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NO. 51822-8-II

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

STATE OF WASHINGTON, Respondent/Cross-Appellant

v.

ARKANGEL D HOWARD, Appellant/Cross-Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00636-0

BRIEF OF RESPONDENT/CROSS-APPELLANT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. The State presented sufficient evidence to prove premeditation.

II. The trial court properly included Howard's prior Attempted Robbery in the First Degree out of the State of Oregon in his offender score.

III. The State agrees this Court should strike the $200 filing fee.

STATEMENT OF THE CASE

The State charged Arkangel Howard (hereafter 'Howard') with Murder in the First Degree, Murder in the Second Degree, and Unlawful possession of a firearm in the First Degree. CP 1-2. The charges stemmed from an incident that occurred on March 19, 2017 during which Howard used a gun to shoot two men, killing them. CP 6. After shooting the men, Howard fled the scene. CP 6-8. The case proceeded to trial, wherein the State called numerous witnesses, including eye witnesses, neighbors who heard the gunshots, medical personnel, and police officers who responded to the scene and who were involved in the investigation. No motive for the shooting was determined throughout the investigation. RP 1315, 1344. The jury returned verdicts of guilty on two counts of premeditated murder in the first degree and unlawful possession of a firearm in the first degree. CP 80, 83, 86. The jury also found that Howard was armed with a firearm

during the commission of the two counts of premeditated murder in the first degree. CP 82, 85.

The testimony and evidence at trial produced the following:

Valerie Sizemore dated Howard from January 2017 through March 2017. RP 570-72. In March 2017, Ms. Sizemore was living in an apartment in Vancouver, located in Clark County, Washington. RP 572. Ms. Sizemore owned a gray 2011 Prius with a roof rack, which Howard drove sometimes. RP 575.

Ms. Sizemore was moving out of her apartment on March 19, 2017. RP 573-74, 588. The plan was for Howard to go to Portland to get a truck and bring it back for them to use to move Ms. Sizemore's belongings to a storage unit. RP 581, 588. Howard left her apartment to go get the truck in Portland at about 1pm. RP 582. While Howard was getting the truck, Ms. Sizemore packed her belongings. RP 589. Howard came back and was outside Ms. Sizemore's apartment with two men, Bo and Allen. RP 593. Ms. Sizemore was confused by the relationship between Howard and the two men because though she heard that they were friends, it did not really seem like they were friends when they were around. RP 593.

Ms. Sizemore walked over to Howard to try to find out what was going on, but then there was quick gunfire and she looks over and both Bo and Allen had been shot. RP 594. Ms. Sizemore immediately responded

by asking Howard "what the fuck did you just do?" RP 596. Ms. Sizemore believes Howard shot the two men as no one else was around, and there was a gun in Howard's hand. RP 594. Ms. Sizemore believes somewhere between four and six shots were fired. RP 595. Bo was shot first and it seemed like he was killed right away, but Allen did not die right away. RP 595. Neighbors came over to help Allen; he was fighting to stay alive, but he died before the police arrived. RP 595. After Howard shot Bo and Allen he got into Ms. Sizemore's Prius and drove away. RP 595. He still had his gun with him when he left. RP 595.

Laurel Burnett lives near the scene of the shooting. CP 456. She knows Valerie Sizemore, Howard's girlfriend, and lived right next door to where Ms. Sizemore lived. RP 457-58. Ms. Burnett was aware that Ms. Sizemore was moving out of the apartment on the day of the shooting. RP 459. Ms. Burnett saw Ms. Sizemore's belongings in suitcases and boxes sitting out front of the apartment and believed the gentlemen had arrived to help her move. RP 459-60. Around 5 p.m., or possibly a little later, Ms. Burnett was outside on her patio when she heard five pops coming from the front of the apartment. RP 460, 463. At first she thought children were messing around or something, maybe it was fireworks. RP 460, 487. She ran through her apartment and came out her front door. RP 464. Ms. Burnett saw Ms. Sizemore running, screaming her head off. RP 460. She

saw a black man with his hair in braids get quickly into Ms. Sizemore's car, and then she saw two men lying on the ground. RP 460, 465, 476. The man in the car backed up and left. RP 466. Ms. Sizemore was hysterical; Ms. Burnett asked her what was going on, but she responded that she didn't know. RP 466-67. Ms. Burnett saw there was a woman, a neighbor who is a nurse, attending to one of the men on the ground, so she went to the other man and check him; he had already passed away. RP 468, 477-78. She grabbed her phone and dialed 911. RP 468. Ms. Burnett noticed shell casings on the ground; everyone made sure not to disturb them. RP 471. Then she waited for help to arrive. RP 468. She thought maybe they couldn't find where they were at as it seemed to be taking a while, so she went to the end of the driveway and waited for police to arrive. RP 469, 472.

Jason Hurst lives with his fiancée, Tiffany Jones, and their three children. RP 492. He is a mechanic. RP 493. They live in a house behind the scene of the shooting; their back porch faces the parking lot of the apartment building where the shooting occurred. RP 493, 504-05, 540; EX. 30. On March 19, 2017, at approximately 5 p.m., he was upstairs in the kitchen, grabbing some food, when he heard what he believed to be three shots. RP 494. He then heard a female voice say, "I can't believe you just did that." RP 496. Mr. Hurst looked out the back door of his house

and saw a woman and a man standing outside; the man that he saw standing outside was Howard, identified in court as the same person he saw standing outside immediately after he heard the shots. RP 497. Mr. Hurst then saw Howard jump into a Prius and make a three-point turn to get out of the area. RP 498. He left in a hurry. RP 498. The vehicle that Howard left in was owned by the woman that Mr. Hurst heard say, "I can't believe you just did that." RP 498. Mr. Hurst told his fiancée to get their children into the back room, and then he walked down to the fence line and when he got up to the fence line he noticed two men lying on the ground. RP 501, 543. He saw a pool of blood coming out from the first person he saw, and then looked over and saw the other man had a bullet hole in his head. RP 501. Before he climbed over the fence, Mr. Hurst's fiancée, Ms. Jones, came down and told him to help her get over the fence since she is a nursing assistant and could potentially help the injured men. RP 503. Mr. Hurst helped her over the fence and then called 911; he went back to his house to get his children into the back room and to get his own gun to make sure they would be safe. RP 504.

Ms. Jones noticed that one man was lying on the ground and appeared to have lost a lot of blood, and the other man was lying on the ground and had elevated respirations. RP 548. Ms. Jones immediately went to the man who she couldn't see if he was breathing or not and

checked for a pulse; he did not have a heartbeat. RP 550. She returned to the man who was still breathing, and then realized she didn't have any gloves on, so asked if anyone had any gloves she could use. RP 550-52. While she was waiting for gloves, Ms. Jones took notice of her surroundings; she saw five shell casings on the ground around the men. RP 552-53. Someone brought her a pair of gloves, and she attended to the second man lying on the ground. RP 554-55. She stayed there until paramedics arrived. RP 557.

Another neighbor, Andrew Kallenberger, did not notice anything unusual prior to the shooting. RP 659, 665. He saw no argument. Neither did neighbor Cynthia McDaniel. RP 702.

Allen Collins died of three gunshot wounds to the left side of his body, and Jason Benton ('Bo') died of a single gunshot wound to the head. RP 1135, 1143-53. Police found a gun under Howard's mother's shed; the bullets that killed Allen and Bo were likely fired from this gun according to the State's expert. RP 1105.

After the jury returned verdicts of guilty on two counts of Murder in the First Degree and Unlawful Possession of a Firearm in the First Degree, the trial court held a sentencing hearing. The State asked the trial court to sentence Howard to life as a persistent offender, arguing that Howard's two prior Oregon convictions for Robbery in the Third Degree

and Attempted Robbery in the First Degree counted as two "strike" offenses. However, the trial court found that only one of Howard's two Oregon convictions was comparable to a Washington "strike" offense and the second was not. RP 1392-95. Howard was sentenced with an offender score of 4 and received a sentence of 760 months. CP 201-02. Howard then timely appealed and the State submitted its notice of cross-appeal for the sentencing issue.

ARGUMENT

I. The State presented sufficient evidence to prove premeditation

Howard argues that his convictions for premeditated murder in the first degree should be reversed because there is insufficient evidence of premeditation. This argument is without merit as the State presented sufficient evidence from which a jury could reasonably find premeditation was proven beyond a reasonable doubt.

Evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could find the elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Rehak*, 67 Wn. App. 157, 164, 834 P.2d 651 (1992). All reasonable inferences from the evidence are drawn in favor of the State and interpreted against the defendant. *State v. Pirtle,* 127 Wn.2d 628, 643,

904 P.2d 245 (1995). First degree murder includes the element of a premeditated intent to cause the death of another person. RCW 9A.32.030. Premeditation is the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. *State v. Commodore*, 38 Wn.App. 244, 247, 684 P.2d 1364, *rev. denied*, 103 Wn.2d 1005 (1984). Direct and circumstantial evidence may be considered. Premeditation can be shown by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial. *State v. Bingham*, 105 Wn.2d 820, 824, 719 P.2d 109 (1986); *Pirtle*, 127 Wn.2d at 643; *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995).

Premeditation must involve "more than a moment in point of time." RCW 9A.32.020(1). However, mere opportunity to deliberate is not sufficient to support a finding of premeditation. *Pirtle*, 127 Wn.2d at 644. Instead, premeditation must involve "the deliberate formation of and reflection upon the intent to take human life" and involves "the mental process of thinking beforehand, deliberation, reflection, weighing, or reasoning for a period of time, however short." *Id.* (quoting *Gentry*, 125 Wn.2d at 597-98 and *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992)).

Our Courts have considered the sufficiency of the evidence with respect to premeditation in a variety of circumstances. A review of several cases may help with analyzing the sufficiency of the evidence in this case. In *Rehak*, 67 Wn.App. at 157, the Court found sufficient evidence to support premeditation when the victim was shot three times in the head, twice after he had fallen to the floor. In *State v. Massey*, 60 Wn.App. 131, 803 P.2d 340 (1990), evidence that the defendant brought a gun to the murder site was sufficient to support a finding of premeditation. In *State v. Gibson*, 47 Wn.App. 309, 734 P.2d 32 (1987), evidence of a brief time lapse between blunt force blows to the head and later strangulation was sufficient to show premeditation. In *Bingham*, the Court found that the planned presence of a weapon necessary to facilitate a killing has been held to be adequate evidence to allow the issue of premeditation to go to the jury. *Bingham*, 105 Wn.2d at 827.

Just as in *Massey, supra*, and in *Bingham, supra*, Howard had to have planned the presence of the murder weapon, his own gun, at the scene of the murders. He had the gun with him, on his person, just prior to the shooting. In *Massey*, the Court held, "In this case, the evidence indicates that Massey had the gun prior to entering the marina. Therefore, sufficient evidence exists to show premeditation." *Massey*, 60 Wn.App. at 145. Here, the evidence indicated that Howard had the gun prior to coming

to Ms. Sizemore's apartment building that afternoon. Once he arrived at the scene, Howard did not go anywhere else before the shooting occurred. He could not have procured the weapon from anywhere else, and there was no testimony to support that it came from anywhere or anyone else. There was sufficient evidence to show premeditation and for that issue to have gone to the jury.

The existence of the gun in the defendant's presence at the scene shows his preparation for the murders, shows his contemplation of his use for the murders, and while the murders were done quickly, that can support premeditation as it shows that Howard knew exactly what he was doing, he knew where he was aiming (the victims' heads), and he wanted to do this to the extent that he took no provocation to complete the act. When the evidence is viewed in the light most favorable to the State, taking all reasonable inferences that can be drawn from the evidence, it is clear that there was sufficient evidence to support the jury's finding of premeditation.

II. The trial court correctly included Howard's Oregon conviction in his offender score

Howard argues the trial court erred in including his Oregon conviction for Attempted Robbery in the First Degree in his offender score. Howard argues the trial court erred because it found his Oregon

crime was factually comparable to a Washington felony, arguing factual comparability violates the Sixth Amendment. However, factual comparability is permissible and was appropriate here. Accordingly, Howard's claim of error fails.

This Court reviews a trial court's calculation of a defendant's offender score de novo. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187, *cert. denied*, 135 S.Ct. 287 (2014). Out-of-state convictions are classified according to their comparable offense under Washington law. RCW 9.94A.525(3). The State must prove the existence and comparability of a defendant's out-of-state conviction by a preponderance of the evidence. *State v. Collins*, 144 Wn.App. 547, 554, 182 P.3d 1016 (2008), *rev. denied*, 165 Wn.2d 1032 (2009). The first step in determining comparability of offenses is to determine if the offenses are legally comparable. *Olsen*, 180 Wn.2d at 472. Under legal comparability, the elements of the out-of-state conviction are compared to the elements of the relevant Washington criminal statute. *Id.* at 472-73. If the foreign conviction is narrower or identical, than it is comparable and will count towards the offender score as if it were a Washington offense. *Id.* However, if the foreign offense is broader, then the court determines factual comparability. *Id.* at 473. In determining factual comparability, the court looks to whether the defendant's conduct in the out-of-state

conviction would have violated the comparable Washington statute. *Id.* In determining factual comparability, only facts that were admitted, stipulated to, or proved beyond a reasonable doubt are considered. *Id.* at 473-74. "[F]acts in a charging document that are untethered to the elements of a crime are outside the proper scope of what courts may consider" to determine factual comparability. *State v. Davis*, 3 Wn.App.2d 763, 782, 418 P.3d 199 (2018).

Howard had previously been convicted of Robbery in the Third Degree and Attempted Robbery in the First Degree in the State of Oregon. CP 210. With regards to Attempted Robbery in the First Degree, in his guilty plea statement in Oregon, Howard admitted that he "helped another person take a substantial step towards using a firearm to steal money from Nigel Nuckles." CP 121. 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, which is committing a robbery while armed with a deadly weapon, a deadly weapon which includes a firearm, and a robbery which is taking personal property from another person by the use or threatened use of force. From this admission of facts in his guilty plea statement, Howard admitted to conduct which, if committed in the State of Washington, would have violated the Attempted Robbery in the First Degree statute. Howard's

Oregon conviction is therefore factually comparable to an Attempted Robbery in the First Degree. The trial court did not err in finding Howard's Oregon offense was factually comparable. While our Courts have recently found that admission to extraneous facts which are untethered to elements of the crime are not admissible to prove factual comparability, there are no extraneous admissions in this case untethered to elements of the crime. The trial court properly included Howard's prior Attempted Robbery in the First Degree in his offender score as it was factually comparable to a Washington offense.

III. The State Agrees the Filing Fee should be stricken

The State agrees with Howard that the $200 filing fee should be stricken as he is indigent and the amendments to the LFO statutes apply retroactively, making the prohibition against imposing the filing fee on indigent defendants apply in Howard's case.

CONCLUSION

The State presented sufficient evidence of premeditation and Howard's convictions should be affirmed. The trial court properly found that Howard's prior Oregon conviction for Attempted Robbery in the First Degree was factually comparable to a Washington attempted Robbery in

the First Degree. And finally, the State agrees the filing fee should be stricken from Howard's judgment and sentence.

CROSS-APPEAL

I. The trial court erred in finding Howard's prior out-of-state conviction for Robbery in the Third Degree was not comparable to a Washington "strike" offense.

STATEMENT OF THE CASE

Howard was previously convicted in the State of Oregon of Robbery in the Third Degree. CP 210. At sentencing, the State argued this prior conviction was comparable to a Washington Robbery in the Second Degree. CP 87-98. The trial court found that Howard's prior Oregon conviction for Robbery in the Third Degree was neither legally nor factually comparable to a Washington most serious offense. RP 1192-95. The State then submitted its notice of cross-appeal of the sentencing issue.

ARGUMENT

I. The trial court erred in finding Howard's prior out-of-state conviction for Robbery in the Third Degree was not comparable to a Washington "strike" offense.

The trial court erred in finding Howard's prior conviction for Robbery in the Third degree was not comparable to a Washington most serious offense and for failing to sentence Howard as a persistent offender. This Court should reverse the trial court's finding that Howard's Robbery

in the Third Degree out of Oregon was not comparable and remand for resentencing as a persistent offender.

This Court reviews a trial court's calculation of a defendant's offender score de novo. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187, *cert. denied*, 135 S.Ct. 287 (2014). Out-of-state convictions are classified according to their comparable offense under Washington law. RCW 9.94A.525(3). The State must prove the existence and comparability of a defendant's out-of-state conviction by a preponderance of the evidence. *State v. Collins*, 144 Wn.App. 547, 554, 182 P.3d 1016 (2008), *rev. denied*, 165 Wn.2d 1032 (2009). The first step in determining comparability of offenses is to determine if the offenses are legally comparable. *Olsen*, 180 Wn.2d at 472. Under legal comparability, the elements of the out-of-state conviction are compared to the elements of the relevant Washington criminal statute. *Id.* at 472-73. If the foreign conviction is narrower or identical, than it is comparable and will count towards the offender score as if it were a Washington offense. *Id.* However, if the foreign offense is broader, then the court determines factual comparability. *Id.* at 473. In determining factual comparability, the court looks to whether the defendant's conduct in the out-of-state conviction would have violated the comparable Washington statute. *Id.* In determining factual comparability, only facts that were admitted,

stipulated to, or proved beyond a reasonable doubt are considered. *Id.* at 473-74. "[F]acts in a charging document that are untethered to the elements of a crime are outside the proper scope of what courts may consider" to determine factual comparability. *State v. Davis*, 3 Wn.App.2d 763, 782, 418 P.3d 199 (2018).

Oregon defines Robbery in the Third Degree as:

> 1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft or unauthorized use of a vehicle as defined in ORS 164.135 the person uses or threatens the immediate use of physical force upon another person with the intent of:
> (a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or
> (b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.

ORS 164.395. Washington defines Robbery in the Second Degree as when one person:

> Unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial....

RCW 9A.56.190. In *State v. McIntyre*, 112 Wn.App. 478, 49 P.3d 151 (2002), this Court analyzed whether Oregon's Robbery in the Third Degree statute was legally comparable to Washington's Robbery in the Second Degree statute. Finding the two crimes were legally comparable, this Court reasoned that both statutes required (1) a theft; (2) the use or threatened use of immediate force or fear of injury; and (3) that the force or fear be used to obtain or retain the property. *McIntyre*, 112 Wn.App. at 481. Therefore, the elements of this Oregon Robbery and its Washington counterpart "are the same...." *Id.* at 483.

The Superior Court erred in failing to recognize that the elements of Oregon's Robbery in the Third Degree and Washington's Robbery in the Second Degree are legally comparable as our Court has already recognized in *McIntyre, supra.*

Not only are the two crimes legally comparable, they are factually comparable in Howard's case as well. Howard admitted on his guilty plea statement in his Oregon offense that he "aided and abetted Latisha M. Storey in taking property from Marshalls [*sic*] by assaulting Richard Wyche who [was] chasing my sister and attempting to take her in custody for shoplifting." CP 91. Based on the facts he admitted to, facts directly related to the elements of the crime to which he pled guilty, Howard

admitted to facts which met the elements of the crime of Robbery in the Second degree in the State of Washington. Had the conduct he admitted to been committed in the State of Washington he would have been convicted of Robbery in the Second degree. Therefore, this crime is also factually comparable to a Robbery in the Second Degree.

Convictions from other jurisdictions count as strike offenses if they are comparable to Washington's most serious offenses. RCW 9.94A.030(38)(a)(ii). The purpose of the statute is to ensure that defendants with equivalent prior convictions are treated the same way, regardless of where they committed these offenses. *See State v. Villegas*, 72 Wn.App. 34, 38-39, 863 P.2d 560 (1993), *rev. denied*, 124 Wn.2d 1002, 877 P.2d 1287 (1994). Thus a comparable out-of-state offense, if comparable to a most serious offense, is to be counted as a most serious offense for purposes of the Persistent Offender Accountability Act. Robbery in the Second Degree is a most serious offense. RCW 9.94A.030(33)(o). As Howard's Oregon conviction for Robbery in the Third Degree is both legally and factually comparable to a Washington Robbery in the Second Degree, and a Robbery in the Second Degree is a "strike offense," Howard's Oregon conviction for Robbery in the Third Degree should have been counted as a strike offense and Howard should

have been sentenced as a persistent offender to life in prison without the possibility of parole.

CONCLUSION

The trial court erred in failing to sentence Howard as a persistent offender and the trial court's sentence should be reversed and the matter should be remanded for Howard to be resentenced as a persistent offender.

DATED this 21st day of May, 2019.

Respectfully submitted:

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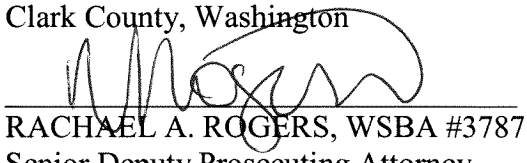
By: 

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