

**NO. 43785-6-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**DONTRAIL MONIQUE LATHAM,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The appellant was charged by amended information with seven offenses, including two counts assault in the second degree – domestic violence. CP 1-3. These charges stemmed from an incident where the appellant strangled and beat his girlfriend, Trista Enriquez, along with her young child, over the course of a single day in October of 2011.

The case proceeded to jury trial on May 22, 2012, before the Honorable Judge Pro Tem Dennis Maher. After hearing the testimony of a number of witnesses, the jury returned guilty verdicts for all counts, including the charges of assault in the second degree. CP 101-109.

A sentencing hearing was then held on July 19, 2012. RP 641-717. At this proceeding, the State offered evidence the appellant had been convicted of two offenses in Nevada that qualified as most serious offenses under Washington law.<sup>1</sup> Specifically, these offenses were (1) battery with substantial bodily harm and (2) voluntary manslaughter.

Judge Maher, having considered the record and applicable law, found these two prior convictions were comparable to most serious offenses under Washington law and imposed a sentence of life in prison without the possibility of early release, pursuant to the Persistent Offender

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<sup>1</sup> The appellant did not dispute that he had been convicted of these offenses.

Accountability Act, for the assault in the second degree convictions. CP 142-158. The instant appeal timely followed.

## **II. STATEMENT OF THE CASE**

The State generally agrees with the facts and procedural history set forth by the appellant. Where appropriate, the State cites to additional facts in the record.

## **III. ISSUES PRESENTED**

1. **Did the trial court err by finding the appellant's Nevada conviction for battery with substantial bodily harm was comparable to a most serious offense under Washington law?**
2. **Did the trial court err by finding the appellant's Nevada conviction for voluntary manslaughter was comparable to a most serious offense under Washington law?**

## **IV. SHORT ANSWERS**

1. **No.**
2. **No.**

## **V. ARGUMENT**

- i. **The Trial Court Properly Sentenced the Appellant as a Persistent Offender.**

The Persistent Offender Accountability Act mandates a life sentence without the possibility of early release for offenders convicted on three separate occasions of "most serious offenses." A "most serious

offense” is defined in RCW 9.94A.030(32), which includes a list of both types of crimes and specific offenses.<sup>2</sup> An out-of-state conviction may count as a most serious offense if it is comparable to a Washington crime that qualifies as a most serious offense. RCW 9.94A.030(32)(u); State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998). If an offender receives three separate convictions for most serious offenses, he becomes a “persistent offender” and receives a mandatory life sentence without the possibility of early release. RCW 9.94A.030(37), RCW 9.94A.570.

In the instant case, the appellant was convicted at trial of a most serious offense, assault in the second degree. RCW 9.94A.030(32)(b). Thus, the question before the sentencing court was whether the appellant’s prior Nevada convictions for battery with substantial bodily harm under NRS 100.481 and voluntary manslaughter under NRS 200.040, NRS 200.050, and NRS 200.080 were comparable to most serious offenses under Washington law.

To determine if a foreign conviction is comparable to a Washington offense, a court first considers whether the elements of the two crimes are the same. State v. Wiley, 124 Wn.2d 679, 684, 880 P.2d 983 (1994). If the elements are the same, the offense is legally comparable to a Washington crime. However, if the elements differ, or the foreign

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<sup>2</sup> Most serious offenses are often commonly referred to as “strike offenses.”

statute is broader than the Washington offense, the court must determine whether the particular crime committed is factually comparable to a Washington crime. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

In determining factual comparability, 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.” Morley, 134 Wn.2d at 606; quoting State v. McCorkle, 88 Wn.App. 485, 495, 945 P.2d 736 (1997). To determine the acts the defendant committed, the court may look to the charging documents, plea colloquy, jury instructions, or other sources. Id.

The appellant argues the trial court erred by finding both of these offenses were comparable and sentencing him as a persistent offender. However, a comprehensive review of the criminal law of Washington and Nevada supports the trial court’s finding of comparability.

**a. The Appellant’s Conviction For Battery With Substantial Bodily Harm is Comparable to a Most Serious Offense Under Washington Law.**

The appellant argues his conviction for battery with substantial bodily harm is not comparable to the Washington crime of assault in the second degree because (1) the Nevada crime lacks the *mens rea*

requirement of recklessness found in Washington and (2) Nevada's definition of "substantial bodily harm" differs from the Washington definition.

Nevada defines the crime of battery with substantial bodily harm in NRS 200.481. The term "battery" is defined as "any willful and unlawful use of force or violence upon the person of another." NRS 200.481(1)(a). Battery is punishable in Nevada as a category C felony:

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.

NRS 200.481(2)(b).

The appellant concedes that Nevada's requirement that a battery be willful is comparable to Washington's requirement an assault be intentional, based on Nevada case-law defining this term. Appellant's brief at 14, Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). The appellant instead argues the statutes are not comparable because Washington requires an additional *mens rea* of recklessly inflicting bodily harm, RCW 9A.36.021(1)(a), while Nevada only requires that substantial bodily harm results to the victim.

Though perhaps appealing at first blush, this argument runs afoul of the nuances of Nevada's criminal code. Unlike Washington, Nevada's statutory scheme includes a requirement for a "unity of act and intent" to

constitute a crime. NRS 193.190 states “In every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence.” Thus, under Nevada’s criminal code, a crime exists only where there is a combination of act and intent, thus supplying a higher level of *mens rea* than required for assault in the second degree in Washington. When a *mens rea* of recklessness is required, liability may be established where the person acted intentionally, as the greater *mens rea* will satisfy the lesser requirement. RCW 9A.08.010(2).

Significantly, Nevada courts have found that battery with substantial bodily harm under NRS 200.481 cannot stand where the injury was accidentally inflicted, as the statute requires a “willful use of force of violence.” McDonald v. Sheriff of Carson City, 89 Nev. 326, 512 P.2d 774 (1973). Nevada has thereby established a stricter standard for battery resulting in physical injury than Washington, so that a person with the requisite *mens rea* for the Nevada offense would necessarily have the required mental state under Washington law. The *mens rea* element of this offense is therefore comparable to a most serious offense in Washington, and it legally comparable.

Additionally, if the Court looks further to factual comparability, the acts in question clearly establish the defendant, at a minimum,

recklessly inflicted substantial bodily harm for his battery conviction. The information to which the appellant pled guilty charged that he:

“[D]id then and there willfully, 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, in part (capitalization in original). As noted by this Court, without question any reasonable person knows that punching a person multiple times may cause significant injuries. State v. R.H.S., 94 Wn.App. 844, 847, 974 P.2d 1253 (1999); State v. Keend, 140 Wn.App. 858, 870, 166 P.3d 1268 (2007). On these facts, the appellant would be guilty of assault in the second degree if the acts had occurred in the State of Washington. The potential result of punching a woman numerous times, substantial bodily harm, would be obvious to any reasonable person, making these acts factually comparable. Morley, 134 Wn.2d at 606.

The appellant’s second argument is that the definition of substantial bodily harm in Nevada is broader than the same term’s definition in Washington. This argument is based upon the second prong of Nevada’s statute defining substantial bodily harm:

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. The appellant argues the inclusion of “prolonged physical pain” prevents the offense of battery from being comparable with assault in the second degree, as prolonged physical pain would not meet the threshold required under Washington law. However, this argument misapprehends the meaning of both Nevada and Washington’s definition of “substantial bodily harm.”

Washington defines “substantial bodily harm” 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.04.110(4)(b). This definition is thereby linked to the meaning of “bodily injury.” Bodily injury is itself defined as “*physical pain* or injury, illness, or an impairment of physical condition.” RCW 9A.04.110(4)(a) (emphasis added). With this meaning of bodily injury understood, substantial bodily harm can be defined as:

[*physical pain*] 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.

It is therefore incorrect to state, as the appellant argues, that physical pain cannot constitute substantial bodily harm. Physical pain may qualify as substantial bodily harm where it leads to the temporary but substantial negative effects set forth in RCW 9A.04.110(4)(b), such as loss or impairment of bodily functions.

Nevada case-law is also instructive on the fuller meaning of the term “prolonged physical pain” in 0.060. In Collins v. State, 125 Nev. 60, 64, 203 P.3d 90 (2009), the Nevada court noted that prolonged physical pain must be understood to require “physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act.” Notably, the injuries at issue in Collins included a skull fracture, seizure risk, and significant impairment of the victim’s ability to move and work. 125 Nev. at 62. See also Gibson v. State, 95 Nev. 99, 590 P.2d 158 (1979) (injuries including a crushed nose, broken wrist, and facial lacerations sufficient to cause prolonged physical pain.) As can be seen from these cases, prolonged physical pain under Nevada law is not trivial or inconsequential, but clearly rises to at least the level of substantial bodily harm under Washington law. The element of substantial bodily harm is thus legally comparable between battery and assault in the second degree.

Finally, the acts at issue in the appellant’s battery conviction would be factually comparable to substantial bodily harm required for assault in

the second degree. The appellant was convicted of battery by repeatedly punching a woman about the body, resulting in either bodily injury such as a risk of death, permanent disfigurement, the loss of bodily function, or prolonged physical pain. The only reasonable conclusion to be drawn from the facts of the appellant's battery conviction is that he inflicted a grave injury upon his victim. It is extremely difficult to understand how the appellant could have inflicted prolonged physical pain *without* simultaneously inflicting significant bodily injury, particularly given the serious nature of this term under Nevada law.

For these reasons, the trial court did not err by finding the appellant's conviction for battery with substantial bodily harm was comparable to the crime of assault in the second degree in Washington. This holding is supported by the statutory schemes of the two states, and the case-law addressing both offenses. This Court should affirm this ruling.

**b. The Appellant's Conviction For Voluntary Manslaughter is Comparable to a Most Serious Offense Under Washington Law.**

The appellant argues the trial court erred by finding his Nevada conviction for voluntary manslaughter comparable to either manslaughter in the first degree or manslaughter in the second degree in Washington.

The appellant claims that (1) the facts support a claim of self-defense under Washington law and (2) there was no showing the appellant acted recklessly or negligently in causing the victim's death. Both of these arguments are without foundation in fact or law, as will be seen.

Nevada defines manslaughter, in pertinent part, as:

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.

NRS 200.040 (excluding provisions not related to voluntary manslaughter).

Voluntary manslaughter is defined as:

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.

NRS. 200.50.

The information charging the appellant with voluntary manslaughter read, in pertinent part:

[D]id then and there without authority of law, willfully, 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 fists 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 in the original).

The appellant alleges that in Nevada a person may be convicted of voluntary manslaughter where the killing occurred in self-defense, and argues this defeats any comparability between this offense and Washington law. This claim ignores a number of provisions apparent in the Nevada statutes, including that manslaughter is the “*unlawful* killing of any human being.” NRS 200.40 (emphasis added). Indeed, Nevada case law makes plain that, as in Washington, the burden of disproving self-defense or justified homicide lies with the prosecution. St. Pierre v. State, 96 Nev. 887, 620 P.2d 1240 (1980) (error to instruct jury that defendant must prove self-defense); Hill v. State, 98 Nev. 295, 647 P.2d 370 (1982) (burden of disproving self-defense in on State). This argument is wholly without support in Nevada law. In order for the appellant to be guilty of voluntary manslaughter, he could not have been acting in self-defense.<sup>3</sup>

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<sup>3</sup> The appellant argues that the “serious and highly provoking injury” element of voluntary manslaughter in NRS 200.050 suggests he must have been acting in self-defense. Again, this argument is based on a misunderstanding of Nevada law. The provoking injury need not be an actual assault upon the defendant, but can be any sort of serious insult or emotional harm. Roberts v. State, 102 Nev. 170, 717 P.2d 1115 (1986) (victim’s act of infidelity constituted sufficient provocation for voluntary manslaughter).

Additionally, even if Nevada's approach to self-defense was as claimed by the appellant, different defenses do not prevent an offense from being comparable. State v. Jordan, 158 Wn.App. 297, 241 P.3d 464 (2010) (Texas approach to self-defense, though substantially less favorable to defendant than Washington law, did not prevent manslaughter conviction from being comparable). The inclusion of the "provocation" element in the Nevada statute is similarly irrelevant, as a foreign crime that is *narrower* than a Washington crime does not preclude comparability, as the concern is that the foreign statute may criminalize acts that would not be offenses in Washington. Morley, 134 Wn.2d 588. The Court should reject this argument, as it is without any actual legal foundation.

Next, the appellant argues there was no element or proof that he recklessly or negligently caused the victim's death. This claim is incorrect, as the charging information and the appellant's plea hearing established that he acted willfully, i.e. intentionally. The information charged that the appellant "[d]id then and there without authority of law, *willfully*, unlawfully, and feloniously, without malice and without deliberation kill GREGORY JOHN STUART." Sentencing Exhibit 18 (emphasis added). During his plea hearing, the appellant agree to a recitation of facts that

included the statement “Mr. Latham did in fact kill Mr. Stewart through force of violence *willfully*, feloniously.” RP 689-690 (emphasis added).

The appellant admits that Nevada’s use of the term willfully is equivalent to intent in Washington. Appellant’s brief at 14. Given this, the appellant would be liable for manslaughter if he acted intentionally, as this greater mental state would satisfy the elements of either degree of the crime. RCW 9A.08.010(2). Indeed, the facts admitted at the plea hearing would also establish the appellant’s guilt for the offense of felony murder in the second degree, predicated on an assault, under RCW 9A.32.50(1)(b) were the crime to have occurred in Washington. Thus, the voluntary manslaughter conviction would also be factually comparable to murder in the second degree. This offense, and either degree of manslaughter, are most serious offenses. RCW 9.94A.030(32)(a),(k),(l).

This Court should affirm the trial court’s holding that voluntary manslaughter was comparable to a most serious offense under Washington law. As the appellant’s current convictions for assault in the second degree would then be his third conviction for most serious offenses, the Persistent Offender Accountability Act mandates a sentence of life in prison without the possibility of early release. The trial court correctly imposed this sentence, and its judgment should be upheld.

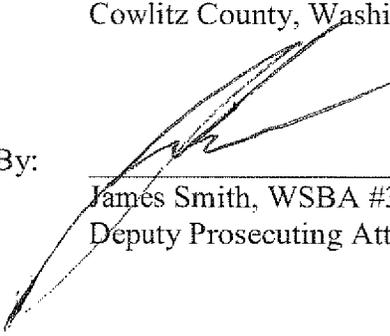
**VI. CONCLUSION**

Based on the preceding argument, the State asks the Court to deny the appeal. The trial court correctly found the appellant's Nevada convictions were comparable to most serious offenses under Washington law. Upon this finding, the trial court was mandated to sentence the appellant as a persistent offender. The State respectfully requests this Court affirm the judgment and sentence of the trial court.

Respectfully submitted this 15<sup>th</sup> day of August, 2013.

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**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on August <sup>7<sup>th</sup></sup> 7, 2013.

  
\_\_\_\_\_  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

## August 02, 2013 - 11:39 AM

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