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No. 50370-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL McCASLAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

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A. SUMMARY OF ARGUMENT

During a visit to see her father, Nathaniel McCasland, seven year old D.M. asked to see his penis, then asked to touch it. Mr. McCasland admitted allowing D.M. to touch his penis in a misguided attempt at parenting. Mr. McCasland did not have an erection when D.M. touched his penis and testified he received no sexual gratification. In light of the dearth of evidence that D.M.'s touching of Mr. McCasland's penis was sexual contact which was an essential element of the offense, his conviction for first degree child molestation must be reversed.

Alternatively, Mr. McCasland's sentence of life imprisonment without the possibility of parole must be reversed as the trial court erred when it found the Oregon prior convictions that served as predicate offenses for the persistent offender finding were qualifying offenses. Finally, the persistent offender finding violated Mr. McCasland's right to due process and equal protection.

B. ASSIGNMENTS OF ERROR

1. Imposition of a conviction for first degree child molestation in the absence of sufficient evidence violated Mr. McCasland's constitutionally protected right to due process.

2. The trial court erred in finding Mr. McCasland's prior Oregon convictions for first degree sodomy comparable to the Washington felony offense of second degree rape of a child.

3. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of a qualifying prior conviction violated Mr. McCasland's right to equal protection.

4. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of a qualifying prior conviction violated Mr. McCasland's rights to a jury trial and due process.

5. The trial court violated Mr. McCasland's rights under the Sixth and Fourteenth Amendments when it engaged in a factual comparability inquiry of his prior Oregon convictions in order to find him to be a persistent offender.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State to prove each essential element of the offense beyond a reasonable doubt. Sexual contact is an element of child molestation, which requires proof that the contact was for the purpose of sexual gratification. Mr. McCasland admitted that he allowed D.M. to touch his penis but stated he did so to educate D.M.

about the male anatomy. Is Mr. McCasland entitled to reversal of his conviction with instructions to dismiss where the State failed to prove an essential element of child molestation?

2. Prior out-of-state convictions may be included in the offender score if they are found to be comparable to Washington offenses. The court must determine whether the offenses are legally comparable by examining the elements, and if not legally comparable, whether they are factually comparable by looking at the facts underlying the foreign conviction that have been admitted to, stipulated to, or proven beyond a reasonable doubt. The court here found Mr. McCasland's two Oregon convictions for first degree sodomy comparable the Washington felony offense of second degree child rape. A review of the facts admitted by Mr. McCasland proved the Oregon convictions are comparable to the Washington offense of first degree incest. Did the trial court err in finding the out-of-state convictions comparable, thus requiring reversal of Mr. McCasland's sentence?

3. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With

the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions ‘elements,’ requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them ‘aggravators’ or ‘sentencing factors,’ permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and where the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

4. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Mr. McCasland’s Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had a prior most serious offense,

thus elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

5. When an out-of-state conviction is based upon a non-divisible statute, the Sixth and Fourteenth Amendments bar a factual inquiry by the trial court in order to determine whether the prior conviction is comparable to a Washington felony offense. Here, the trial court ruled Mr. McCasland's prior Oregon convictions were not legally comparable to a Washington felony offense where the Oregon statute prohibited broader conduct than the Washington offense. Did the trial court violate Mr. McCasland's Sixth and Fourteenth Amendment rights when it subsequently conducted a factual inquiry into the out-of-state priors to determine comparability in order to find him to be a persistent offender?

D. STATEMENT OF THE CASE

Nathaniel McCasland was the father of seven year old D.M. RP 738. Mr. McCasland and D.M.'s mother, Aubrey Holmquist, lived together in New Mexico when D.M. was born. RP 738. For the first two years of D.M.'s life, Mr. McCasland was a stay-at-home dad. RP 1081. In 2011, when D.M. was two years old, Mr. McCasland and Ms. Holmquist ended their relationship and Mr. McCasland moved to

Washington while D.M. remained in New Mexico with her mother. RP 738, 1079.

In 2012, Mr. McCasland met and married Shelly McCasland and the two lived together on a five acre farm in Bush Prarie. RP 589-90. In June 2015, Ms. Holmquist thought it would be a good idea for D.M. to spend some time with her father. RP 741. On June 6, 2015, D.M. arrived for an extended visit with the McCaslands. RP 591.

During the first week of her visit, D.M. was very happy to be reconnecting with her father. RP 593. On June 12, 2015, Ms. McCasland left Mr. McCasland and D.M. alone for approximately two hours. RP 594, 1099. During this period, Mr. McCasland gave D.M. a bath. RP 1106. As he was toweling D.M. off, D.M. asked to see Mr. McCasland's underwear. RP 1106. Although uncomfortable and nervous, Mr. McCasland pulled down the top of his shorts to show D.M. the top band of his underwear. RP 1106. D.M. pointed to the front of Mr. McCasland's shorts and asked him if that was where his privates were. RP 1107. She asked to see his privates and Mr. McCasland pulled his underwear down and showed D.M. his penis. RP 1107. Mr. McCasland immediately pulled his shorts back up. RP 1107

D.M. asked again to see Mr. McCasland's penis, and he again showed it to her. RP 1107-08. D.M. asked to touch his penis and Mr. McCasland allowed her to. RP 1108. D.M. grabbed Mr. McCasland's penis and pulled a few times. RP 1109. Mr. McCasland immediately flinched and it appeared D.M. became scared. RP 1109. D.M. asked Mr. McCasland if the pulling on his penis hurt. RP 1109. Because of her reaction and to comfort her, Mr. McCasland told D.M. it did not hurt, but that sometimes the act of pulling on it can make it feel good. RP 1110. Mr. McCasland did not have an erection during this incident. RP 1113.

After her bath, D.M. seemed normal. RP 1113. Mr. McCasland did not tell his wife about the incident that night. RP 1115.

The next evening, D.M. disclosed to Ms. McCasland that Mr. McCasland had shown her his "privates." RP 596. D.M. also disclosed Mr. McCasland had said that "[t]his feels good" and made a motion with her hand. RP 596. Ms. McCasland questioned further and discovered the incident happened in the bathroom. RP 596.

Ms. McCasland, with D.M. in tow, confronted Mr. McCasland. RP 597, 1117. D.M. repeated what she had said to Ms. McCasland,

including the hand motion. RP 598, 1117. Mr. McCasland denied that anything happened. RP 598, 1117.

D.M. was subsequently placed into the custody of Child Protective Services (CPS). RP 603. Later, Mr. McCasland admitted to his wife D.M. had asked to see his “privates,” and, at first he declined, then he showed them to her. RP 604. When she grabbed his penis, Mr. McCasland said he pulled her had away and, when she asked why, he told her, “Because that’s what we do to make it feel good.” RP 604.

Following an investigation, Mr. McCasland was charged with first degree child molestation. CP 5. The State also alleged the aggravating factor that Mr. McCasland used his position of trust to facilitate the commission of the offense. CP 5.

The jury found Mr. McCasland guilty as charged, including the aggravating factor. CP 128-29. At sentencing, the State alleged Mr. McCasland had two 1991 convictions from Oregon for first degree sodomy. RP 1337-38. Based on the prior convictions and Mr. McCasland’s current conviction, the State sought a finding that he is a persistent offender and should be sentenced to life imprisonment without the possibility of parole. RP 1336-41.

The State acknowledged, and the trial court found, that the Oregon sodomy statute was not legally comparable to a Washington felony offense. RP 1349-51. But, based upon Mr. McCasland's admission in the Petition to Enter Plea of Guilty, the court found the Oregon prior convictions to be comparable to the Washington felony offense of second degree child rape. CP 228, RP 1352. The court imposed a sentence of life imprisonment without the possibility of parole. CP 220, RP 1363.

E. ARGUMENT

1. There was insufficient evidence presented to prove Mr. McCasland had sexual contact with D.M.

- a. *The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

- b. *D.M.’s touching Mr. McCasland’s penis was not for the purpose of his sexual gratification and did not constitute sexual contact.*

A person commits first degree child molestation when that person has “sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.083. “Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2).

The State has the burden to show sexual gratification as part of its burden to prove sexual contact. In order to prove “sexual contact,” the State must establish the defendant acted with a purpose of sexual gratification. *State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006). “Offenses such as child molestation or indecent liberties reasonably require a showing of sexual gratification because the

touching may be inadvertent.” *State v. Gurrola*, 69 Wn.App. 152, 157, 848 P.2d 199 (1993).

“Sexual gratification” is not an element of the crime of first degree child molestation rather, a definition clarifying the meaning of the element “sexual contact.” *State v. Lorenz*, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004).

In determining whether there was sufficient evidence of sexual contact, this Court looks to the totality of the facts and circumstances presented. *State v. Brooks*, 45 Wn.App. 824, 826, 727 P.2d 988 (1986).

Here, it was undisputed that Mr. McCasland allowed D.M. to see, then touch, his penis. But, the evidence failed to establish the touching was done for the purpose of satisfying Mr. McCasland’s sexual gratification. Mr. McCasland did not have an erection during D.M.’s observation or D.M.’s touching. Mr. McCasland described his actions essentially as a misguided attempt at sex education for his young daughter.

D.M. asked to see Mr. McCasland’s penis, which at first he refused.¹ RP 1106-07. On second thought, he believed it would be

¹ D.M. made several statements regarding the incident that were admitted under the child hearsay exception. D.M. was unclear in her statements how she came to see Mr. McCasland’s penis. RP 596, 637, 702.

better that her father showed her as opposed to a stranger. RP 1107-08. Thus, focusing on the totality of the evidence as this Court must, there was no evidence that D.M.'s touching was for the purpose of Mr. McCasland's sexual gratification. As a consequence, the State failed to prove this element of the charged offense and Mr. McCasland's conviction must be reversed.

c. *Mr. McCasland's conviction must be reversed with instructions to dismiss.*

Since there was insufficient evidence to support the conviction for first degree child molestation, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. The trial court erred in concluding Mr. McCasland is a persistent offender based upon prior Oregon sodomy convictions which are not comparable to a qualifying offense.

The State sought to include Mr. McCasland's two Oregon prior convictions for first degree sodomy in his sentence in order to find him to be a persistent offender. RP 1336-41. The State offered Mr. McCasland's guilty plea as evidence. CP 221-40. The State conceded at sentencing that the Oregon statute was broader than the comparable Washington felony offense and, as a result, was not legally comparable. RP 1349. The State argued the Oregon priors were comparable to the Washington offense of second degree child rape based upon Mr. McCasland's statement in his guilty pleas. RP 1350. The trial court found the Oregon prior convictions to be factually comparable, found Mr. McCasland to be a persistent offender and imposed a sentence of life imprisonment without the possibility of parole. RP 1352-54..

a. The State bore the burden of proving factual comparability.

To properly calculate a defendant's offender score, the Sentencing Reform Act (SRA) requires that sentencing courts determine a defendant's criminal history based on his prior convictions. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The criminal sentence is based upon the defendant's offender score and the seriousness level of the crime. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). "The offender score measures a defendant's criminal

history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses." *Id.*

When a defendant's criminal history includes out-of-state or federal convictions, the SRA requires classification "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State must prove the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of the evidence. *Ross*, 152 Wn.2d at 230. This Court reviews the classification of an out-of-state conviction *de novo*. *State v. Jackson*, 129 Wn.App. 95, 106, 117 P.3d 1182 (2005), *review denied*, 156 Wn.2d 1029 (2006).

Generally, when engaging in the comparability analysis, the sentencing court must compare the elements of the prior out-of-state offense with the elements of the potentially comparable current Washington offenses. *In re the Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the crimes are comparable, a sentencing court must treat the defendant's out-of-state conviction the same as a Washington conviction. *Lavery*, 154 Wn.2d at 254. If, on the other hand, the comparison reveals that the prior offense did not

contain one or more elements of the current crime as of the date of the offense (legal comparability), it is then necessary to determine from the out-of-state record whether the out-of-state conviction encompassed each fact necessary to liability for the Washington crime (factual comparability). *Morley*, 134 Wn.2d at 605-06.

Here, the State conceded that the Oregon sodomy offenses were not legally comparable to any Washington felony offense. Thus, the issue was whether the sodomy convictions were factually comparable to a Washington offense, and if so, which one.

b. *Mr. McCasland's acts in committing the Oregon sodomy convictions were factually comparable to the Washington offense of first degree incest.*

“In making its factual comparison [the court] may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt.” *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007), *citing Lavery*, 154 Wn.2d at 258. *See also* RCW 9.94A.530(2) (“In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537”).

Mr. McCasland was convicted of two counts of first degree sodomy involving his brother. CP 209. Mr. McCasland's admission regarding the counts was: "During July 1991 I sucked the penis of my 12 year old brother and I caused him to place his penis in my anus." CP 213.

ORS 163.405 (1989) provided:

"A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:

...

(c) The victim is under 16 years of age and is the actor's brother or sister, of the whole or half blood, the son or daughter of the actor or the son or daughter of the actor's spouse

"Deviate sexual intercourse" is:

" [s]exual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another."

ORS 163.305(1); *State v. Ketchum*, 66 Or. App. 52, 56, 673 P.2d 555, 557 (1983).

Thus, Mr. McCasland admitted committing the offense with his half brother, an element of the Oregon offense. The comparable Washington offense is not child rape, but rather, first degree incest.

The elements of first degree incest are:

A person is guilty of incest in the first degree if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

RCW 9A.64.020(1)(a). The elements of the Oregon statute as admitted by Mr. McCasland match up with Washington's first degree incest statute. Both require sexual intercourse and both require the victim be a whole or half sibling, here Mr. McCasland's younger half brother.

The trial court erred in finding the Oregon offense comparable to Washington's child rape offense.

c. First degree incest is not one a qualifying offense as a persistent offender.

To be classified as a "persistent offender" eligible for a life imprisonment sentence without the possibility of parole, one must have been convicted of a qualifying offense. Mr. McCasland was determined to be a persistent offender based upon his convictions for sex offenses under the "two strikes" provision.

Under the "two strikes," one is classified as a persistent offender when he:

Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a

finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (38)(b)(i) and

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)(i), (ii).

First degree incest is not one of the qualifying convictions listed in RCW 9.94A.030(38)(b)(i). As a consequence, the trial court erred in finding Mr. McCasland was a persistent offender and sentencing him to life imprisonment without the possibility of parole.

- d. *Remand for resentencing to a standard range sentence is required.*

In *Ford*, the Supreme Court found that where “the evidence is insufficient to support the conclusion that the disputed convictions would be classified as felonies under Washington law” resentencing was required. 137 Wn.2d at 485.

In light of the trial court’s error, Mr. McCasland is entitled to reversal of his sentence and remand for resentencing to a standard range sentence.

3. The classification of the Persistent Offender finding as an “aggravator” or “sentencing factor,” rather than as an “element,” deprived Mr. McCasland of the equal protection of the law.

Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, *Smith v. Washington*, 124 S.Ct. 1616 (2004); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, the Washington Supreme Court has held that where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of “much confusion,” the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony, it “actually alters the crime that may be charged,” and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. *Id.* While *Roswell* correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which *Roswell* termed “sentencing factors,” is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the United States Supreme Court has said “merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” *Apprendi*, 530 U.S. at 476-77. More recently the Court noted:

Apprendi makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L. Ed.2d 466 (2006). Beyond its failure to abide by the logic of *Apprendi*, the distinction *Roswell* draws does not accurately reflect the impact of the recidivist fact in either *Roswell* or the cases the Court attempts to distinguish.

In *Roswell*, the Court considered the crime of communication with a minor for immoral purposes (CMIP). *Id.* at 191. The Court found that in the context of this and related offenses,² proof of a prior conviction functions as an “elevating element,” i.e., it elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. *Id.* at 191-92. Thus, *Roswell* found it significant that the fact altered the maximum possible penalty from one year to five. *See* RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross

² Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. *Roswell*, 165 Wn.2d at 196, *discussing State v. Oster*, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002).

misdemeanor unless the person has a prior conviction, in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to *Blakely*, the “maximum punishment” is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In all other circumstances “maximum penalty” is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender score of 3³ would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. See Washington Sentencing Guidelines Commission, *Adult Sentencing Manual 2008*, III-76. The “elevation” in punishment on which *Roswell* pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the “elements” of the substantive crime remain the same, save for the prior conviction “element.” A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which

³ Because the offense is elevated to a felony based upon a conviction of a prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have a score lower than 3.

actually alters the maximum punishment from 171 months to life without the possibility of parole.

In fact, the Legislature has expressly provided that the purpose of the additional conviction “element” is to elevate the *penalty* for the substantive crime. See RCW 9.68.090 (“Communication with a minor for immoral purposes – Penalties”). But there is no rational basis for classifying the punishment for recidivist criminals as an ‘element’ in certain circumstances and an ‘aggravator’ in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994), *abrogated by, Apprendi*, 530 U.S. at 476-77. A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. *Thorne*, 129

Wn.2d at 771. The Washington Supreme Court has held that “recidivist criminals are not a semi-suspect class,” and therefore where an equal protection challenge is raised, the court will apply a “rational basis” test. *Id.*

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be “purely arbitrary” to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the Persistent Offender Accountability Act (POAA) as follows:

to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist

criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable doubt, even if the prior rape conviction is the person’s only felony and thus results in a “maximum sentence” of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. *Roswell* concluded the recidivist fact in that case was an element because it defined the very illegality, reasoning, “if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for

immoral purposes.” 165 Wn.2d at 192 (*italics in original*). But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction, the prior offense merely alters the maximum punishment to which the person is subject. *Id.* So too, first degree assault is a crime whether one has two prior convictions for most serious offenses or not.

Because the recidivist fact here operates in the precise fashion as in *Roswell*, this Court should hold there is no basis for treating the prior conviction as an “element” in one instance – with the attendant due process safeguards afforded “elements” of a crime – and as an aggravator in another. The trial court violated Mr. McCasland’s right to equal protection.

4. The judicial finding that Mr. McCasland had suffered a qualifying conviction which rendered him a Persistent Offender violated his rights to a jury trial and to due process.

The Due Process Clause of the Fourteenth Amendment ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. A criminal defendant has the right to a jury trial and may only be

convicted if the government proves every element of the crime beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 111-15, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); *Blakely*, 542 U.S. at 300-01; *Apprendi*, 530 U.S. at 476-77.

The Supreme Court has recognized this principle applies equally to facts labeled “sentencing factors” if the facts increase the maximum penalty faced by the defendant or the mandatory minimum. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 304. *Blakely* held that an exceptional sentence imposed under Washington’s Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. *Id.* at 304-05; see *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (invalidating death penalty scheme where jury did not find aggravating factors). In *Apprendi*, the Court found a statute unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by only the preponderance of the evidence. 530 U.S. at 492-93.

In *Alleyne*, the Supreme Court ruled the facts underlying the imposition of a mandatory minimum sentence must be found beyond a

reasonable doubt by a jury, ruling that “the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum.” 570 U.S. at 111.

Finally, the Supreme Court has recognized that the jury’s traditional role in determining the degree of punishment included setting fines, and concluded that under *Apprendi*, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. *Southern Union Co. v. United States*, 567 U.S. 343, 359, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012).

In these cases, the Court rejected the notion that arbitrarily labeling facts as “sentencing factors” or “elements” was meaningful. “Merely using the label ‘sentence enhancement’ to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently.” *Apprendi*, 530 U.S. at 476. A judge may not impose punishment based on judicial findings. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 304-05.

As noted above, the Washington Supreme Court has embraced this principle in *Roswell*: where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” *Roswell*, 165 Wn.2d at 192.

And since the prior convictions are elements of the crime rather than aggravating factors, *Roswell* states that the prior conviction exception in *Apprendi* does not apply. *Id.* at 193 n.5. Thus, under *Alleyne*, *Blakely*, *Apprendi* and *Roswell*, the judicial finding of Mr. McCasland's prior conviction and the fact he qualified as a persistent offender violated his right to due process and right to a jury trial.⁴

5. Engaging in a factual inquiry to determine comparability of his out-of-state prior convictions violated Mr. McCasland's rights under the Sixth and Fourteenth Amendments.

- a. *Out-of-state convictions may not be included in a defendant's offender score if the foreign statute prohibits a broader swath of conduct than the analogous Washington statute.*

The United States Constitution guarantees the rights to due process and a jury trial, any fact that increases the prescribed range of penalties must be either admitted by the defendant or found by a jury beyond a reasonable doubt. U.S. Const. amends. VI, XIV; *Alleyne*, 570 U.S. at 115-16, *citing, inter alia, Apprendi, supra*. Although the fact of

⁴ *But see State v. Witherspoon*, 180 Wn.2d 875, 892, 329 P.3d 888 (2014) (“Like *Blakely*, nowhere in *Alleyne* did the Court question *Apprendi's* exception for prior convictions. It is improper for us to read this exception out of Sixth Amendment doctrine unless and until the United States Supreme Court says otherwise. Accordingly, *Witherspoon's* argument that recent United States Supreme Court precedent dictates that his prior convictions must be proved to a jury beyond a reasonable doubt is unsupported.”).

a prior conviction may be an exception to the above rule, there is no exception allowing courts to find facts *underlying* prior convictions. *Descamps v. United States*, 570 U.S. 254, 268-70, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). “The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt.” *Id.* A sentencing court may not “rely on its own finding about a non-elemental fact” to increase a defendant’s sentence. *Id.* at 270.

If the out-of-state statute is “divisible,” in the sense that it sets forth alternative elements, the sentencing court may engage in a limited factual inquiry to determine under which prong of the foreign statute the defendant was convicted. *See Descamps*, 570 U.S. at 257-58. In *Descamps*, the U.S. Supreme Court explained the constitutional limits of comparability analysis while addressing whether a defendant’s prior California conviction for burglary could be counted as a “prior violent felony” that would increase his sentence under the federal Armed Career Criminal Act (“ACCA”). *See id.*, citing 18 U.S.C. § 924(e). Prior crimes do not count under the ACCA unless they are comparable to the so-called “generic offense.” The Court explained its “modified categorical approach” for addressing whether a prior conviction

obtained under a “divisible statute” is comparable to the generic offense:

That kind of statute sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building *or* an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant’s prior conviction.

Id.

If the out-of-state statute under which the defendant was convicted is not divisible and simply prohibits a broader swath of conduct than the relevant Washington felony statute, the prior foreign conviction may not be counted as a felony in the defendant’s offender score. A sentencing court may not consider the underlying facts of a prior conviction to determine whether the defendant *could have* been convicted under the narrower Washington statute. *Descamps*, 570 U.S. at 257-58.

In *Descamps*, the Court held a prior California burglary could not be used to increase a defendant’s sentence because the California burglary statute is broader than generic burglary: it does not require breaking and entering. *Descamps*, 570 U.S. at 277-78. The Court

emphasized, “[w]hether Descamps *did* break and enter makes no difference.” *Id.* at 265. “A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense.” *Id.* at 277-78. Because a conviction for generic burglary requires proof of an element that does not exist in the California burglary statute, the prior California burglary could not be counted. *Id.*

- b. *The Oregon sodomy statute prohibits broader conduct, thus Mr. McCasland’s prior convictions may not be counted as a prior qualifying conviction for a persistent offender finding.*

The parties and the trial court agreed that the Oregon sodomy statute was not legally comparable to a Washington felony offense because it covered broader conduct. RP 51-52. Thus, under *Descamps*, “the inquiry is over.” *Descamps*, 133 S.Ct. at 2286.⁵

Nevertheless, the trial engaged in the forbidden factual inquiry. By engaging in this factfinding regarding Mr. McCasland’s prior convictions pursuant to a broader statute, the trial court violated Mr. McCasland’s rights under the Sixth and Fourteenth Amendments and the SRA. *Descamps*, 570 U.S. at 268-71. The Oregon convictions may

⁵ *But see State v. Olsen*, 180 Wn.2d 468, 476, 325 P.3d 187 (2014) (“*Descamps*’ Sixth Amendment implications do not call into question Washington’s comparability analysis under the SRA.”).

not be counted as a qualifying felony for purposes of finding Mr. McCasland's to be a persistent offender. *See id.*

F. CONCLUSION

For the reasons stated, Mr. McCasland asks this Court to reverse his conviction with instructions to dismiss. Alternatively, Mr. McCasland asks this Court to reverse his sentence and remand for resentencing to a standard range sentence.

DATED this 5th day of April 2018.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
Washington Appellate Project – 91052
1511 Third Avenue, Suite 701
Seattle, WA. 98101
(206) 587-2711
Fax (206) 587-2710
tom@washapp.org
Attorneys for Appellant

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

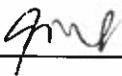
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 50370-1-II
)	
NATHANIEL MCCASLAND,)	
)	
Appellant.)	

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
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Fax (206) 587-2710

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