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Court of Appeals
Division II
State of Washington
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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

REPLY 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. ARGUMENT

The prior Oregon convictions were not factually comparable to a Washington qualifying offense, thus the persistent offender sentence must be reversed.

It was undisputed at trial that the Oregon prior convictions were not legally comparable to a Washington qualifying offense. RP 1349. The trial court found the prior convictions comparable to a Washington conviction for second degree rape of a child. RP 1350.

In the Brief of Appellant, Mr. McCasland submitted his prior Oregon convictions were factually comparable to the Washington offense of first degree incest. The court may only base its ruling on factual comparability on “facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt.” *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). Thus, this case turns on Mr. McCasland’s statement when he pleaded guilty in Oregon:

“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.

Instead of addressing Mr. McCasland’s argument, the State merely parrots the argument it made to the trial court. Brief of Respondent at 12-20.

Mr. McCasland was convicted in Oregon under ORS 163.405

(1989), which provides:

“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*

(Emphasis added).

“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). The victim in the Oregon offense was Mr. McCasland’s half-brother. Thus, the Oregon prior offense of First Degree Sodomy was factually comparable, based upon Mr. McCasland’s express admission, to Washington’s first degree sodomy offense, which requires a relationship by among others, half-blood, and also involves sexual intercourse. RCW 9A.64.020(1)(a). “Sexual intercourse” in Washington is defined as: “any penetration of the vagina or anus, however slight . . .” or “any act of sexual contact between persons

involving the sex organs of one person and the mouth or anus of another . . .” RCW 9A.44.010(1)(a), (b); *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

The trial court erred in finding the Oregon prior convictions qualified as prior convictions for a persistent offender finding. RCW 9.94A.030(38). This Court should find the Oregon prior convictions were comparable to a Washington first degree sodomy conviction, which is not a qualifying offense, and reverse Mr. McCasland’s sentence.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. McCasland asks this Court to reverse his conviction with instructions to dismiss. Alternatively, Mr. McCasland asks this Court to reverse his persistent offender sentence and remand for a standard range sentence.

DATED this 13th day of August 2018.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

Washington Appellate Project – 91052

1511 Third Avenue, Suite 610

Seattle, WA. 98101

(206) 587-2711

tom@washapp.org

Attorneys for Appellant

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)	
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)	
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Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

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