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Division II
State of Washington
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No. 50631-9-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RUBEN SOLOVIOV,
Appellant.

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

The Honorable David Gregerson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

In its response, the State argues that Mr. Soloviov's Oregon offenses for second degree assault and unlawful use of a motor vehicle are comparable to Washington offenses. Brief of Respondent (BR) at 14-24.

Mr. Soloviov argues in reply that the trial court improperly included in his offender score the Oregon convictions for unauthorized use of a motor vehicle and second degree assault.

As noted in prior briefing, a sentencing court may not include a prior out-of-state conviction in a person's offender score unless the State proves the offense is comparable to a Washington felony. Washington courts use a two-part test to determine the comparability of a foreign offense. *State v. Thiefault*, 160 Wash.2d 409, 415, 158 P.3d 580 (2007). First, the reviewing court determines whether the foreign offense is legally comparable—"that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Thiefault*, 160 Wash.2d at 415. (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, the trial court must review the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense. *Morley*, 134 Wash.2d at

606. “In making its factual comparison [the reviewing court] may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt.” *Thiefault*, 160 Wash.2d at 415 (citing *In re Pers. Restraint of Lavery*, 154 Wash.2d 249, 258, 111 P.3d 837 (2005)). The State must meet this burden by a preponderance of the evidence. See *State v. Ford*, 137 Wn.2d 472, 479–80, 973 P.2d 452 (1999).

a. 2002 Oregon conviction for unauthorized use of a vehicle

Soloviov was convicted of unauthorized use of a vehicle in Oregon based on an incident that occurred in 2002. The State concedes that the Oregon and Washington offenses are not legally comparable. BR at 17. The State argues that the sentencing court found the 2002 Oregon prior offense to be comparable to theft or possession of stolen property. BR at 17.

In 2002 the elements of the Oregon “unauthorized use of a vehicle” statute, cover a broader range of activity than the Washington statute that prohibits “taking a motor vehicle without permission.” See former RCW 9A.56.070 (1975).

The Oregon statute provides:

(1) A person commits the crime of unauthorized use of a vehicle when:

(a) The person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner; or

(b) Having custody of a vehicle, boat or aircraft pursuant to an agreement between the person or another and the owner thereof whereby the person or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, boat or aircraft, the person intentionally uses or operates it, without consent of the owner, for the person's own purpose in a manner constituting a gross deviation from the agreed purpose; or

(c) Having custody of a vehicle, boat or aircraft pursuant to an agreement with the owner thereof whereby such vehicle, boat or aircraft is to be returned to the owner at a specified time, the person knowingly retains or withholds possession thereof without consent of the owner for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement.

(2) Unauthorized use of a vehicle, boat or aircraft is a Class C felony.

Or.Rev.Stat. § 164.135 (1971).

The former Washington statute for taking a motor vehicle without permission requires (1) intentionally taking or driving away a motor vehicle without permission of the owner or person entitled to the possession thereof or (2) voluntarily riding in a motor vehicle with knowledge that it was unlawfully taken. Former RCW 9A.56.070 (1975)¹;

¹Former RCW 9A.56.070 states:

(1) Every person who shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, the property of another, shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of taking a motor vehicle without permission. (2) Taking a motor vehicle without

State v. Jackson, 129 Wash.App. 95, 108, 117 P.3d 1182 (2005)

It is easy to conceive of a situation in which a defendant could commit the Oregon crime without committing the Washington crime. See *Jackson*, 129 Wash.App. at 107-08, 117 P.3d 1182. (holding that Oregon's former unauthorized use of a vehicle offense was not legally comparable to Washington's taking a motor vehicle without permission offense because the former Oregon statute prohibited a broader range of activity than the former Washington statute)

A sentencing court properly can consider facts conceded by the defendant in a guilty plea as an admitted fact. *Thiefault*, 160 Wash.2d at 415, 158 P.3d 580; see *State v. Tewee*, 176 Wash.App. 964, 970, 309 P.3d 791 (2013) review denied, 179 Wn.2d. 1016, 318 P.3d 280 (2014); *State v. Bunting*, 115 Wash.App. 135, 143, 61 P.3d 375 (2003) (noting that element of Washington offense was not conceded by the defendant's guilty plea in out-of-state case).

According to the information filed, the Oregon prosecutor charged Soloviov with “unauthorized use of a vehicle,” alleging that he did “unlawfully and knowingly take and operate a vehicle, to-wit: a 2001 Chevrolet Camaro, without the consent of the owner Capital Chevrolet, contrary to the statutes in such cases made and provided.” Clerk's Papers

permission is a class C felony.

at 180. In his guilty plea, Soloviov admitted that he “knew [he] took and operated a motor vehicle that did not belong to [him], and it was worth more than \$10,000.” CP 182. The record, however, does not indicate if he initially obtained permission to take the car from the dealership. In Washington, once a person obtains permission to use an automobile he cannot violate former RCW 9A.56.070(1) (1975) even if he exceeds the scope of that permission. *State v. Clark*, 96 Wash.2d 686, 692, 638 P.2d 572 (1982).

State v. Teevee, 176 Wash.App. 964, 309 P.3d 791 (2013) is instructive. In *Teevee*, this Court held that an Oregon conviction for unauthorized use of motor vehicle was not legally or factually comparable to Washington crime of second-degree taking of motor vehicle without permission. Here, the charging document does not address the specific circumstance under which Soloviov obtained the vehicle. Because the victim was a car dealership, the facts presented leave open the possibility that Soloviov initially obtained permission from Capital Chevrolet to test drive the car and agreed that Soloviov would return the vehicle, but that he retained possession of the vehicle longer without the owner's consent. Under that circumstance, Soloviov's criminal actions that led to his Oregon conviction would not constitute Washington's taking of a motor vehicle without permission. Therefore it is not possible to determine from

the record if the Oregon conviction is factually comparable to Washington's taking a motor vehicle statute. The State failed to prove that Mr. Soloviov's conviction under the broad Oregon statute was factually comparable to the more narrow Washington statute. See e.g. *Tewee*, 176 Wash.App. at 970-71.

The sentencing court erred by increasing Mr. Soloviov's offender score based on the Oregon conviction. The case must be remanded for resentencing without the Oregon conviction. See *State v. Thomas*, 135 Wash.App. 474, 480, 144 P.3d 1178 (2006), review denied, 161 Wash.2d 1009, 166 P.3d 1218 (2007).

b. 2009 Oregon conviction for second degree assault (firearm)

The State argues that Soloviov's 2009 Oregon conviction for second degree assault with a firearm is comparable to Washington's assault in the third degree under the deadly weapon prong. BR at 21. The Washington statute defines the offense of third degree assault more narrowly than the Oregon statute. Under ORS 163.175(1)(b), "A person commits the crime of assault in the second degree if the person ... [i]ntentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon." The *mens rea* under ORS 163.175(1)(b) is "intentionally or knowingly."

Washington's statute, however, states that a person is guilty of

third degree assault who, “[w]ith criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.” RCW 9A.36.031(1)(d).

In Washington, assault is a specific intent crime. *State v. Williams*, 159 Wn.App. 298, 307, 244 P.3d 1018 (citing *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)), review denied, 171 Wn.2d 1025 (2011). In other words, a defendant must act with specific intent to commit an actual battery or to put his victim in apprehension of harm. *Williams*, 159 Wn.App. at 307. Assault is defined not by statute but by common law and covers three types of conduct: “(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.” *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). “Criminal negligence” is defined in RCW 9A.08.010(1)(d):

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Washington distinguishes the mental states of “intentionally” and

“knowingly.” RCW 9A.08.010(1).² The *mens rea* element of the Oregon offense is therefore broader than Washington's and dispositive of the legal comparability question in this case. In Oregon, an assault may be committed either knowingly or intentionally – OR.REV.STAT. § 163.208(1) – while in Washington, assault must be committed intentionally. *Williams*, 159 Wn.App. at 307.

Regarding factual comparability, third degree assault requires the defendant act “[w]ith criminal negligence, [and] cause bodily harm to another person by means of a weapon.” RCW 9A.36.031(1)(d). Here, the record does not evidence Soloviov’s mental state as to the consequence of his acts, and thus, the State cannot show whether he acted with criminal negligence. Thus, the State failed to provide sufficient evidence to prove with a preponderance of the evidence that Soloviov’s plea to Oregon’s second degree assault is factually comparable to Washington's third degree assault.

Because neither of the two Oregon offenses are legally or factually

²RCW 9A.08.010(1) in states in relevant 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.

comparable to any of Washington's most serious offenses put forward by the State or relied on by the trial court, this court should reverse Soloviov's sentence and remand for resentencing with an offender score of "3."

The State notes that the trial court erroneously assigned one extra point to Soloviov's offender score by finding Oregon assault conviction to be the equivalent to second degree assault instead of third degree assault and that Soloviov should be resentenced with an offender score of "5" instead of "6." BR at 15, 24-25.

In the alternative, Mr. Soloviov asks that this court accept the State's concession that Mr. Soloviov was incorrectly sentenced with an additional point for second degree assault, and to remand for resentencing to an offender score of "5".

B. CONCLUSION

For the reasons stated herein and in the appellant's opening brief, this Court should grant the relief previously requested.

In the alternative, if the Court finds both challenged Oregon convictions are comparable to Washington felonies, Mr. Soloviov asks that this Court find that Mr. Soloviov was incorrectly sentenced with an additional point for the 2009 second degree assault conviction, and to remand for resentencing with an offender score of "5."

DATED: June 1, 2018.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', written over a horizontal line.

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CERTIFICATE

I certify that I sent by JIS a copy of the Reply Brief of Appellant to Clerk of Court of Appeals and to Ms. Rachael Rogers, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on June 1, 2018, to appellant, Ruben Soloviov:

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