SUPREME COURT NO. 92077-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON DELACRUZ,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 45656-7-II
Pierce County No. 09-1-02999-9

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, JASON DELACRUZ, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the July 14, 2015, unpublished decision of Division Two of the Court of Appeals affirming his sentence and convictions.

C. ISSUES PRESENTED FOR REVIEW

1. Where the appellate court remanded with specific instructions to vacate an unlawful conviction and resentence solely with respect to that action, did the sentencing court exceed this mandate by resentencing on all counts based on an issue not by the State raised in the previous appeal?

2. Did the sentencing court abuse its discretion in refusing to consider imposition of an exceptional sentence below the standard range?

3. Delacruz seeks review of the assertions of error in his statement of additional grounds for review.

D. STATEMENT OF THE CASE

In March 2011, appellant Jason Delacruz was sentenced on the following offenses:

Count 1—first degree burglary
Count 4—first degree theft
Count 5—theft of a firearm
Count 8—residential burglary
Count 9—second degree theft
Count 11—residential burglary
Count 12—theft of a firearm
Count 13—possession of a stolen firearm
Count 14—first degree theft
Count 16—first degree trafficking in stolen property
Count 17—first degree unlawful possession of a firearm

CP 15-16. The court ran the sentences on counts 12, 13, and 17 consecutively to each other and all other counts concurrently. CP 20. The total sentence imposed was 300 months. CP 19.

On appeal Delacruz and his codefendants argued that trial counsel were ineffective at sentencing for failing to ask the court to vacate their convictions for possession of a stolen firearm, since they had been convicted of theft of a firearm for the same property. The State conceded error, and the Court of Appeals accepted the concession.

In the introductory paragraph of its opinion the Court of Appeals said, "the defendants' convictions for firearm theft merge with their convictions for firearm possession, thus, we accept the State's concession, vacate those convictions, and remand for resentencing..." CP 112. In the analysis portion of the opinion dealing with that issue the Court stated, "we vacate the convictions for possession of a stolen firearm because they merge with the convictions for firearm theft....We remand for

resentencing regarding those counts...." CP 119. In the concluding paragraph of the opinion, the Court reiterated, "We affirm, but remand for vacation of the defendants' convictions for possession of stolen firearms." CP 126.

On remand, the State argued for the first time that count 5 should run consecutively to counts 12 and 17, relying on RCW 9.94A.589(1)(c). RP 6-7. The prosecutor admitted that the State had not argued at the original sentencing hearing that count 5 should run consecutively. RP 6. Nor had the State cross appealed the original sentence, and the Court of Appeals did not address that issue. Thus, defense counsel argued, the question was whether the unaddressed error could be corrected on remand. RP 9. To answer that question, the court needed to look at the purpose for which the case was remanded. RP 4. Counsel argued that the trial court was not required to resentence based on the Court of Appeals' opinion, and the court should refuse to do so because the State had not appealed the original sentence. RP 16-17.

The State argued that the Court of Appeals remanded for resentencing, and the entire sentence was before the court. RP 17. The sentencing court agreed. It interpreted the Court of Appeals' opinion as remanding for resentencing as a whole, rather than just vacation of the

possession of a stolen firearm conviction. It stated that it was exercising its discretion to resentence. RP 19.

The State recommended slightly different terms so that the total sentence, without the vacated conviction but running count 5 consecutively, would remain 300 months. RP 18. Defense counsel argued that there was some issue about whether Delacruz's California conviction for first degree burglary as a juvenile was equivalent to a strike offense in Washington, although he acknowledged that the conviction did not affect the offender score calculation. RP 26. Counsel asked for a low end sentence on each count, for a total of 241 months. RP 27-28. The court adopted the State's recommendation, running counts 5, 12, and 17 consecutively, and imposing a total confinement of 300 months. RP 32-33; CP 65.

Delacruz appealed, arguing that the trial court exceeded the scope of the appellate mandate. The Court of Appeals affirmed, holding that, while confusing, the language in the first appellate decision gave the resentencing court authority to conduct a new sentencing hearing. Opinion, at 6. The Court of Appeals also rejected the arguments presented in Delacruz's statement of additional grounds for review. Opinion, at 6-10.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS' DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT. RAP 13.4(b)(1).

A trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate. State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009); see also In re Wilson's Estate, 53 Wn.2d 762, 764, 337 P.2d 56 (1959) (trial court may consider no issue other than the one for the determination of which the case was remanded). The appellate court's mandate is binding on the superior court and must be strictly followed. In re Marriage of McCausland, 129 Wn.App. 390, 399, 118 P.3d 944 (2005), rev'd on other grounds, 159 Wn.2d 607, 152 P.3d 1013 (2007).

When the appellate court issues an open ended mandate on remand, the trial court has discretion to revisit an issue that was not the subject of the earlier appeal. Kilgore, 167 Wn.2d at 38 (citing State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993); RAP 2.5(c)(1)); see also State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006) (where appellate court remands "for further proceedings" or instructs trial court to enter judgment "in any lawful manner" consistent with opinion, court has authority to decide any issue necessary to resolve case on remand), aff'd, 162 Wn.2d 664, 185 P.3d 1151 (2008). The trial court has no discretion to

exceed specific limitations set forth by the appellate court, however. See Kilgore, 167 Wn.2d at 42.

In this case, following Delacruz's initial appeal, the Court of Appeals remanded with specific directions to the superior court to vacate the conviction for possession of a stolen firearm. CP 119 ("we vacate the convictions for possession of a stolen firearm because they merge with the convictions for firearm theft....We remand for resentencing regarding those counts...."). Resentencing was directed solely with respect to removing the unauthorized conviction. CP 126 ("We affirm, but remand for vacation of the defendants' convictions for possession of stolen firearms."). These specific limitations on resentencing could not be exceeded by the trial court on remand. See Kilgore, 167 Wn.2d at 42.

In fact, remand for resentencing on unchallenged portions of the sentence would be granting the State affirmative relief, for which a notice of cross appeal is required. See State v. Sims, 171 Wn.2d 436, 442, 256 P.3d 285 (2011) (notice of cross appeal essential when State seeks affirmative relief, as distinguished from urging additional grounds for affirmance). Affirmative relief may be granted to a respondent without cross appeal only if the necessities of the case demand it. Sims, 171 Wn.2d at 443; RAP 2.4(a).

In Sims, the appellant challenged an order, imposed as part of a SSOSA, banishing him from Cowlitz County, and the State conceded error. Although the State did not cross-appeal, the Court of Appeals remanded for reconsideration of the entire sentence, rather than limiting remand to removal of the unconstitutional provision. This Court held that the remand order improperly granted the State affirmative relief for which it failed to seek review and which was not necessary to resolve the issue raised by appellant. It reversed the Court of Appeals and remanded for the limited resentencing necessitated by the issue raised on appeal. Sims, 171 Wn.2d at 449.

Here, as in Sims, the State conceded the error argued by Delacruz and did not cross appeal the sentence. It then argued for resentencing on an issue it failed to raise either at the original sentencing or on appeal. Because the issue raised by Delacruz could be resolved separately from the issue later raised by the State, interpreting the Court of Appeals' initial decision as remand for resentencing on the unchallenged issue would be an improper grant of affirmative relief.

Because the Court of Appeals remanded solely for vacation of the unauthorized conviction, the sentencing court exceeded the scope of the appellate court mandate by resentencing on the remaining convictions.

The Court of Appeals' decision to the contrary conflicts with this Court's decisions in Kilgore and Sims.

2. THE SENTENCING COURT'S FAILURE TO CONSIDER AN EXCEPTIONAL SENTENCE WAS AN ABUSE OF DISCRETION, AND THE COURT OF APPEALS' OPINION TO CONTRARY CONFLICTS WITH A PRIOR DECISION OF THIS COURT. RAP 13.4(b)(1).

At resentencing, defense counsel acknowledged that RCW 9.94A.589 requires consecutive sentencing, but he argued that the State did not cross appeal the original sentence, and it should not get a second chance to argue for consecutive sentences just because Delacruz won on appeal. RP 16-17. The State responded that if the court were to depart from RCW 9.94A.589 and not run the sentence on count 5 consecutively, it would be imposing an exceptional sentence downward. RP 19. From this exchange it can be surmised the parties understood the defense was asking for an exceptional sentence below standard range so that the State would not receive a windfall from Delacruz's successful appeal. The court responded, however, that its hands were tied and the sentence had to run consecutively. RP 24, 32.

A sentencing court abuses its discretion when it categorically refuses to impose an exceptional sentence below the standard range under any circumstances. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d

1183(2005). The Court of Appeals' decision that sentencing court did not abuse its discretion conflicts with this Court's decision in Grayson.

3. DELACRUZ'S ASSERTIONS OF ERROR IN HIS STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW SHOULD BE REVIEWED BY THIS COURT.

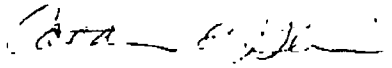
Delacruz filed a statement of additional grounds for review, which the Court of Appeals rejected as meritless. Opinion, at 6-10. Delacruz asks this Court to grant review on those grounds and reverse his conviction and sentence.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the Court of Appeals' decision.

DATED this 13th day of August, 2015.

Respectfully submitted,



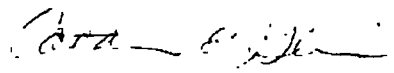
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of this Petition for Review directed to:

Jason Delacruz DOC# 319869
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
August 13, 2015

GLINSKI LAW FIRM PLLC

August 13, 2015 - 2:15 PM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NELSON GEOVANY HERNANDEZ, Appellant.	No. 45656-7-II UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. JASON ANTHONY DELACRUZ, Appellant.	(Consolidated with No. 45723-7-II)

JOHANSON, C.J. — Jason A. Delacruz and Nelson G. Hernandez appeal their consecutive sentences for theft of a firearm. They primarily argue that the trial court exceeded this court's mandate on remand when it resentenced them to consecutive sentences on two counts of theft of a firearm. In a statement of additional grounds (SAG), Delacruz argues that there is insufficient evidence to support his conviction for first degree unlawful possession of a firearm and that his offender score is incorrect. Because we remanded for resentencing, we conclude that the trial court

did not exceed its authority and because Delacruz provides an insufficient record to enable us to decide the SAG issues, we affirm.

FACTS

I. BACKGROUND FACTS AND FIRST TRIAL

Delacruz and Hernandez were among a group of individuals who, over a two-day period, burglarized three homes. Among the items they stole were firearms, electronics, and sports paraphernalia.

A jury convicted Delacruz and Hernandez on 11 counts each, including two counts of theft of a firearm,[1] one count of possession of a stolen firearm (count XIII),[2] and one count of unlawful possession of a firearm (count XVII).[3] On count XVII, Delacruz was charged with first degree unlawful possession of a firearm based on a prior California conviction for first degree burglary.[4] The original sentencing court ordered only one of the two theft of a firearm convictions, the convictions for possession of a stolen firearm, and the convictions for unlawful possession of a firearm to run consecutively to each other and for all other counts to run concurrently.

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[1] RCW 9A.56.300.

[2] RCW 9A.56.310.

[3] Former RCW 9.41.040 (2005).

[4] CAL. PENAL CODE § 460. We assume that Delacruz's first degree unlawful possession of a firearm conviction was based on the trial court's determination that his prior first degree burglary conviction in California was a "serious offense" that elevated second degree unlawful possession of a firearm to a first degree offense. Although Delacruz argues in his SAG that his California conviction is what elevated his unlawful possession of a firearm conviction to a first degree offense, this fact is not clear from the record.

Delacruz and Hernandez appealed. *State v. Hernandez*, 172 Wn. App. 537, 290 P.3d 1052 (2012), *review denied*, 177 Wn.2d 1022 (2013). The State conceded that the convictions for one count of theft of a firearm should merge with one count of possession of a stolen firearm. In the published portion of the opinion we held that we "accept[ed] the State's concession, vacate[d] those convictions, and remand[ed] for resentencing." *Hernandez*, 172 Wn. App. at 539. We also said later in the unpublished portion of the opinion that we "accept the State's concession and we vacate the convictions for possession of a stolen firearm because they merge with the convictions for firearm theft. . . . We remand for resentencing regarding those counts." *Hernandez*, No. 41707-3-II, slip op. at 9.

II. RESENTENCING HEARINGS

In December 2013, Delacruz and Hernandez were resentenced. At the resentencing hearings, the trial court vacated Delacruz's and Hernandez's convictions for possession of a stolen firearm. The State argued for the first time that under RCW 9.94A.589(1)(c), Delacruz's and Hernandez's convictions for two counts of theft of a firearm must run consecutively to each other and to their convictions for unlawful possession of a firearm. Delacruz argued that "it is clear that the Court can resentence" on his theft of a firearm conviction but that the resentencing court had discretion not to resentence on all counts if it chooses. Delacruz Report of Proceedings (RP) (Dec. 20, 2013) at 15. Hernandez agreed with the State, arguing that under the statute, it was proper for both theft of a firearm sentences to run consecutively. Delacruz and Hernandez both asked for sentences at the low end of the standard range.

The resentencing court relied on (1) the "language at the outset of [this court's] opinion," Delacruz RP (Dec. 20, 2013) at 19, on appeal where we "accept[ed] the State's concession,

vacate[d] those convictions [for possession of a stolen firearm], and remand[ed] for resentencing," *Hernandez*, 172 Wn. App. at 539, and (2) the fact that "[c]ounsel are both acknowledging that it's within my discretion to resentence or not" and agreed with the State, ordering that Delacruz's and Hernandez's sentences for theft of a firearm run consecutively to each other and to their sentences for unlawful possession of a firearm. Delacruz RP (Dec. 20, 2013) at 19. Both defendants were resentenced to the same total months of confinement that they received at their first sentencing. Delacruz and Hernandez appeal their sentences.

ANALYSIS

I. THE TRIAL COURT'S AUTHORITY TO RESENTENCE ON REMAND

Delacruz and Hernandez argue that the trial court exceeded its sentencing authority on remand.[5] The State argues that this court's mandate was a broad mandate to conduct any proceedings necessary to "lawfully resentence" the defendants.[6] Br. of Resp't at 7. Because we remanded for resentencing, we hold that the sentencing court did not err by ordering that both theft of a firearm convictions sentences must run consecutively.

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[5] Delacruz and Hernandez also argue that the trial court abused its discretion when it refused to consider imposing exceptional sentences below the standard range. Although a defendant is entitled to request an exceptional sentence below the standard range and a sentencing court abuses its discretion when it "'refuses categorically to impose an exceptional sentence below the standard range under any circumstances,'" *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)), neither Delacruz nor Hernandez requested an exceptional sentence below the standard range. Therefore, the trial court did not abuse its discretion.

[6] The State also argues that Delacruz's and Hernandez's sentences are not appealable because the resentencing court sentenced the defendants to standard range sentences, acted within its mandate from this court, and properly determined that RCW 9.94A.589(1)(c) requires consecutive sentences. Because we rule in favor of the State, we need not address its additional arguments.

A. STANDARD OF REVIEW AND RULES OF LAW

"The trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate." *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). When our opinion states that we only "remand for resentencing," the resentencing court has broad discretion to resentence on all counts. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009) ("Toney's sentence was not final because our remand did not limit the trial court to making a ministerial correction. Rather, we unequivocally 'remand[ed] for resentencing.'" (quoting *State v. Toney*, noted at 95 Wn. App. 1031, 1999 WL 294615, at *1)).

RCW 9.94A.589(1)(c) provides,

> If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, . . . [t]he offender *shall serve consecutive sentences* for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(Emphasis added.)

Delacruz and Hernandez rely on the remand language in our prior opinion to support their claim that the resentencing court exceeded its authority. They argue that we remanded with "specific instructions" and that our mandate must be "strictly followed." Br. of Appellant Delacruz at 1; Br. of Appellant Hernandez at 5. The State argues that our remand language gave the resentencing court broad discretion to resentence Delacruz and Hernandez "lawfully." Br. of Resp't at 7. We conclude that the trial court acted within its authority because we remanded for resentencing.

In the first appeal, we specifically "held" that we "accept[ed] the State's concession, vacate[d] those [possession of a stolen firearm] convictions, and remand[ed] for resentencing."

Hernandez, 172 Wn. App. at 539. This statement suggests that we intended to give the resentencing court broad authority to conduct a new sentencing hearing. *Toney*, 149 Wn. App. at 792. Later in the opinion, we stated that we "accept the State's concession and we vacate the convictions for possession of a stolen firearm because they merge with the convictions for firearm theft. . . . We remand for resentencing regarding those counts." *Hernandez*, slip op. at 9. For a second time we remanded for resentencing. But in contrast to this opinion's earlier statement, this excerpt suggests that we intended to limit the resentencing court's mandate only to the theft of the firearm conviction that was the subject of Delacruz's and Hernandez's first appeals. When we look at this opinion's conflicting language, we are persuaded to rely on the language contained in our specific holding. And that holding remanded for resentencing. Thus, the trial court followed our broad remand to conduct a resentencing.

II. Statement of Additional Grounds

Insufficiency of the Record For Factual Comparability Analysis

In a SAG, Delacruz makes two additional arguments. Both arguments fail due to lack of a sufficient record for our review.

1. Sufficiency of the Evidence For First Degree Unlawful Possession of a Firearm

First, Delacruz argues that the evidence is insufficient to support his conviction on one count of first degree unlawful possession of a firearm. Specifically, he argues that the State never proved that he had committed a prior, "serious offense" based on his California first degree

burglary conviction.[7] We do not address this argument on the merits because the record is inadequate to determine the merits of this claim.

It is the burden of the party presenting an issue for our review on appeal to provide a record sufficient to establish the alleged error. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012) (citing RAP 9.2(b)). We may decline to review an alleged error "'when faced with a material omission in the record.'" *Sisouvanh*, 175 Wn.2d at 619 (quoting *State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999)).

We review a challenge to the sufficiency of the evidence at trial to determine whether, when "'viewed in the light most favorable to the prosecution, [the evidence] permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.'" *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014) (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). A defendant commits first degree unlawful possession of a firearm when he "owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense." Former RCW 9.41.040(1)(a). A "serious offense" is defined by a list of offenses including "[a]ny crime of violence" and "any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious offense." Former RCW 9.41.010(12)(a), (o) (2001). The definition of a "crime of violence" includes second degree burglary, residential burglary, and second degree robbery. Former RCW 9.41.010(11)(a) (2001). Thus, we must decide whether Delacruz's

[7] Delacruz does not explicitly identify the comparability of his California burglary conviction as the error at issue. But based on his statements about "the comparability of the defendants [sic] out-of-state convictions" and the fact that a California burglary conviction is the only out-of-state conviction on his judgment and sentence, we presume that the California burglary conviction is the subject of his SAG. SAG at 3.

California first degree burglary conviction is comparable to a Washington conviction for second degree burglary or residential burglary.

Whether an out-of-state conviction is comparable to a Washington conviction is a question of law that we review de novo. *State v. Werneth*, 147 Wn. App. 549, 552, 197 P.3d 1195 (2008). When doing a comparability analysis of an out-of-state conviction, we apply a two-part test. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). We must first compare the elements of the out-of-state conviction with a similar Washington offense to determine if the offenses are "legally comparable." *State v. Olsen*, 180 Wn.2d 468, 472-73, 325 P.3d 187, *cert. denied*, 135 S. Ct. 287 (2014). Where the foreign offense is broader than the Washington offense, the two statutes are not legally comparable and we must determine whether they are factually comparable. *Olsen*, 180 Wn.2d at 473. A factual comparability analysis requires this court to ask "whether the defendant's conduct would have violated the comparable Washington statute." *Olsen*, 180 Wn.2d at 473.

In Washington, a defendant commits second degree burglary when he or she, "with intent to commit a crime against a person or property therein, . . . enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). A defendant commits residential burglary, similarly, when he "with intent to commit a crime against a person or property therein, . . . enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1).

In California, "[e]very person who enters any house, room, apartment, tenement, shop, warehouse, store, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." CAL. PENAL CODE § 459. In California, a burglary is elevated to first degree burglary when it is of an "inhabited" dwelling or vessel. CAL. PENAL CODE § 460.

Considering the elements of these offenses, California's definition of burglary is not legally comparable to Washington's because it covers conduct that would not violate Washington's second degree and residential burglary statutes. In California, a person is guilty of burglary whether he entered and remained in the subject building, dwelling, or space either lawfully *or* unlawfully. CAL. PENAL CODE § 459. In contrast, Washington's second degree and residential burglary statutes explicitly require a person to enter or remain in the subject space *un*lawfully. RCW 9A.52.030(1), .025(1). A person who *lawfully* enters or remains in a space with intent to commit a crime commits a burglary in California but does not commit a burglary in Washington.

Division One of this court agreed with this analysis in *State v. Thomas*, 135 Wn. App. 474, 483, 144 P.3d 1178 (2006), where it accepted the State's concession that California's burglary statute is broader than Washington's because it does not require unlawful entry or remaining. We conclude, as Division One did in *Thomas*, that because California's definition of burglary covers lawful as well as unlawful entry and remaining, it covers more conduct than Washington's burglary statutes and is, thus, not legally comparable. Therefore, we must turn to factual comparability analysis.

When performing a factual comparability analysis, we may consider the "defendant's conduct, as evidenced by the indictment or information" as well as other evidence that was admitted or proven beyond a reasonable doubt in the out-of-state proceeding. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 258, 111 P.3d 837 (2005).

But Delacruz has not provided any record from his trial here or from his California conviction to permit this court to conduct a factual comparability analysis to determine whether his conduct in violating California's first degree burglary statute would violate a comparable

Washington statute. Nor can this court review the factual question of whether sufficient evidence existed from which a rational jury could have found the essential elements of first degree unlawful possession of a firearm. Therefore, we decline to consider this alleged error because Delacruz has not met his burden to provide sufficient record on appeal.

2. OFFENDER SCORE

Second, Delacruz argues that his sentence is improper because his California conviction for first degree burglary is not comparable to a similar Washington offense and, thus, may not be used to increase his offender score. For the same reasons discussed above, we also decline to address this argument because Delacruz has not presented sufficient evidence upon which we can conduct a factual comparability analysis of his out-of-state conviction.

We review the trial court's calculation of a defendant's offender score de novo. *Olsen*, 180 Wn.2d at 472. An illegal or erroneous offender score may be raised for the first time on appeal. *State v. Rice*, 159 Wn. App. 545, 571, 246 P.3d 234 (2011), *aff'd on other grounds*, 174 Wn.2d 884, 279 P.3d 849 (2012). The sentencing court may increase a defendant's offender score for an out-of-state conviction if the State meets its burden to show that the out-of-state conviction is "comparable" to a similar Washington offense. RCW 9.94A.525(3); *Olsen*, 180 Wn.2d at 472.

As discussed earlier, California's burglary statute is not legally comparable to Washington's. The next test is factual comparability. But Delacruz has not provided the indictment or information from his California conviction nor has he provided any evidence or documentation from which we can determine whether his conduct in that case would have violated Washington's burglary statute. Therefore, we decline to consider on the merits his argument about his offender score.

Affirmed.

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 in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Melnick, J.
MELNICK, J.