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Court of Appeals  
Division II  
State of Washington  
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NO. 49614-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN WILLIAMS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA  
COUNTY

HONORABLE JUDGE BRIAN P. ALTMAN

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**BRIEF OF RESPONDENT**

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## **A. ISSUES PRESENTED**

1. Did the trial court properly find that Williams' prior Oregon conviction for attempted rape in the first degree was factually comparable to Washington crime of attempted rape in the second degree? Yes.
2. Is the proper legal standard for determining whether Mr. Williams has a prior conviction for a "two-strike" offense a preponderance of the evidence? Yes.
3. Does the Equal Protection Clause of the Fourteenth Amendment require that the persistent offender finding, or "two-strike" finding, be proven to a jury beyond a reasonable doubt? No.

## **B. STATEMENT OF THE CASE**

### **1. PROCEDURAL FACTS**

The State agrees with and relies on the Appellant's Procedural (charges and sentence) Statement of the Case.

### **2. SUBSTANTIVE FACTS**

For the purposes of this appeal, because Appellant takes no issue with the jury verdicts, any evidentiary decisions of the court, or the performance of the prosecutor or defense counsel, the State agrees with and relies on the Appellant's brief Statement of the Case regarding the trial testimony.

## C. ARGUMENT

### 1. WILLIAMS WAS PROPERLY SENTENCED AS A SECOND STRIKE PERSISTENT OFFENDER BECAUSE HIS OREGON CONVICTION FOR ATTEMPTED RAPE IN THE FIRST DEGREE IS FACTUALLY COMPARABLE TO WASHINGTON'S ATTEMPTED RAPE IN THE SECOND DEGREE.

Benjamin Williams was convicted of rape in the second degree. CP 52. A person is considered a persistent offender if he:

“(b)(i) Has been convicted of: (A) Rape in the first degree . . . rape in the second degree, or indecent liberties by forcible compulsion; (B) [deleted]; or (C) an attempt to commit any crime listed in this subsection (38)(b)(i); and (ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection.” RCW 9.94A.030(38)(b).

A person who is a persistent offender must be sentenced to life in prison without the possibility of parole. RCW 9.94A.570.

Williams had been previously convicted of the crime of attempted rape in the first degree in Oregon in 2005. CP 139 – 153. Criminal history from another state counts as a prior conviction in Washington if the foreign crime is comparable to a Washington crime. RCW 9.94A.030((b)(i)). There is a two-part test for comparability in Washington. A prior conviction must be either *legally* comparable or *factually* comparable to a Washington crime. State v. Thieffault, 160 Wn. 2d 409 (2007). The State concedes that the Oregon crime of attempted rape in the first degree is not *legally* comparable to any crime in Washington because the Oregon definition of “attempt” is broader than the Washington definition. CP 128. State v. Arndt, 179 Wn. App. 373 (2014).

In order to be *factually* comparable, the sentencing court must determine that “the conduct underlying the foreign offense would have violated the comparable Washington statute.” State v. Thieffault, 160 Wn. 2d 409 (2007). In making a determination of *factual* comparability, “the sentencing court properly can consider [the] plea as an admitted fact.” State v. Arndt, 179 Wn. App. 373, 383 (2014).

Williams written plea of guilty to attempted rape in the first degree in Oregon in 2005 included a factual statement regarding the details of the underlying offense. Williams, in his "Petition to Enter a Plea of Guilty" filed May 31, 2005 in Circuit Court of Wasco County, Oregon, stated:

"I plead guilty on the basis of the fact that in Wasco County, Oregon, I did the following: On or about 2/5/05 I did unlawfully [and] intentionally attempt, by forcible compulsion, to engage in sexual intercourse [with] Sadie Mountainchief [and] as part of the same act and transaction I did unlawfully [and] recklessly cause physical injury to Sadie Mountainchief." CP 124.

Washington defines rape in the second degree as follows: "A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: (a) by forcible compulsion[.]" RCW 9A.44.050(1)(a). Williams' Oregon attempted rape in the first degree conviction is *factually* comparable to the Washington crime of attempted rape in the second degree "if the defendant's conduct constituting the foreign offense as evidenced by the undisputed facts in the record would constitute the Washington offense." Arndt, 179 Wn. App. 373, at 382-383. Williams admission in his plea statement is that he "intentionally attempt[ed]" to "engage in sexual intercourse" by "forcible

compulsion.” On its face, the described/admitted conduct would clearly constitute the crime of attempted rape in the second degree in Washington. The analysis of the attempt issue in Arndt is controlling. Even though attempted crimes in Oregon are not *legally* comparable to attempt crimes in Washington (because Oregon requires only general intent to commit a crime, not the intent to commit the specific crime alleged, as is required in Washington), if the defendant admits or makes a factual statement in a plea statement that they “attempted” to commit the specific crime, then the Oregon and Washington crimes are still *factually* comparable. Arndt, at 382-383.

**a. Williams Oregon plea statement contains facts sufficient to find that he took a substantial step in committing the crime of rape in the first degree.**

Williams first argues that the Oregon attempted rape in the first degree is not comparable to Washington attempted rape in the second degree because the Oregon plea statement “fails to articulate a substantial step.” This argument fails because it confuses legal and factual comparability. When doing a factual analysis, you no longer compare the legal definitions of the

elements of the crime, but rather, ask whether the admitted or proven conduct satisfies the elements of the Washington crime.

Here, when Williams admits that he “intentionally attempt[ed]” to do something, the question is whether in Washington, whether using those words (or for example even more colloquially, something like “tried to accomplish”) constitutes sufficient proof that Williams took a “substantial step”. To say that the common-sense notion of an attempt would *not* constitute a “substantial step” toward doing an act would be quite surprising, given that the language “substantial step” from RCW 9A.28.020 is merely an effort to explicate the meaning of the word “attempt.” If Williams’ argument is correct, then when a person in Washington admitted that they “attempted to assault” someone, for example, in a plea statement, then that statement would not constitute a sufficient factual basis for a plea to a crime of attempted assault, because a clearer “substantial step” was not specifically articulated. This seems absurd. In any case, Arndt seems to have answered this question. Admitting that you “attempted” to do something is the same as admitting that you took a “substantial step” toward committing the act. The language in the plea statement at issue in Arndt also uses the word “attempt” in a perfectly analogous way to

how it is used in the plea statement in Mr. Williams case. This court, in Arndt, found the attempt language in that case to be sufficient for factual comparability.

Answering the question of whether an admission that a person “intentionally attempted” an act, by itself, is sufficient to constitute a substantial step toward commission of that act is not necessary in this case, however. Mr. Williams Oregon plea statement gives additional information about the circumstances of the Oregon crime. Mr. Williams also admits that “as part of the same act and transaction I did unlawfully [and] recklessly cause physical injury to Sadie Mountainchief.” Any act that results in injuring a victim in an attempted rape case is enough of an act to satisfy the “substantial step” requirement to be considered an attempt to commit the crime of rape. The court can, and should, infer from the fact that the intentional attempt to have sexual intercourse by forcible compulsion with the victim also resulted in physical injury to the victim, that the attempt constituted a “substantial step,” and that the attempted rape in the first degree in Oregon is factually comparable to attempted rape in the second degree in Washington.

**b. Williams Oregon plea statement contains facts sufficient to find that the attempted first degree rape was accomplished by forcible compulsion.**

Mr. Williams second argument is similar to his first, and fails for similar reasons. Williams argues that the definition of “forcible compulsion” is broader in Oregon than it is in Washington. The definitions are remarkably similar, however. In Oregon forcible compulsion means “to compel by (a) physical force; or ...”. ORS 163.305(2)(a). In Washington it means “physical force which overcomes resistance, or...”. RCW 9A.44.010(6). Williams suggests that there is a meaningful difference between using physical force to “compel” an act and using physical force to “overcome resistance.” Even if this distinction were being made in the context of *legal* comparability, it’s not clear that there is a meaningful difference between the idea of trying to compel someone to engage in an act as compared to overcoming their resistance to such an act. The very concept of compelling someone to engage in an act, in this context, assumes that they are resisting it. Otherwise, there would be no need to compel it, as the victim would be physically acquiescing.

Mr. Williams proposes a hypothetical situation where a victim is held down in order to compel them to engage in sexual intercourse, but where the victim does not resist being held down. But if a victim is not resistant to being held down, then it's not clear that they are even being held down. They are merely lying down. Some manner of resistance is necessary for the proposed situation to even be thought of as "compelling" an act. So, even in the context of *legal* comparability, the Oregon crime of rape in the first degree (by forcible compulsion) and the Washington crime of rape in the second degree (by forcible compulsion) appear to be comparable.

In Mr. Williams case, however, the question is *factual* comparability: whether the facts admitted by Mr. Williams in his 2005 Oregon plea statement are sufficient to demonstrate that he would have been guilty of the crime of attempted rape in the second degree in Washington for the same act. This is a much easier question: does the language "forcible compulsion," admitted by the defendant in his Oregon plea statement, satisfy the "forcible compulsion" element of the Washington crime of rape in the second degree? To find otherwise would be absurd, for the same reasons it would be absurd to say that someone who "attempted" an act did

not take a substantial step toward committing an act. When making a finding that the proven or admitted facts of a foreign crime satisfy the element of a Washington crime, it's not necessary to define the words used in the proven or admitted facts using the foreign definitions. Rather, the question is whether the admitted facts, taken at face value, would justify conviction of the Washington crime. Here, when Williams admitted to using "forcible compulsion" when he attempted to have sexual intercourse with the victim, he satisfied the Washington element that the crime must be committed by forcible compulsion. That is, that he used physical force that overcomes resistance.

If there is any question, again, the court can, and should, infer from the additional statement in his Oregon plea statement that as part of the same act that Williams also caused physical injury to the victim, and that it was the forcible compulsion and the victim's resistance that resulted in the victim being injured. The only reasonable inference from Williams' Oregon plea statement, given that the rape was not a completed offense (was merely an attempt) and that the victim was injured as a result of the attempt, is that he injured the victim *because* the victim resisted the rape, and hence the rape was by forcible compulsion.

This court should find that Williams was appropriately found to have a prior "two-strike" offense under Washington law and that he was properly sentenced as a persistent offender to life in prison.

**2. THE STATE CONCEDES THAT THE JURY INSTRUCTIONS DID NOT MAKE IT MANIFESTLY APPARENT THAT THE CONVICTION FOR FOURTH DEGREE ASSAULT AND THE CONVICTION FOR SECOND DEGREE ASSAULT WERE NOT BASED ON THE SAME CONDUCT, AND SO MAY VIOLATE DOUBLE JEOPARDY PROHIBITION AND THEREFORE THE FOURTH DEGREE ASSAULT CONVICTION SHOULD BE VACATED.**

The State concedes the defendants argument that the jury instructions did not adequately inform the jury that they need find a separate and distinct act constituted the crime of assault fourth degree and assault second degree, that the two convictions may have been for the same act and therefore constitute double jeopardy, and that consequently the conviction for assault fourth degree should be vacated.

**3. THE DEFENDANT WAS PROPERLY SENTENCED AS A TWO STRIKE PERSISTENT OFFENDER TO LIFE IN PRISON BASED ON THE SENTENCING COURT'S FINDING, BY A PREPONDERANCE OF THE EVIDENCE, THAT MR. WILLIAMS HAD PREVIOUSLY BEEN CONVICTED OF A TWO STRIKE PERSISTENT OFFENSE.**

Williams argues that the court violated his right to a jury trial and his right to proof beyond a reasonable doubt when it sentenced

him to life in prison as a two-strike offender under Washington's persistent offender statute (RCW 9.94A.570) based on the court's finding, by a preponderance of the evidence that Williams had previously been convicted of a two-strike offense. Williams also argues that the classification of a persistent offender (under RCW 9.94A.030 and 9.94A.570) as a "sentencing factor" that need not be proven to a jury beyond a reasonable doubt violates the equal protect clause.

The State would simply note that the same arguments have been made in the context of "three-strike" cases, and both the Court of Appeals and the State Supreme Court have rejected such arguments. See State v. Langstead, 155 Wn. App. 448, 452-453 (2010); State v. Thieffault, 160 Wn. 2d 409, 418, (2007); State v. Serano Salina, 169 Wn. App. 210, 225 – 226 (2012); State v. Williams, 156 Wn. App. 482, 495 – 498 (2010); State v. McKague, 159 Wn. App. 489, 513 – 519 (2011). All three divisions of the court of appeals have repeatedly rejected Williams argument as it applies to three-strike cases. There is no reason to distinguish Williams' case from those cases. The court should reject Williams' challenge to Washington's persistent offender statute and affirm Williams' sentence of life in prison.

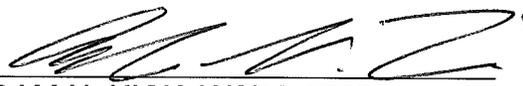
**4. THE STATE CONCEDES THAT SCRIVENORS ERRORS SHOULD BE CORRECTED.**

The state concedes that the two Oregon assault second degree convictions are comparable to Washington assault third degree convictions, and that Williams' Judgment and Sentence should be amended to correct the error.

**D. CONCLUSION**

Williams Oregon conviction for attempted rape in the first degree is factually comparable to the Washington crime of attempted rape in the second degree and therefore Williams' sentence of life in prison should be affirmed. Washington's persistent offender statute is constitutional and does not require that Williams' prior convictions be proven to a jury beyond a reasonable doubt. Finally, the State concedes that Williams' conviction for assault in the fourth degree should be vacated and his judgement and sentence should be amended to correct an error regarding his prior convictions from Oregon that should be classified as assault three (Class C felony) rather than assault two (Class B felony) convictions.

DATED this 21st day of February, 2018  
RESPECTFULLY submitted,

By:   
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February 21, 2018, Stevenson, Washington

# SKAMANIA COUNTY PROSECUTOR

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## Transmittal Information

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