

65622-8

65622-8

No. 65622-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CORDARREL ROBERT-LOUIS HAYES,

Appellant.

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

APPELLANT'S REPLY BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

A handwritten mark, possibly a signature or initials, consisting of a looped shape with a vertical line extending downwards from the center.

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

1. ADMISSION OF THE COMPLAINANT'S HEARSAY STATEMENTS TO MEDICAL PERSONNEL VIOLATED MR. HAYES'S STATE CONSTITUTIONAL RIGHT TO CONFRONTATION 1

 a. Mr. Hayes may raise his Confrontation Clause challenge for the first time on appeal..... 1

 b. Admission of the statements violated Mr. Hayes's state constitutional right to confrontation..... 6

 c. Admission of the statements was not harmless 13

2. THE COURT'S DECISION TO EXCLUDE MS. SHAW'S LETTERS WAS ERRONEOUS 14

3. MR. HAYES DID NOT WAIVE HIS RIGHT TO CHALLENGE HIS OFFENDER SCORE, BECAUSE THE STATE NEVER ALLEGED THE FACTS NECESSARY TO PROVE COMPARABILITY 17

B. CONCLUSION..... 21



TABLE OF AUTHORITIES

Constitutional Provisions

Article I, section 22..... 7, 13

Washington Cases

Estes v. Babcock, 119 Wash. 270, 205 P. 12 (1922)..... 10

Hinds v. Johnson, 55 Wn.2d 325, 347 P.2d 828 (1959)..... 9

In re Pers. Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837
(2005) 18

Kraettli v. North Coast Transp. Co., 166 Wash. 186, 6 P.2d 609
(1932) 9, 10

Petersen v. Dep't of Labor and Indus., 36 Wn.2d 266, 217 P.2d 607
(1950) 9, 10

Poropat v. Olympic Peninsula Motor Coach Co., 163 Wash. 78, 299
P. 979 (1931)..... 9, 10

Smith v. Ernst Hardware Co., 61 Wn.2d 75, 377 P.2d 258 (1962).. 9

State v. Ammons, 105 Wn.2d 175, 713 P.2d 719 (1986)..... 20

State v. Chenoweth, 160 Wn.2d 454, 158 P.3d 595 (2007)..... 7

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 20

State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998)..... 6

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)..... 14

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) 6, 7

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010)..... 15

State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007) 2, 3

<u>State v. Lee</u> , ___ Wn. App. ___, 247 P.3d 470 (2011).....	2, 3
<u>State v. Lucero</u> , 168 Wn.2d 785, 230 P.3d 165 (2010)	21
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992)	2, 3
<u>State v. Magers</u> , 164 Wn.2d 174, 189 P.3d 126 (2008)	17
<u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009)	20
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998)	18
<u>State v. Price</u> , 158 Wn.2d 630, 146 P.3d 1183 (2006)	2
<u>State v. Pugh</u> , 167 Wn.2d 825, 225 P.3d 892 (2009).....	6, 7
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	11
<u>State v. Shafer</u> , 156 Wn.2d 381, 128 P.3d 87 (2006).....	6

United States Supreme Court

<u>Olden v. Kentucky</u> , 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988)	16
--	----

Statutes

RCW 9.94A.030(11).....	19
RCW 9.94A.500	17, 18
RCW 9.94A.530(2)	17, 19

Other Authorities

5C Karl B. Tegland, <u>Washington Practice: Evidence Law and Practice</u> , § 803.19 (5th ed. 2007).....	8, 9, 11
Robert H. Aronson, <u>The Law of Evidence in Washington</u> , § 803.04[5][c] (4th ed. 2010).....	12

Robert R. Rugani, Jr., The Gradual Decline of a Hearsay
Exception: The Misapplication of Federal Rule of Evidence
803(4), The Medical Diagnosis Hearsay Exception, 39 Santa
Clara L. Rev. 866 (1999)..... 12

Rules

ER 803(a)(4) 11

RAP 2.5(a) 1

A. ARGUMENT IN REPLY

1. ADMISSION OF THE COMPLAINANT'S HEARSAY STATEMENTS TO MEDICAL PERSONNEL VIOLATED MR. HAYES'S STATE CONSTITUTIONAL RIGHT TO CONFRONTATION

a. Mr. Hayes may raise his Confrontation Clause

challenge for the first time on appeal. The State contends Mr. Hayes waived his Confrontation Clause challenge because defense counsel did not object to admission of Ms. Shaw's hearsay statements to medical personnel, and because counsel approved admission of the statements as part of a legitimate trial strategy. SRB at 11-12. The State is incorrect. Courts routinely permit criminal defendants to raise Confrontation Clause challenges for the first time on appeal. Here, the constitutional error is "manifest" and therefore may be raised under RAP 2.5(a). Additionally, even if defense counsel used portions of the medical witnesses' testimonies as part of the defense, counsel did not approve admission of the hearsay statements at issue. Ms. Shaw's hearsay statements describing the cause of her injuries, stating that she was afraid of Mr. Hayes, and claiming that he assaulted her in the past, were all *harmful* to the defense and not part of the defense strategy.

Courts routinely permit criminal defendants to raise Confrontation Clause challenges for the first time on appeal. See, e.g., State v. Kronich, 160 Wn.2d 893, 899-901, 161 P.3d 982 (2007); State v. Lee, ___ Wn. App. ___, 247 P.3d 470, 479 (2011); State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006). In State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992), this Court outlined a four-step analysis for constitutional errors raised for the first time on appeal:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Applying that test here, first, a cursory review of the case shows plainly that the alleged error suggests a constitutional issue—violation of the state and federal Confrontation Clauses.

Second, the asserted error had practical and identifiable consequences in the trial of the case and was therefore "manifest." In Lee, appellants argued admission of cell phone records through

affidavits that attested to their authenticity violated their Sixth Amendment right to confrontation. Lee, 247 P.3d at 479. This Court agreed the asserted Confrontation Clause error was "manifest," where the cell phone records corroborated the testimony of the only eyewitness to the crime. The Court explained, "[g]iven the impact Holt's testimony could have had on the jury's decision, the alleged error was manifest under the second factor in Lynn." Id. In contrast, "[a] purely formalistic error will not be deemed manifest." Kronich, 160 Wn.2d at 899.

Here, as in Lee, the admission of Ms. Shaw's hearsay statements to medical personnel must have had a significant impact on the jury and was not a purely formalistic error. Ms. Shaw did not testify at trial and therefore the State relied principally on her hearsay statements to prove an assault occurred. Although Mr. Hayes is not contesting admission of Ms. Shaw's hearsay statements to Officer Schweiger, those statements were brief and incomplete and unlikely to result in a conviction for assault on their own. Officer Schweiger testified Ms. Shaw told him only that: "she was scared, and she needed some help"; that "she'd been beat up, and that her boyfriend had done it"; that her boyfriend was

Cordarrel Hayes; and that "she was punched, knocked down, and then kicked in the head." Sub #33A at 11-12.

In contrast, Ms. Shaw's hearsay statements to medical personnel contained much more highly prejudicial and inflammatory detail that seriously undermined the defense of accident and undoubtedly had an impact on the jury. Social worker Alice Walters testified on direct examination that Ms. Shaw told her that her boyfriend "grabbed her" and "threw her down." 5/10/10RP 19. She said it had happened four times in the past but never as seriously. 5/10/10RP 19-20. She said she had never reported it, because Mr. Hayes had hurt her and her baby. 5/10/10RP 19-20. She said that she was afraid of him, that she did not want to go home, and that he had come to Harborview to find her on several occasions in the past. 5/10/10RP 23.

Matthew Klein, a Harborview physician, testified on direct that Ms. Shaw stated her "boyfriend choked her and fist punched her in the face, neck and chest." 5/11/10RP 23. She also reported "her boyfriend has assaulted her four times in the past." 5/11/10RP 23. She said "he's going to kill me." 5/11/10RP 26.

Finally, firefighter Thomas Burke, who treated Ms. Shaw at the scene, testified on direct that she said "she had been hit in the

face" and "hit in the neck in an altercation." 5/11/10RP 86. She said "she had gotten beat up" and that "her boyfriend did it."

5/11/10RP 87.

Mr. Hayes's defense was that Ms. Shaw got between him and another man while the two men were fighting and tried to break them apart. 5/12/10RP 43. In the struggle, both men accidentally hit Ms. Shaw and she hit her head against a wall. 5/12/10RP 43, 59-60. Ms. Shaw heard the man accuse Mr. Hayes of sleeping with his girlfriend, and this made her angry. 5/12/10RP 42. She falsely accused Mr. Hayes of assaulting her because she was angry at him for cheating on her. 5/12/10RP 89.

Ms. Shaw's hearsay statements to medical personnel seriously undermined Mr. Hayes's defense, much more so than her brief statements to Officer Schweiger. She told medical personnel that: Mr. Hayes grabbed her and threw her down; he choked her and punched her in the face, neck and chest with his fist; he assaulted her four times in the past; she never reported it because he had hurt her and her baby; she was afraid of him and did not want to go home; he had come to Harborview to find her in the past; and she thought he was going to kill her.

Admission of these highly prejudicial hearsay statements to medical personnel was not part of the defense strategy. Counsel did not elicit any of the above statements, all of which were elicited by the deputy prosecutor on direct examination. In addition, counsel specifically objected to admission of evidence of prior assaults. 5/05/10RP 72-73. In sum, the hearsay statements undoubtedly had an impact on the jury. Their admission was not part of the defense strategy. The constitutional error was therefore "manifest" and this Court must reach the merits of the issue.

b. Admission of the statements violated Mr. Hayes's state constitutional right to confrontation. The State contends the state Confrontation Clause should not be interpreted independently of the federal clause, but that argument is contrary to State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009). In Pugh, the Washington Supreme Court plainly stated a Gunwall¹ analysis of article I, section 22 is not necessary, as "we have already concluded that an independent analysis applies." Pugh, 167 Wn.2d at 835 (citing State v. Foster, 135 Wn.2d 441, 473, 481, 957 P.2d 712 (1998) (Alexander, J., concurring and dissenting; Johnson, J., dissenting); State v. Shafer, 156 Wn.2d 381, 391, 128 P.3d 87 (2006) (article I,

¹ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

section 22 is subject to an independent analysis with regard to both the scope of the confrontation right as well as the manner in which confrontation occurs)).

In Pugh, the court did not engage in a full Gunwall analysis but explained, instead, the court must "examine the constitutional text, the historical treatment of the interest at stake as disclosed by relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." Pugh, 167 Wn.2d at 835 (citing State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007)). The court explained the state provision requiring a "face to face" confrontation between the witnesses and the accused must not be interpreted literally, as doing so would eliminate all exceptions to the hearsay rule. Pugh, 167 Wn.2d at 836. Instead, in determining whether the state provision provided more protection, the court examined at length the historical treatment of the hearsay exception at issue. Id. at 836-43. Because the witness's statements would have been admissible under a hearsay exception existing when our state constitution was adopted, they did not implicate the right to confrontation under article I, section 22. Id. at 843. Here, in contrast, Ms. Shaw's statements to medical personnel would not have been admissible at the time our state

constitution was adopted. Their admission therefore violated article I, section 22.

The State takes issue with Mr. Hayes's historical analysis of the medical treatment exception to the hearsay rule. The State contends that, rather than excluding medical hearsay statements, the early cases draw a distinction between statements made by a patient to a treating physician, which were admissible as substantive evidence, and statements made to a physician solely for the purpose of qualifying the physician as an expert witness who would render an opinion at trial, which were not admissible as substantive evidence. SRB at 26. The State misreads the early cases.

Contrary to the State's argument, the early cases show that historically, hearsay statements to medical providers were not admissible as substantive evidence of guilt. As Professor Tegland explains:

Under prerule Washington law, statements of past symptoms and statements relating to medical history, even though made to a treatment physician, were inadmissible as independent substantive evidence. Such statements were admissible, but only for the limited purpose of supporting the physician's medical conclusions.

5C Karl B. Teglund, Washington Practice: Evidence Law and Practice, § 803.19 at 66-67 (5th ed. 2007).

In Smith v. Ernst Hardware Co., 61 Wn.2d 75, 77, 377 P.2d 258 (1962), for example, appellant offered the medical testimony of her treating physician, who testified that appellant related to him the history and causation of her sinus condition. In holding the statements were inadmissible, the court explained, "[i]t is the rule in this state that a doctor who treats a patient and later becomes a witness may, in relating his medical conclusion, testify relative to statements made to him by his patient, as an exception to the hearsay rule." Id. at 79 (citing Hinds v. Johnson, 55 Wn.2d 325, 347 P.2d 828 (1959); Petersen v. Dep't of Labor and Indus., 36 Wn.2d 266, 217 P.2d 607 (1950)). But although such hearsay statements were admissible, they were admissible for only the "limited purpose" of supporting the doctor's medical conclusion. Smith, 61 Wn.2d at 79. They were "not evidence which establishes the fact of the patient's condition" or the causal relationship between the patient's condition and the accident. Id. (citing Kraettli v. North Coast Transp. Co., 166 Wash. 186, 6 P.2d 609 (1932); Poropat v. Olympic Peninsula Motor Coach Co., 163 Wash. 78, 299 P. 979 (1931); Estes v. Babcock, 119 Wash. 270, 205 P. 12

(1922)). Since the causal relationship between the accident and the sinus condition was not otherwise established in the case, the court affirmed the trial court's decision to grant a new trial. Smith, 61 Wn.2d at 80.

Similarly, in Estes, the issue was whether the court erred in permitting a physician to testify as to statements made to him by the plaintiff regarding her condition, upon which he based his opinion. Estes, 119 Wash. at 274. The court explained, "[s]uch evidence is admissible for the purpose of affording the jury some means of determining the weight to be given to the opinion of the physician, but not as evidence tending to prove the actual condition of the patient at the time." Id. The court described this as "the general rule." Id.; see also Petersen, 36 Wn.2d at 269 ("universal rule" is that physician who treats a patient may later become a witness and testify as to his medical conclusions, which may be based substantially on patient's hearsay statements regarding his or her subjective symptoms); Kraettli, 166 Wash. at 190-91 (purpose of admitting plaintiff's statements to physicians was to determine what weight to give to physicians' opinions as to cause of her condition); Poropat, 163 Wash. at 83-84 ("statements made by an injured party to his physician are not evidence tending to prove

the actual condition of the patient" but are admissible for limited purpose of "showing the situation upon which the physicians based their opinions") (citing Estes, 119 Wash. 270).

The current exception for statements to medical providers is much broader than the earlier common law exception. See Tegland, Washington Practice, supra, § 803.19 at 66 ("The prerule cases defined a rule of much narrower admissibility."). ER 803(a)(4) allows admission of hearsay statements to medical providers attributing causation if the statements are "reasonably pertinent to diagnosis or treatment."

But even under the modern rule, only neutral statements of causation ("I was hit by a car") would normally be admissible, with statements attributing fault ("... driven by Jane Andrews, who was drunk and ran a red light") being inadmissible. Tegland, Washington Practice, supra, at § 803.23 at 73-74. Thus, in State v. Redmond, 150 Wn.2d 489, 497, 78 P.3d 1001 (2003), the Washington Supreme Court held that hearsay statements to medical personnel that Johnson was accosted in the parking lot, that he was taken from his automobile, and that his head was slammed against the roof of the car, were inadmissible.

The modern rule has also expanded over time and resulted in inconsistent court decisions. See Robert H. Aronson, The Law of Evidence in Washington, at § 803.04[5][c] (4th ed. 2010) (and cases cited) (explaining that the principle underlying the hearsay exception for statements to medical providers requires excluding most statements of causation and fault, and noting conflicting holdings of cases applying the exception in that regard); Robert R. Rugani, Jr., The Gradual Decline of a Hearsay Exception: The Misapplication of Federal Rule of Evidence 803(4), The Medical Diagnosis Hearsay Exception, 39 Santa Clara L. Rev. 866, 879 (1999) (noting practice of permitting admission of hearsay statements as to fault made to medical providers has "expanded the scope of the medical diagnosis hearsay exception"). This expansion in application has rendered the hearsay exception for statements to medical providers a "less firmly rooted hearsay exception" and has undermined its reliability. Rugani, The Gradual Decline of a Hearsay Exception, *supra*, at 891-92.

Thus, Ms. Shaw's hearsay statements to medical personnel that Mr. Hayes grabbed her, threw her down, choked her, and punched her; that he assaulted her four times in the past; that she was afraid of him and did not want to go home; that he had come to

Harborview to find her in the past; and that she thought he was going to kill her, would not be admissible under either the early common law exception for statements to medical personnel or the modern rule as originally written. The common law history shows unequivocally the framers of the Washington Constitution would not have contemplated or approved the modern expansion of the hearsay exception. In order to safeguard the reliability of statements admitted under the exception and ensure consistency in application of the rule, this Court should hold admission of hearsay statements to medical personnel such as those outlined above violate article I, section 22, where the defendant has no opportunity to cross-examine the declarant.

c. Admission of the statements was not harmless.

The State contends that if admission of Ms. Shaw's hearsay statements was error, it was harmless, in light of Ms. Shaw's statements to Officer Schweiger, Ms. Johnson's testimony that she observed prior incidents of violence between Mr. Hayes and Ms. Shaw, and Mr. Hayes's testimony admitting that he punched Shaw.

For the reasons given above and in the opening brief, admission of Ms. Shaw's statements to medical personnel was not harmless. The test is whether the untainted evidence is so

overwhelming it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The State cannot meet that test here. As the State points out, Mr. Hayes admitted he hit Ms. Shaw. But the issue in the case was whether he acted intentionally or whether Ms. Shaw was injured accidentally and fabricated the allegations. Ms. Shaw's statements to medical personnel that Mr. Hayes choked her, that she was afraid of him, that she did not want to go home, that he had assaulted her in the past, and that she thought he was going to kill her, seriously undermined the defense. Without those statements, the evidence of guilt was not overwhelming. The conviction must be reversed.

2. THE COURT'S DECISION TO EXCLUDE MS. SHAW'S LETTERS WAS ERRONEOUS

The State concedes the letters contained relevant material and therefore the trial court's ruling that they were irrelevant is in error. SRB at 37-38. Indeed, the letters were relevant to rebut Ms. Johnson's testimony and Ms. Shaw's hearsay statements that she was afraid of Mr. Hayes. They were also relevant to counter the deputy prosecutor's argument that Ms. Shaw did not appear at trial because she was afraid. Nonetheless, the State argues that exclusion of the letters did not violate Mr. Hayes's constitutional right to present a defense, because he was able to introduce other

evidence supporting his theory that Ms. Shaw fabricated the allegations: the jury heard that Ms. Shaw wrote to him and visited him in jail, although the jury did not learn the content of the letters; O'Donnell testified Shaw told her that she lied to police; and the trial court read a stipulation that Shaw told a victim's advocate that the whole thing was a misunderstanding and she was injured when she tried to stop a fight between Hayes and another individual. SRB at 38-39.

A criminal defendant's constitutional due process right to defend against the charges includes the right to admission of evidence relevant to his defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). If the evidence is relevant, it may be withheld only if the State's interest outweighs the defendant's need. Id. If the evidence has high probative value, no state interest is compelling enough to preclude its admission. Id.

As the State concedes, at least portions of the letters were relevant and not overly prejudicial. Therefore, Mr. Hayes had a due process right to have those portions of the letters admitted. Although the jury heard other evidence that Ms. Shaw recanted her allegations, the jury heard no evidence to rebut the State's theory that she was afraid of Mr. Hayes. The letters, written in her own

words, were powerful evidence that she wanted to maintain a relationship with Mr. Hayes and was not afraid of him. Without the letters, the jury could have easily concluded Ms. Shaw recanted the allegations out of fear, which is what the deputy prosecutor argued in closing argument. 5/12/10RP 62-63.

The State contends some of the material in the letters was inflammatory and not relevant and therefore not admissible. SRB at 37-38. Contrary to the State's argument, those portions of the letters were highly probative. The sexually suggestive comments and photograph of Ms. Shaw, and her statements of jealousy about Mr. Hayes's relationships with other women, were highly probative of the defense theory that she was not afraid of him and fabricated the allegations out of jealousy. A trial court may not exclude evidence relevant to the defense merely in order to prevent the jury from learning about a prosecution witness's sexual relationship that might prejudice the jury against her. Olden v. Kentucky, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988).

Finally, it was fundamentally unfair to allow the State to introduce evidence of prior assaults by Mr. Hayes in order to explain why Ms. Shaw was not present in court, but not allow Mr. Hayes a full opportunity to rebut that theory. Prior acts of domestic

violence involving the defendant and the victim are admissible for the limited purpose of assisting the jury in judging the credibility of a recanting victim. State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008) (plurality opinion); id. at 194 (Madsen, J., concurring in judgment). But it is axiomatic that evidence of a defendant's prior acts of assault in a current prosecution for assault has great potential to sway the jury unfairly. Where such evidence is presented, the defendant should be able to present evidence to show the victim is absent from trial for reasons other than fear of the defendant. Because Mr. Hayes was denied the opportunity to present such evidence, his right to a fair trial was violated.

For the reasons above and in the opening brief, and in combination with the error in admitting Ms. Shaw's hearsay statements to medical personnel, Ms. Hayes was denied a fair trial, requiring reversal.

3. MR. HAYES DID NOT WAIVE HIS RIGHT TO CHALLENGE HIS OFFENDER SCORE, BECAUSE THE STATE NEVER ALLEGED THE FACTS NECESSARY TO PROVE COMPARABILITY

Citing recent amendments to RCW 9.94A.530(2) and RCW 9.94A.500, the State contends Mr. Hayes waived his right to challenge his offender score by failing to object to inclusion of the out-of-state prior conviction. SRB at 42-43. Notably, the State

does not contend the prior conviction is comparable to a Washington felony.

The recent amendments to the SRA do not help the State. RCW 9.94A.500(1) provides: "A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein." (emphasis added). Here, the issue is not whether the State proved the "existence and validity" of the prior conviction, but whether the State proved the *comparability* of the prior conviction. As explained in the opening brief, where the State seeks to include an out-of-state conviction in the offender score that is not legally comparable to a Washington felony, the State must show the defendant's conduct underlying the prior conviction would have violated the comparable Washington felony statute. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The State must show that the facts necessary to establish comparability were proved to a jury or admitted by the defendant in the course of a guilty plea. Lavery, 154 Wn.2d at 258. The mere fact of the prior conviction is not sufficient to make this showing. Id.

Therefore, the State's assertions about the existence of Mr. Hayes's prior conviction is not prima facie evidence of the *comparability* of the prior conviction.

RCW 9.94A.530(2) also does not help the State. It provides:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to *criminal history presented at the time of sentencing*.

(emphasis added). "Criminal history' means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere." RCW 9.94A.030(11).

The prosecutor's statement of Mr. Hayes's criminal history at sentencing encompassed the *existence* of the prior out-of-state conviction, but not its comparability. The State alleged no facts to establish the comparability of the prior conviction. Thus, under the new statute, Mr. Hayes cannot be deemed to have "acknowledged" those facts.

This interpretation of the statute is consistent with constitutional due process. The Washington Supreme Court has consistently held the SRA must be interpreted in accordance with

principles of due process. State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719 (1986) (convicted defendant has liberty interest which minimal due process protects; use of evidentiary standard of preponderance of the evidence at sentencing satisfies minimal due process requirements); State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999); State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). For a sentence to comport with due process, the facts relied upon by the trial court must have some evidentiary basis in the record. Mendoza, 165 Wn.2d at 926; Ford, 137 Wn.2d at 481-82. It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the comparability determination. Ford, 137 Wn.2d at 480. The SRA expressly places this burden on the State because it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove." Id. (citation omitted).

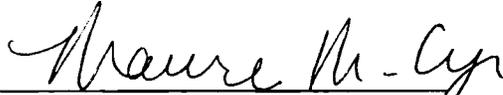
The Washington Supreme Court has repeatedly "emphasized the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for purposes of sentencing." Mendoza, 165 Wn.2d at 928. Where the State seeks to include an out-of-state conviction in the offender score that is not

legally comparable to a Washington felony, the defendant must "affirmatively acknowledge" the conviction is comparable in order to waive his right to challenge the offender score on appeal. State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010). Here, the State never alleged and therefore Mr. Hayes never affirmatively acknowledged the facts necessary to establish comparability. He did not waive his right to challenge his offender score on appeal.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Hayes's constitutional rights to confrontation and to present a defense were violated, requiring reversal of the assault conviction. In addition, the trial court erred in including a prior out-of-state conviction in the offender score where the State did not prove the conviction was comparable to a Washington felony. Therefore, Mr. Hayes is entitled to be resentenced.

Respectfully submitted this 11th day of April 2011.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65622-8-I
v.)	
)	
Cordarrel Robert-Louis Hayes,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 11TH DAY OF APRIL, 2011, 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:

[X] ANDREA RUTH VITALICH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] Cordarrel Robert-Louis Hayes 327601 Coyote Ridge Corrections Cener PO Box 769 Connell, WA 99362-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF APRIL, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710