ” under NRS 0.060(1), which would meet the Washington definition for substantial bodily harm under RCW 9A.04.110(4)(b). However, it might also have been “prolonged physical pain” under NRS 0.060(2), which would not meet the Washington definition for substantial bodily harm under RCW 9A.04.110(4)(b). Since the evidence the state presented fails to prove which alternative was met, any argument by the state that it proved factual comparability must also fail.

(2) The Defendant’s Nevada Conviction for Voluntary Manslaughter is Neither Legally Nor Factually Comparable to First or Second Degree Manslaughter under Washington Law.

In the case at bar, the state presented evidence at the sentencing

hearing that the defendant had been convicted of voluntary manslaughter under NRS 200.040, 200.050, and 200.080. This evidence included a copy of the information charging the defendant with this offense. It read as follows:

That DONTRAIL MONIQUE LATHAM, the Defendant(s) above named, having committed the crime of **VOLUNTARY MANSLAUGHTER (Category B Felony - NRS 200.040, 200.050, 200.080)**, on or about the 7th day of October, 2008, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did then and there without authority of law, wilfully, unlawfully, and feloniously, without malice and without deliberation kill GREGORY JOHN STUART, a human being, by the said defendant causing a blunt force trauma to the head of the said GREGORY JOHN STUART by striking the said GREGORY JOHN STUART with his fist and/or an unknown object and/or causing GREGORY JOHN STUART'S head to strike the ground and/or unknown object and/or by an unknown manner, said act of the defendant being the result of a sudden heat of irresistible passion caused by a provocation of the deceased.

Sentencing Exhibit 18 (capitalization and bold in original).

This information cites three statutes defining the crime: NRS 200.040, NRS 200.050 and NRS 200.080. The third statute is the punishment provision and neither defines the offense nor lists its elements. By contrast, the general definition for the term “manslaughter” is found in NRS 200.040, and the specific elements for “voluntary manslaughter” are found in NRS 200.050. The former statute reads as follows:

1. Manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of

deliberation.

2. Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.

3. Manslaughter does not include vehicular manslaughter as described in NRS 484B.657.

NRS 200.040.

Under Washington law there is no general definition for manslaughter separate from the specific definitions for first degree manslaughter under RCW 9A.32.060 and second degree manslaughter under RCW 9A.32.070. Rather, under RCW 9A.32.010, the Washington Legislature have provided a general definition to the word “homicide,” which ranges from first degree murder down to the justified killing of another person. This statute states:

Homicide is the killing of a human being by the act, procurement, or omission of another, death occurring at any time, and is either (1) murder, (2) homicide by abuse, (3) manslaughter, (4) excusable homicide, or (5) justifiable homicide.

RCW 9A.32.010.

Under Washington law, there is an important distinction to be found in this statute. That distinction is the Washington Legislature’s decision to treat some killings as “legal” as opposed to “illegal but excused.” This distinction found in RCW 9A.32.010(5) finds its expression in the legal rule in Washington that a person who uses deadly force to kill another in defense

of self or others is committing no crime. *See* RCW 9A.16.020. In other words, the act of killing in this instance is “justified” or “legal” as opposed to “illegal but excused.” *Id.* Thus, in Washington, when a person charged with homicide or assault claims self-defense and there exists any evidence whatsoever to support the claim, the burden of disproving self-defense becomes an element of the offense which the state had the burden of disproving beyond a reasonable doubt. *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977); *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977).

The second statute cited in the information, NRS 200.050, specifically defines “voluntary manslaughter” and sets out its elements. This statute states:

1. In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

2. Voluntary manslaughter does not include vehicular manslaughter as described in NRS 484B.657.

NRS 200.050.

By contrast, under Washington law, manslaughter in the first degree is defined as follows:

- (1) A person is guilty of manslaughter in the first degree when:
 - (a) He or she recklessly causes the death of another person; or

(b) He or she intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.

(2) Manslaughter in the first degree is a class A felony.

RCW 9A.32.060.

Manslaughter in the second degree is defined almost identically, except as to the *mens rea* element. This statute states:

(1) A person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person.

(2) Manslaughter in the second degree is a class B felony.

RCW 9A.32.070.

The legal distinction between voluntary manslaughter under Nevada law and manslaughter or any other offense under Washington law is that under Nevada law, the decedent must have provoked the commission of the crime by either inciting or attacking the defendant first. As the language from the second half of the statute states: “there must be a serious and highly provoking injury inflicted upon the person killing . . . or an attempt by the person killed to commit a serious personal injury on the person killing.” In other words, for the voluntary manslaughter statute to apply under Nevada law, the decedent must have attacked the defendant. There is no requirement that the defendant act either “recklessly” (first degree manslaughter) or “with criminal negligence” (second degree manslaughter) as is required in Washington. Thus, a person who acts in self defense and kills because he or

she was resisting an attack could still be found guilty of voluntary manslaughter under Nevada law but not guilty under Washington law.

In addition, a person could be convicted under the Nevada statute without any proof that he or she acted with a *mens rea* of recklessness or criminal negligence.” However, absent one of these mental states, the same person would not be guilty under Washington law. As a result, there are a number of ways to commit the Nevada statute without committing the Washington offense. Consequently, the two offenses are not legally comparable. In addition, as the following explains, the state in this case failed to present evidence that the defendant’s Nevada voluntary homicide conviction was factually comparable to manslaughter in Washington.

Apart for the factual claims made in the information, the only other facts presented relating to the defendant’s conduct came from playing the tape of the defendant’s guilty plea hearing in Nevada. During that hearing, the defendant entered an *Alford* plea to voluntary manslaughter. As part of the hearing, the state presented the following factual basis for the plea:

JUDGE: (Inaudible). I want you to listen now to the facts that are going to be put on the record by the State, okay?

DEFENDANT: All right.

PROSECUTOR: Thank you, Judge. That on or about the 7th day of October, 2008, here within the County of Clark, State of Nevada, the Defendant and the named victim, Gregory John Stewart met for a drug transaction. They went into an alley and during the process of

the drug transaction, Mr. Latham got into a fight with Mr. Stewart. In the process of the fight, Mr. Latham did in fact kill Mr. Stewart through force of violence willfully, feloniously, and without malice of forethought, deliberation, (inaudible). Mr. Stewart died as a result of (inaudible).

JUDGE: (Inaudible)?

DEFENDANT: Yes, sir.

JUDGE: Did you hear that factual basis put on the record by the State, sir?

DEFENDANT: Yes, I have.

JUDGE: You're not contesting those facts, are you?

DEFENDANT: No.

JUDGE: (Inaudible) – of more serious charges of second degree murder, is that correct?

DEFENDANT: Yes.

JUDGE: (Inaudible) – in those serious charges?

DEFENDANT: Yes, sir.

RP 689-690.

This evidence does not prove either a first degree manslaughter or second degree manslaughter under Washington law for three reasons. First, it raises facts supporting self-defense but fails to allege that the defendant was not acting in self-defense. Second, it fails to allege or prove that the defendant acted recklessly in causing the death. Third, it fails to allege or prove that the defendant acted with criminal negligence in causing the death.

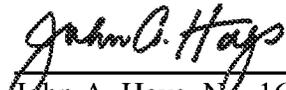
Thus, the state's evidence failed to prove factual comparability, and the trial court erred when it sentenced the defendant under the Persistent Offender Act. As a result, this court should vacate the defendant's sentence and remand for a new trial.

CONCLUSION

The trial court erred when it sentenced the defendant under the Persistent Offender Act. As a result, this court should vacate the defendant's sentences and remand for resentencing within the standard range.

DATED this 4th day of March, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

NRS 0.060 “Substantial Bodily Harm” Defined

Unless the context otherwise requires, “substantial bodily harm” means:

1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
2. Prolonged physical pain.

NRS 200.040 “Manslaughter” Defined

1. Manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation.
2. Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.
3. Manslaughter does not include vehicular manslaughter as described in NRS 484B.657.

NRS 200.050 “Voluntary Manslaughter” Defined

1. In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.
2. Voluntary manslaughter does not include vehicular manslaughter as described in NRS 484B.657.

NRS 200.080
Punishment for Voluntary Manslaughter

A person convicted of the crime of voluntary manslaughter is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than \$10,000.

NRS 200.481
Battery: Definitions; Penalties

1. As used in this section:

(a) "Battery" means any willful and unlawful use of force or violence upon the person of another.

(b) "Child" means a person less than 18 years of age.

(c) "Officer" means:

(1) A person who possesses some or all of the powers of a peace officer;

(2) A person employed in a full-time salaried occupation of fire fighting for the benefit or safety of the public;

(3) A member of a volunteer fire department;

(4) A jailer, guard, matron or other correctional officer of a city or county jail or detention facility;

(5) A justice of the Supreme Court, district judge, justice of the peace, municipal judge, magistrate, court commissioner, master or referee, including, without limitation, a person acting pro tempore in a capacity listed in this subparagraph; or

(6) An employee of the State or a political subdivision of the State whose official duties require the employee to make home visits.

(d) "Provider of health care" has the meaning ascribed to it in NRS 200.471.

(e) “School employee” means a licensed or unlicensed person employed by a board of trustees of a school district pursuant to NRS 391.100.

(f) “Sporting event” has the meaning ascribed to it in NRS 41.630.

(g) “Sports official” has the meaning ascribed to it in NRS 41.630.

(h) “Strangulation” means intentionally impeding the normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person in a manner that creates a risk of death or substantial bodily harm.

(i) “Taxicab” has the meaning ascribed to it in NRS 706.8816.

(j) “Taxicab driver” means a person who operates a taxicab.

(k) “Transit operator” means a person who operates a bus or other vehicle as part of a public mass transportation system.

2. Except as otherwise provided in NRS 200.485, a person convicted of a battery, other than a battery committed by an adult upon a child which constitutes child abuse, shall be punished:

(a) If the battery is not committed with a deadly weapon, and no substantial bodily harm to the victim results, except under circumstances where a greater penalty is provided in this section or NRS 197.090, for a misdemeanor.

(b) If the battery is not committed with a deadly weapon, and either substantial bodily harm to the victim results or the battery is committed by strangulation, for a category C felony as provided in NRS 193.130.

(c) If:

(1) The battery is committed upon an officer, provider of health care, school employee, taxicab driver or transit operator who was performing his or her duty or upon a sports official based on the performance of his or her duties at a sporting event;

(2) The officer, provider of health care, school employee, taxicab driver, transit operator or sports official suffers substantial bodily harm or the

battery is committed by strangulation; and

(3) The person charged knew or should have known that the victim was an officer, provider of health care, school employee, taxicab driver, transit operator or sports official, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than \$10,000, or by both fine and imprisonment.

(d) If the battery is committed upon an officer, provider of health care, school employee, taxicab driver or transit operator who is performing his or her duty or upon a sports official based on the performance of his or her duties at a sporting event and the person charged knew or should have known that the victim was an officer, provider of health care, school employee, taxicab driver, transit operator or sports official, for a gross misdemeanor, except under circumstances where a greater penalty is provided in this section.

(e) If the battery is committed with the use of a deadly weapon, and:

(1) No substantial bodily harm to the victim results, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, and may be further punished by a fine of not more than \$10,000.

(2) Substantial bodily harm to the victim results or the battery is committed by strangulation, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than \$10,000.

(f) If the battery is committed by a probationer, a prisoner who is in lawful custody or confinement or a parolee, without the use of a deadly weapon, whether or not substantial bodily harm results and whether or not the battery is committed by strangulation, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years.

(g) If the battery is committed by a probationer, a prisoner who is in lawful custody or confinement or a parolee, with the use of a deadly weapon, and:

(1) No substantial bodily harm to the victim results, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years.

(2) Substantial bodily harm to the victim results or the battery is committed by strangulation, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years.

RCW 9A.04.110(4)
Definitions

In this title unless a different meaning plainly is required:

. . .

(4)(a) “Bodily injury,” “physical injury,” or “bodily harm” means physical pain or injury, illness, or an impairment of physical condition;

(b) “Substantial bodily harm” means 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;

(c) “Great bodily harm” means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ; . . .

RCW 9A.16.020
Use of Force – When Lawful

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

(1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer’s direction;

(2) Whenever necessarily used by a person arresting one who has committed a felony and delivering him or her to a public officer competent to receive him or her into custody;

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary;

(4) Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person's presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public;

(5) Whenever used by a carrier of passengers or the carrier's authorized agent or servant, or other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than is necessary to expel the offender with reasonable regard to the offender's personal safety;

(6) Whenever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person, or in enforcing necessary restraint for the protection or restoration to health of the person, during such period only as is necessary to obtain legal authority for the restraint or custody of the person.

RCW 9A.32.010
Homicide Defined

Homicide is the killing of a human being by the act, procurement, or omission of another, death occurring at any time, and is either (1) murder, (2) homicide by abuse, (3) manslaughter, (4) excusable homicide, or (5) justifiable homicide.

RCW 9A.32.060
Manslaughter in the First Degree

- (1) A person is guilty of manslaughter in the first degree when:
 - (a) He or she recklessly causes the death of another person; or
 - (b) He or she intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.
- (2) Manslaughter in the first degree is a class A felony.

RCW 9A.32.070
Manslaughter in the Second Degree

- (1) A person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person.
- (2) Manslaughter in the second degree is a class B felony.

RCW 9A.36.021
Assault in the Second Degree

- (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; or
 - (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
 - (c) Assaults another with a deadly weapon; or
 - (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
 - (e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

RCW 9A.36.031
Assault in the Third Degree

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or

(c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(e) Assaults a firefighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

(h) Assaults a peace officer with a projectile stun gun; or

(i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: “Nurse” means a person licensed under chapter 18.79 RCW; “physician” means a person licensed under chapter 18.57 or 18.71 RCW; and “health care provider” means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW; or

(j) Assaults a judicial officer, court-related employee, county clerk, or county clerk’s employee, while that person is performing his or her official duties at the time of the assault or as a result of that person’s employment within the judicial system. For purposes of this subsection, “court-related employee” includes bailiffs, court reporters, judicial assistants, court managers, court managers’ employees, and any other employee, regardless of title, who is engaged in equivalent functions.

(2) Assault in the third degree is a class C felony.

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

STATE OF WASHINGTON,
Respondent,

NO. 43785-6-II

vs.

AFFIRMATION OF
OF SERVICE

DONTRAIL M. LATHAM,
Appellant.

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On March 4th, 2013, I personally placed in the United States Mail and/or E-filed the following document with postage paid to the indicated parties:

1. BRIEF OF APPELLANT

SUE BAUR
COWLITZ CO PROS ATTY
312 SW. FIRST AVE.
KELSO, WA 98626

DONTRAIL M. LATHAM- #359605
WA STATE PENITENTIARY
1313 N. 13TH AVE.
WALLA WALLA, WA 99362

Dated this 4TH day of March, 2013, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant

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