

63016-4

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No. 63016-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERICK DESHUM JORDAN,

Appellant.

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

The Honorable Dean Lum

APPELLANT'S REPLY BRIEF

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2010 JUN 12 PM 4:43

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STATE OF WASHINGTON
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A. ARGUMENT IN REPLY

1. INCLUSION OF JORDAN'S PRIOR TEXAS
CONVICTION IN HIS OFFENDER SCORE
VIOLATED DUE PROCESS.

The State concedes the trial court erred in concluding that Erick Jordan's prior Texas conviction for voluntary manslaughter was comparable to the crime of murder in the second degree. Br. Resp. at 38-39. Nevertheless, the State urges the Court to affirm, contending that the Texas offense could be comparable to the crime of manslaughter in the first degree in Washington. *Id.* The State suggests that the differences between the law of self-defense in Texas and Washington are not germane to the comparability analysis. Br. Resp. at 41-42. The State alternatively asks the Court to remand so that it may have yet another opportunity to prove the factual comparability of the prior offense. Br. Resp. at 44.

None of the State's arguments are availing. This Court should conclude that the narrower instances in which a Texas defendant may claim self-defense as compared to in Washington prevent Jordan's prior offense from being included in his SRA offender score.

a. Because the absence of self-defense is an element that the State must prove beyond a reasonable doubt, the significant disparities between the law of self-defense in Texas and self-defense in Washington preclude the prior offense from being comparable to a Washington felony. Conspicuously absent from the State's discussion is any acknowledgment that self-defense, when raised, becomes an element of the substantive crime which the State must disprove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 621-23, 683 P.2d 1069 (1984). But because self-defense is an element, where distinctions between the pertinent out-of-state definition and self-defense in Washington could preclude a viable self-defense claim in Washington from succeeding in the foreign jurisdiction, use of the foreign offense in the current offender score violates due process.¹ Cf., In re Personal Restraint of Lavery, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). Although not faced with the precise question presented by the facts in this case, appellate courts have embraced variants of this rule.

In In re Personal Restraint of Carter, 154 Wn. App. 907, 230 P.3d 181 (2010), the Court concluded that Carter's prior California conviction for assault on a peace officer with a firearm was not comparable to a crime

¹ This is an iteration of the axiomatic rule that if the elements of the foreign offense are different from or broader than the crime in Washington, it is not comparable to a Washington felony. Lavery, 154 Wn.2d at 257; State v. Howe, 151 Wn. App. 338, 341, 212 P.3d 565 (2010).

in Washington, and therefore not a strike offense, for purposes of Carter's persistent offender sentence. 230 P.3d at 189.² The dispositive consideration was the difference between the intent elements of assault in California, as contrasted to assault in Washington. Id. at 188-89. In California, intent is a general intent crime. Id. at 188. The Court noted that because of this difference, intoxication would not be an available defense to a person charged with assault in California. Id.

Carter only admitted to facts sufficient to establish that he committed the crime of assault on a peace officer with a firearm in California. Id. at 189. In the absence of facts showing "that Carter acted with the specific intent to injure a police officer or create an apprehension of injury," the Court concluded that Carter was "actually innocent" of being a persistent offender. Id.

In Howe, supra, the Court also evaluated the differences between definitions of essential elements to conclude the defendant's prior California conviction for violation of lewd acts upon a child was not legally comparable to a crime in Washington. 151 Wn. App. at 345-46. Likewise, in In re Personal Restraint of Crawford, 150 Wn. App. 787, 209 P.3d 507 (2009), the Court concluded that the existence of additional

² As of the date of this writing, Washington Reporter pin citations were not yet available on Westlaw.

elements of first degree child molestation in Washington precluded the defendant's Kentucky sex abuse I conviction from being legally comparable to a crime in Washington. Id. at 795-96. The Court applied Lavery to reject the State's claim that the crimes were factually comparable, because those facts had not been proven in Kentucky, and vacated Crawford's persistent offender sentence. Id. at 797. As stated in Lavery, "[a]ny attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic." 154 Wn.2d at 258.

i. In Texas, Jordan had a duty to retreat and had to establish his use of deadly force was in response to the threatened use of deadly force.³ Two key differences preclude Jordan's prior Texas conviction from being comparable to a felony in Washington. First, under Texas law at the time that Jordan was convicted, Jordan had a duty to retreat. Tex. Penal Code § 9.32 (1992). Under Washington law, a person claiming self-defense does not have a duty to retreat. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

³ Believing the arguments regarding the defective instructions on the State's burden of proof to be adequately presented in the brief of appellant, no further argument on this issue is made in this reply.

Second, in Texas, Jordan was not permitted to use deadly force to defend himself unless he believed that (a) he was under attack with unlawful deadly force and (b) death or serious bodily injury would be the result. See Tex. Penal Code § 9.32 (1992); Trammell v. State, 287 S.W.3d 336, 341 (Tex. App. 2009). In Washington, a person is permitted to use deadly force to defend himself if he believes he is under imminent threat of great personal injury. RCW 9A.16.050(1).

The State disputes that the defense is available in narrower circumstances than in Washington. Br. Resp. at 41. However, the State only quotes a portion of the instructions issued to Jordan's Texas jury.

The Texas "act on appearances" instruction actually provided:

When a person is attacked with unlawful deadly force, or he reasonably believes he is under attack or attempted attack with unlawful deadly force, and there is created in the mind of such person a reasonable expectation or fear of death or serious bodily injury, then the law excuses or justifies such person in resorting to deadly force by any means at his command to the degree that he reasonably believes immediately necessary, viewed from his standpoint at the time, to protect himself from such attack or attempted attack, as a person has a right to defend his life and person from apparent danger as fully and to the same extent as he would had the danger been real, provided that he acted upon a reasonable apprehension of danger, as it appeared to him from his standpoint at the time, and that he reasonably believed such deadly force was immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force.

CP 54.

Likewise, the Texas court's elements instruction stated, in pertinent part, that the jury must find:

it reasonably appeared to the juvenile respondent that his life or the life or person of Michael Williams was in danger and there was created in juvenile respondent's mind a reasonable expectation or fear of his or Michael Williams's death or serious bodily injury from the use of unlawful deadly force at the hands of Juan Gillespie[.]

CP 55 (emphasis added). Because the Texas jury had to find that Jordan's assailant had used unlawful deadly force against him before it was permitted to find he had a viable self-defense claim, the law of self-defense is narrower in Texas than in Washington.

ii. Because the Texas jury only found facts sufficient to disprove self-defense in Texas, the Texas conviction cannot be included in Jordan's SRA offender score. Carter and Lavery make clear that where the record is silent as to factual differences between what was necessary to prove the foreign jurisdiction's crime and what would be required in Washington, the Court cannot conclude that the defendant would be convicted of the foreign offense in Washington. Lavery, 154 Wn.2d at 258; Carter, 230 P.3d at 189. The Texas jury convicted Jordan of voluntary manslaughter based on the instructions and evidence presented at trial in light of then-existing Texas law. Then-existing Texas law imposed a duty to retreat and required the jury to find Jordan believed

he was under imminent threat of deadly force before it could determine he acted in self defense. The Texas conviction must be excluded from Jordan's offender score.

b. This Court does not need to decide the State's "different defenses" hypothetical in order to resolve this appeal. As an alternative argument, the State disputes the contention that "different defenses, on their own, would justify a finding that . . . crimes [are] not comparable." Br. Resp. at 44. The State alleges that there are many instances in which defenses vary from state to state, and contends, "[i]f Jordan's argument is accepted, it is likely that few out-of-state convictions would be legally comparable." Br. Resp. at 43.

The State's foundational premise is of questionable accuracy in light of Lavery. Moreover, the "parade of horrors" advanced by the State in support of its position is a straw man argument. Jordan does not ask this Court to decide whether differences between the means of proving affirmative defenses preclude a finding of comparability. The question instead turns upon the definitions of the elements of the crime and the availability of defenses.⁴

As the State itself concedes, "In Lavery, upon which Jordan relies, the Supreme Court held that the elements of federal bank robbery were not

⁴ See Br. App. at 15-16 (discussing availability of defenses).

substantially similar to the crime of robbery in Washington[.]” Br. Resp. at 44 (State’s emphasis). The State seemingly has forgotten that when a self-defense claim goes to the jury, the absence of self-defense becomes an element that the State must prove beyond a reasonable doubt. Acosta, 101 Wn.2d at 621-23. Because a claim of self-defense in Texas is available in more limited circumstances than in Washington, this Court should hold that the substantive differences between the essential elements of the pertinent offenses preclude a comparability finding.

c. Remand to allow the State a second bite at the apple would not cure the due process problems with including the prior conviction in Jordan’s offender score. The State contends that because the precise objection argued on appeal was not advanced below, if this Court agrees the crimes are not comparable, it is entitled to remand to again try to prove comparability. Br. Resp. at 44-45. However, State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007), relied upon by the State, does not alter the essential rule that the State is only allowed a second bite at the apple when the defendant has failed to object to comparability below. Thiefault, 160 Wn.2d at 417; State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002).

Moreover, even assuming the State could avail itself of this rule, allowing the State another opportunity to present evidence relating to the

Texas conviction would not answer the due process problem with inclusion of the prior offense. The documents introduced by the State below are silent as to whether Jordan believed that he or another was imminently threatened with deadly force or merely great personal injury. Similarly, the State's evidence does not, and cannot, prove whether the Texas jury rejected Jordan's self-defense claim because it concluded he had a duty to retreat. Because the due process problems identified by the Court in Lavery cannot be addressed by the presentation of further evidence, this Court should decline the State's request for an opportunity to offer more evidence pertaining to the Texas offense at resentencing.

2. THE TRIAL COURT HAD A DUTY TO REFER
JORDAN FOR A COMPETENCY EVALUATION
BASED UPON DEFENSE COUNSEL'S
REPRESENTATIONS.

RCW 10.77.060 imposes on the trial court a mandatory obligation to refer a criminal defendant for a competency evaluation whenever there is "a reason to doubt a defendant's competency." In re Personal Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). In State v. Heddrick, 166 Wn.2d 898, 903-04, 215 P.3d 201 (2009), the Supreme Court reiterated that the statutory procedures in RCW 10.77.060 are compulsory, and that failure to follow these procedures results in a denial of due process. As emphasized in Jordan's opening brief, the

circumstances in which a defendant may be said to have waived these mandatory procedures are very limited.

The State does not reference the rule of Heddrick in its response brief, or, indeed, discuss Heddrick at all. Nor does the State engage in meaningful analysis of the statutory requirements of RCW 10.77.060. The State attempts to distinguish State v. Marshall, 144 Wn.2d 266, 27 P.3d 192 (2001), cited in Jordan's opening brief, on its facts. But the State fails to recognize Marshall's rule.⁵

Because Jordan's counsel affirmatively alerted the trial court to concerns regarding Jordan's competency, the court had a "reason to doubt" Jordan's competency. Under RCW 10.77.060, a competency evaluation was required, and the failure to follow the statute's mandatory requirements denied Jordan due process.

⁵ In Marshall, a capital case, the defense motion to withdraw Marshall's guilty plea was supported by abundant evidence, including expert evaluations, of Marshall's incompetency. Both the nature of the case and the procedural posture of the motion warranted the presentation of this evidence. In a case such as the case at bar, involving an indigent defendant in a non-capital case at a preliminary hearing, it is neither realistic nor fair to expect that the defendant will be able to present similar evidence in support of his incompetency. Marshall does not impose this burden on criminal defendants, and the proposed "rule" extrapolated by the State from Marshall's facts does not comport with the Court's analysis in that case or RCW 10.77.060.

3. THE TRIAL COURT HAD A DUTY TO ISSUE THE DEFENSE-PROPOSED JURY INSTRUCTIONS NECESSARY TO ALLOW JORDAN TO PRESENT HIS THEORY OF THE CASE TO THE JURY.

The State apparently does not dispute that the trial court erred in concluding Jordan was barred from presenting his justifiable homicide theory to the jury because of his unsworn pretrial interview. But the State contends that there was not a sufficient factual basis for the instructions. However, the State overstates the predicate evidentiary threshold required for the issuance of self-defense instructions. The State also misunderstands the interplay between these instructions and instructions on lesser included offenses.

To obtain instructions on self-defense, “[a]lthough it is essential that some evidence be admitted in the case as to self-defense, there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of jurors on that issue.” *Id.* (quoting *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)). All that is required is “credible evidence, from whatever source, to establish that the killing occurred in circumstances that meet the requirements of RCW 9A.16.050.” *State v. Brightman*, 155 Wn.2d 506, 520, 122 P.3d 150 (2005); *McCullum*, 98 Wn.2d at 488.

Sufficient evidence was introduced to warrant the issuance of self-defense instructions under this standard. There was uncontroverted evidence of two shots fired before the shots that killed Maurice Jackson. There was evidence of a fight or argument between them that preceded the shooting. This evidence provided a sufficient factual basis for the issuance of self-defense instructions.

Likewise, as argued in the Brief of Appellant, even if the jury did not believe a perfect claim of self-defense was presented, and found that excessive force was used, the jury may have convicted Jordan of a lesser included offense, had such instructions been given.⁶ The failure to give the defense-proposed instructions denied Jordan his right to a defense.

⁶ To the extent the State's analysis under State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1984), is predicated on the assumption that self-defense instructions were not warranted, the State's discussion of potential lesser included offenses is unhelpful to this Court.

B. CONCLUSION

For the reasons argued here and in the Brief of Appellant, this Court should reverse Erick Jordan's convictions. On remand, his prior Texas conviction from voluntary manslaughter should be excluded from his offender score.

DATED this 12th day of July, 2010.

Respectfully submitted:

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

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 63016-4-I
v.)	
)	
ERICK JORDAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF JULY, 2010.

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