Case No. 95546-8

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

STATE OF WASHINGTON
Plaintiff/Respondent,

vs.

LENDIN SAITI,
Defendant/Appellant.

Appeal from the Court of Appeals

Court of Appeals No. 49178-8-II
Superior Court Case No. 15-1-00228-5

AMENDED

MOTION FOR DISCRETIONARY REVIEW TO SUPREME COURT

Eugene C. Austin
Attorney for the Appellant
WSBA #31129
PO Box 1753
Belfair, WA 98528
(360) 551-0782

TABLE OF CONTENTS

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

TABLE OF AUTHORITIES

Table of Cases

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

Table of Statutes

Table of Other Authorities

Other Authorities

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

IDENTITY OF PETITIONER.

This Petition is filed by Dale Smith, Defendant/Appellant in the above entitled case.

CITATION TO COURT OF APPEALS DECISION

Appellant seeks review of the Court of Appeals Decision in *State v. Saiti*, No. 49178-8-II (Wash. Ct. App. November 14, 2017). A copy of the decision is attached hereto in the Appendix.

ISSUES PRESENTED FOR REVIEW

1. Comparability of foreign convictions of statute that alows discretionary applicability of degree of crime. ("Wobblers")
    a. Is the State required to the factual basis for a foreign conviction, where the foreign statute can be used for multiple degrees of the same crime, misdemeanor and felony, at the discretion of the foreign state, before the foreign statute can be imputed to be similar to a Washington statute for sentencing purposes?
    b. If the State does not or cannot show that a foreign statute is a misdemeanor or a felony equivalent, does the rule on lenity apply requiring the court to apply the conviction as a misdemeanor.
2. Confrontation Clause violation
    a. When the trial court authorizes the arrest of a witness the day before trial to force a deposition, that deposition is then used against the witness at trial, and the court inadvertently threatened a witness with possible felony charges if she testified differently from her deposition, is there a Confrontation Clause violation when the court denies the defendant the opportunity to cross examine the witness on her motives for testifying based on the court's actions and the prior deposition?
3. Insufficiency of the evidence
    a. Is the fact that a Defendant saw his live in girlfriend's gun on a single occasion as she put it into one of many large handbags, sufficient evidence to support a conviction for unlawful possession of a firearm, when the defendant took the handbag a significant time after seeing the gun, the gun was not visible without searching the handbag, and no

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

evidence is presented that the Defendant saw the gun in the handbag?

b. Is there sufficient evidence to support a conviction for theft of a motor vehicle where the defendant was allowed to use the vehicle on a regular bases, no evidence was presented that Defendant needed permission to use the car, was never told that he couldn't use the car, and the alleged victim testified that she would have let the Defendant use the car?

STATEMENT OF THE CASE

In July of 2015, Ms. Lopez and Mr. Saiti became romantically involved and began living together, along with Ms. Lopez's minor daughter in Ms. Lopez's apartment that was located above the restaurant where Ms. Lopez worked. VRP at 48, 107. From time to time, Ms. Lopez gave Mr. Saiti money to buy drugs because of his addiction. VRP at 115, 163. Mr. Saiti would regularly use Ms. Lopez's car for different purposes. VRP at 149. Sometime after Mr. Saiti moved in with Ms. Lopez, Ms. Lopez purchased a handgun. She reported that she took it out of the box and placed it in a large purse while Mr. Saiti was present. VRP at 77. Ms. Lopez owned a number of large Coach Purses, which allowed her to carry a large number of items in the purse. VRP at 156 - 159. Ms. Lopez changed bags on a weekly basis. VRP at 151; 170. However, she testified that except for the time she took the gun out of the box and placed it in the first purse, Mr. Saiti never saw the gun again. VRP at 151.

On December 20, 2015, Mr. Saiti approached Ms. Lopez asked for money. However, Ms. Lopez declined and went to work. VRP at 53, 63. Taking her purse and a large set of keys with her. VRP at 153 - 154. Ms.

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

Lopez placed her purse in the kitchen at the restaurant she worked at, located below the apartment where the couple lived and with the keys. VRP at 155 - 156. Mr. Saiti was familiar with the restaurant and the people working there. Later that day, Ms. Lopez observed her car leaving the parking lot. She went to the kitchen and found her purse, which contained $80, car keys, the gun, and other items, was gone. VRP at 66. After discovering that her purse was gone, Ms. Lopez her boss, Ms. Leback, call the police. Ms. Leback had seen Mr. Saiti use Ms. Lopez's car on several occasions without Ms. Lopez. VRP at 115. In response to Ms. Leback's call, the police began looking for Mr. Saiti. The vehicle was soon located parked in a trailer park about a half mile away from the restaurant. VRP at 259. Ms. Lopez's purse was locked inside her car and Mr. Saiti was inside one of the trailers where he was taken into custody without incident. VRP at 212-214. Because the purse was locked in the car, Ms. Lopez ws called to the scene. Ms. Lopez authorized an officer to enter the car for the purse. VRP at 160. On searching the purse, the Officer had to move numerous items to locate the gun that he had been told was in the purse. VRP at 215, 231 - 232, 157 - 158. Only $80 in cash was missing. VRP at 159.

After Mr. Saiti was arrested and charged, Ms. Lopez met with the prosecutor on a number of occasions and discussed the facts of the case. However, as the trial date approached, Ms. Lopez asked the prosecutor to drop the charges, which the prosecutor declined to do. VRP at 177. Ms. Lopez did not feel that Mr. Saiti intended to steal her car or purse (VRP at

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

162) and did not believe he knew about the gun. VRP at 167. Because Ms. Lopez was not fully cooperative with the State, officers were sent to inform her that she would be arrested if she did not cooperate. VRP at 139. Then a week before trial, despite the fact that the State had interviewed Ms. Lopez on prior occasions (VRP at 2), the State sought to depose Ms. Lopez on May 20, 2015. Record, Notice of Deposition, May 16, 2015, at 174.[1] When Ms. Lopez failed to appear at the deposition, the State obtained a material witness warrant, and had Ms. Lopez arrested on $50,000 bail. Record, Bench Warrant at 184. Ms. Lopez was then forced to give a deposition the day before trial. VRP at 53 - 62. The next day, Ms. Lopez was called by the State as a witness at trial. During the testimony, Ms. Lopez appeared to testify differently from her deposition the prior day. VRP at 53 - 54. The State then asks the court to dismiss the jury so that it can make a motion relating to the testimony. The State alleges that Ms. Lopez is committing perjury because the State believes she is testifying differently from her deposition. VRP at 54 - 55. As a result, the State's claim the court asks Ms. Lopez, "Do you know what perjury is?" Ms. Lopez answers that she does not. VRP at 56. The court attempts to explain what perjury is to Ms. Lopez. *Id*. The court states:

> Okay. If you do not tell the truth while you're testifying, the prosecutor is saying that, oh, if I don't think she's telling the truth, I could possibly charge her for perjury. Now, I'm not telling you that that's what you're doing because this isn't a trial about perjury. I'm just warning you that if you do lie under oath and if the State has

[1] The electronic version of the record provided to appellant's counsel is approximately 315 pages. However, the pages appear to be out of order. As a result, counsel will try to include the title of the document, page numbers refer to the electronic file.

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

> whatever other information they say they have, that could be a basis for a future criminal charge against you for perjury. Then that's up to the prosecutor whether they wish to pursue that or not. Is that any -- is that clear now what perjury is?

VRP at 56 -57. The court also informs Ms. Lopez that perjury is a crime and a felony. VRP at 57. As a result of these events, Defense counsel informs the court he believes he will need to raise the issue because the witness has "been told that if you don't start responding the way you did yesterday, then, you know, we're going to charge you with [perjury]." VRP at 58. The trial court further attempts to explain to Ms. Lopez that it was not telling her to "answer the questions the way the prosecutor wants you to" (VRP at 59; 60 - 61), and orders the parties to not mention the deposition from a day earlier. VRP at 138. Later in the trial, the defense seeks to raise the issue of prior police contact and Ms. Lopez's arrest for deposition, however, the motion is denied again. VRP at 179, 181 - 186.

After trial, Mr. Saiti is convicted of Possession of Heroin RCW 69.50.4013, Theft of a Motor Vehicle RCW 9A.56.065, Unlawful Possession of a Firearm in the First Degree RCW 9.41.040(1)(a), and Unlawful Possession/Use Of Drug Paraphernalia RCW 69.50.412. At sentencing, Mr. Saiti contested the 5-point finding on his criminal history score. The criminal history enhancement arose out of foreign conviction involving a California statute that can be used as either a misdemeanor or a felony. Mr. Saiti received a sentence commensurate with a misdemeanor conviction in California. However, without presenting any evidence as to the factual basis for the California conviction, the State argued that it was

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

the same as a Felony in Washington. The trial court accepted this argument and used the enhancement in sentencing.

Mr. Saiti appealed his convictions and sentence to the Court of Appeals, which affirmed the lower court. Mr. Saiti now seeks discretionary review by the Supreme Court.

ARGUMENTS

1. Comparability of foreign convictions of statute that alows discretionary applicability of degree of crime. ("Wobblers")

The Court of Appeals found in its opinion that "Factual comparability requires the sentencing court to determine whether the defendant's conduct, as evidenced by the indictment or information, or the records of the foreign conviction, would have violated the comparable Washington statute." *State v. Saiti,* at 13 citing *State v. Farnsworth*, 133 Wn. App. 1, 18, 130 P.3d 389 (2006) *remanded*, 159 Wn.2d 1004, 151 P.3d 976 (2007). The court went on to say:

> The record does not contain any clear facts to allow for a full factual comparability analysis. The record only contains the judgment and sentence. The record does not contain the charging document. The judgment includes a restitution amount of $200. Saiti argues that because the restitution amount in the judgment was $200, it must be a misdemeanor. However, the judgment is also clear that Saiti was charged under California Penal Code § 487(c) (2009), which involves the theft of property of any value from a person, similar to RCW 9A.56.030(1)(b).

Id., at 13. As a result, despite the factual comparability requirement, the lower court made no factual finding at all. Further, the State presented no evidence on the factual basis of the charged crime. The court disregarded how the California statute, which is fact dependant, operates and based its

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

ruling on similar language, and the fact that RCW 9A.56.030(1)(b) does not have a monetary requirement. *State v Saiti*, at 12. This ruling effectively allows the court to impose the highest sanction regardless of the level of the foreign criminal judgment and violates the factual comparability requirement of *State v. Farnsworth.*

California uses a type of theft statute that can be used to cover different scenarios at the discretion of the State and the Court. Such statutes are known as "wobblers." See, People v. Sauceda, __ Cal.Rptr.3d __, 3 Cal.App.5th 635, 641 (Sept 23, 2016). This means that statutes like Ca. Pen. Code § 487 can cover both misdemeanor and felony charges depending on the facts of the case. As a result, comparability of the statute to a Washington statute should be dependent on the facts in each rather than a sting of words taken for the California statute. The question for the court then is whether the State must prove the facts behind the conviction to show comparability? This is an issue that has not been directly addressed before by Washington court and warrants review.

Washington law requires that "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions sentences provided by Washington law." RCW 9.94A.525(3). Under the Sentencing Reform Act (SRA), the state bears the burden to prove the existence and comparability of a defendant's prior out-of state conviction. *State v. Thomas*, 135 Wn.App. 474, 487, 144 P.3d 1178 (Div. 1 2006); RCW 9.94A.010. To determine a proper comparison, it is necessary to

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

evaluate the relevant California statutes and then locate a proper fit in Washington statutes. If there is no direct correlation, the Rule of Lenity dictates that the defendant receive the benefit of the more favorable determination. *State v. Gore,* 101 Wash.2d 481, 486, 681 P.2d 227 (1984) citing *State v. Sass,* 94 Wash.2d 721, 620 P.2d 79 (1980); *State v. Workman,* 90 Wash.2d 443, 584 P.2d 382 (1978); *Seattle v. Green,* 51 Wash.2d 871, 322 P.2d 842 (1958); see also *State v. Baker*, 194 Wn.App. 678, 378 P.3d 243 (Div. 3 2016). (rule of lenity will be applied to offender scores).

In California levels of criminal conduct are defined as follows:

> A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

Ca. Pen. Code § 17(a). There are no "gross misdemeanors" in California. In California "grand theft" is not defined as a felony or misdemeanor. This definition is discretionary except in specific circumstances. This type of statue is referred to as a "wobbler" and can be either a felony or misdemeanor. See, *People v. Sauceda*, __ Cal.Rptr.3d __, 3 Cal.App.5th 635, 641 (2016); *Davis v. Municipal Court*, 249 Cal.Rptr. 300, 46 Cal.3d 64, 70, 757 P.2d 11 (1988). The punishment for Grand Theft is described in California as follows:

> Grand theft is punishable as follows:
> (a) When the grand theft involves the theft of a firearm, by imprisonment in the state prison for 16 months, two, or three years.

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

> (b) In all other cases, by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170.

Ca. Pen. Code § 488. Because Mr. Saiti's conviction in 2009 did not involve the theft of a firearm, section (b) applies and Mr. Saiti could only be sentenced to "jail not exceeding one year or pursuant to subdivision (h) of Section 1170." In Washington, a jail sentence of one year would be classified as a "gross misdemeanor." See, RCW 9A.20.021. This is also true in California except for certain discretionary case sentenced "pursuant to subdivision (h) of Section 1170." Ca. Pen. Code § 17(a), § 488. Ca. Pen. Code § 1170(h)(1) and (2) restates the punishment in the same terms as Ca. Pen. Code § 488. However, the other sections allow for enhancements for violent criminals and other deviations. Ca. Pen. Code § 1170. As the sentence for grand theft is stated in Ca. Pen. Code § 488, it is "imprisonment in a county jail not exceeding one year." This is confirmed by the fact that when Mr. Saiti was convicted of Attempted Grand Theft, his sentence was half that of the sentence required by Ca. Pen. Code § 488. This is mandated by Ca. Pen. Code § 664(b). Washington law dictates that convictions for "anticipatory offenses of criminal attempt" should be treated as if they "were for a completed offense." RCW 9.94A.525(6). Therefore, the Attempted Grand Theft conviction is treated as Grand Theft. However, the attempt conviction is still important because it confirms they were are dealing with a maximum one-year jail sentence, which is the equivalent of a gross misdemeanor in Washington, not a class C felony (or higher) that carries a maximum prison sentence of up to 5 years. RCW

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

9A.20.21.

The maximum sentence for this crime in California indicates we are actually dealing with a gross misdemeanor in Washington law. However, it is still necessary to determine the comparable statute to complete the analysis. Ca. Pen. Code § 487(c) clearly defines a theft charge as it is defined as occurring "[w]hen the property is taken from the person of another." However, the dollar amount is not specified nor is any other guidance provided. In the current statute, section (a) set a dollar amount of over $950 for "money, labor, or real or personal property," and section (b) sets an amount of over $250 for farm goods. Ca. Pen. Code § 487(a) and (b). Washington theft statutes are divided into three degrees. Each of the various degrees of theft contain different limits on their use. Theft in the first and second degree are both felonies, carrying maximum prison sentences of ten and five years respectively. RCW 9A.56.030; RCW 9A.56.040; RCW 9A.20.021. However, these sentences are completely disproportionate with the maximum jail sentence that could be imposed in Mr. Saiti's California conviction. Only Theft in the third carries a sentence that matches the sentence that could have been imposed on Mr. Saiti; one year in jail. RCW 9A.56.050; RCW 9A.20.021.

At the sentencing hearing, defense counsel suggested the restitution fee of $200, indicated the amount did "not exceed $700 in the state of Washington" and that would make the relevant crime theft in the third. VRP at 357. Defense counsel also correctly pointed out "[w]e don't know

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

how the crime was committed" and that Mr. Saiti "was sent to jail for a period of six months." VRP at 357 - 358. The State countered that the comparable Washington statute was Theft in the first degree, arguing that the Washington statute called for "property of any value, other than a firearm as defined in RC[W 9.]41.010 or a motor vehicle, taken from the person of another. So directly compared to the California statute, it appears to be the exact same." VRP at 353 - 354. This would be a powerful argument except the California statute is not the same. PC 487 does use the words "taken from the person of another," but everything else is different, including the penalty. The California statute functions differently and can be imposed in different ways than the Washington theft statutes, allowing it to be used to cover different scenarios at the discretion of the State and the Court, which is why it is called a "wobbler." It is clear that Ca. Pen. Code § 487 covers theft. It is clear that grand theft is sentenced as if it were a gross misdemeanor in Washington. However, its discretionary nature and the fact that we don't know how the crime was committed means that we do not know if the charges are comparable. Under such conditions that State has failed to show Mr. Saiti's out-of-state theft conviction is comparable to theft in the first degree. The State failed to present evidence of the fact that gave rise to the charge. This means that based on the evidence we do have, the closest analogous crime in Washington is theft in the third degree, because it carries the same penalty. Further, in such situations, the Rule of Lenity indicates that Mr. Saiti receive the benefit of the doubt and this

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

conviction be treated as a gross misdemeanor, making his score for out-of-state convictions a four rather than a five.

2. Confrontation Clause violation

The Court of Appeals ruled that the lower court did not err in suppressing testimony regarding pressure placed on Ms. Lopez to testify a certain way because the "trial court has considerable discretion to consider what evidence is relevant and to balance its possible prejudicial impact against its probative value." *State v. Saiti*, at 10 citing *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014). The court reasoned that "the evidence of Lopez's material witness warrant was not relevant. As the trial court stated, Lopez did not testify that she felt pressured to testify in the way that she did." *Id.* However, the "material witness" warrant[2] was not the entire issue. In fact, the trial court was responsible for much of the improper pressure placed on Ms. Lopez to testify in a manner acceptable for the prosecution. After Ms. Lopez had been arrested and forced to testify at a deposition, she began to give testimony that was unsatisfactory to the State. The State said Ms. Lopez was a hostile witness and committing perjury. VRP at 53 - 55. The trial court questioned Ms. Lopez, whose native language is Spanish, and she told the trial court she did not know what perjury was. VRP at 56. The trial court then attempted to explain it to Ms. Lopez. The Trial court

> If you do not tell the truth while you're testifying, the prosecutor is saying that, oh, if I don't think she's telling the truth, I could

[2] When Ms. Lopez failed to appear and the State obtained a material witness warrant with a bail amount of $50,000. Record, Order Directing Issuance, May 20, 2015, at 179.

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

> possibly charge her for perjury. Now, I'm not telling you that that's what you're doing because this isn't a trial about perjury. I'm just warning you that if you do lie under oath and if the State has whatever other information they say they have, that could be a basis for a future criminal charge against you for perjury. Then that's up to the prosecutor whether they wish to pursue that or not. Is that any -- is that clear now what perjury is?

VRP at 56 - 57. The trial court also told s. Lopez it was class B felony. *Id*. The defense asked they be able cross examine based on the pressure placed on Ms. Lopez because she had "just been told that if you don't start responding the way you did yesterday, then, you know, we're going to charge you with [perjury]." *Id*. at 58. The trial court then attempted correct the situation, telling Ms. Lopez she didn't need to worry, she could testify differently, maybe it wasn't perjury, he wasn't on either side, etc. *Id*. at 59 - 61. However, the damage was done and the defense was entitled to inquire into Ms. Lopez's motives in testifying, which were now greatly influenced by the threat of incarceration by testifying differently from the compelled deposition, for which she may not have understood was actually subject to perjury because she didn't understand that term. This was all relevant information, and was the type of information the confrontation clause was intended to address.

The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *State v. McDaniel*, 83 Wn.App. 179, 185, 920 P.2d 1218 (Div. 1 1996) citing *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Russell,* 125 Wash.2d 24, 73, 882

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

P.2d 747 (1994), cert. denied, --- U.S. ----, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). This is a fundamental constitutional right. *State v. Spencer*, 111 Wn.App. 401, 410, 45 P.3d 209 (Div. 2 2002) citing *State v. Wilder,* 4 Wash.App. 850, 854, 486 P.2d 319, *review denied,* 79 Wash.2d 1008 (1971); *See Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); *Merzbacher v. State,* 346 Md. 391, 413, 697 A.2d 432 (1997); *Ebb v. State,* 341 Md. 578, 590, 671 A.2d 974 (1996). ndeed, "'[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*'" Of particular relevance here, [w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware v. Van Arsdall*, at 678 - 679 (internal cites omitted, emphasis in original). However, "***[b]efore the State may preclude the admission of a defendant's relevant evidence; it must demonstrate a compelling state interest.***" *State v. McDaniel*, 83 Wn.App. 179, 185, 920 P.2d 1218 (Div. 1 1996), (emphasis added). Here the only compelling state interest was to hide the pressure asserted on Ms. Lopez and make the State's case easier.

Although trial judges have discretion to reasonably limit cross-examination, they may not impose restrictions until the defendant has been afforded the basic threshold of inquiry allowed by constitutional mandate, *i.e.,* until the defense has been given an opportunity to present the fact finder with enough information to make a discriminating appraisal of the

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

reliability, possible biases, motivations, and credibility of the prosecution's witness. *See State v. Van Arsdall,* 475 U.S. at 679-80, 106 S.Ct. at 1435-36; *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974); *Martin v. State,* 364 Md. 692, 698-99, 775 A.2d 385 (2001); *Smallwood v. State,* 320 Md. 300, 307, 577 A.2d 356 (1990). Because Ms. Lopez's testimony was central to the State's case, it was also central to the Defendant's case. The failure to allow any witness examination in this area denied the Defendant 'a meaningful opportunity to present a complete defense.'" *Nevada v. Jackson*, 133 S.Ct. 1990, 569 U.S. ___ (2013) citing *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). As a result, Defendant should be granted review of this issue by the Supreme Court.

3. Insufficiency of the evidence.

In the current case, the State failed to prove beyond a reasonable doubt that Mr. Saiti ever knew Ms. Lopez's gun was in the her purse. Without such knowledge, Mr. Saiti could not form the requisite criminal intent. The failure to prove these elements beyond a reasonable doubt requires the Court to reverse Mr. Saiti's convictions on these charges. Similarly, the State failed to prove beyond a reasonable doubt that Mr. Saiti wrongfully obtained or exerted unauthorized control over Ms. Lopez's car or that he ever formed the requisite "intent to deprive" her of such property.

a. There is insufficient evidence to support a conviction for Unlawful Possession of Firearms

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

RCW 9.41.040(1)(a) states:

> (1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

With the exception of strict liability crime, all crimes require a person have knowledge of the criminal act. Without knowledge, it is impossible to form any criminal intent. See, *State v. Anderson*, at 367. Possession necessarily requires a person to have knowledge of an item if he/she is to be criminally culpable for having it within his/her control. Black's Law Dictionary defines "possession" as:

> The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it and either held personally or by another who exercises it in one's place and name. . . . That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.
>
> The, law in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direst physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Black's Law Dictionary, 5th ed. at 1047. Washington Courts apply this same definition to possession. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014); see also, *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Further, the Washington Supreme Court has held that RCW

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

9.41.040(1)(a) is not a strict liability crime and that the State must "prove a culpable mental state" to obtain a conviction for unlawful possession of a firearm. *State v. Anderson*, 141 Wn.2d 357, 366 - 367, 5 P.3d 1247 (2000). In such a case, the "State has the burden to plead, to instruct, and to prove knowledge in addition to the other statutory elements of unlawful possession of a firearm." *State v. Cuble*, 109 Wn.App. 362, 368, 35 P.3d 404 (Div. 2 2001). The State "must prove that the defendant knew he possessed the firearm." *State v. Marcum*, 116 Wn.App. 526, 535, 66 P.3d 690 (Div. 3 2003) citing *State v. Anderson,* 141 Wash.2d at 361, 5 P.3d 1247.

In the current case, the State put on evidence that Mr. Saiti saw Ms. Lopez's handgun on one occasion, when she removed it from the box and put it in her handbag. VRP at 76. The State's evidence showed that this was a significant amount of time prior to the day that Mr. Saiti took the hand bag to gain access to the car. The State did not show how much time had elapsed, but it was enough time that Ms. Lopez had swapped the contents between various handbags, which she did weekly. VRP at 171 - 172. The State's evidence also showed that the gun was not easily seen, and the police officer who retrieved the gun had search the handbag and move numerous items that covered it in order to find the gun. VRP at 215. Except for the one undated instance when Mr. Saiti saw the gun, no evidence was presented that Mr. Saiti searched the purse, saw the gun, or knew the gun was in the purse on the day in question. VRP generally. While the evidence

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

may show that Mr. Saiti took the purse without permission and knew Ms. Lopez owned a gun, it does not show knowledge that he possessed the gun on the day in question. As a result, the State did not prove beyond a reasonable doubt that Mr. Saiti knew the gun was in the purse and the conviction for Unlawful Possession of Firearm is not in compliance with Washington case law.

The Court of Appeals acknowledged that "[t]he State must prove that the defendant knowingly owned, possessed, or controlled the firearm." *State v. Saiti*, at 6 citing *State v. Williams*, 158 Wn.2d 904, 909, 148 P.3d 993 (2006). The Court then reasoned that Saiti saw the gun when Ms. Lopez purchased it and saw her put it in her purse at that time. *State v. Saiti* at 6. This demonstrates knowledge on that date, but not on the date in question. Next, the Court notes that Ms. Lopez "always kept the gun in her purse." *Id. "*She moved the gun into different purses when changing them." *Id*. However, these later items relate to what Ms. Lopez knew and did. The only evidence relating to Mr. Saiti on these matters was that he didn't know what Ms. Lopez did with the gun. VRP at 166 - 168. The Court then says that "Saiti took the same purse he had originally seen Lopez place the gun into." *Id*. However, there is no evidence as to why Mr. Saiti would remember this, that he knew Ms. Lopez always kept the gun in whaterver purse she had, or that he knew the gun was in the purse. This is pure speculation which is impermissible in this analysis. *State v. Hummel*, 196 Wn.App. 329, 357, 383 P.3d 592 (Div. 1 2016) citing *State v. Vasquez*, 178

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

Wn.2d 1, 16, 309 P.3d 318 (2013). Taking the analysis a step further, the Court states that Mr. Saiti "placed the purse on the front seat" and concluded that "[t]he gun was easily accessible." *State v. Saiti*, at 6. The problem with this is that it says nothing about whether Mr. Saiti knew about the gun or even tried to look through the purse. Whether the gun was "easily accessible" means nothing unless a person knows it is there. Thus, we are left with Mr. Saiti knew Ms. Lopez owned a gun and everything else is speculation.

b. There is insufficient evidence to support a conviction for Theft of a Motor Vehicle

RCW 9A.56.065 defines Theft of a Motor Vehicle as "[a] person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle." Theft is defined in pertinent part as:

> (1) "Theft" means:
> (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
> (c) . . .

RCW 9A.56.020(1). However, the State has presented no evidence that Mr. Saiti intended to deprive Ms. Lopez of the vehicle. He used the car by himself on a regular basis. VRP at 149 - 150. There is no testimony at all that during the entire time that Ms. Lopez and Mr. Saiti lived together, that Mr. Saiti was ever told he had to ask to take the car. See, VRP generally. Instead, Ms. Lopez testified she did not discuss the car with Mr. Saiti. VRP

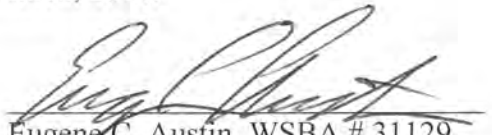
Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

at 161. Mr. Saiti used the car on a regular basis. VRP at 149 - 150. Ms. Lopez testified that had Mr. Saiti asked to take the car, she would have said "yes." VRP at 161. Ms. Lopez also testified that she did not think Mr. Saiti stole the car. VRP at 162. And Ms. Lopez testified she knew Mr. Saiti would return the car. VRP at 161. Likely because the lived together. Further, the State acknowledged Ms. Lopez "is the State's only witness to testify that she did not give Mr. Saiti permission to take her vehicle, purse and handgun." Record, Motion for a Bench Warrant, May 20, 2016, at 177. Because the State did not show Mr. Saiti was not allowed to take the car or that he intended to deprive Ms. Lopez, there is insufficient evidence to show theft under RCW 9A.56.020(1). Additionally, Mr. Saiti did not use any "deception" as required by RCW 9A.56.020(1)(b) to obtain access to the vehicle, he simply took the car. As a result, the State failed to prove theft beyond a reasonable doubt or the aggravating circumstances.

CONCLUSION

The Supreme Court should grant discretionary review of the California "wobbler" statute issue as it has not been sufficiently addressed by the Court. The Supreme Court should also grant discretionary review of the other items as they conflict with case law and to avoid a miscarriage of justice.

DATED this 26 day of March, 2018.



Eugene C. Austin, WSBA # 31129
Attorney for Defendant/Appellant

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

Appendix

1. *State v. Saiti*, No. 49178-8-II (Wash. Ct. App. November 14, 2017)
2. California Statutes

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

Filed
Washington State
Court of Appeals
Division Two

November 14, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LENDIN SAITI, Appellant.	No. 49178-8-II UNPUBLISHED OPINION

MELNICK, J. — Lendin Saiti appeals his convictions and sentence for unlawful possession of a controlled substance (PCS), theft of a motor vehicle with two aggravating circumstances (position of trust and invasion of privacy), unlawful possession of a firearm in the first degree, and use of drug paraphernalia.

We conclude that sufficient evidence supports each conviction, no right to confrontation violation occurred, and the trial court properly calculated the offender score and sentenced Saiti on all charges. We do not consider whether sufficient evidence supports the aggravating circumstances. We affirm.

FACTS

Patty Lopez initially met Saiti through Facebook. At the time, Saiti lived in California. They began a romantic relationship in July 2015. Saiti moved to Washington and lived with Lopez "[o]ff and on." Report of Proceedings (RP) (May 24, 2016) at 48. Saiti did not have his own car; Lopez often allowed him to use her car.

During their relationship, Lopez purchased a firearm and showed it to Saiti. In Saiti's presence, she put the gun in her purse. She kept it there at all times, but would move the gun from purse to purse when changing purses.

Lopez lived above the restaurant where she worked. Saiti often came into the restaurant throughout the day.

On December 20, as Lopez was getting ready for work, Saiti asked Lopez for money. Lopez refused to give him money because she did not want him to buy drugs. Previously, Lopez had given Saiti money for drugs.

Lopez exited her apartment and went to work. Lopez took her purse and put it in the kitchen. The kitchen was restricted to employees only. Her purse contained her car keys, cash, and her gun, among other items.

Amy Leback, Lopez's coworker, knew Saiti was Lopez's boyfriend. Leback saw Saiti come into the restaurant. Saiti went into the kitchen and again asked Lopez for money. She again refused. Saiti left, looking frustrated and mad.

Leback left the kitchen and saw Saiti quickly leaving the restaurant out the back door. He had Lopez's purse. Lopez walked down the hall and saw her car leaving the parking lot. Lopez ran back to the kitchen to check on her purse, but found it missing. Lopez yelled to Leback to call the police because Saiti drove off in her car with her purse.[1] Leback called the police.

[1] Lopez later testified that Saiti did not ask Lopez for permission to use the car, but if he had, she stated that she would have allowed him to borrow the car. However, she did not give him permission to take the car.

Pacific County Sheriff's Deputy Samuel Schouten saw Lopez's car at an RV park. Schouten saw Saiti walk away from the car and enter a trailer. The police went to the trailer and arrested Saiti after he exited it.

Long Beach Police Officer Rodney Nawn searched Saiti and the vehicle after his arrest. Nawn discovered a rubber container containing heroin in Saiti's pocket. The police found Lopez's purse with the gun inside on the front seat of her car. The police did not recover the money.

The State charged Saiti with possession of heroin with a deadly weapon, theft of a motor vehicle, theft of a firearm, unlawful possession of a firearm in the first degree, and possession/use of drug paraphernalia.[2] The theft charges each had two aggravating factors charged: that Saiti used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense, and that the offense involved an invasion of Lopez's privacy.[3]

Before trial, the State filed a motion to depose Lopez who refused to return phone calls or make herself available for an interview. The trial court granted the motion. After Lopez failed to appear for her deposition, the State moved for a material witness warrant and the court issued one.

Lopez appeared at trial. After some questions, the State informed the court that Lopez was not testifying as she had during her interview the previous day. The trial court had a colloquy with Lopez and discussed the meaning of perjury with her.

The State asked to treat Lopez as a hostile witness. The State stated that "the statements she's saying today are sworn under penalty of perjury. If there were untruthful statements, that

[2] RCW 69.50.4013; RCW 9A.56.065; RCW 9A.56.020(1)(a); RCW 9A.56.300; RCW 9.41.040(1)(a); RCW 69.50.412(1).

[3] RCW 9.94A.535(3)(n) & (p).

would be grounds for perjury. To prove whether or not it's perjury, we have several statements." RP (May 24, 2016) at 55.

Saiti responded that Lopez's failure to remember did not amount to hostility. Saiti said that Lopez has "just been told that if you don't start responding the way you did yesterday, then, you know, we're going to charge you with [perjury]." RP (May 24, 2016) at 58. The trial court denied the motion and reiterated that Lopez needed to testify truthfully.

Saiti sought to elicit testimony about Lopez's material witness warrant. He argued that the evidence was relevant to bias, prejudice, and credibility. The trial court denied the motion.

The jury found Saiti guilty of all charges except theft of a firearm.[4] By special verdict, the jury found both aggravating factors on the theft of a motor vehicle charge.

The trial court sentenced Saiti to a total of 67 months of confinement and 12 months of community custody. In calculating Saiti's offender score, the trial court included one point for an attempted grand theft conviction from California.[5] After reviewing documentation the State provided, the court found that the conviction was comparable to a Washington felony, to-wit attempted theft in the first degree. Saiti appeals.

ANALYSIS

I. SUFFICIENT EVIDENCE

Saiti argues insufficient evidence supports his convictions for unlawful possession, theft of a motor vehicle, and the two aggravating circumstances. He argues that the State failed to prove

[4] On the possession of heroin charge, the jury did not find that Saiti was armed with a deadly weapon.

[5] Cal. Penal Code §§ 487(c) & 664.

that he knew Lopez's purse contained her gun. Saiti also argues insufficient evidence showed that he intended to deprive Lopez of her car.

We conclude that sufficient evidence supports Saiti's convictions. We do not consider whether sufficient evidence supports the two aggravating circumstances.

A. STANDARD OF REVIEW

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Circumstantial evidence is equally as reliable as direct evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

In claiming insufficient evidence, "the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Any inferences "'must be drawn in favor of the State and interpreted most strongly against the defendant.'" *Homan*, 181 Wn.2d at 106 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). In addition, we "must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *Homan*, 181 Wn.2d at 106.

B. UNLAWFUL POSSESSION OF A FIREARM

A person "is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter." RCW

9.41.040(1)(a). The State must prove that the defendant knowingly owned, possessed, or controlled the firearm. *State v. Williams*, 158 Wn.2d 904, 909, 148 P.3d 993 (2006).

Saiti stipulated at trial that he had previously been convicted of a serious offense. He argues that insufficient evidence exists to show he knowingly possessed or controlled a firearm.

Actual possession occurs when a defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Constructive possession is established when "the defendant was in dominion and control of either the drugs or the premises on which the drugs were found." *State v. Callahan*, 77 Wn.2d 27, 30-31, 459 P.2d 400 (1969). To determine whether a defendant had constructive possession of a firearm, we examine the totality of the circumstances touching on dominion and control. *State v. Jeffrey*, 77 Wn. App. 222, 227, 889 P.2d 956 (1995).

"A person knows or acts knowingly or with knowledge when: (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense." RCW 9A.08.010(1)(b)(i). As the jury instructions in this case explain, "[i]f a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact." CP at 99 (Instr. 27).

The evidence shows that Lopez showed Saiti her gun when she purchased it. She placed the gun in her purse in Saiti's presence. Lopez always kept the gun in her purse. She moved the gun into different purses when changing them. Saiti took the same purse he had originally seen Lopez place the gun into. He placed the purse on the front seat and drove away in her car. The gun was easily accessible. A reasonable juror could find beyond a reasonable doubt that Saiti had knowledge of the gun's presence and that he knowingly possessed it.

Saiti analogizes his case to *State v. Davis*, 176 Wn. App. 849, 315 P.3d 1105 (2013) *rev'd on other grounds by* 182 Wn.2d 222, 340 P.3d 820 (2014). However, the issue in *Davis* involved whether the defendant had dominion and control over the car in which the gun was present. 176 Wn. App. at 868. The defendant did not argue he lacked knowledge about the gun's presence.

Therefore, we conclude that sufficient evidence supports Saiti's conviction of unlawful possession of a firearm.

C. THEFT OF A MOTOR VEHICLE

Saiti argues that the State failed to present evidence that he intended to deprive Lopez of her car. In addition, Saiti argues that the State failed to prove that he exerted unauthorized control over the vehicle.

The State had to prove that Saiti wrongfully obtained or exerted unauthorized control over another's motor vehicle, and that he intended to deprive that person of the motor vehicle. RCW 9A.56.020(1)(a); RCW 9A.56.065(1). The jury instructions explained that "[t]heft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services." CP at 85 (Instr. 13) and that "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP at 110 (Instr. 35).

"[T]he specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Moreover, when analyzing intent in a theft case, intent to permanently deprive is not required. *State v. Crittenden*, 146 Wn. App. 361, 369-70, 189 P.3d 849 (2008). A person who exceeds the permissive authority to use a vehicle wrongfully obtains that vehicle and may be convicted of theft. *State v. Clark*, 96 Wn.2d 686, 691, 638 P.2d 572 (1982).

Here, Saiti took Lopez's purse and car keys, and drove off in her vehicle. There is no evidence that he had permission to use the vehicle on the date in question, regardless of the fact that he regularly used Lopez's vehicle without asking permission. Lopez called law enforcement because she wanted her car back. This evidence, along with Lopez telling Leback to call the police, demonstrated that even if Saiti had permission to use her vehicle on some occasions, a rational jury could conclude that he exceeded the scope of that permission when he took her vehicle after Lopez refused to give him money. Thus, sufficient evidence supports Saiti's conviction for theft of a motor vehicle.

D. AGGRAVATING CIRCUMSTANCES

This issue is moot because the trial court did not impose an exceptional sentence based on the aggravating factors. Accordingly, we do not consider the issue further.

"As a general rule, we do not consider questions that are moot." *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). "A case is technically moot if the court can no longer provide effective relief." *Hunley*, 175 Wn.2d at 907. However, we will review an appeal if the sentence has collateral effects. *State v. Rinaldo*, 98 Wn.2d 419, 422, 655 P.2d 1141 (1982).

Because the trial court did not impose an exceptional sentence, the jury's special verdict on the aggravating circumstances is moot.

II. CONFRONTATION CLAUSE VIOLATION

Saiti argues that the trial court violated his confrontation clause right when it denied Saiti's motion to introduce evidence of Lopez's material witness warrant because it was relevant for the jury's credibility assessment of Lopez. Because the court did not err in excluding the evidence, we disagree.

A. LEGAL PRINCIPLES

The United States Constitution and the Washington State Constitution guarantee criminal defendants the right to confront and cross-examine witnesses. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22. "The purpose is to test the perception, memory, and credibility of witnesses." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Accordingly, the right to confrontation must be zealously guarded. *Darden*, 145 Wn.2d at 620.

Yet, the right is not absolute. *Darden*, 145 Wn.2d at 621. "Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative." *Darden*, 145 Wn.2d at 620-21. "The confrontation right and associated cross-examination are limited by general considerations of relevance." *Darden*, 145 Wn.2d at 621.

We review a trial court's ruling limiting cross-examination for a manifest abuse of discretion. *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017); *Darden*, 145 Wn.2d at 619. A trial court has broad discretion regarding the admission or exclusion of evidence, and the trial court's decision will not be reversed absent a manifest abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). A manifest abuse of discretion arises when "the trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or reasons.'" *Darden*, 145 Wn.2d at 619 (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

B. THE TRIAL COURT DID NOT ERR

Saiti moved to introduce evidence of the material witness warrant because, he argues, it showed Lopez's bias, prejudice, or credibility as a witness. It would demonstrate that pressure from the State caused her to testify as she did.

Evidence is relevant if it has any tendency to make a disputed material fact more or less probable than it would be without the evidence. ER 401. Only minimal logical relevancy is

required. *State v. Bebb*, 44 Wn. App. 803, 814, 723 P.2d 512 (1986), *aff'd*, 108 Wn.2d 515, 740 P.2d 829 (1987). The trial court may exclude relevant evidence if the danger of unfair prejudice substantially outweighs its probative value. ER 403. The trial court has considerable discretion to consider what evidence is relevant and to balance its possible prejudicial impact against its probative value. *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014).

Here, the evidence of Lopez's material witness warrant was not relevant. As the trial court stated, Lopez did not testify that she felt pressured to testify in the way that she did. The court did not abuse its discretion by ruling that the necessity of a warrant to insure Lopez came to court was irrelevant to any disputed fact. Accordingly, we conclude that the trial court did not err by excluding the evidence of the material witness warrant and it did not violate Saiti's confrontation right.

III. COMPARABILITY OF FOREIGN OFFENSE

Saiti argues that the trial court erred by concluding his California conviction for attempted grand theft was comparable to the Washington crime of attempted theft in the first degree. He argues that it is more appropriately comparable to theft in the third degree because his sentence reflected that of a misdemeanor and the restitution fee imposed indicated that the value of the attempted theft did not exceed $700, as required by Washington's theft in the third degree statute.

Saiti also argues that, because his California conviction is not defined as a felony or a misdemeanor, and gross misdemeanors do not exist in California, the rule of lenity should apply. We disagree with Saiti.

A. LEGAL PRINCIPLES

We conduct de novo review of a sentencing court's decision to count a prior conviction as criminal history. *State v. Moeurn*, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010).

There is 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). We must first determine whether the foreign offense is legally comparable, or "whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Thiefault*, 160 Wn.2d at 415. "If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute." *Thiefault*, 160 Wn.2d at 415. "In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." *Thiefault*, 160 Wn.2d at 415. If the court determines that the "prior, foreign conviction is neither legally nor factually comparable, it may not count the conviction." *Thiefault*, 160 Wn.2d at 415.

Statutory interpretation is a question of law that we review de novo. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). "In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the Legislature in creating the statute." *Watson*, 146 Wn.2d at 954. "The court discerns legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Fast v. Kennewick Pub. Hosp. Dist*., 187 Wn.2d 27, 33, 384 P.3d 232 (2016).

B. THE TRIAL COURT CORRECTLY DETERMINED CRIMINAL HISTORY

First, we must determine whether the statutes at issue are legally comparable. *Thiefault*, 160 Wn.2d at 415.

Saiti's conviction for attempted grand theft is based upon a violation of California Penal Code §§ 664 and §487(c). The former is California's attempt statute. Cal. Penal Code § 664 (2006). The latter provides, "[g]rand theft is theft committed in any of the following cases: . . . When the property is taken from the person of another." Cal. Penal Code § 487(c) (2009).

Washington's statute for theft in the first degree states, "(1) [A] person is guilty of theft in the first degree if he or she commits theft of: . . . Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another." RCW 9A.56.030(1)(b).

Both statutes contain unambiguous language and criminalize theft of property from the person of another. Cal. Penal Code § 487(c) (2009); RCW 9A.56.030(1)(b). Although the lesser degrees of theft and other prongs of theft in the first degree in Washington have monetary requirements as elements, RCW 9A.56.030(1)(b) does not. *See* RCW 9A.56.040; RCW 9A.56.050. The plain language of grand theft and theft in the first degree are the same. Cal. Penal Code § 487(c) (2009); RCW 9A.56.030(1)(b). Accordingly, we conclude that the statutes are legally comparable.

We next consider whether the crime committed in California is factually comparable to a felony crime in Washington. "Factual comparability requires the sentencing court to determine whether the defendant's conduct, as evidenced by the indictment or information, or the records of the foreign conviction, would have violated the comparable Washington statute." *State v.*

Farnsworth, 133 Wn. App. 1, 18, 130 P.3d 389 (2006) *remanded*, 159 Wn.2d 1004, 151 P.3d 976 (2007) (internal citations omitted).

The record does not contain any clear facts to allow for a full factual comparability analysis. The record only contains the judgment and sentence. The record does not contain the charging document. The judgment includes a restitution amount of $200. Saiti argues that because the restitution amount in the judgment was $200, it must be a misdemeanor. However, the judgment is also clear that Saiti was charged under California Penal Code § 487(c) (2009), which involves the theft of property of any value from a person, similar to RCW 9A.56.030(1)(b).

One prong of Washington's theft in the first degree statute similarly does not have a monetary requirement. RCW 9A.56.030(1)(b). Therefore, if Saiti committed grand theft as proscribed by the California statute, the facts required by the statute (that he took property from another person) would have also violated Washington's theft in the first degree statute.

Therefore, the trial court did not err by including Saiti's California conviction as criminal history.

IV. CONCURRENT STATUTES

Saiti argues that his conviction of unlawful possession of heroin and unlawful use of drug paraphernalia are concurrent crimes and the trial court should have dismissed the possession of a controlled substance charge. He argues that because the object in question was a legal object and became drug paraphernalia only because of the presence of a controlled substance, the statutes are necessarily concurrent. We disagree with Saiti.

A. LEGAL PRINCIPLES

We review the question of whether two statutes are concurrent de novo. *State v. Wilson*, 158 Wn. App. 305, 314, 242 P.3d 19 (2010).

"When a specific statute and a general statute punish the same conduct, the statutes are concurrent and the State can charge a defendant only under the specific statute." *Wilson*, 158 Wn. App. at 313-14. "This rule gives effect to legislative intent and ensures charging decisions comport with that intent." *Wilson*, 158 Wn. App. at 314.

However, if a person can violate the specific statute without violating the general statute, the statutes are not concurrent. *State v. Heffner*, 126 Wn. App. 803, 808, 110 P.3d 219 (2005). "Statutes are concurrent only when every violation of the specific statute would result in a violation of the general statute." *Wilson*, 158 Wn. App. at 314.

In determining whether two statutes are concurrent, we examine the elements of each of the statutes to ascertain whether a person can violate the specific statute without necessarily violating the general statute. *Heffner*, 126 Wn. App. at 808. "Statutes are concurrent if all of the elements to convict under the general statute are also elements that must be proved for conviction under the specific statute." *Wilson*, 158 Wn. App. at 314. The facts of the particular case need not be examined, we examine only the elements of the statutes. *Wilson*, 158 Wn. App. at 314.

B. THE STATUTES ARE NOT CONCURRENT

Saiti claims that the rubber container became drug paraphernalia only because it contained heroin residue, and thus, the convictions are inseparable. However, we do not examine the facts of the particular case, we only examine the statutory elements. *Wilson*, 158 Wn. App. at 314.

RCW 69.50.412(1) states that:

> It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana. Any person who violates this subsection is guilty of a misdemeanor.

RCW 69.50.4013(1) provides that it is "unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter." A person that violates this statute is guilty of a class C felony. RCW 69.50.4013(2).

In *State v. Williams*, 62 Wn. App. 748, 754, 815 P.2d 825 (1991), the court held that the drug paraphernalia statute and the possession of controlled substances statute were not concurrent statutes. In its reasoning, the court described an example where the defendant could admit to recently attending a party where he used drug paraphernalia to inject controlled substances:

> Although no controlled substances or paraphernalia are found in the defendant's possession, his behavior and appearance may be consistent with recent controlled substance use, tests of his blood could confirm the presence of controlled substances, and recent injection marks could be found on his arm. Among other offenses, the defendant could be prosecuted for using drug paraphernalia to inject controlled substances, although it could not be established that he was in possession of either drug paraphernalia or controlled substances.
>
> There are no doubt other situations where the evidence may establish that a defendant was under the influence of controlled substances at the time of his arrest, although no paraphernalia or controlled substances are found. Nevertheless, such evidence creates an inference that drug paraphernalia was used to ingest the controlled substances.

Williams, 62 Wn. App. at 752-53 (footnote omitted).

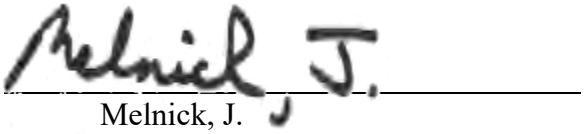
Although the law has been recodified since *Williams*, the rationale remains the same.[6] Even though one statute may implicate the other because of the relation between the two, facts in a given case could support a charge for use of paraphernalia without evidence to support a charge of unlawful possession of a controlled substance. Because the elements of the statutes are not the

[6] *See* LAWS OF 2017, ch. 317 § 15; LAWS OF 2013, ch. 3 § 22 (most recent amendments to the possession of controlled substance and paraphernalia statutes, respectively).

same and not every violation of one statute would be a violation of the other, we conclude that the statutes are not concurrent.

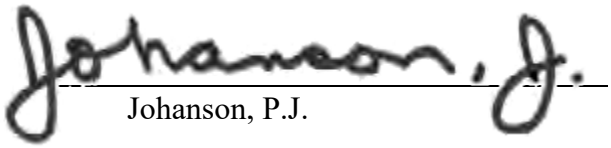
We affirm.

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.

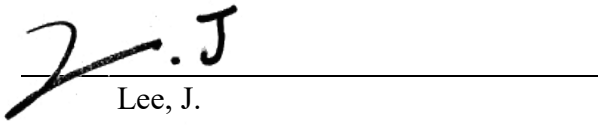


Melnick, J.

We concur:



Johanson, P.J.



Lee, J.

2. California Statutes

- Ca. Pen. Code § 664 Punishment for attempt to commit crime
-

CALIFORNIA CODES
CALIFORNIA PENAL CODE
Part 1. OF CRIMES AND PUNISHMENTS
Title 16. GENERAL PROVISIONS
Current through the 2016 Legislative Session

§ 664. Punishment for attempt to commit crime

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows:

(a) If the crime attempted is punishable by imprisonment in the state prison, or by imprisonment pursuant to subdivision (h) of Section 1170, the person guilty of the attempt shall be punished by imprisonment in the state prison or in a county jail, respectively, for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. If the crime attempted is any other one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven, or nine years. The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(b) If the crime attempted is punishable by imprisonment in a county jail, the person guilty of the attempt shall be punished by imprisonment in a county jail for a term not exceeding one-half the term of imprisonment prescribed upon a conviction of the offense attempted.

(c) If the offense so attempted is punishable by a fine, the offender convicted of that attempt shall be punished by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense attempted.

(d) If a crime is divided into degrees, an attempt to commit the crime may be of any of those degrees, and the punishment for the attempt shall be determined as provided by this section.

(e) Notwithstanding subdivision (a), if attempted murder is committed upon a peace officer or firefighter, as those terms are defined in paragraphs (7) and (9) of subdivision (a) of Section 190.2, a custodial officer, as that term is defined in subdivision (a) of Section 831 or subdivision (a) of Section 831.5, a custody assistant, as that term is defined in subdivision

(a) of Section 831.7, or a nonsworn uniformed employee of a sheriff's department whose job entails the care or control of inmates in a detention facility, as defined in subdivision (c) of Section 289.6, and the person who commits the offense knows or reasonably should know that the victim is a peace officer, firefighter, custodial officer, custody assistant, or nonsworn uniformed employee of a sheriff's department engaged in the performance of his or her duties, the person guilty of the attempt shall be punished by imprisonment in the state prison for life with the possibility of parole.

This subdivision shall apply if it is proven that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific intent to unlawfully kill another human being. The Legislature finds and declares that this paragraph is declaratory of existing law.

(f) Notwithstanding subdivision (a), if the elements of subdivision (e) are proven in an attempted murder and it is also charged and admitted or found to be true by the trier of fact that the attempted murder was willful, deliberate, and premeditated, the person guilty of the attempt shall be punished by imprisonment in the state prison for 15 years to life. Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not apply to reduce this minimum term of 15 years in state prison, and the person shall not be released prior to serving 15 years' confinement.

Cite as Ca. Pen. Code § 664

History. Amended by **Stats 2011 ch 39 (AB 117)**, **s 68**, eff. 6/30/2011.

Amended by **Stats 2011 ch 15 (AB 109)**, **s 439**, eff. 4/4/2011, but operative no earlier than October 1, 2011, and only upon creation of a community corrections grant program to assist in implementing this act and upon an appropriation to fund the grant program.

Amended by **Stats 2006 ch 468 (SB 1184)**, **s 1**, eff. 1/1/2007.

Amended by **Stats 2005 ch 52 (AB 999)**, **s 1**, eff. 1/1/2006

- Ca. Pen. Code § 487 Grand theft

CALIFORNIA CODES
CALIFORNIA PENAL CODE
Part 1. OF CRIMES AND PUNISHMENTS
Title 13. OF CRIMES AGAINST PROPERTY
Chapter 5. LARCENY
Current through the 2016 Legislative Session

§ 487. Grand theft

Grand theft is theft committed in any of the following cases:

(a) When the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950), except as provided in subdivision (b).

(b) Notwithstanding subdivision (a), grand theft is committed in any of the following cases:

(1) (A) When domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops are taken of a value exceeding two hundred fifty dollars ($250).

(B) For the purposes of establishing that the value of domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops under this paragraph exceeds two hundred fifty dollars ($250), that value may be shown by the presentation of credible evidence which establishes that on the day of the theft domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops of the same variety and weight exceeded two hundred fifty dollars ($250) in wholesale value.

(2) When fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products are taken from a commercial or research operation which is producing that product, of a value exceeding two hundred fifty dollars ($250).

(3) Where the money, labor, or real or personal property is taken by a servant, agent, or employee from his or her principal or employer and aggregates nine hundred fifty dollars ($950) or more in any 12 consecutive month period.

(c) When the property is taken from the person of another.

(d) When the property taken is any of the following:

(1) An automobile.

(2) A firearm.

Cite as Ca. Pen. Code § 487

History. Amended by **Stats 2013 ch 618 (AB 924)**, **s 7**, eff. 1/1/2014.

Amended by **Stats 2010 ch 694 (SB 1338)**, **s 1.5**, eff. 1/1/2011.

Amended by **Stats 2010 ch 693 (AB 2372)**, **s 1**, eff. 1/1/2011.

Amended by **Stats 2009 ch 28 (SB X3-18)**, **s 17**, eff. 1/1/2010.

Amended by **Stats 2002 ch 787 (SB 1798)**, **s 12**, eff. 1/1/2003

Ca. Pen. Code § 488
Grand theft is punishable as follows:
(a) When the grand theft involves the theft of a firearm, by imprisonment in the state prison for 16 months, two, or three years.
(b) In all other cases, by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170.

- Ca. Pen. Code § 1170 [Effective 1/1/2017] Legislative findings and declarations; sentence choice; recall

CALIFORNIA CODES
CALIFORNIA PENAL CODE
Part 2. OF CRIMINAL PROCEDURE
Title 7. OF PROCEEDINGS AFTER THE COMMENCEMENT OF THE TRIAL AND BEFORE JUDGMENT
Chapter 4.5. TRIAL COURT SENTENCING
Article 1. Initial Sentencing
Current through the 2016 Legislative Session

§ 1170. *[Effective 1/1/2017]* Legislative findings and declarations; sentence choice; recall

(a)

(1) The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.

(2) The Legislature further finds and declares that programs should be available for inmates, including, but not limited to, educational, rehabilitative, and restorative justice programs that are designed to promote behavior change and to prepare all eligible offenders for successful reentry into the community. The Legislature encourages the development of policies and programs designed to educate and rehabilitate all eligible offenders. In implementing this section, the Department of Corrections and Rehabilitation is encouraged to allow all eligible inmates the opportunity to enroll in programs that promote successful return to the community. The Department of Corrections and Rehabilitation is directed to establish a mission statement consistent with these principles.

(3) In any case in which the sentence prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison, or a term pursuant to subdivision (h), of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the sentence prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d). In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, except for a remaining portion of mandatory supervision imposed pursuant to subparagraph (B) of paragraph (5) of subdivision (h), the entire sentence shall be deemed to have been served, except for the remaining period of mandatory supervision, and the defendant shall not be actually delivered to the custody of the secretary or the county correctional administrator. The court shall advise the defendant that he or she shall serve an applicable period of parole, postrelease community supervision, or mandatory supervision and order the defendant to report to the parole or probation office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole, postrelease community supervision, or mandatory supervision. The sentence shall be deemed a separate prior prison term or a sentence of imprisonment in a county jail under subdivision (h) for purposes of Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower

term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(c) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000 or 3000.08 or postrelease community supervision for a period as provided in Section 3451.

(d)

(1) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison or county jail pursuant to subdivision (h) and has been committed to the custody of the secretary or the county correctional administrator, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, or the county correctional administrator in the case of county jail inmates, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

(2) (A)

(i) When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing.

(ii) Notwithstanding clause (i), this paragraph shall not apply to defendants sentenced to life without parole for an offense where it was pled and proved that the defendant tortured, as described in Section 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.

(B) The defendant shall file the original petition with the sentencing court. A copy of the petition shall be served on the agency that prosecuted the case. The petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(C) If any of the information required in subparagraph (B) is missing from the petition, or if proof of service on the prosecuting agency is not provided, the court shall return the petition to the defendant and advise the defendant that the matter cannot be considered without the missing information.

(D) A reply to the petition, if any, shall be filed with the court within 60 days of the date on which the prosecuting agency was served with the petition, unless a continuance is granted for good cause.

(E) If the court finds by a preponderance of the evidence that one or more of the statements specified in clauses (i) to (iv), inclusive, of subparagraph (B) is true, the court shall recall the sentence and commitment previously ordered and hold a hearing to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. Victims, or victim family

members if the victim is deceased, shall retain the rights to participate in the hearing.

(F) The factors that the court may consider when determining whether to resentence the defendant to a term of imprisonment with the possibility of parole include, but are not limited to, the following:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the defendant was sentenced to life without the possibility of parole.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) Prior to the offense for which the defendant was sentenced to life without the possibility of parole, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.

(v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.

(vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.

(viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

(G) The court shall have the discretion to resentence the defendant in the

same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. The discretion of the court shall be exercised in consideration of the criteria in subparagraph (F). Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.

(H) If the sentence is not recalled or the defendant is resentenced to imprisonment for life without the possibility of parole, the defendant may submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20 years. If the sentence is not recalled or the defendant is resentenced to imprisonment for life without the possibility of parole under that petition, the defendant may file another petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence.

(I) In addition to the criteria in subparagraph (F), the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria.

(J) This subdivision shall have retroactive application.

(K) Nothing in this paragraph is intended to diminish or abrogate any rights or remedies otherwise available to the defendant.

(e) (1) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary or the Board of Parole Hearings or both determine that a prisoner satisfies the criteria set forth in paragraph (2), the secretary or the board may recommend to the court that the prisoner's sentence be recalled.

(2) The court shall have the discretion to resentence or recall if the court finds that the facts described in subparagraphs (A) and (B) or subparagraphs (B) and (C) exist:

(A) The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department.

(B) The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.

(C) The prisoner is permanently medically incapacitated with a medical

condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing.

The Board of Parole Hearings shall make findings pursuant to this subdivision before making a recommendation for resentence or recall to the court. This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.

(3) Within 10 days of receipt of a positive recommendation by the secretary or the board, the court shall hold a hearing to consider whether the prisoner's sentence should be recalled.

(4) Any physician employed by the department who determines that a prisoner has six months or less to live shall notify the chief medical officer of the prognosis. If the chief medical officer concurs with the prognosis, he or she shall notify the warden. Within 48 hours of receiving notification, the warden or the warden's representative shall notify the prisoner of the recall and resentencing procedures, and shall arrange for the prisoner to designate a family member or other outside agent to be notified as to the prisoner's medical condition and prognosis, and as to the recall and resentencing procedures. If the inmate is deemed mentally unfit, the warden or the warden's representative shall contact the inmate's emergency contact and provide the information described in paragraph (2).

(5) The warden or the warden's representative shall provide the prisoner and his or her family member, agent, or emergency contact, as described in paragraph (4), updated information throughout the recall and resentencing process with regard to the prisoner's medical condition and the status of the prisoner's recall and resentencing proceedings.

(6) Notwithstanding any other provisions of this section, the prisoner or his or her family member or designee may independently request consideration for recall and resentencing by contacting the chief medical officer at the prison or the secretary. Upon receipt of the request, the chief medical officer and the warden or the warden's representative shall follow the procedures described in paragraph (4). If the secretary determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's sentence be recalled. The secretary shall submit a recommendation for release within 30 days in the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings with respect to the inmates who have applied under this section. The board shall consider this information and make an independent judgment pursuant to paragraph (2) and make findings

related thereto before rejecting the request or making a recommendation to the court. This action shall be taken at the next lawfully noticed board meeting.

(7) Any recommendation for recall submitted to the court by the secretary or the Board of Parole Hearings shall include one or more medical evaluations, a postrelease plan, and findings pursuant to paragraph (2).

(8) If possible, the matter shall be heard before the same judge of the court who sentenced the prisoner.

(9) If the court grants the recall and resentencing application, the prisoner shall be released by the department within 48 hours of receipt of the court's order, unless a longer time period is agreed to by the inmate. At the time of release, the warden or the warden's representative shall ensure that the prisoner has each of the following in his or her possession: a discharge medical summary, full medical records, state identification, parole or postrelease community supervision medications, and all property belonging to the prisoner. After discharge, any additional records shall be sent to the prisoner's forwarding address.

(10) The secretary shall issue a directive to medical and correctional staff employed by the department that details the guidelines and procedures for initiating a recall and resentencing procedure. The directive shall clearly state that any prisoner who is given a prognosis of six months or less to live is eligible for recall and resentencing consideration, and that recall and resentencing procedures shall be initiated upon that prognosis.

(11) The provisions of this subdivision shall be available to an inmate who is sentenced to a county jail pursuant to subdivision (h). For purposes of those inmates, "secretary" or "warden" shall mean the county correctional administrator and "chief medical officer" shall mean a physician designated by the county correctional administrator for this purpose.

(f) Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385.

(g) A sentence to state prison for a determinate term for which only one term is specified, is a sentence to state prison under this section.

(h)

(1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.

(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term

described in the underlying offense.

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.

(4) Nothing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1.

(5)

(A) Unless the court finds, in the interest of justice, that it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion.

(B) The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later. During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under that supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.

(6) The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011.

(7) The sentencing changes made to paragraph (5) by the act that added this paragraph shall become effective and operative on January 1, 2015, and shall be applied

prospectively to any person sentenced on or after January 1, 2015.

(i) This section shall become operative on January 1, 2022.

Cite as Ca. Pen. Code § 1170

History. Amended by **Stats 2016 ch 887 (SB 1016)**, **s 6.3**, eff. 1/1/2017.

Amended by **Stats 2016 ch 867 (SB 1084)**, **s 2.1**, eff. 1/1/2017.

Amended by **Stats 2016 ch 696 (AB 2590)**, **s 1**, eff. 1/1/2017.

Amended by **Stats 2015 ch 378 (AB 1156)**, **s 2**, eff. 1/1/2016.

Amended by **Stats 2014 ch 612 (AB 2499)**, **s 2**, eff. 1/1/2015.

Amended by **Stats 2014 ch 26 (AB 1468)**, **s 17**, eff. 6/20/2014.

Amended by **Stats 2013 ch 508 (SB 463)**, **s 6**, eff. 1/1/2014.

Amended by **Stats 2013 ch 76 (AB 383)**, **s 152**, eff. 1/1/2014.

Amended by **Stats 2013 ch 32 (SB 76)**, **s 6**, eff. 6/27/2013.

Amended by **Stats 2012 ch 828 (SB 9)**, **s 2**, eff. 1/1/2013.

Amended by **Stats 2012 ch 43 (SB 1023)**, **s 28**, eff. 6/27/2012.

Amended by **Stats 2011 ch 361 (SB 576)**, **s 7.7**, eff. 9/29/2011.

Amended by **Stats 2011 ch 12 (AB X1-17)**, **s 12.4**, eff. 9/20/2011, op. 10/1/2011.

Amended by **Stats 2011 ch 136 (AB 116)**, **s 4**, eff. 7/27/2011.

Amended by **Stats 2011 ch 39 (AB 117)**, **s 68**, eff. 6/30/2011.

Amended by **Stats 2011 ch 39 (AB 117)**, **s 28**, eff. 6/30/2011.

Amended by **Stats 2011 ch 15 (AB 109)**, **s 451**, eff. 4/4/2011, but operative no earlier than October 1, 2011, and only upon creation of a community corrections grant program to assist in implementing this act and upon an appropriation to fund the grant program.

Amended by **Stats 2010 ch 256 (AB 2263)**, **s 6**, eff. 1/1/2011.

Amended by **Stats 2010 ch 328 (SB 1330)**, **s 162**, eff. 1/1/2011.

Amended by **Stats 2008 ch 416 (SB 1701)**, **s 2**, eff. 1/1/2009.

Amended by **Stats 2007 ch 740 (AB 1539)**, **s 2**, eff. 1/1/2008.

Amended by **Stats 2007 ch 3 (SB 40)**, **s 3**, eff. 3/30/2007.

Amended by **Stats 2007 ch 3 (SB 40)**, **s 2**, eff. 3/30/2007.

Amended by **Stats 2004 ch 747 (AB 854)**, **s 1**, eff. 1/1/2005.

- Ca. Pen. Code § 17 Felony; misdemeanor; infraction

CALIFORNIA CODES
CALIFORNIA PENAL CODE
PRELIMINARY PROVISIONS
Current through the 2016 Legislative Session

§ 17. Felony; misdemeanor; infraction

(a) A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

(b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170.

(2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

(c) When a defendant is committed to the Division of Juvenile Justice for a crime punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail not exceeding one year, the offense shall, upon the

discharge of the defendant from the Division of Juvenile Justice, thereafter be deemed a misdemeanor for all purposes.

(d) A violation of any code section listed in Section 19.8 is an infraction subject to the procedures described in Sections 19.6 and 19.7 when:

(1) The prosecutor files a complaint charging the offense as an infraction unless the defendant, at the time he or she is arraigned, after being informed of his or her rights, elects to have the case proceed as a misdemeanor, or;

(2) The court, with the consent of the defendant, determines that the offense is an infraction in which event the case shall proceed as if the defendant had been arraigned on an infraction complaint.

(e) Nothing in this section authorizes a judge to relieve a defendant of the duty to register as a sex offender pursuant to Section 290 if the defendant is charged with an offense for which registration as a sex offender is required pursuant to Section 290, and for which the trier of fact has found the defendant guilty.

Cite as Ca. Pen. Code § 17

History. Amended by **Stats 2011 ch 12 (AB X1-17)**, **s 6**, eff. 9/20/2011, op. 10/1/2011.

Amended by **Stats 2011 ch 39 (AB 117)**, **s 68**, eff. 6/30/2011.

Amended by **Stats 2011 ch 15 (AB 109)**, **s 228**, eff. 4/4/2011, but operative no earlier than October 1, 2011, and only upon creation of a community corrections grant program to assist in implementing this act and upon an appropriation to fund the grant program.

AUSTIN LAW OFFICE, PLLC

March 26, 2018 - 3:52 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95546-8
Appellate Court Case Title:	State of Washington v. Lendin Saiti

The following documents have been uploaded:

- 955468_Motion_Discretionary_Review_20180326155118SC827376_0728.pdf
  This File Contains:
  Motion for Discretionary Review - Discretionary Review (CA)
  The Original File Name was Motion for Discretionary Review Saiti.pdf

A copy of the uploaded files will be sent to:

- mmcclain@co.pacific.wa.us

Comments:

Sender Name: Eugene Austin - Email: eugene.c.austin@gmail.com
Address:
PO BOX 1753
BELFAIR, WA, 98528-1753
Phone: 360-551-0782

Note: The Filing Id is 20180326155118SC827376