Supreme Court No. 91159-2
No. 44808-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDDIE LEE TRICE,

Petitioner.

PETITION FOR REVIEW

ELAINE L. WINTERS
Attorney for Petitioner

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

FILED IN COA ON DECEMBER 26, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

United States Supreme Court Decisions

Washington Statutes

Arkansas Decisions

Arkansas Statutes

Washington Court Rule

A. IDENTITY OF PETITIONER

Eddie Lee Trice, appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Trice seeks review of the portion of the Court of Appeals decision holding that his 1987 Arkansas aggravated robbery conviction was legally and factually comparable to a Washington's attempted first degree robbery conviction and was therefore properly included in calculating his SRA offender score. State v. Eddie Lee Trice, No. 44808-4-II.

A copy of the opinion dated November 25, 2014, is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

The sentencing court included a 1987 Arkansas aggravated robbery conviction in calculating Mr. Trice's offender score even though the court concluded the Arkansas state was broader and therefore not legally comparable to a Washington attempted first degree robbery conviction. The State did not produce Mr. Trice's guilty plea, but the Court of Appeals upheld the trial court's conclusion that the

crimes were factually comparable by holding that Mr. Trice's guilty plea admitted the facts contained in the Arkansas charging document.

1. Is the Court of Appeals decision in conflict with this Court's decisions in In re Pers. Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005) and State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007)?

2. Is the Court of Appeals decision in conflict with this Court's reasoning in State v. Olsen, 180 Wn.2d 468, 325 P.3d 187 (2014) because the Court of Appeals assumed that a guilty plea admitted the facts contained in a charging document rather than the elements of the charged crime?

3. Did the Court of Appeals incorrectly construe Washington's accomplice liability statute in holding that an attempted robbery conviction requires the intent to steal rather than the intent to commit robbery as required by RCW 9A.28.020(1)?

D. STATEMENT OF THE CASE

This is Eddie Trice's second appeal of his sentence. At his first sentencing hearing, Mr. Trice was sentenced to life in prison without the possibility of parole as a persistent offender. CP 6, 10, 74. That sentence was reversed on appeal when the State conceded that a Florida

conviction for sexual battery was not legally or factually comparable to a qualifying Washington offense. CP 54-55, 74-78; Slip Op. at 2

Upon remand Mr. Trice agreed that he had four out-of-state convictions but argued that none were comparable to a Washington felony. CP 86-88, 116; RP 40. The sentencing court included two of those convictions in Mr. Trice's offender score. The court concluded that Mr. Trice's 1989 Arkansas aggravated robbery conviction was not legally comparable to attempted first degree robbery in Washington but found the conviction was factually comparable based upon the indictment and a notation on the judgment that Mr. Trice plead guilty.[1] RP 47, 50; CP 146-47.

On appeal, the Court of Appeals agreed that the Arkansas robbery statute is not legally comparable to attempted first degree robbery in Washington. Slip Op. at 6-7. The court, however, concluded that the facts outlined in the charging document would have supported a conviction for attempted first degree robbery in

---

[1] The sentencing court also counted a 1996 Florida conviction for sexual battery in Mr. Trice's offender score even though the crime was not comparable to a Washington felony. RP 41-42. On appeal, the Court of Appeals accepted the State's concession that the Florida conviction was improperly included in Mr. Trice's offender score. Slip Op. at 9-10.

Washington and affirmed the inclusion of the Arkansas conviction in Mr. Trice's offender score. Slip Op. at 7-9. Mr. Trice seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court of Appeals' holding that Mr. Trice's Arkansas aggravated robbery conviction is factually comparable to Washington's attempted first degree robbery conflicts with decisions of this Court and misinterprets Washington's accomplice liability statute.

After determining that Arkansas's 1987 aggravated robbery statute was legally broader than Washington's attempted first degree robbery, the Court of Appeals found the two crimes were factually comparable and affirmed the inclusion of the Arkansas conviction in Mr. Trice's offender score. The State did not produce Mr. Trice's guilty plea, but the Court of Appeals assumed that the plea admitted the facts found in the indictment and not simply the elements of the crime. The decision is thus in conflict with decisions of this Court. In addition, the Court of Appeals misinterpreted Washington's accomplice liability statute, RCW 9A.28.020, which requires the intent to commit the specific crime at issue. This Court should accept review.

Washington's Sentencing Reform Act (SRA) creates a grid of sentence ranges based upon the statutorily-established seriousness level of the current offense and the defendant's offender score. RCW

9.94A.510, .515, .525, .530; State v. Olsen, 180 Wn.2d 468, 472, 325 P.3d 187 (2014); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). To properly calculate the offender score, the court must determine the defendant's criminal history, which is defined as a list of the defendant's prior criminal convictions and juvenile adjudications. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004); RCW 9.94A.030(11).

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The court determines if the out-of-state conviction is comparable to a Washington criminal statute in effect at the time the foreign crime was committed. Ross, 152 Wn.2d at 229. The State must prove the existence and comparability of any out-of-state offenses by a preponderance of the evidence. Olsen, 180 Wn.2d at 472; Ford, 137 Wn.2d at 480-81; RCW 9.94A.500(1).

This Court has established a two-part test for comparing out-of-state convictions to Washington offenses. The sentencing court first determines if the out-of-state crime is legally comparable to a Washington offense by comparing the elements of the out-of-state conviction to a relevant Washington crime. Olsen, 180 Wn.2d at 472.

If the foreign statue is broader than the Washington statute, the crimes are not legally comparable. Id. at 472-73.

When the crimes are not legally comparable, the court determines if the offense is factually comparable – "whether the defendant's conduct would have violated the comparable Washington statute." Olsen, 180 Wn.2d at 473. In making this determination, the court may rely only upon facts in the record of the out-of-state conviction "that are admitted, stipulated to, or proved beyond a reasonable doubt." State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007); accord In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

The Court of Appeals correctly determined that Mr. Trice's Arkansas aggravated robbery conviction was not legally comparable to attempted first degree robbery in Washington. In 1987, Arkansas's robbery statute provided:

> 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.

Ark. Code § 5-12-102(a). The 1987 aggravated robbery statute required the defendant to commit robbery as defined in § 5-12-102 with the additional requirement that he:

> (1) Is armed with a deadly weapon or represents by word or conduct that he is so armed; or
> (2) Inflicts or attempts to inflict death or serious physical injury upon another.

Ark. Code § 5-12-103(a). Thus, in Arkansas, "the offense [of robbery] is complete when physical force is threatened; no transfer of property need take place." Mitchell v. Arkansas, 281 Ark. 112, 113-14, 661 S.W.2d 390 (1983) (quoting Jarrett v. Arkansas, 265 Ark. 662, 580 S.W.2d 460 (1979)).

In contrast, Washington defines robbery as the unlawful taking of property from another person or in her presence by the use or threatened use of immediate force, violence, or fear of injury to that person, her property, or to another person or property. RCW 9A.56.190 (2006).[2] A person is guilty of an attempt to commit a crime if, "with intent to commit a specific crime he or she does any act which is a substantial step towards the commission of the crime." RCW 9A.28.020(1). Thus, an essential element of attempted first degree

---

[2] RCW 9A.56.190 remains substantially the same as in 1987. The only amendment was to insert gender-neutral language. Laws of 2011, ch. 336.

robbery in Washington is the attempt to commit robbery. Id.; see State v. DeRyke, 149 Wn.2d 906, 911-12, 73 P.3d 1000 (2003) (intent to commit rape an element of attempted rape). Arkansas' robbery statute, however, only requires the attempt to commit a misdemeanor or felony theft. Ark. Code § 5-12-102.

The Court of Appeals determination that the Arkansas conviction is legally comparable to attempted first degree robbery is incorrect. The State did not produce a copy of Mr. Trice's guilty plea. Instead, the Court of Appeals looked at the wording of the information. The Court of Appeals then reasoned that the guilty plea admitted the elements of the crime and therefore the facts in the information. Slip Op. at 8-9 (citing Graham v. Arkansas, 358 Ark. 296, 188 S.W.3d 893, 895 (2004) (defendant who entered plea of guilty not entitled to post-conviction DNA testing because he admitted that he committed the offense) and Standridge v. Arkansas, 2012 Ark. App. 563, 423 S.W.3d 677, 681 (2012) (defendant cannot challenge sufficiency of evidence on appeal after pleading guilty)).

When Mr. Trice pled guilty, he admitted only that he committed the elements of the crime, not the facts included in the information.

> [W]hen a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's

> elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.

Deschamps v. United States, ___ U.S. ___, 133 S. Ct. 2276, 2288, 186 L. Ed. 2d 438 (2013) (citing Shepard v. United States, 544 U.S. 13, 24-26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)); see Olsen, 180 Wn.2d at 478-79 (finding the defendant admitted to the elements of a California conviction by pleading no contest).

Thus, Mr. Trice's guilty plea is only an admission to the elements of aggravated robbery – employing physical force upon another with the intent to commit theft while armed with a deadly weapon. Ark. Code §§ 5-12-102; 5-12-103(1). The Court of Appeals incorrectly looked at the facts in the charging document without any proof that Mr. Trice admitted to those facts. As this Court explained in Lavery:

> Any 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. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258. The Court of Appeals decision is thus in conflict with Lavery and Thiefault and misinterprets Olsen's discussion of the use of a guilty plea to establish elements, not facts.

Moreover, the elements included in the Arkansas information are not comparable to attempted first degree robbery in Washington. Mr. Trice did not admit that he used force to obtain or retain possession of property or that he unlawfully took personal property from the person of another or in his presence, elements required for a Washington robbery. RCW 9A.56.190. And he did not admit he had the intent to commit robbery, an element of attempted robbery in Washington. RCW 9A.28.020(1).

The Court of Appeals incorrectly concluded that (1) the facts included in the Arkansas information were necessarily admitted by Mr. Trice when he pled guilty and (2) the elements of the Arkansas crime would have constituted attempted first degree robbery in Washington. The Court of Appeals is in conflict with decisions of this Court and incorrectly turns an Arkansas guilty plea into an admission of any fact included in the information. And, it misinterprets Washington's attempt statute, which requires the intent to commit the specific

offense. RCW 9A.28.020(1). This Court should accept review. RAP 13.4(a)(1), (3), (4).

F. CONCLUSION

Eddie Trice asks this Court to accept review of the portion of the Court of Appeals decision affirming the inclusion of a 1987 Arkansas aggravated robbery conviction in his offender score.

DATED this ___ day of December 2014.

Respectfully submitted,

Elaine L. Winters - WSBA # 7780
Washington Appellate Project
Attorneys for Petitioner

APPENDIX

COURT OF APPEALS DECISION TERMINATING REVIEW

November 25, 2014

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.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 44808-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Kawyne Ann Lund, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 25, 2014

WASHINGTON APPELLATE PROJECT

December 25, 2014 - 12:50 PM

Transmittal Letter

Document Uploaded: 3-448084-Petition for Review.pdf

Case Name: STATE V. EDDIE TRICE

Court of Appeals Case Number: 44808-4

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us