

NO. 45753-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RYAN JOSEPH SMITH  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR

The Honorable Gordon Godfrey, Judge

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BRIEF OF APPELLANT

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Attorney for Appellant

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WSB #20955

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A. ASSIGNMENT OF ERROR

The trial court incorrectly determined that Smith's Oregon Assault conviction was legally and factually comparable to a Washington assault.

Issue Presented on Appeal

Was the trial court incorrect in determining that Smith's Oregon assault conviction was legally and factually comparable where he was charged with committing an "unlawful and knowing" assault in Oregon and the Washington assault statute requires "intent"?

B. STATEMENT OF THE CASE

Ryan Smith was convicted by a jury of unlawful possession of methamphetamine. CP 57-67. The state argued that Smith's offender score was 8 based on his 28 prior convictions, including three Oregon convictions: burglary in the first degree, assaulting a public officer and robbery in the second degree. RP 3-5, 12 (12-20-13); CP 36-47. Smith stipulated to all of his prior conviction with the exception of these three convictions. Smith argued to the sentencing court that these three convictions were not comparable to

Washington crimes. RP 6-9 (12-20-13); CP 48-53. The court agreed with the state and calculated Smith's offender score at 8. RP 12-13(12-20-13).

This timely appeal follows. CP 70.

C. ARGUMENT

1. IN CALCULATING SMITH'S OFFENDER SCORE, THE TRIAL COURT INCORRECTLY INCLUDED AN OREGON ASSAULT THAT IS NOT-COMPARABLE.

Smith challenges the trial court's inclusion of his Oregon assault of a public officer in calculating his offender score.

a. Standard of Review

This Court reviews a sentencing court's calculation of an offender score de novo. *State v. Arndt*, 179 Wn.App. 373, 320 P.3d 104, 109-110 (2014). 1

b. Scoring Out of State Offenses.

Under the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, the sentencing court uses the defendant's prior convictions to determine an offender score, which along with the "seriousness level" of the current

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1 Counsel uses the Pacific Reporter jump cite for this case because the Washington

offense establishes his or her presumptive standard sentencing range. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999) (quoting *State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994)).

The State must prove the existence of prior felony convictions used to calculate an offender score by a preponderance of the evidence. *Ford*, 137 Wn.2d at 479–80; *see also* RCW 9.94A.500(1). If the convictions are from another jurisdiction, the State also must prove that the conviction would be a felony under Washington law. *Ford*, 137 Wn.2d at 480.

The State Supreme Court has adopted a two-part analysis for determining whether an out-of-state conviction is comparable to a Washington conviction. *State v. Thiefault*, 160 Wn.2d 409, 414–15, 158 P.3d 580 (2007). First, the sentencing court determines whether the offenses are *legally* comparable—whether the elements of the out-of-state offense are substantially similar to the elements of the Washington offense. *Thiefault*, 160 Wn.2d at 41.

Under RCW 9.94A.030(11), this requires examination of the out-of-state crime for which the defendant was defendant **convicted**. *Id*; *Accord*,

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reporter jump cite is missing from Westlaw.

*State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). RCW 9.94A.030(11) provides, “Criminal history” means the list of a defendant’s **prior convictions** and juvenile adjudications, whether in this state, in federal court, or elsewhere.” (Emphasis added). If the elements of the out-of-state offense are broader than the elements of the Washington offense, they are not legally comparable. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

If the offenses are not legally comparable, the sentencing court may include the out-of-state conviction in the offender score if the offense is *factually* comparable. *Thiefault*, 160 Wn.2d at 415; *Lavery*, 154 Wn.2d at 255. Determining factual comparability involves analyzing whether the defendant’s conduct underlying the out-of-state conviction would have violated the comparable Washington statute. *Thiefault*, 160 Wn.2d at 415.

The sentencing court may “look at the defendant’s conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute.” *Lavery*, 154 Wn.2d at 255.” In the factual comparability analysis, the sentencing court is not allowed

to consider evidence not presented in the out-of-state proceeding.”. *Arndt*, 320 P.3d at 109-110. The facts must be admitted or proved beyond a reasonable doubt in the out-of-state conviction. *Lavery*, 154 Wn.2d at 258. If an out-of-state conviction involves an offense that is neither legally or factually comparable to a Washington offense, the sentencing court may not include the conviction in the defendant's offender score. *Thiefault*, 160 Wn.2d at 415.

c. Smith's Oregon Assault Conviction for Assault of An Officer is Not Legally Comparable.

Smith's Oregon assault of a public officer is not legally or factually comparable to Washington's assault in the third degree statute RCW 9A.36.031(1)(a),(g) because ORS 163.208(1) is a: (1) class A misdemeanor; (2) its mens reas of “intentionally or knowingly” is broader than the “intent” mens rea in RCW 9A.36.031(1); and (3) Smith was charged with “unlawfully and knowingly” assaulting an officer, and convicted as charged. Supp. CP (Exhibit 8, 9 12-20-13) (see Appendix A)).

Mens rea is defined as “[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a

crime.” Black's Law Dictionary 1006 (8th ed.2004). The elements of ORS 163.208(1) are different and broader than RCW 9A.36.031(1)(a),(g) because generally that statute’s mens rea is either “knowing” or “intentional”.

Under ORS 163.208(1) “[a] person commits the crime of assault in the second degree if the person [i]ntentionally **or** knowingly causes physical injury to another.” (Emphasis added). Under RCW 9A.36.031(1):

(a) 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:

.....

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

RCW 9A.36.031(1)(a), (g).

The term “assault” is not defined in the Washington criminal code, and thus Washington courts look to the common law for its definition. *State v. Stevens*, 158 Wn.2d 304, 310-311, 143 P.3d 817 (2006); *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). The common law in Washington recognizes three definitions of assault:

“(1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault].”

*Stevens*, 158 Wn.2d at 310-311.

Here, the term “assault” in RCW 9A.36.031(1)(a) and (g) refers to one of the three possibilities means of assault: the actual battery form of assault; an unlawful touching with criminal intent; or the creating a reasonable apprehension of fear of harm. *State v. Brown*, 94 Wn.App. 327, 342, 972, P.2d 112 (1999) (because assault is not a strict liability crime, no additional mental state beyond the *mens rea* of assault is required).

d. “Knowing and Intentional” Are Not Legally Comparable to “Intentional”.

Washington distinguishes the mental states of “intentional” and “knowing”. RCW 9A.08.010(1). This statute provide in pertinent part:

(a) INTENT. A person acts with intent or intentionally when he 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 is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

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

Id.

Several Washington crimes are distinguished by the different mens rea based on “knowledge” instead of “intent.” For example, in *State v. Mohamed*, 175 Wn.App. 45, 51, 310 P.3d 504 (2013), the required mental state for the crime of indecent liberties is knowledge), *See also, State v. Shipp*, 93 Wn.2d 510, 518–19, 610 P.2d 1322 (1980) (the legislature specifically included the requirement of knowledge in the promoting prostitution statute); *see also, State v. Garbaccio*, 151 Wn.App. 716, 734, 214 P.3d 168 (2009) (possession of child pornography requires knowledge of the nature of the illegal material).

Because Washington distinguishes between “knowledge” and “intent” they are not the same. The Oregon legislature’s choice of both “knowing and intentional” in ORS 163.208(1) makes it broader than RCW 9A.36.031. It is

also broader because in Oregon, the state need not prove both mens rea, but can satisfy the statute by proving only one of the mens rea. *State v. Stevens Equip Co.*, 165 Or.App. 673, 685–86, 998 P.2d 1278, review denied, 330 Or. 553 (2000).

Oregon provides that the state may “plead in the conjunctive and prove in the disjunctive.” *Stevens Equip Co.*, 165 Or.App. at 685–86. “When the statute makes it a crime to do this or that, mentioning several things disjunctively, the indictment may, as a general rule, embrace the whole in a single count, but it must use the conjunctive ‘and’ where ‘or’ occurs in the statute.” *State v. Carr*, 6 Or. 133, 134 (1876); see also *State v. Soasey*, 237 Or. 167, 171, 390 P.2d 190 (1964); *State v. White*, 48 Or. 416, 421, 87 P. 137 (1906). Thus, Oregon was not required to prove that the assault was both intentional and knowing. See *Stevens Equip. Co.*, 165 Or.App. at 686.

The elements of ORS 163.208(1)(b) are broader than the elements of the Washington offense, thus they are not legally comparable *Lavery*, 154 Wn.2d at 258; RCW 9.94A.030(11).

e. Statutes Not Factually Comparable

This Court may review the factual comparability of the Oregon indictment and the Oregon judgment and sentence to determine whether Smith's conduct would have violated RCW 9A.28.030(1)(g). *Thiefauld*, 160 Wn.2d at 415.

The state in its trial brief argued that Oregon's mens rea of a "knowing and intentional" assault is inconsequential because ORS 163.208(1) provides for a mens rea of both "knowing or intentional". CP 36-47. This argument is incorrect based on the previous argument and because Smith's Oregon assault indictment did not contain the mens rea of "intent". Supp. CP (Exhibit 8, 9 12-20-13) (see Appendix A)). The indictment only contained the mens rea of "unlawfully and knowing".

Smith was indicted and convicted of the following:

"[t]he defendant on or about November 12, 2005, in Lane County Oregon, did **unlawfully and knowingly** cause physical injury to Officer Kyle S. Williams of the Eugene Police Department, knowing that person to be a peace officer acting in the course of official duty....".

(Emphasis added). As discussed supra, under RCW 9A.08.010(1), knowing is not the same as intent, thus making ORS 163.208(1) legally broader and

factually different than RCW 9A.36.031.

As charged, under ORS 163.208(1), the record in this case is insufficient to determine what Smith plead to or was convicted of by a fact finder. As a result, this conviction cannot be determined to be factually comparable to a Washington offense and therefore may not be included in Smith's offender score. *Arndt*, 320 P.3d at 109-110.

In *Arndt* this Court analyzed the Oregon assault in the second degree statute and determined that it was not legally comparable and that the trial record was insufficient to establish factual comparability based on a *nolo contendere* plea. *Arndt*, 320 P.3d at 109-110. Here, similar to *Arndt*, the indictment and judgment and sentence do not provide any information regarding the facts or mens rea established at trial or in a guilty plea. Supp. CP (Exhibit 8, 9 12-20-13) (see Appendix A)).

Thus even if Smith had been properly charged under ORS 163.208(1) with a "knowing and intentional" assault, the record in this case, as in *Arndt*, is insufficient to determine a factual basis for the plea or conviction by a fact finder. As a result, the Oregon conviction is not factually comparable to a

Washington offense and therefore may not be included in Smith's offender score. *State v. Arndt*, 320 P.3d at 109-110.

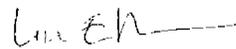
In sum, third degree assault in Oregon is not legally comparable to third degree assault in Washington because in general Oregon is only required to prove "knowing or intentional" assault. Third degree assault in Oregon is also not factually comparable because in this case Smith was charged with an "unlawful and knowing" assault, and the record does not provide any evidence of an intentional assault. Accordingly, the sentencing court erred in including the Oregon conviction in Smith's offender score. The remedy is to remand for a new sentence without consideration of the Oregon Assault.

D. CONCLUSION

Mr. Smith respectfully request this Court remand for a new sentence without consideration of his Oregon assault because that crime is neither legally nor factually comparable to a Washington assault. *Thiefault*, 160 Wn.2d at 415.

DATED this 24th day of July 2014.

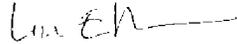
Respectfully submitted,



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LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office [Jason F. Walker JWalker@co.grays-harbor.wa.us](mailto:Jason.F.Walker@co.grays-harbor.wa.us) a true copy of the document to which this certificate is affixed, on July, 24, 2014. Service was made by electronically to the prosecutor and to Ryan Smith DOC# 371194 **Stafford Creek Corrections Center** 191 Constantine Way Aberdeen, WA 98520 by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

APPENDIX A

F. DOUGLASS HARCLEROAD  
Lane County District Attorney  
125 E. 8<sup>th</sup> Avenue  
Eugene, OR 97401  
(541) 682-4261 (541) 682-3890 (fax)

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FOR THE COURT

BY

In the Circuit Court of the State of Oregon for Lane County

THE STATE OF OREGON,  
Plaintiff,

vs.

RYAN JOSEPH SMITH,  
Defendant.

INFORMATION

20-05-22638

The above named defendant is accused on oath by the Lane County District Attorney as follows:

ASSAULTING A PUBLIC SAFETY OFFICER - 6  
RESISTING ARREST - 6

committed as follows:

COUNT 1

The defendant, on or about November 12, 2005, in Lane County, Oregon, did unlawfully and knowingly cause physical injury to Officer Kyle S. Williams of the Eugene Police Department, knowing that person to be a peace officer acting in the course of official duty; contrary to statute and against the peace and dignity of the State of Oregon.

COUNT 2

The defendant, on or about November 12, 2005, in Lane County, Oregon, did unlawfully and intentionally resist a person known to the defendant to be a peace officer, in making an arrest; contrary to statute and against the peace and dignity of the State of Oregon.

DATED November 14, 2005 at Eugene, Lane County, Oregon.

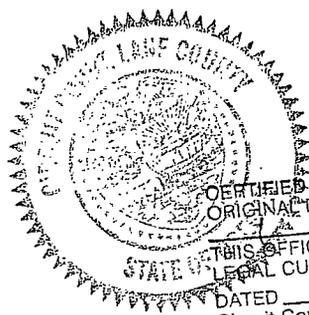
ORS 163.208/Class C Felony  
ORS 162.315/Class A Misdemeanor

F. DOUGLASS HARCLEROAD, District Attorney

DOB: 06/05/1986  
Agency: EGP 05-101536  
DA No.: 05-8513  
Control:

By: K. McIntyre  
Karrie K. McIntyre, OSB 99203  
Assistant District Attorney

GRAYS HARBOR COUNTY  
CAUSE NO. 13KLP096  
PLA/PET ID 8  
DEF/RSP ID \_\_\_\_\_  
EXHIBIT NO. 8  
ADMITTED 10-20-2013  
OFFERED & REFUSED \_\_\_\_\_



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DATED 11/26/13  
Circuit Court  
Lane County, Oregon  
BY COJ/mcp



The length of post-prison supervision is **2 years**. However, if the length of incarceration for this count plus the length of post-prison supervision exceeds the statutory maximum indeterminate sentence described in ORS 161.605, then the length of post-prison supervision is hereby reduced to the extent necessary to conform the total sentence length to the statutory maximum. If the Defendant violates the conditions of post-prison supervision, the Defendant shall be subject to sanctions imposed by the supervisory agent or additional incarceration imposed by the State Board of Parole and Post-Prison Supervision in accordance with OAR 213-001-0000 through 213-019-0015.

IT IS FURTHER ORDERED that the Defendant may be considered by the executing or releasing authority for any form of temporary leave from custody, reduction in sentence, work release, alternative incarceration program or program of conditional or supervised release authorized by law for which the Defendant is otherwise eligible at the time of sentencing.

IT IS FURTHER ORDERED pursuant to ORS 137.076 that a blood or buccal sample from Defendant shall be obtained at the request of the appropriate agency and, unless the Defendant lacks the ability to pay, the Defendant shall reimburse the appropriate agency for the cost of obtaining and transmitting the blood or buccal sample.

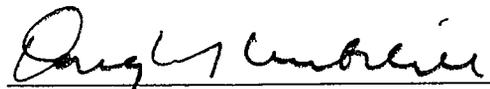
#### **RESISTING ARREST (Count 2)**

IT IS FURTHER ORDERED that Defendant shall serve a period of **6 months** in the custody of the Department of Corrections, concurrently with the sentence imposed in Count 1, with credit for time served. Defendant is continued in the custody of the Lane County Sheriff for transportation to the Department of Corrections.

IT IS FURTHER ORDERED that the Defendant may be considered by the executing or releasing authority for any form of temporary leave from custody, reduction in sentence, work release, alternative incarceration program or program of conditional or supervised release authorized by law for which the Defendant is otherwise eligible at the time of sentencing.

Thereupon the Court advised the Defendant of the rights of appeal.

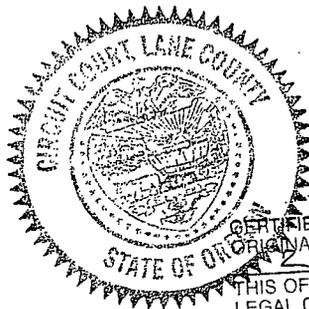
Dated this 28<sup>th</sup> day of April, 2006



DOUGLAS S. MITCHELL  
CIRCUIT COURT JUDGE

Prepared by S. Phillips

GRAYS HARBOR COUNTY  
CAUSE NO. 137-400-6  
PLA/PET ID 9  
DEF/RSP ID 9  
EXHIBIT NO. 9  
ADMITTED 10/20/2013  
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Lane County, Oregon  
BY COOPER

**ELLNER LAW OFFICE**

**July 24, 2014 - 11:51 AM**

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Court of Appeals Case Number: 45753-9

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