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Court of Appeals  
Division II  
State of Washington  
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No. 51822-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ARKANGEL HOWARD,

Appellant.

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

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APPELLANT'S REPLY AND CROSS-RESPONSE BRIEF

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A. ARGUMENT IN REPLY

**1. The convictions for first-degree murder should be reversed for insufficient evidence of premeditation.**

As explained in the opening brief, to convict a defendant of first-degree murder, the State must prove premeditated intent to kill, not merely intent to kill. Here, the State presented no evidence of planning, threats, or motive. The State's evidence showed the shooting was "quick" and lasted only a few seconds. This Court should accordingly reverse the convictions for first-degree murder and remand for entry of convictions for second-degree murder. Br. of Appellant at 5-13.

In response, the State relies solely on the fact that Mr. Howard had "his own gun" with him that day "prior to coming to Ms. Sizemore's apartment that afternoon." Br. of Respondent at 9-10. But this is insufficient on its own, and if anything, shows a lack of premeditation. As the State concedes, Mr. Howard already owned "his own gun" – there is no evidence he procured it for the purpose of killing the victims. On the contrary, the evidence presented was that Mr. Howard always carried a gun in his waistband, and had bought it to protect himself. RP 603-04. Therefore, he just happened to have it with him that day, because he has it with him every day. *See id.*

State's witness Valerie Sizemore testified, "He had started to carry a gun about two weeks prior all the time with him. At that point the people he was hanging around with all were carrying guns. It just -- it seemed like always an agitated situation." RP 603. Ms. Sizemore saw the gun that morning beside the bed, and she had seen Mr. Howard carry the gun with him every day the preceding week. RP 603-04. Thus, the only evidence the State presented was that Mr. Howard always had his own gun with him for self-protection, and then suddenly snapped and shot his friends on the day in question.

The case the State relies on is inapposite. *See State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1990). There, although the court did rely on the juvenile's procurement of a gun to support a finding of premeditation, there was also significant additional evidence on that element. The defendant admitted to a motive that existed in advance: that the victim could identify the defendant's friend, who was wanted for another crime. *Id.* at 135. Moreover, the defendants shot the victim twice and stabbed him seven times. *Id.* at 134; *see State v. Allen*, 159 Wn.2d 1, 8, 147 P.3d 581 (2006) ("injuries inflicted by various means over a period of time can support a finding of premeditation").

Here, Mr. Howard merely shot the two men in quick succession. This "mere infliction of the fatal act" is insufficient to prove

premeditation. *State v. Bingham*, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). This Court should reverse and remand for entry of convictions on the lesser offense of second-degree murder. *In re Heidari*, 174 Wn.2d 288, 292, 274 P.3d 366 (2012).

**2. The sentence should be reversed because the trial court improperly included in the offender score an Oregon conviction that is not comparable to a Washington crime.**

The trial court erred in including a prior Oregon conviction for attempted first-degree robbery in Mr. Howard's offender score. As the trial court recognized, the Oregon crime is broader than Washington's because Washington requires proof of specific intent, while Oregon requires only general intent. That should have ended the inquiry, and the conviction should not have been counted. Br. of Appellant at 13-20.

In response, the State appears to concede the Oregon crime is broader than the Washington crime, but it avers the conviction was properly counted because Mr. Howard "admitted that he 'helped another person take a substantial step towards using a firearm to steal money from Nigel Nuckels.'" Br. of Respondent at 12. The State claims, "To commit an attempted robbery in the first degree in the State of Washington, one must take a substantial step towards committing the crime of robbery in the first degree[.]" *Id.* Therefore, according to the State, Mr. Howard

“admitted to conduct which, if committed in the State of Washington, would have violated the Attempted Robbery in the First Degree statute.”

*Id.*

The State is wrong. Taking a substantial step toward the commission of a crime is not enough to prove an attempt crime. The State must also prove *intent* to commit the crime. RCW 9A.28.020(1). And, as the trial court recognized, Oregon’s attempt statute is broader than Washington’s because Oregon proscribes general intent while Washington requires proof of specific intent:

ORS 161.405(1): “A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime.”

RCW 9A.28.020(1): “A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.”

In Washington, “[t]he mental state required for criminal attempt (specific intent) is the highest mental state requirement defined by statute.” *State v. Johnson*, 173 Wn.2d 895, 905, 270 P.3d 591 (2012). It requires proof of “intent to commit the base crime[.]” *Id.* at 904. Oregon, in contrast, requires only “an intent to *engage in conduct which constitutes the crime* rather than a specific intent to commit the crime.” *State v.*

*Kimbrough*, 364 Or. 66, 83, 431 P.3d 76, 85 (2018) (internal citation omitted; emphasis in original). Oregon’s crime is broader than Washington’s, and Mr. Howard did not admit to the mental state required in Washington.

More to the point, *even if* Mr. Howard had admitted to specific intent in Oregon, any such admission would be irrelevant for comparability purposes. As the Supreme Court explained in *Lavery*, a prior federal bank robbery may not be counted as a robbery in Washington because the former requires only general intent while the latter requires specific intent. *In re the Personal Restraint of Lavery*, 154 Wn.2d 249, 255-57, 111 P.3d 837 (2005). The underlying facts of the federal offense did not matter, because there would have been “no incentive for the accused to have attempted to prove that he did not commit the narrower offense.” *Id.* at 257. Courts have reached similar conclusions in other cases. *E.g. Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 2289, 186 L. Ed. 2d (2013); *State v. Davis*, 3 Wn. App. 2d 763, 782, 418 P.3d 199 (2018); *See* Br. of Appellant at 17-19.

In sum, because attempted first-degree robbery is a broader crime in Oregon than in Washington, the trial court erred by including it in Mr. Howard’s offender score. This Court should reverse the sentence and remand for resentencing. Br. of Appellant at 13-20.

B. ARGUMENT ON CROSS-APPEAL

- 1. The sentencing court correctly concluded the prior Oregon conviction for third-degree robbery is not comparable to a conviction for second-degree robbery in Washington, and therefore is not a strike offense.**

The trial court properly concluded that Mr. Howard’s prior Oregon conviction for third-degree robbery is not comparable to second-degree robbery in Washington and may not be counted as a strike. Accordingly, the State’s appeal should be rejected.

As the trial court recognized, the Oregon crime is broader than the Washington crime because it encompasses *attempted* thefts while Washington’s statute requires a completed theft. RP 1393; *see* ORS 164.395 (“A person commits the crime of robbery in the third degree if in the course of committing *or attempting to commit* theft ...”); RCW 9A.56.190 (“A person commits robbery when he or she unlawfully *takes personal property* ...”). The State has set out these statutes in its brief, yet it ignores this important distinction in its analysis. Br. of Respondent at 16.

The State relies on *State v. McIntyre*, 112 Wn. App. 478, 49 P.3d 151 (2002). Br. of Respondent at 17. In that case, the defendant argued the two crimes were not comparable because Washington’s requires that the property be taken “from the person of another or in his presence against

his will.” *McIntyre*, 112 Wn. App. at 481. The defense argued a person who pushed a security guard after shoplifting would be guilty of third-degree robbery in Oregon but not second-degree robbery in Washington. *Id.* This Court disagreed, and cited Washington cases holding such conduct constitutes second-degree robbery. *Id.* But this Court did not address any argument that Oregon’s statute is broader because it criminalizes the threatened use of force in *attempted* thefts in addition to completed thefts. Thus, *McIntyre* is not relevant to the trial court’s conclusion here. *See In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (“An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered”) (internal quotation omitted).

Moreover, the State again errs in reaching “factual comparability” where the foreign crime is broader than the Washington crime. If the elements of the prior out-of-state crime are broader than those of the relevant Washington crime, “the inquiry is over.” *Descamps*, 133 S. Ct. at 2286. The trial court correctly concluded that the elements of third-degree robbery in Oregon are broader than the elements of second-degree robbery in Washington, and therefore the prior Oregon conviction may not be counted as a “most serious offense” in Washington. RP 1393. This Court should affirm.

**2. The legislature removed second-degree robbery from the list of strike offenses, providing another independent basis for affirming the sentencing court's decision.**

This Court should also reject the State's appeal for the independent reason that the legislature has removed second-degree robbery from the list of "most serious" offenses that may be counted as strikes for purposes of sentencing defendants to life without parole. Laws of 2019, ch. 187 ("An ACT Relating to removing robbery in the second degree from the list of offenses that qualify an individual as a persistent offender; and amending RCW 9.94A.030"). Thus, at any resentencing hearing, Mr. Howard would not fall within the definition of "persistent offender" even if he had a prior conviction that was comparable to second-degree robbery in Washington. *See id.* For this independent reason, this Court should reject the State's argument that Mr. Howard should be resentenced as a persistent offender based on a prior third-degree robbery in Oregon.

C. CONCLUSION

Because the State failed to prove premeditation, Mr. Howard asks this Court to reverse his convictions for first-degree murder and remand for entry of convictions for the lesser crime of second-degree murder, and for resentencing. Mr. Howard also asks this Court to vacate the sentence and remand for resentencing because the sentencing court erred in

including a prior Oregon conviction for first-degree attempted robbery in the offender score. The State's argument regarding an alleged strike offense should be rejected because third-degree robbery in Oregon is not comparable to second-degree robbery in Washington, and, in any event, second-degree robbery is no longer a strike offense in Washington. Finally, this Court should remand with instructions to strike the criminal filing fee from the judgment.

DATED this 1st day of July, 2019.

Respectfully submitted,



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DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent/Cross-appellant,	)	
	)	NO. 51822-8-II
v.	)	
	)	
ARKANGEL HOWARD,	)	
	)	
Appellant/Cross-respondent.	)	

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