RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 15, 2015, 3:32 pm
BY RONALD R. CARPENTER
CLERK

NO. 91159-2

E CRF

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EDDIE LEE TRICE, APPELLANT

Court of Appeals Cause No. 44808-4-II

ANSWER TO PETITION FOR REVIEW

MARK LINDQUIST
Prosecuting Attorney

By
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Statutes

Rules and Regulations

Other Authorities

A. IDENTITY OF PARTY.

The State of Washington, Respondent below, asks this Court to deny review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION.

Petitioner Eddie Lee Trice (the "defendant") is seeking review of the unpublished opinion filed by the Court of Appeals on November 25, 2014, in his direct appeal. Petition, Appendix. The State did not file a separate petition for review. The State respectfully requests that this Court deny review of the Court of Appeals decision.

C. ISSUES PRESENTED FOR REVIEW.

1. Has the defendant failed to show that the criteria for acceptance of review have been met when the court below correctly applied settled out-of-state conviction comparability precedent from this Court?

2. Has the defendant failed to show error by the court below in its application of this Court's two part test for comparability of convictions from other states, when the factual comparability was proved by the elements of the defendant's 1987 Arkansas aggravated robbery conviction?

D. STATEMENT OF THE CASE.

In May 2006, the defendant was charged with four sex offenses and first degree burglary committed against an 11 year old fifth grader. CP 1-3. He was tried in 2008 and convicted of all five offenses. His first sentencing was held on July 1, 2008. CP 3-19.

At the 2008 sentencing, the trial court found that the defendant was a persistent offender and sentenced him to life in prison without possibility of parole. CP 12. The defendant filed a timely notice of appeal. His convictions were affirmed by the Court of Appeals in an unpublished opinion that was filed on May 15, 2012. CP 20-51. The defendant's sentence was reversed (the state conceded error) after a Florida sex assault conviction was held not to have been legally or factually comparable to a Washington felony. CP 41. The defendant had also assigned error to the trial court having included a 1987 Arkansas aggravated robbery conviction in his offender score, but the Court of Appeals declined to review that ruling in light of its remand for a re-sentencing hearing. CP 44-45.

The re-sentencing hearing was held on April 5, 2013. CP 100-114. At that hearing, the state introduced evidence and presented argument supporting the inclusion of the 1987 Arkansas aggravated robbery conviction as criminal history that added two points to the defendant's offender score. CP 135-226, State's Sentencing Memorandum, Appendix A. The trial court agreed with the state's calculation as to the Arkansas convictions. RP, April 5, 2013, p.57. The court also found that the

Florida sexual assault conviction, while not comparable to a most serious sexual offense, was comparable to a Washington felony. RP, April 5, 2013, p.42. After having calculated the defendant's offender score at five, with a range of 138 to 184 months to life for the three counts with the highest seriousness levels, the trial court sentenced the defendant to 184 months to life in prison. CP 106.

The defendant filed a second, timely notice of appeal. CP 119-132. The state conceded that the inclusion of the Florida sexual assault conviction was error, but argued that the 1987 Arkansas aggravated robbery conviction was properly found to be legally and factually comparable to a Washington offense. Brief of Respondent, §§ C 1, C 2. On November 25, 2014, in a second unpublished opinion, the court below accepted the state's concession as to the Florida sexual assault conviction, but held that the Arkansas aggravated robbery conviction was factually comparable to attempted first degree robbery in Washington. Appendix A, p. 9. The court remanded a second time for re-sentencing. Appendix A, p. 11. The defendant filed this timely petition for review on December 24, 2014.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED.

1. THE DEFENDANT HAS NOT SHOWN THAT THE CRITERIA FOR ACCEPTANCE OF REVIEW HAVE BEEN MET WHEN THE COURT BELOW CORRECTLY APPLIED SETTLED PRECEDENT FROM THIS COURT.

The criteria for acceptance of a petition for review are listed in RAP 13.4(b). One criterion specifies that review may be accepted if "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court. . . . " RAP 13.4(b)(1). This is the criterion relied upon by the defendant in this case. Petition for Review, p.2, 10. This reliance is misplaced. The Court of Appeals cited and applied the very same cases from this Court that are now cited by the defendant in this petition. The defendant's argument is not so much that the Court of Appeals decision is in conflict with a decision of this Court, as it is that the Court of Appeals erred.

The decision below applied settled precedent. The standard for determining a defendant's offender score from criminal history that includes convictions from other states begins with a statutory comparability requirement. RCW 9.94A.525(3). "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." *Id.* The State must prove the foreign conviction is comparable to a Washington crime by preponderance of the evidence. ***State v. Ford***, 137 Wn.2d 472,

479-80, 973 P.2d 452 (1999). An out-of-state conviction, not proved to have been comparable by a preponderance of the evidence, may not be used to increase the defendant's offender score. ***State v. Weiand***, 66 Wn. App. 29, 831 P.2d 749 (1992).

A court's analysis of comparability requires application of a two part test. ***State v. Olsen***, 180 Wn.2d 468, 325 P.3d 187(2014), ***State v. Thiefault***, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). An out-of-state conviction is equivalent and therefore comparable to a Washington offense if it is either (1) legally comparable, or (2) factually comparable. ***In Re: Lavery***, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). An offense is legally comparable if, after a comparison of the elements of the out-of-state crime with the elements of the analogous Washington crime, "the foreign conviction is identical to or narrower than the Washington statute, and thus contains all the most serious elements of the Washington statute. . . ." ***State v. Olsen,*** 180 Wn.2d at 472-73. The comparison must be of the Washington criminal statute in effect at the time the out-of-state crime was committed. ***In re Lavery***, 154 Wn.2d at 255, citing ***State v. Morley***, 134 Wn.2d 588, 605–06, 952 P.2d 167 (1998).

In this case the defendant has no quarrel with the Court of Appeals analysis of the legal prong of the two part test. Petition for Review, p. 6. The Court of Appeals determined that the elements of defendant's Arkansas aggravated robbery conviction were not comparable to the

analogous Washington crime, attempted first degree robbery. Appendix A, p. 6 – 7. The petition takes issue only with the Court of Appeals application of the factual prong. Petition for Review, p. 4.

2. THE COURT BELOW PROPERLY APPLIED THIS COURT'S FACTUAL COMPARABILITY TEST TO THE DEFENDANT'S 1987 ARKANSAS AGGRAVATED ROBBERY CONVICTION.

If application of the test for legal comparability does not establish comparability, the out-of-state conviction may nevertheless be included in an offender score calculation if it was factually comparable. ***State v. Morley***, 134 Wn.2d at 606, 952 P.2d 167 (1998). The test for factual comparability is narrow because the due process clause of the Fourteenth Amendment requires that facts leading to an increase in punishment must be determined by a jury. ***Apprendi v. New Jersey***, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). Thus, Washington courts may "consider only facts [from an out-of-state conviction] that were admitted, stipulated to, or proved beyond a reasonable doubt." ***State v. Olsen,*** 180 Wn.2d at 473-74, citing ***In Re: Lavery***, 154 Wash.2d 249, 258, 111 P.3d 837 (2005).

In this case the court below considered only facts derived from the defendant's guilty plea in Arkansas in 1987. Under Arkansas law, a guilty plea is "an admission of all of the elements of the charges and constitutes a

waiver of any defense that might have been raised at the trial of the charges." ***Standridge v. State,*** 2012 Ark.App. 563, 423 S.W.3d 677, 681(2012), citing ***Rhoades v. State***, 2010 Ark. App. 730, 379 S.W.3d 659 (2010). Thus, since the defendant pleaded guilty to aggravated robbery and theft of property, the elements of those crimes could be considered as facts "admitted" by the defendant when he was convicted of those offenses.

After limiting itself to the facts admitted in the defendant's 1987 guilty plea, the court below correctly determined that those facts would have made the defendant guilty of attempted first degree robbery in Washington. Appendix A, p. 9. That determination was correct.

In Arkansas in 1987, before the effective date of a 1987 amendment[1], the elements of the completed crime of robbery were defined as follows: a robbery defendant (1) must have committed an act, namely "employs or threatens to immediately employ physical force upon another", and (2) must have had a specific mental state, namely "the purpose of committing a theft or resisting apprehension immediately thereafter " Appendix B, Acts of 1975, Act 280 § 2103. Former Ark.Stat.Ann. § 41-2101. In 1987 the crime of robbery could be elevated

[1] The Arkansas robbery statutes that were in effect in January 1987 when the defendant committed the aggravated robbery at issue were adopted in 1975. Acts of 1975, Act 280 § 2101-2103. Former Ark.Stat.Ann. 41-2101 – 2103. A copy of these statutes are attached as Appendix B. The statute analyzed by the court below was approved in April 1987 and thus was not in effect when the defendant committed the crimes. The slight difference in the 1987 act does not affect the correctness of the Court of Appeals analysis.

to aggravated robbery when the perpetrator "is armed with a deadly weapon, or represents by word or conduct that he is so armed". Appendix B, Acts of 1975, Act 280 § 2102. Former Ark. Stat.Ann. § 41-2102. Since the defendant's guilty plea necessarily constituted an admission of the facts necessary to prove aggravated robbery, it is a straightforward analysis to apply Washington law to those facts.

The court below held that the defendant would have necessarily committed attempted first degree robbery had he committed the acts that led to his aggravated robbery conviction in the State of Washington. In a review of this decision, it is important to point out that the theft conviction facts, when coupled with the robbery conviction facts, proved that the defendant had completed a theft of a firearm, that is an actual taking of property, as part of his crime. The theft conviction proved that "with the purpose of depriving the true owners of their property, [the defendant did] knowingly take unauthorized control over property, to wit: a shotgun. . . ." CP 135-226, State's Sentencing Memorandum, Appendix A. *See* Ark.Stat.Ann. § 5-36-103(a), Former Ark.Stat.Ann. § 41-2203. Those facts were sufficient to prove that the defendant's 1987 aggravated robbery was factually comparable to a completed Washington first degree robbery. Since under RCW 10.61.003, a defendant in Washington may be found guilty of an attempt as a lesser included offense of the completed crime,

there is all the more support for the validity of the Court of Appeals holding.

Concerning the substantial step and use of force elements for attempted robbery, those elements, from WPIC 100.02, are:

> (1) That on or about [the date of the offense], the defendant did an act that was a substantial step toward the commission of robbery in the first degree;
>
> (2) That the act was done with the intent to commit robbery in the first degree; and
>
> (3) That the act occurred in the State of Washington.

Terms incorporated in the elements are further defined as follows: First, a "substantial step", is defined as "conduct that strongly indicates a criminal purpose and that is more than mere preparation." RCW 9A.28.020, WPIC 100.05. Second, "robbery in the first degree", is defined as a robbery committed by a perpetrator who "[i]s armed with a deadly weapon". RCW 9A.56.200(1)(a)(i). Finally, the definition of "robbery" includes that it is a crime committed when the perpetrator "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". RCW 9A.56.190.

The court below reasoned that the state had established, via the crimes that the defendant pleaded guilty to in Arkansas, that the defendant

had employed force against two victims with the purpose of committing a theft. In light of those facts, the defendant necessarily would have committed attempted first degree robbery. The defendant takes issue with that reasoning largely because there is no reference to the term "substantial step" in the Arkansas statute.

A reference to substantial step might have been significant in an analysis of the legal prong, but in a factual prong analysis it is of no consequence. Any perpetrator who used actual force or threatened to use force with the requisite purpose of committing a theft would necessarily have engaged in "conduct that strongly indicates a criminal purpose and that is more than mere preparation." WPIC 100.05. The use of force or the threat to use force is conduct. It is conduct that surely "strongly indicates a criminal purpose".

Applying the preponderance of the evidence standard, the court below can hardly be criticized when it reasoned that a use of force or a threatened use of force is a substantial step when accompanied by the purpose of committing a theft. Furthermore, when the use or threatened use of force accompanied an actual theft, there is even less reason for criticism. While Arkansas does not utilize the term, "substantial step", the defendant's conduct in Arkansas more than satisfied the preponderance of the evidence standard for the State to establish factual comparability of attempted first degree robbery in Washington.

As was mentioned above, the defendant has no quarrel with the decision of the court below on the legal prong. In section B 1 of the opinion, the court held that the elements of the Arkansas aggravated robbery statute are not legally comparable to Washington's attempted first degree robbery statute. At first glance, it could seem inconsistent for the court to also hold that the elements of same statute are sufficient for the factual prong. The difference, of course, is the difference between facts and elements of a crime. Considering that very few states have adopted identical criminal codes, insofar as elements are concerned, it is to be expected that there is wide variation. Human criminal activity is not variable in the same way. Theft of a shotgun from a couple by the use or threatened use of force translates easily into comparable Washington offenses, namely first degree robbery or attempted first degree robbery.

F. CONCLUSION.

For the foregoing reasons this Court should deny the defendant's petition for review.

DATED: Monday, June 15, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

James Schacht by K Proctor
JAMES SCHACHT 14811
Deputy Prosecuting Attorney
WSB # 17298

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6.15.15 Theresa Kay
Date Signature

APPENDIX "A"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EDDIE LEE TRICE, Appellant.	No. 44808-4-II UNPUBLISHED OPINION

MAXA, J. — Eddie Lee Trice appeals the calculation of his offender score for sentencing, alleging that the trial court erred by (1) counting two points for his 1989 Arkansas aggravated robbery conviction and (2) counting one point for his 1996 Florida sexual battery conviction. We hold that Trice's Arkansas aggravated robbery conviction was factually comparable to a conviction in Washington for attempted first degree robbery, and therefore was properly included in his offender score. But we accept the State's concession that Trice's Florida conviction should not have been included in his offender score. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

In 2008, a jury found Trice guilty of three counts of first degree child rape, one count of first degree child molestation, and one count of first degree burglary – all committed on May 8, 2006. At sentencing, for purposes of calculating the offender score, Trice stipulated to and the trial court found four prior felony convictions. These included a 1989 aggravated robbery

conviction in Arkansas and a 1996 sexual battery conviction in Florida. The trial court ruled that the 1996 Florida conviction for sexual battery was comparable to a Washington crime for Persistent Offender Accountability Act (POAA) purposes. *State v. Trice*, noted at 168 Wn. App. 1009, 2012 WL 1699858, at *4. Therefore, the trial court sentenced Trice as a "two strikes" offender to life confinement without the possibility of release for the three rape convictions. The trial court also ruled that the 1989 Arkansas aggravated robbery conviction was not comparable to a Washington "strike" offense for POAA purposes, but included the conviction in calculating Trice's offender score. *Trice*, 2012 WL 1699858, at *4, *14.

Trice appealed, and we accepted the State's concession that it had failed to prove that the Florida statute was legally or factually comparable to the Washington statute. *Trice*, 2012 WL 1699858, at *11. We did not consider whether the Arkansas aggravated robbery conviction could be included in the offender score because Trice did not support the argument with legal authority. *Trice*, 2012 WL 1699858, at *14. We remanded for resentencing, but noted that the trial court was required to determine Trice's offender score anew and that both parties could submit additional evidence regarding criminal history. *Trice*, 2012 WL 1699858, at *14.

At the resentencing hearing, Trice again stipulated to the four prior felony convictions. The trial court ruled that the 1989 Arkansas aggravated robbery conviction was comparable to first degree attempted robbery in Washington and counted that conviction as two points on his offender score. The trial court ruled that Trice's 1996 Florida sexual battery conviction was not legally or factually comparable to a Washington crime, but counted that conviction as a point on Trice's offender score anyway because it was a felony.

Following the trial court's rulings on comparability, Trice's calculated offender score was five: two points for the Arkansas aggravated robbery conviction, one point for the Florida sexual battery conviction, and two points for the current offense. Trice appeals.

ANALYSIS

Trice argues that the trial court miscalculated his offender score by including his 1989 Arkansas conviction for aggravated robbery and his 1996 Florida conviction for sexual battery in his offender score. The State argues that the Arkansas conviction was comparable to a Washington conviction, but concedes that the Florida conviction should not have been included in the offender score. We hold that the trial court properly included the Arkansas conviction in calculating Trice's offender score, and we accept the State's concession that the Florida conviction should not have been included.

A. CALCULATING OFFENDER SCORE – OUT-OF-STATE CONVICTIONS

Under the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, the sentencing court uses the defendant's prior convictions to determine an offender score which, along with the seriousness level of the current offense, establishes his or her presumptive standard sentencing range. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014). A defendant's sentence is determined based on the law in effect when the defendant committed the current offense. RCW 9.94A.345; *see also In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 809, 272 P.3d 209 (2012).

We review a sentencing court's calculation of an offender score de novo. *Olsen*, 180 Wn.2d at 472. In addition, we review underlying factual determinations under an abuse of discretion standard. *In re Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759, 764, 297 P.3d 51 (2013).

The State must prove the existence of prior felony convictions used to calculate an offender score by a preponderance of the evidence. RCW 9.94A.500(1); *see also Olsen*, 180 Wn.2d at 472. If the convictions are from another jurisdiction, the State also must prove that the underlying offense would have been a felony under Washington law. RCW 9.94A.525(3); *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). The existence of a prior conviction is a question of fact. *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540 (2010).

Where the defendant's offenses resulted in out-of-state convictions, RCW 9.94A.525(3) provides that such offenses "shall be classified according to the comparable offense definitions and sentences provided by Washington law." This statute requires the sentencing court to make a determination of whether the out-of-state conviction is comparable to a Washington conviction. *State v. Morley*, 134 Wn.2d 588, 601, 952 P.2d 167 (1998). Only if the convictions are comparable can the out-of-state conviction be included in the offender score. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

Our Supreme Court has adopted a two-part analysis for determining whether an out-of-state conviction is comparable to a Washington conviction. *Olsen*, 180 Wn.2d at 472. First, the sentencing court determines whether the offenses are *legally* comparable – whether the elements of the out-of-state offense are substantially similar to the elements of the Washington offense. *Olsen*, 180 Wn.2d at 472-73. If the elements of the out-of-state offense are broader than the elements of the Washington offense, they are not legally comparable. *Olsen*, 180 Wn.2d at 473; *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

Second, even if the offenses are not legally comparable, the sentencing court still can include the out-of-state conviction in the offender score if the offense is *factually* comparable. *Olsen*, 180 Wn.2d at 473. Determining factual comparability involves analyzing whether the defendant's conduct underlying the out-of-state conviction would have violated the comparable Washington statute. *Thiefault*, 160 Wn.2d at 415. In making this factual comparison, the sentencing court cannot consider evidence not presented in the out-of-state proceeding. *State v. Arndt*, 179 Wn. App 373, 379, 320 P.3d 104 (2014). And the sentencing court may rely on facts in the out-of-state record only if they are admitted, stipulated to, or proved beyond a reasonable doubt. *Olsen*, 180 Wn.2d at 474-45; *Thiefault*, 160 Wn.2d at 415.

If an out-of-state conviction involves an offense that is neither legally or factually comparable to a Washington offense, the sentencing court may not include the conviction in the defendant's offender score. *Thiefault*, 160 Wn.2d at 415. If a defendant has been erroneously sentenced, we remand the defendant's case to the sentencing court for resentencing. *State v. Wilson*, 170 Wn.2d 682, 691, 244 P.3d 950 (2010).

B. ARKANSAS AGGRAVATED ROBBERY CONVICTION

Trice argues that his 1989 Arkansas conviction for aggravated robbery is not legally or factually comparable to any Washington crime, and therefore was improperly included in the calculation of his offender score. We hold that the elements of Arkansas' aggravated robbery

statute are not legally comparable to Washington's attempted first degree robbery offense, but that the offenses are factually comparable.[1]

1. Legal Comparability

Trice argues that the Arkansas robbery statute is not legally comparable to attempted first degree robbery in Washington because the statutes require differing intents. We agree.

At the time Trice committed the offense of aggravated robbery in 1987,[2] Arkansas' robbery statute stated: "A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another." Former Ark. Code § 5-12-102(a) (1987). Washington's 1987 definition of robbery stated in part: "A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone." Former RCW 9A.56.190 (1975).[3]

[1] The State also argues that the Arkansas aggravated robbery offense is legally and factually comparable to Washington's crimes of first degree and second degree robbery. We need not address these arguments because we affirm on an alternate basis.

[2] Trice committed the Arkansas crime in 1987 and was convicted in 1989. Under the comparability analysis, we address the statutes in effect at the time the crime was committed. *See* RCW 9.94A.345.

[3] RCW 9A.56.190 was amended in 2011. However, there were no substantive changes other than the addition of gender neutral references.

In 1987, Washington's attempt statute stated: "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime." Former RCW 9A.28.020(1) (1981). And to have committed attempted first degree robbery a person must have: (1) intended to commit the crime of (2) unlawfully taking "personal property from the person of another" (3) while armed with a deadly weapon and (4) have actually taken a substantial step toward the commission of that crime. *See* former RCW 9A.56.190; former RCW 9A.56.200 (1975); former RCW 9A.28.020(1) (1981).

Here, the elements of an Arkansas aggravated robbery conviction are broader than the elements of a conviction in Washington for attempted first degree robbery. An Arkansas conviction requires a person to act with "the purpose of committing a felony *or misdemeanor* theft." Former Ark. Code § 5-12-102(a) (1987) (emphasis added). Conversely, a Washington conviction requires a person to intend to commit first degree robbery, which in 1987 did not encompass the category of misdemeanor thefts. *See* RCW 9A.20.010(2)(a) & former RCW 9A.56.200 (robbery in the first degree was categorized as a class A felony). As a result, the elements for Arkansas' aggravated robbery are broader than Washington's attempted first degree robbery, and we hold the two offenses are not legally comparable.

2. Factual Comparability

Trice's conviction based on Arkansas' 1987 aggravated robbery statute still can be included in his offender score if the facts underlying the conviction are factually comparable to an attempted first degree robbery conviction in Washington. *See Thiefault*, 160 Wn.2d at 415.

The State argues that Trice's guilty plea admitted sufficient facts for his Arkansas conviction to constitute a conviction in Washington for attempted first degree robbery. We agree.

The sentencing court may rely on facts in the out-of-state record if the defendant has admitted those facts. *Thiefault*, 160 Wn.2d at 415. Such an admission may occur in a guilty plea. *Arndt*, 179 Wn. App. at 381 (stating "[a] sentencing court properly can consider facts conceded by the defendant in a guilty plea as an admitted fact"); *State v. Tewee*, 176 Wn. App. 964, 970, 309 P.3d 791 (2013), *review denied*, 179 Wn.2d 1016 (2014) (considering admission in guilty plea). Here, Trice voluntarily entered into a guilty plea. Washington courts treat an out-of-state guilty plea as an admission of a crime's elements if the convicting state also does. *See, e.g.*, *Olsen*, 180 Wn.2d at 478-479 (treating California nolo contendere plea as a plea of guilty for all purposes when California law would have given it such treatment).

In Arkansas courts, a voluntary guilty plea is the defendant's trial. *Graham v. State*, 188 S.W.3d 893, 895 (Ark. 2004). "A guilty plea is inherently an admission of all of the elements of the charges and constitutes a waiver of any defense that might have been raised at the trial of the charges." *Standridge v. State*, 2012 Ark. App. 563, 423 S.W.3d 677, 681. As a result, Arkansas case law requires us to treat Trice's voluntary guilty plea as an admission of the charges in his 1987 charging document.

Count 1 of Trice's charging document accused him of "unlawfully, feloniously, employ[ing] physical force upon BETTY GRIFFIN and CLARENCE GRIFFIN, with the purpose of committing a theft while armed with a deadly weapon, to-wit: a shotgun." Clerk's Papers at 146. Accordingly, we treat Trice's guilty plea as an admission that Trice unlawfully

employed physical force against two people, while armed with a shotgun, with the purpose of committing a theft. *See Standridge*, 423 S.W.3d at 681.

These admitted facts are sufficient to show that Trice's conduct underlying his Arkansas conviction would have supported a Washington conviction of attempted first degree robbery. By pleading guilty in Arkansas, Trice admitted – at a minimum – that it was his purpose to take personal property from another, i.e. a theft, while armed with a deadly weapon. Because Trice's charging document also contended that Trice employed "physical force" upon two people in the commission of his crime, these facts also support a finding that Trice's conduct would have constituted a "substantial step" towards the commission of first degree robbery in Washington. Therefore, we hold that Trice's 1989 conviction of aggravated robbery in Arkansas was factually comparable to a conviction in Washington of attempted first degree robbery.

Because Trice's 1989 Arkansas conviction for aggravated robbery was factually comparable to Washington's crime of attempted first degree robbery, we hold that the trial court properly included that conviction in Trice's offender score. We affirm the trial court on this issue.

C. FLORIDA SEXUAL BATTERY CONVICTION

Trice argues that the 1996 Florida conviction is not comparable to a Washington felony, and therefore the trial court erred by including that in his offender score. The State agrees that Trice's 1996 Florida conviction was not legally or factually comparable to a Washington felony and concedes that the conviction should not have been included in his offender score. We accept the State's concession.

At Trice's 2013 sentencing hearing, the State contended that Florida's sexual battery statute was legally comparable to Washington's former third degree rape statute. However, the elements of the Florida statute are broader than Washington's former third degree rape statute because the Florida statute does not impose a requirement that the perpetrator and victim not be married. *Compare* former Fla. Stat. Ann. § 794.001(3) (1996) *with* former RCW 9A.44.060(1) (1979). Accordingly, the Florida conviction is not legally comparable to a Washington third degree rape conviction. And there were no facts in the record that were admitted, stipulated to, or proved beyond a reasonable doubt that could establish factual comparability.

Despite finding that Trice's Florida sexual battery conviction was not legally or factually comparable to Washington's definition of third degree rape, the trial court reasoned that because Trice's sexual battery conviction was a Florida felony, Trice's sexual battery conviction should count as one point in Trice's offender score. This ruling was incorrect. If an out-of-state conviction involves an offense that is neither legally nor factually comparable to a Washington offense, the sentencing court may not include the conviction in the defendant's offender score. *Olsen*, 180 Wn.2d at 478; *Thiefault*, 160 Wn.2d at 415.

Because Florida's 1996 sexual battery statute is neither legally nor factually comparable to a Washington statute, Trice's conviction under the Florida sexual battery statute cannot be used in computing his sentencing offender score. Accordingly, we hold that the sentencing court erred by allocating Trice one point for his 1996 sexual battery conviction and we remand for resentencing.

We hold that the trial court did not err in including Trice's 1989 Arkansas conviction in his offender score, but did err in including Trice's 1996 Florida conviction in his offender score. Accordingly, we affirm in part, reverse in part, and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Maxa, J.
MAXA, J.

We concur:

Bjorgen, A.C.J.
BJORGEN, A.C.J.

Melnick, J.
MELNICK, J.

APPENDIX "B"

GENERAL ACTS

OF THE

Seventieth General Assembly

OF THE

State of Arkansas

Volume II

Book 1

Passed at the Regular Session held at the Capitol in the City of Little Rock, Arkansas,
convening on the 13th day of January, 1975
recessed the 27th day of March, 1975
convening the 9th day of April, 1975
recessed the 9th day of April, 1975
convening the 12th day of January, 1976
adjourned the 28th day of January, 1976

INCLUDING ACTS OF THE EXTENDED SESSION OF

THE

SEVENTIETH GENERAL ASSEMBLY

January 12, 1976 — January 28, 1976

INCLUDING ACTS OF THE FIRST

EXTRAORDINARY SESSION

OF THE

SIXTY-NINTH GENERAL ASSEMBLY

June 24, 1974 — August 1, 1974

SECTION 2004. CRIMINAL TRESPASS.

(1) A person commits criminal trespass if he purposely enters or remains unlawfully in or upon a vehicle or the premises of another person.

(2) Criminal trespass is a class B misdemeanor if the vehicle or premises involved is an occupiable structure. Otherwise, it is a class C misdemeanor.

CHAPTER 21. ROBBERY

SECTION 2101. DEFINITIONS.

As used in this Chapter, unless the context plainly requires otherwise:

"Physical force" means any bodily impact, restraint, or confinement, or the threat thereof.

SECTION 2102. AGGRAVATED ROBBERY

(1) A person commits aggravated robbery if he commits robbery as defined in section 2103 and he:

(a) is armed with a deadly weapon, or represents by word or conduct that he is so armed; or

(b) inflicts or attempts to inflict death or serious physical injury upon another person.

(2) Aggravated robbery is a class A felony.

SECTION 2103. ROBBERY

(1) A person commits robbery if with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

(2) Robbery is a class B felony.

CHAPTER 22. THEFT

SECTION 2201. DEFINITIONS.

As used in this Chapter, unless the context plainly requires otherwise:

(1) "Article" means any object, material, device or substance or copy thereof including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, micro-organism, blueprint or map.

(2) "Copy" means any facsimile, replica, photograph or other reproduction of an article, and any note, drawing or sketch made of or from an article.

(3) "Deception" means:

(a) creating or reinforcing a false impression, including false impressions of fact, law, value or intention or other state of mind that the actor does not believe to be true; or

(b) preventing another from acquiring information which would affect his judgment of a transaction; or

(c) failing to correct a false impression that the actor knows to be false and (i) that he created or reinforced or (ii) that he knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

OFFICE RECEPTIONIST, CLERK

To: Therese Nicholson-Kahn
Cc: Elaine Lilley; wapofficemail
Subject: RE: St. v. Eddie Trice, No. 91159-2, OID 91121

Rec'd 6/15/15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Therese Nicholson-Kahn [mailto:tnichol@co.pierce.wa.us]
Sent: Monday, June 15, 2015 3:30 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Elaine Lilley; wapofficemail
Subject: St. v. Eddie Trice, No. 91159-2, OID 91121

Please see attached the State's Answer to Petition for Review in the below matter:

St. v. Trice
No. 91159-2
Submitted by: J. Schacht
WSB # 17298

Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to J. Schacht