IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31857-5-III

STATE OF WASHINGTON, Respondent,

v.

THOMAS L. PARKER, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED

Federal Cases

State Cases

Constitution

Statutes

Court Rules

I. INTRODUCTION

Thomas L. Parker was charged with second degree robbery for taking two bottles of tequila belonging to Rite Aid while using force against the loss prevention officer. During the jury trial, after the State rested, the defense made a motion to dismiss for insufficient Information because the charging document failed to include an essential element of the crime and failed to include specific facts supporting the allegation that Parker used or threatened to use force. In addition, the trial court refused to submit Parker's requested lesser included instructions to the jury permitting conviction of third degree theft. The jury found Parker guilty. At sentencing, the trial court determined that Parker's offender score was 6 instead of 4 based on Parker's prior out of state convictions. Parker was ultimately sentenced to and exceptional sentence downward of 29 months in prison.

On appeal, Parker contends that the trial court erred in refusing to submit the lesser included offense instructions to the jury, in denying his motion to dismiss for insufficient information, and in determining his offender score for purposes of sentencing based on prior out-of-state convictions that are not comparable to Washington state offenses. As a result of these errors, Parker's conviction should be reversed and vacated, and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in refusing to instruct the jury on third degree theft as a lesser included offense of second degree robbery, requiring reversal.

ASSIGNMENT OF ERROR 2: The trial court erred in denying Parker's motion to dismiss for insufficient information because the charging document omitted an essential element of the offense.

ASSIGNMENT OF ERROR 3: The trial court erred in determining Parker's offender score for purposes of sentencing because Parker's out-of-state convictions were not comparable to the Washington statutes.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Whether Parker was entitled to have jury instructions on a lesser-included offense.

ISSUE 2: Whether the trial court improperly refused to instruct the jury on third degree theft because the requested instructions satisfied the legal prong of the *Workman* test.

ISSUE 3: Whether the trial court abused its discretion by improperly refusing to instruct the jury on third degree theft because the requested instructions satisfied the factual prong of the *Workman* test.

ISSUE 4: Whether failure to instruct the jury on third degree theft prejudiced Parker.

ISSUE 5: Whether the court must reverse Parker's second degree robbery conviction.

ISSUE 6: Whether the trial court erred in denying parker's motion to dismiss for insufficient information because the charging document omitted an essential element of the offense.

ISSUE 7: Whether the court should strictly construe the Information.

ISSUE 8: Whether Parker was constitutionally entitled to notice that is both legally and factually sufficient.

ISSUE 9: Whether the Information was deficient because it failed to include an essential element of the crime and failed to include specific facts supporting the allegation that Parker used or threatened to use force.

ISSUE 10: Whether Parker's prior Arkansas convictions were legally comparable to Washington offenses.

ISSUE 11: Whether Parker's prior Arkansas convictions were factually comparable to Washington offenses.

IV. STATEMENT OF THE CASE

Parker was charged with second degree robbery. CP 132. During a two day jury trial beginning on July 12, 2013, the evidence showed that on November 27, 2012, Parker entered a Rite Aid store on 215 N. 4th Avenue in Pasco, Washington. CP 134; RP (6/13/13) 3-4. While in Rite Aid, Parker concealed two bottles of tequila in his pants. CP 134; RP (6/13/13) 4. Before Parker left the store, he asked the cashier if they took APS cards, then exited the store and set off the alarm. CP 134; RP (6/13/13) 4. When loss prevention officer Zakariah Briggs, dressed in plain clothes, saw Parker conceal these items, Briggs headed for the exit of the store. RP (6/13/13) 3-4. As Briggs was starting to identify himself to Parker, Parker lowered himself down and drove his shoulder into Briggs, impacting his upper body and knocking him off balance, and driving him back four or five steps. CP 134; RP (6/13/13) 5-6, 18. Briggs got under Parker's center of gravity and stood Parker up and they went toward the water cooler. RP (6/13/13) 6. Parker attempted to get away. CP 134; RP (6/13/13) 6-7.

When store manager Samuel Farias saw this confrontation between Parker and Briggs, Farias came over to assist. RP (6/13/13) 7, 16. As

Briggs was struggling with Parker, Parker took the liquor out and threw it down, and came back up striking Briggs on the face with an open hand causing his glasses to fall from his face. CP 134; RP (6/13/13) 7, 19.

After Parker hit Briggs, Farias grabbed Parker's arm and put it behind his back, and Briggs took his phone out and dialed 911. RP (6/13/13) 8. As soon as Parker heard Briggs talking with the dispatcher, he calmed down. RP (6/13/13) 8.

City of Pasco police officer Kevin Erickson arrived on the scene and noticed a man, later identified as Parker, struggling with two other people at the front door of Rite Aid. RP (6/12/13) 7. After placing him under arrest, Erickson gave Parker his Miranda warnings. RP (6/12/13) 7-8. Parker told Erickson that he had a family and had people to take care of, and asked if Erickson could write him a ticket instead of taking him to jail. RP (6/12/13) 9. Erickson then asked Parker what occurred and Parker said that he went out the door, two men grabbed him for no reason, and he did not do anything. RP (6/12/13) 9.

City of Pasco police officer Bill Wright was also dispatched to Rite Aid at the time. RP (6/12/13) 13. Wright made contact with Briggs and Farias who both appeared tired and out of breath. RP (6/12/13) 13-14.

After the State rested, defense counsel made a motion to dismiss or directed verdict. RP (6/13/13) 25. Specifically, defense counsel argued:

> The Information that was filed and we have been using to prepare for trial clearly states, "on or about November 27, 2012, then and there with the intent to deprive the owner of property did unlawfully take such personal property, to wit: two bottles of tequila which belonged to a person other than the accused, in the presence of Zak N. Briggs, against such person's will by use of threatened use of immediate force, violence or fear or injury to the person." The State does not include the RCW. They did not include the language regarding the definition. The instruction and elements they are now trying to use in the jury instruction regarding number four that the force or fear was used by the defendant to obtain or retain possession of the property I don't understand the court to include that in the instructions and without that included and the evidence provided, if the Court believes and guides everything and rules in the favor and looks at it in the light most favorable to the State, I think it's clear there was no force or threatened use of force, violence or fear when Mr. Parker took the items and places them in his pants pocket.

RP (6/13/13) 26. The court denied the defendant's motion to dismiss. RP (6/13/13) 26.

In addition, defense counsel proposed jury instructions to the court asking the court to submit to include lesser included instructions on third degree theft. CP 121-130. However, the court denied the defense counsel's proposed lesser included instructions, stating, "I'm not going to hand out the proposed instructions. I'm not going to grant the motion." RP (6/13/14) 26.

Further, defense counsel objected to the court's proposed "to convict" jury instruction seven as to element four, because that element was not written in the charging document, arguing that it was not proper to

be included in the court's instructions.[1] CP 115; RP (6/13/13) 28. The court noted the defense's objections for the record, and still submitted the instruction to the jury. CP 115; RP (6/13/13) 28.

In Parker's case-in-chief, the defense called Mark Almquist, a private investigator who witnessed the defense interviews of Briggs and Farias. RP (6/13/13) 28-29. Almquist testified that in that defense interview, Briggs gave a statement of what occurred in front of Rite Aid that day. RP (6/13/13) 30. According to Almquist, Briggs stated that it came to his attention there was someone who was suspicious and may have been selecting products intending to leave the store without paying for them. RP (6/13/13) 30. The building has two sets of glass doors, an interior door, a vestibule, an exterior and "he was outside the vestibule door approximately 15 to 20 feet." RP (6/13/13) 30. Briggs saw a black male who was approximately six feet tall with a black jacket coming through both sets of doors. RP (6/13/13) 30. Briggs said as the individual made contact with him he put his shoulder down and "crashes at him like a football player and they make contact." RP (6/13/13) 30. Then Farias grabbed the man around the arms above the elbows like a bear hug. RP (6/13/13) 30. They squirmed around, then the man reached into his pants

[1] Element four of jury instruction seven states: "That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking." CP 115.

with his lower arm and pulled out a bottle and threw it in the grass and the bottle did not break. RP (6/13/13) 30-31.

After hearing all the evidence, the jury found Parker guilty of second degree robbery. CP 102. On August 6, 2013, at a sentencing hearing, the State submitted in a sentencing memorandum to the court proposing that Parker's offender score was a 6 with a standard range of 33 to 43 months. CP 34-94. Defense counsel objected, stating that Parker's offender score should be a 4 with a standard range of 15 to 20 months because Parker's out of state convictions from Arkansas were not comparable to the Washington statute. CP 27-33. In addition, defense counsel requested that the court impose an exceptional sentence downward of 13 months. CP 29. The court found that Parker had an offender score of 6. CP 12; RP (8/6/13) 5. However, the court found there were substantial and compelling mitigating factors to depart from the standard range and imposed an exceptional downward sentence of 29 months. CP 10-24; RP (8/6/13) 6. The court entered findings of fact and conclusions of law in support of an exceptional sentence downward. CP 23-24; RP (8/6/13) 6.

Parker timely appeals.

V. ARGUMENT

A. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THIRD DEGREE THEFT AS A LESSER INCLUDED OFFENSE OF SECOND DEGREE ROBBERY, REQUIRING REVERSAL.

1. Parker was entitled to have the jury instructed on a lesser-included offense.

A criminal defendant has the constitutional right to meaningful opportunity to present a complete defense. U.S. Const. amends. VI, XIV; Wash. Const. art. I, § 22; *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *Davis v. Alaska,* 415 U.S. 308, 314-15, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Maupin,* 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The Washington Constitution also provides an "inviolate" right to a jury determination of a case. Wash. Const. art. I, §§ 21, 22; *Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 656, 771 P.2d 711 (1989); *Pasco v. Mace,* 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Those accused of a crime in Washington have the statutory right to have the jury instructed on any lesser-included offenses. RCW 10.61.006. The statute reads:

> In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that which he is charged in the indictment or information.

RCW 10.61.006.

Washington utilizes the two-prong *Workman* test to determine whether the defendant is entitled to have the jury instructed on a lesser-included offense. *State v. Nguyen,* 165 Wn.2d 428, 434-35, 197 P.3d 673 (2008); *State v. Berlin,* 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v. Workman,* 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). First, under the legal prong of the test, each of the elements of the lesser offense must be a necessary element of the offense charged. *State v. Fernandez-Medina,* 141 Wn.2d 448, 454, 6 P.3d 1150 (2000); *Workman,* 90 Wn.2d at 447-48. Under the factual prong, the evidence in the case must support an inference that solely the lesser crime was committed to the exclusion of the charged offense. *Fernandez-Medina,* 141 Wn.2d at 455; *Workman,* 90 Wn.2d at 447-48. As a threshold determination apart from the *Workman* test, the included offense must arise from the same act or transaction supporting the greater offense that is charged. *State v. Porter*, 150 Wn.2d 732, 738-40, 82 P.3d 234 (2004).

The rule entitling a defendant to have juries instructed on lesser included offenses serves to ensure a defendant's constitutional right to adequate notice and protects the constitutional right to present a defense. *Berlin,* 133 Wn.2d at 548. It also affords the juries the benefit of a third option, in addition to conviction or acquittal, which "accord[s] the defendant the full benefit of the reasonable-doubt standard." *Beck v.*

Alabama, 447 U.S. 625, 633-34, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). In other words, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Beck,* 447 U.S. at 634. This result is avoided with the option to convict of the lesser included offense.

The standard for review applied depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. On appeal, the legal prong of the *Workman* test is reviewed de novo. *State v. Walker,* 136 Wn.2d 767, 772, 966 P.2d 883 (1998). The factual prong is reviewed under an abuse of discretion standard. *State v. Hunter,* 152 Wn.App. 30, 43-44, 216 P.3d 421 (2009).

2. The trial court improperly refused to instruct the jury on third degree theft because the requested instructions satisfied the legal prong of the *Workman* test.

The requested third degree theft instruction satisfied the legal prong of the *Workman* test because each element of third degree theft had to be proved to establish second degree robbery as charged and prosecuted by the State. Third degree theft is legally a lesser included offense of second degree robbery. Thus, the trial court erred in refusing the instruction.

Both the statutory language of RCW 10.61.006 and the language of *Workman* necessitate that the reviewing court examine the elements of the offense charged. *Berlin,* 133 Wn.2d at 550. Under a proper *Workman* analysis in this case, each element of third degree theft is a necessary element of second degree robbery. A person commits third degree theft when the value of the property or services taken does not exceed $750.00 in value. RCW 9A.56.050. Theft is defined as "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services." RCW 9A.56.020.

The elements of the "to convict" instruction of third degree theft as proposed by Parker in his requested lesser included instruction, are:

(1) That on or about November 27, 2012, the defendant wrongfully obtained or exerted unauthorized control over property of another not exceeding $750 in value; and

(2) That the defendant intended to deprive the other person of the property; and

(3) That this act occurred in the State of Washington...

CP 126; *see also* WPIC 70.11.

Further, the court instructed the jury on the definition of second degree robbery in instruction 6:

> A person commits the crime of robbery in the second degree when he or she unlawfully and intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. A threat to use immediate force or violence may be either expressed or implied. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial.

CP 114 (Instruction No. 6); RCW 9A.56.190; *see also* WPIC 37.30.

In relevant part, instruction 7 told the jury that to convict, it must find

> (1) That on or about November 17, 2012, the defendant unlawfully took personal property in the presence of another [and]
>
> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to the person or property of another;
>
> (4) That force or fear was used by the defendant to obtain or retain the possession of the property or to prevent or overcome resistance to the taking; and
>
> (5) That any of these acts occurred in the State of Washington...

CP 115.

Parker's defense was that the State had proved a third degree theft and not a robbery. Defense counsel therefore submitted jury instruction on the lesser-included offense of third degree theft. Both second degree robbery and third degree theft include the taking of property from another person. RCW 9A.56.190; RCW 9A.56.030(1)(b). Robbery also includes the elements of larceny. *Application of Salter,* 50 Wn.2d 603, 605, 313 P.2d 700 (1957); *see State v. Byers,* 136 Wn. 620, 622, 241 P.9, 10 (1925) ("Robbery includes the elements of the crime of larceny, one of which is an intent to deprive the owner or other persons of the things taken."); *see also State v. Kjorsvik,* 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (intent to steal is an element of robbery).

A person cannot commit a robbery without also committing a theft, because when a person "unlawfully takes personal property in the presence of another" (robbery) that is necessarily "wrongfully obtaining... the property... of another" (theft). Indeed, this is precisely how the jury was instructed. Thus, based on how the State charged and prosecuted the second-degree robbery, the legal prong of the *Workman* test for issuance of third degree theft instructions was satisfied.

3. The trial court abused its discretion by improperly refusing to instruct the jury on third degree theft because the requested instructions satisfied the factual prong of the *Workman* test.

Under the factual prong of the *Workman* test, the evidence "must raise an inference that only the lesser included... offense was committed to the exclusion of the offense charged. *Fernandez-Medina,* 141 Wn.2d at 455; *Workman,* 90 Wn.2d at 447-48. In determining whether the facts support the lesser included offense, courts are required to view the supporting evidence in the light most favorable to the party that requested the instruction. *Id.* at 455. The party requesting the lesser included instruction is not required to produce the evidence supporting the instruction. *State v. Pacheco,* 107 Wn.2d 59, 726 P.2d 981 (1986). The instruction should be given if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. *State v. Warden,* 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

Although affirmative evidence must support the issuance of the instruction, evidence in support of a lesser-included offense need not be produced by the defendant. *Fernandez-Medina,* 141 Wn.2d at 456. Instead, the trial court must consider the evidence as a whole to determine whether it supports instruction. *Id.* An instruction requested by the defendant may be warranted, therefore, even if it contradicts the defendant's theory of the case. *Id.* at 456-58.

For example, in *Fernandez-Medina,* the defendant presented an alibi to two charges of first degree assault but requested the trial court

instruct the jury on the lesser offense of second degree assault. *Fernandez-Medina,* 141 Wn.2d at 451-52. The trial court refused the instruction and the Court of Appeals affirmed the decision, concluding the alibi defense negated the inference that only the lesser offense was committed. *Id.* at 452. The Supreme Court reversed, rejecting the theory that the inference supporting and instruction on a lesser offense must be drawn solely from the evidence of the party requesting the instruction. *Id.* at 456-57. Additionally, the Court concluded an accused is entitled to present more than one theory in his defense and it is for the jury, not the judge, to determine if any or all of the theories should be accepted. *Id.* at 460-61. The Court reasoned,

> We believe that the jury's ability to "separate the wheat from the chaff" deserves more deference than was afforded by the courts below, and we are loathe to allow the expansion of the trial judge's authority into the fact-finding province of the jury.

Id. at 461.

In reaching its decision, the Court in *Fernandez-Medina* adopted the rule expressed by the Court of Appeals in Division One in *McClam.* *Id.* In *McClam,* the court stated,

> [a]lthough there must be affirmative evidence from which the jury could find the facts of the lesser included offense... there is no requirement in case law that the evidence must come from the defendant or that the defendant's testimony cannot contradict the evidence.

State v. McClam, 69 Wn.App. 885, 889, 850 P.2d 1377, *review denied,* 122 Wn.2d 1021, 863 P.2d 1353 (1993).

Viewed in the light most favorable to Parker, the evidence supported the inference that he was guilty of only third degree theft and not second degree robbery because the record reflects Parker did not use force to obtain the liquor while he was in the store. In addition, Briggs testified that the Rite Aid company policy was not to detain somebody if they are trying to get away, but they can use "guiding hands" if they are assaulted. RP (6/13/13) 12. Parker told Officer Erickson that he went out the door and "two men grabbed him for no reason." RP (6/12/13) 9. In closing argument, defense counsel argued that the State failed to prove the element of defendant's use or threatened use of immediate force, violence, or fear of injury. RP (6/13/13) 37. Based on testimony during trial, a rational juror could have believed there was no immediate force to take the liquor. The jury, however, only had two choices. It could acquit or find Parker guilty of second degree robbery. Because the jury believed the evidence indicating Parker took the liquor from Rite Aid, it likely resolved any doubts it had on whether immediate force was used in favor of conviction. Parker was entitled to the requested lesser included third degree theft instruction. Without the requested instruction, Parker was

unable to have the jury consider his defense that the liquor was not taken by immediate force, and was just a theft.

Based on the evidence, the factual prong of the *Workman* test was satisfied. As such, the trial court abused its discretion when it failed to give the lesser included instructions to the jury on third degree theft.

4. Failure to instruct the jury on third degree theft prejudiced Parker

Error from the failure to give a lesser included offense instruction may be harmless where, although the trial court wrongly fails to give a lesser included instruction, a jury is instructed on an intermediate offense but convicts the defendant of a greater crime. *See e.g., State v. Guilliot,* 105 Wn.App. 355, 368-69, 22 P.3d 1266, *review denied,* 145 Wn.2d 1004 (2001); *State v. Hansen,* 46 Wn.App. 292, 296-97, 730 P.2d 706 (1986), *opinion modified by* 737 P.2d 670 (1987). Courts have disapproved, however, circumstances where jurors are given an all-or-nothing choice. *Beck v. Alabama,* 447 U.S. at 634; *Keeble v. United States,* 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973).

Because the jurors in this case were faced with the all-or-nothing choice of either to acquit or to convict Parker of second degree robbery, Parker was unfairly prejudiced.

5. This court must reverse Parker's second degree robbery conviction.

Because the evidence is the record affirmatively established Parker was only guilty of third degree theft, the trial court erred in refusing to instruct the jury on the lesser offense. *Fernandez-Medina,* 141 Wn.2d at 461-62. As such, the court's failure to give the lesser included third degree theft instruction requires reversal. *Fernandez-Medina,* 141 Wn.2d at 462; *State v. Parker,* 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

B. THE TRIAL COURT ERRED IN DENYING PARKER'S MOTION TO DISMISS FOR INSUFFICIENT INFORMATION BECAUSE THE CHARGING DOCUMENT OMITTED AN ESSENTIAL ELEMENT OF THE OFFENSE

1. The court must strictly construe the Information.

Parker contends that the Information failed to contain the necessary elements of the crime of second degree robbery. Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a charging document must include all essential elements of a crime to inform a defendant of the charges against him and to allow preparation for the defense. U.S. Const. amend. VI (providing "[i]n all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation"); Wash. Const. art. 1 § 22 (amend. 10) (providing "[i]n criminal prosecutions the accused shall have the right...to demand the nature and cause of the accusation against him"); *State v. Kjorsvik*, 117 Wn.2d 93, 101–02, 812 P.2d 86 (1991). In addition,

CrR 2.1(b) provides in part that "the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. CrR 2.1(b).

A charging document is constitutionally sufficient if the information states each statutory element of the crime, even if it is vague as to some other matter significant to the defense. *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). To determine the essential elements of the charged crime, we look first to the statutory language. *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005). In so doing, we read all the words of the statute together, and we construe the statute to avoid an absurd result. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009); *Young v. Estate of Snell*, 134 Wn.2d 267, 282, 948 P.2d 1291 (1997); *State v. Day*, 96 Wn.2d 646, 648, 638 P.2d 546 (1981); *State v. Chester*, 82 Wn.App. 422, 427, 918 P.2d 514 (1996).

A challenge to the sufficiency of the charging document may be raised at any time. *Kjorsvik,* 117 Wn.2d at 102. When a defendant challenges the sufficiency of a charging document, the standard of review depends on the timing of the challenge. *State v. Ralph*, 85 Wn.App. 82, 84, 930 P.2d 1235 (1997). An information which is not challenged until after the verdict is liberally construed in favor of validity. *Kjorsvik*, 117 Wn.2d at 102. In order to establish an information's insufficiency after

the verdict, a defendant must establish (1) the necessary elements of the offense are not in the information in any form, and (2) how the defendant was prejudiced by the faulty information. *Id.* at 105-06.

If, however, a defendant challenges the sufficiency of the information "at or before trial," the information is strictly construed. *State v. Vangerpen*, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995); *State v. Johnson*, 119 Wn.2d 143, 150, 829 P.2d 1078 (1992); *Ralph*, 85 Wn.App. at 85. In *Ralph,* this court held when the motion to dismiss the information came after both sides had rested, the strict construction rule applies. *Ralph*, 85 Wn.App. at 85. The liberal interpretation rule set forth in *Kjorsvik* does not apply when the defendant challenges the sufficiency of the evidence any time before the verdict. *Ralph*, 85 Wn.App. at 85; *Vangerpen,* 125 Wn.2d at 788 (defendant moved for dismissal for insufficient information after both sides had rested); *but see State v. Phillips*, 98 Wn.App. 936, 942-43, 991 P.2d 1195 (2000) (Division II holding that if a defendant moves to dismiss an allegedly insufficient charging document after a point when the State can no longer amend the information, such as when the State has rested its case, the court construes the information liberally in favor of validity).

Here, defense counsel made a motion to dismiss the case based on an insufficient charging document after the State rested. Accordingly,

Ralph and *Vangerpen* are controlling in this case and the information should be strictly construed. Thus, if the information does not state the elements of second degree robbery, it is insufficient.

2. Parker was constitutionally entitled to notice that was both legally and factually sufficient.

A constitutionally sufficient charging document must notify the accused person of the essential elements of the offense and of the underlying facts. The rule requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged. *State v. Leach,* 113 Wn. 2d 679, 689, 782 P.2d 552 (1989)(emphasis in original). This is not the same as a requirement to "state every statutory element of" the crime charged. *Id.* at 689. Following *Leach,* the Supreme Court elaborated further:

> There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific *conduct* of the defendant which allegedly constituted that crime...[T]he "core holding of *Leach* requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime."

Auburn v. Brook, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992) (footnotes omitted, emphasis in original); *Kjorsvik,* 117 Wn.2d at 101-02 (holding that the correct rule is that *all* essential elements of an alleged crime must

be included in the charging document in order to afford the accused notice of the nature of the allegations so that a defense can be properly prepared).

3. The information was deficient because failed to include an essential element of the crime and failed to include specific facts supporting the allegation that Parker used or threatened to use force.

Parker contends that the information was defective because (1) it failed to include the essential element of the crime of second degree robbery that "force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking"; and (2) it failed to include specific facts supporting the allegation the Parker used or threatened to use for in obtaining or retaining the property. The information in this case states as follows:

> COMES NOW Shawn P. Sant, Franklin County Prosecuting Attorney, and by this Information accuses THOMAS L. PARKER [o]f the crime of: ROBBERY IN THE SECOND DEGREE, [RCW 9A.56.190 AND 9A.56.210], A CLASS B FELONY, Committed as follows:
>
> That the said Thomas L. Parker in the County of Franklin, State of Washington, on or about November 27, 2012, then and there, with intent to deprive the owner of property, did unlawfully take such personal property, to wit: two bottles of tequila which belonged to a person other than the accused, in the presence of Zak N. Briggs, against such person's will by use or threatened use of immediate force, violence, or fear of injury to the person.

CP 132. A conviction for robbery requires proof that the accused person unlawfully took property from another

> [B]y the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

In this case, the Information alleged that Parker used or threatened force, but did not provide any facts outlying the underlying conduct that formed the basis for the allegation. CP 132. Further, the court instructed the jury in instruction number 7, element 4 "[t]hat force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking..." CP 115. Yet neither this element of the crime nor the defendant's specific conduct was included in the Information. CP 132.

In the absence of any details outlining the alleged conduct, the charging document was both legally and factually deficient, because it failed to provide an essential element of the crime, but also failed to provide "a description of the specific *conduct* of the defendant which allegedly constituted that crime. *Brook*, 119 Wn.2d at 629-30 (emphasis in original). Nor can the underlying facts be inferred from the language used in the Information. CP 132. Accordingly, under this strict

construction standard, the information is constitutionally defective, the court must dismiss the case "without prejudice to the State's ability to re-file the charges." *Ralph*, 85 Wn.App. at 86

C. THE TRIAL COURT ERRED IN DETERMINING PARKER'S OFFENDER SCORE FOR PURPOSES OF SENTENCING BECAUSE PARKER'S OUT-OF-STATE CONVICTIONS WERE NOT COMPARABLE TO THE WASHINGTON STATUTES.

Parker contends that the trial court erred in determining his offender score for purposes of sentencing because the court determined that two of Parker's out-of-state convictions from Arkansas should be included in his offender score, giving Parker an offender score of 6, instead of 4. CP 27-33. One conviction for burglary and one conviction for theft of property were included in his offender score. Engaging in a comparability analysis demonstrates that the burglary and the theft charges are not legally comparable to Washington offenses, and therefore they should not have been included in Parker's offender score under RCW 9.94A.525(3).

To properly sentence a defendant, the court is required to calculate his defender score based upon his prior convictions and the seriousness level of the current offense. *State v. Wiley,* 124 Wn.2d 679, 682, 880 P.2d 983 (1994). The Sentencing Reform Act ("SRA") provides that "[o]ut-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). When prior convictions include some from out-of-state, those prior convictions cannot be included in the offender score calculation unless the prosecution proves that the offense is "comparable" to a Washington state felony. *State v. Ford,* 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999). Such a comparison requires that the record reflect the nature and type of out-of-state conviction the State seeks to include in the offender score. *See State v. Morley,* 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

Washington law employs a two-part test to determine the comparability of a foreign offense. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, the court determines whether the foreign offense is legally comparable—"that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Id.* Second, if the foreign offense elements are broader than Washington's elements, precluding legal comparability, the court determines "whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute." *Id.* In making its factual comparison

the court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. *Id.*

The state has the burden of proving by a preponderance of the evidence the existence of all of the defendant's prior convictions and both the existence and comparability of any such convictions which are from out-of-state. *Ford,* 137 Wn.2d at 482-83; *State v. McCorkle,* 137 Wn.2d 490, 495, 973 P.2d 461 (1999). Absent sufficient evidence to prove the existence and comparability of a prior out-of-state conviction, "the sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score." *Ford,* 137 Wn.2d at 480-81. A defendant generally cannot waive a challenge to a miscalculated offender score where the resulting sentence is in excess of what is statutorily authorized. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). Although the prosecution may agree to sentencing recommendations, the sentencing court bears the ultimate responsibility to determine the correct offender score and sentencing range. RCW 9.94A.460; *State v. Malone*, 138 Wn.App. 587, 593, 157 P.3d 909, 912 (2007). The trial court's failure to calculate the standard range based on correct classification of prior convictions is "legal error subject to review." *McCorkle,* 137 Wn.2d at 496.

1. The Arkansas statutes were not legally comparable to the Washington statutes.

Under a comparability analysis of Arkansas and Washington statutes, Parker's offender score would have been a 4 instead of 6. That would have made his standard range for purposes of sentencing 15 to 20 months, instead of 33 to 43 months.

For instance, as to the crime of burglary – residential, the Arkansas statute provides:

> (1) A person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment.

Ark. Code Ann. § 5-39-201. Furthermore, "Residential occupiable structure" means a vehicle, building, or other structure: (i) in which any person lives; or (ii) that is customarily used for overnight accommodation of a person whether or not a person is actually present. Ark. Code Ann. § 5-39-101(4)(A). A "residential occupiable structure" includes "each unit of a residential occupiable structure divided into a separately occupied unit." Ark. Code Ann. § 5-39-101(4)(B). "Vehicle" means "any craft or device designed for the transportation of a person or property across land or water or through the air." Ark. Code Ann. § 5-39-101(5).

By contrast, Washington's burglary statutes generally do not permit a burglary to occur in a vehicle. *See* RCW 9A.52.025, 9A.52.030 (providing that the entry occurs into a building "other than a vehicle"). The exception, the first degree burglary statute, provides:

> (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020. Washington uses the term "dwelling" defined as "any structure, though movable or temporary, or a portion thereof, which is used or ordinarily used for lodging." RCW 9A.04.110. Thus, while first degree burglary is comparable to an aggravated burglary in Arkansas, residential burglary is broader under the Arkansas statute because it permits a felony conviction for an entry into a vehicle without a weapon or an assault, while Washington does not. Instead, in Washington, entering or remaining in a vehicle with the intent to commit a crime would be a misdemeanor, that is, vehicle prowling in the second degree.

Similarly, the Arkansas theft of property statute resembles Washington's except that in Arkansas a person commits theft of property if he "knowingly" takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person,

with the purpose of depriving the owner of the property. Ark. Code Ann. § 5-3-103(a). A person acts "knowingly" with respect to:

> (A) The person's conduct or the attendant circumstances when he or she is aware that his or her conduct is of that nature or that the attendant circumstances exist; or
>
> (B) A result of the person's conduct when he or she is aware that it is practically certain that his or her conduct will cause the result.

Ark. Code Ann. § 5-2-202(2). In contrast, Washington's theft statute has a mental culpability of "intent." RCW 9A.56.020. Additionally, under the Arkansas statue, theft of property is a Class C felony if "[t]he value of the property is less than two thousand five hundred dollars ($2,500) but more than five hundred dollars ($500)." Ark. Code Ann. § 5-3-103(b)(2)(A).

While Washington's statute is limited to intentional acts of theft, Arkansas's statute is therefore broader than Washington's statute and permits conviction for acts with a lesser culpable mental state of "knowingly" which would not constitute a felony in Washington.

Because the Arkansas offenses were broader than its Washington counterparts, in part because the Arkansas statute required a lesser mens rea, the Arkansas conviction was not legally comparable to Washington's version. As a result, Arkansas's burglary and theft statutes are not comparable to Washington's statutes as a matter of law.

2. Parker's conduct on his prior Arkansas convictions was not factually comparable to the Washington statutes.

Because the burglary and theft statutes are not comparable as a matter of law, the court must then look at the actual conduct of the defendant to determine whether or not the conduct would be a felony in Washington. *Thiefault,* 160 Wn.2d at 415. The analysis must be conducted on the existing factual record and the superior court may not use Parker's prior Arkansas convictions, unless the State satisfies its burden of proving that the Arkansas conviction is factually comparable based on facts Parker admitted to, stipulated to, or that were proved beyond a reasonable doubt. *Id.* at 420.

In this case, it is impossible to determine if the prior Arkansas convictions were factually comparable because the State did not provide that information. The record does not include facts that Parker admitted to, stipulated to, or proved beyond a reasonable doubt. For instance, in its Sentencing Memorandum, the State included a copy of the information filed and a judgment and commitment order, but the record is devoid of any facts that Parker admitted, stipulated to, or proved beyond a reasonable doubt. CP 46-49. As such, the State provided no factual evidence of Parker's conduct in either case to support a finding of comparability. Because the record reflects that the Arkansas offenses

were not factually comparable to the Washington statues, the trial court erred in determining Parker's offender score.

Because the State has the burden to support the offender score, this would have resulted in a score of 4 and a lower standard range. This means Parker's standard range for the second degree robbery under the SRA would have been 15 to 20 months, instead of 33 to 43 months. Thus, the trial court's error in holding that the Washington statutes were comparable to the prior Arkansas convictions was prejudicial to Parker because it directly affected the length of the sentence he could be required to serve. Therefore, this case should be remanded back to the trial court for resentencing.

VI. CONCLUSION

Parker respectfully requests that the court find that prejudicial errors were committed below such that his sentence ought to be reversed and his case remanded for further proceedings. The court should have submitted Parker's requested lesser included offense instructions to the jury. In addition, the trial court erred in failing to dismiss the case for an insufficient Information. The trial court also erred in determining Parker's offender score for purposes of sentencing because the prior out of state convictions were not comparable to the Washington statutes. Parker's

judgment and sentence should be vacated, and the case remanded for a new trial.

RESPECTFULLY SUBMITTED this 23 day of May, 2014.

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