SUPREME COURT NO. 95990-1
COURT OF APPEALS NO. 75895-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KEVIN LEE GARRISON,

Respondent.

PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorney for Petitioner

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION.....1

C. ISSUE PRESENTED FOR REVIEW.....1

D. STATEMENT OF THE CASE.....2

E. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT.....5

1. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT BY REFUSING TO CONSIDER THE NECESSARY IMPLICATIONS OF THE FOREIGN STATUTORY LANGUAGE, THUS IMPOSING AN IMPROPERLY HIGH THRESHOLD FOR COMPARABILITY.....6

a. Plain Reading Of The Elements Of Garrison's Texas Manslaughter Conviction Establishes That It Necessarily Entails Criminal Negligence As Defined In Washington 8

b. Texas Statutes And Caselaw Confirm That Garrison's Texas Offense Is Narrower Than Manslaughter In The Second Degree.....12

2. THE PROPER STANDARD FOR COMPARABILITY OF FOREIGN CONVICTIONS IS A MATTER OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT 15

F. CONCLUSION.....16

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Pers. Restraint of Arnold, 190 Wn.2d 136, 410 P.3d 1133 (2018) 12

In re Pers. Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005) 7

State v. Crocker, 196 Wn. App. 730, 385 P.3d 197 (2016) 15

State v. Garrison, No. 75895-1-I, 2018 WL 1801951 (filed April 16, 2018) (unpublished) 1, 4, 5, 9, 10

State v. Jordan, 180 Wn.2d 456, 325 P.3d 181 (2014) 6, 7

State v. Stockwell, 159 Wn.2d 394, 150 P.3d 82 (2007) 6, 7, 8, 11

Other Jurisdictions:

Depauw v. State, 658 S.W.2d 628 (Tex. App. 1983) 10

Saunders v. State, 913 S.W.2d 564 (Tex. Crim. App. 1995)..... 14

State v. Meru, 414 S.W.3d 159 (Tex. Crim. App. 2013)..... 14

Statutes

Washington State:

Former RCW 9A.32.070 (1975) 9

RCW 9.94A.030 7

RCW 9.94A.525 7

RCW 9A.08.010 ..... 4, 9, 13

RCW 9A.32.070 ..... 4, 8

Other Jurisdictions:

Former Tex. Penal Code § 1.07 (1979) 11

Former Tex. Penal Code § 6.03 (1973) 13, 14

Former Tex. Penal Code § 19.01 (1973) 13

Former Tex. Penal Code § 19.02 (1973) 4, 9, 13, 14

Former Tex. Penal Code § 19.04 (1973) 4, 9, 13

Former Tex. Penal Code § 19.05 (1973) 13

Former Tex. Penal Code § 19.07 (1973) 13, 14

Tex. Penal Code § 1.07 11

Tex. Penal Code § 19.02 4

Tex. Penal Code § 19.05 14

Rules and Regulations

Washington State:

GR 14.1 16

RAP 13.4 5

Other Authorities

Sentencing Reform Act 1, 6, 7, 15

A. IDENTITY OF PETITIONER

The State of Washington, petitioner here and Respondent below, respectfully requests that this Court review the decision designated in section B of this petition.

B. COURT OF APPEALS DECISION

The State of Washington requests review of the Court of Appeals' unpublished decision in State v. Kevin Lee Garrison, No. 75895-1-I (April 16, 2018), a copy of which is attached hereto as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

The Sentencing Reform Act ("SRA") was created to ensure that defendants with equivalent prior convictions are treated the same way, regardless of whether their convictions occurred in Washington. The SRA and this Court's caselaw dictate that two offenses are comparable if they are "substantially similar" and that the necessary implications of statutory language must be considered. Garrison's 1981 Texas conviction for voluntary manslaughter required that (1) Garrison committed an act with intent to cause serious bodily injury; (2) the act was objectively clearly dangerous to human life; and (3) the act caused the victim's death. Does Garrison's Texas conviction necessarily establish that

he acted, at a minimum, with criminal negligence as to the risk of death, making it legally comparable to a Washington conviction for manslaughter in the second degree?

D. STATEMENT OF THE CASE

In 1981, Garrison pled guilty to voluntary manslaughter in Texas after beating his four-year-old stepdaughter to death. CP 25, 148. In 2005, he pled guilty to assault in the second degree in Washington after raping and repeatedly molesting the twelve-year-old daughter of his girlfriend. CP 82, 111-12. In the current case, a jury found Garrison guilty of child molestation in the second degree against the 12-year-old best friend of his stepdaughter.[1] CP 426.

Garrison was originally sentenced in this case to life in prison as a persistent offender after the trial court found the 1981 Texas manslaughter conviction comparable to a Washington conviction for manslaughter in the first degree. CP 175. The Court of Appeals overturned the trial court's comparability determination and remanded the case for resentencing, noting the parties' agreement that the Texas offense was comparable to manslaughter in the second degree. CP 189-90. On the record before the court

[1] After Garrison's relationship with the mother of the second degree assault victim ended, Garrison married a different woman who also had a young daughter.

at that time, it appeared that the Texas offense would wash out of Garrison's offender score if it were only comparable to second degree manslaughter, which was a class C felony in 1981. CP 190.

At resentencing, the State provided evidence that the Texas conviction did not wash out under the rules applicable to second degree manslaughter. However, the trial court ruled that Garrison's Texas manslaughter conviction is not comparable to Washington's conviction for manslaughter in the second degree. RP 84-86. Consequently, the trial court imposed a standard range sentence of 34 months.[2] CP 427, 420, 434. The State appealed. CP 439.

The Court of Appeals issued an opinion affirming the resentencing court's comparability determination. After declining to reconsider its previous conclusions that the Texas offense is not comparable to Washington's manslaughter in the first degree or assault in the second degree, the court addressed the comparability of the Texas offense to Washington's manslaughter in the second degree.

The Texas statute under which Garrison was convicted requires proof that the defendant "intends to cause serious bodily

[2] Regrettably, the State did not alert the trial court to the fact that the Texas voluntary manslaughter conviction is also clearly narrower than Washington's assault in the third degree, and thus is comparable to felony murder.

injury and commits an act clearly dangerous to human life that causes the death of an individual." Tex. Penal Code §§ 19.02(a)(2), 19.04 (1973).[3] The Court of Appeals correctly determined that, under Texas law, the State needed to prove that the act that caused the victim's death "was objectively clearly dangerous to human life and was done with intent to cause serious bodily injury. The State did not need to prove that the defendant knew the act was clearly dangerous to human life." Garrison, 2018 WL 1801961 at *6.

In Washington, "[a] person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person." RCW 9A.32.070(1). A person "acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(d). The Court of Appeals correctly determined that in order to prove manslaughter in the

[3] The language of former Tex. Penal Code § 19.02(a)(2) remains unchanged today except that it has moved to § 19.02(b)(2). A violation of that statute, standing alone, has always constituted murder. Tex. Penal Code § 19.02. However, in 1981, a violation of that statute while "under the immediate influence of sudden passion arising from an adequate cause" constituted voluntary manslaughter. Former Tex. Penal Code § 19.04(a) (1973).

second degree, the State must show that the defendant unreasonably failed to be aware of a substantial risk that *death* would occur. Garrison, 2018 WL 1801961 at *7.

The Court of Appeals then concluded, without further analysis, that "Washington's manslaughter in the second degree requires a culpable mental state in connection with the homicide and the Texas offense does not," and concluded therefore that "Washington law is narrower and the offenses are not legally comparable." Id. The Court of Appeals did not appear to consider whether the Texas statute, while not explicitly phrased in terms of negligence, nevertheless requires that the defendant acted with criminal negligence regarding the risk of death. The State's motion to reconsider on that point was denied without explanation on May 23, 2018.

E. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

RAP 13.4(b) permits review by this Court where a decision by the Court of Appeals is in conflict with a decision of this Court or involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1), (4). These criteria are met here. The decision below conflicts with decisions of

this Court, such as State v. Jordan, 180 Wn.2d 456, 325 P.3d 181 (2014) and State v. Stockwell, 159 Wn.2d 394, 150 P.3d 82 (2007), which emphasize that the Sentencing Reform Act ("SRA") requires only "rough comparability—not precision—among offenses" and that the necessary implications of the statutory language must be considered. Jordan, 180 Wn.2d at 465; Stockwell, 159 Wn.2d at 399. It also involves an issue of substantial public interest that should be determined by this Court.

As a question of law, legal comparability is reviewed de novo. Stockwell, 159 Wn.2d at 397.

1. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT BY REFUSING TO CONSIDER THE NECESSARY IMPLICATIONS OF THE FOREIGN STATUTORY LANGUAGE, THUS IMPOSING AN IMPROPERLY HIGH THRESHOLD FOR COMPARABILITY.

In crafting the SRA, the legislature's intent was to create a broad scheme that would ensure that defendants with roughly equivalent prior convictions are treated the same way. Jordan, 180 Wn.2d at 464. The legislature determined that, when a defendant has prior convictions in another state, the out-of-state convictions should be considered part of the defendant's criminal history and "shall be classified according to the comparable offense definitions

and sentences provided by Washington law." RCW 9.94A.525(3); RCW 9.94A.030(12).

The legislature did not intend to differentiate between defendants based on minute differences between their prior offenses. As this Court has noted, "crimes as diverse as premeditated murder and attempted kidnapping count the same number of points," convictions for attempted crimes are scored as if they were completed offenses, and if the sentencing court is unable to find a clearly comparable offense for a federal felony, the offense is nevertheless scored as a class C felony. Jordan, 180 Wn.2d at 464; RCW 9.94A.525(3), (4), (9), .030(45). This has led this Court to hold, time and time again, that the SRA requires only "rough comparability—not precision—among offenses," wherein the elements of the foreign offense must be "substantially similar" to or narrower than the elements of the Washington offense to be legally comparable. Jordan, 180 Wn.2d at 465; In re Pers. Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) (elements of foreign offense and Washington offense must be "substantially similar"); see also, e.g., Stockwell, 159 Wn.2d at 397 ("Legal comparability analysis is not an exact science.").

In Stockwell, this Court held that the former first degree statutory rape statute was comparable to the current definition of first degree rape of a child, despite the lack of any requirement in the statutory rape statute that the perpetrator not be married to the victim, because "it is simply inconceivable that the legislature would expect that children 10 years old or less would marry." 159 Wn.2d at 399. Thus, a proper comparability analysis cannot focus only on differences in statutory language, and must also consider the logical implications of the statutory language.

Here, the Court of Appeals applied a higher and unworkable standard, ruling that Garrison's Texas manslaughter conviction is not comparable to Washington's manslaughter in the second degree simply due to differences in the statutory language, despite the fact that it is impossible to commit the Texas offense without satisfying the elements of the Washington offense.

a. Plain Reading Of The Elements Of Garrison's Texas Manslaughter Conviction Establishes That It Necessarily Entails Criminal Negligence As Defined In Washington.

In Washington, "[a] person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person." RCW 9A.32.070(1). A person "acts

with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(d). Except for the addition of gender neutral language, Washington's definition of manslaughter in the second degree has not changed since 1975. Former RCW 9A.32.070 (1975).

In 1981, Texas's voluntary manslaughter statute stated, in relevant part, that a person commits the offense if he "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual," but acts "under the immediate influence of sudden passion arising from adequate cause." Former Tex. Penal Code §§ 19.02(a)(2), 19.04 (1973). As the Court of Appeals correctly determined, this means that the elements of Garrison's crime included that (1) Garrison committed an act with intent to cause serious bodily injury; (2) the act was objectively clearly dangerous to human life; and (3) the act caused the victim's death. Garrison, 2018 WL 1801961 at *6.

Washington law frames second degree manslaughter in terms of a defendant unreasonably failing to be aware of a

substantial risk that death may occur. Garrison, 2018 WL 1801961 at *7. Texas law frames the elements of Garrison's manslaughter conviction in terms of a defendant intending to cause serious bodily injury when committing an act that is objectively "clearly dangerous to human life." However, the necessary implication of a defendant doing an act that is objectively "clearly dangerous to human life" with the intent to cause serious bodily injury is that the defendant, at the very least, unreasonably failed to be aware of a substantial risk that death may occur.

Under Texas law, "an act clearly dangerous to human life is one that creates a substantial risk of death." Depauw v. State, 658 S.W.2d 628, 634 (Tex. App. 1983). Thus, Garrison's Texas offense required that he caused the victim's death by an act that carried a substantial risk of death. The only remaining question in evaluating criminal negligence is whether a defendant's failure to be aware of such substantial risk of death when committing the fatal act would necessarily be "a gross deviation from the standard of care that a reasonable person would exercise in the same situation." Because the act is *clearly* dangerous to human life, a reasonable person would be aware of the substantial risk of death. Moreover, a defendant who commits voluntary manslaughter in Texas does not

commit the dangerous act innocently or accidentally—he commits it with the specific intent of inflicting serious bodily injury upon the victim.

"Serious bodily injury" is defined in Texas as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Tex. Penal Code § 1.07(a)(46) (former Tex. Penal Code § 1.07(a)(43) (1979)). For a defendant to commit a fatal act that is clearly dangerous to human life *for the express purpose* of inflicting serious bodily injury upon the victim, and yet be unaware of (or disregard) the substantial risk of death, necessarily constitutes "a gross deviation from the standard of care that a reasonable person would exercise in the same situation."

In Stockwell, nonmarriage was the logical implication of the victim being no more than 10 years old. Here, criminal negligence is the logical and necessary implication of killing someone by an act clearly dangerous to human life that was done with intent to inflict serious bodily injury.

The State cannot imagine, and the Court of Appeals did not identify, any set of facts on which a reasonable jury could possibly

find that a defendant caused a victim's death by an act clearly dangerous to human life that was done with intent to inflict serious bodily injury, and yet *not* find that the defendant's failure to be aware of the substantial risk of death was a gross deviation from the standard of care that a reasonable person would exercise. There is thus, as a matter of law, no way for a defendant to commit Garrison's Texas offense without acting with criminal negligence as to the risk of death. Garrison's Texas manslaughter conviction is therefore legally comparable to Washington's manslaughter in the second degree. See In re Pers. Restraint of Arnold, 190 Wn.2d 136, 145, 410 P.3d 1133 (2018) (finding legal comparability where "there is no set of facts that would support a conviction under [the statute under which the defendant pled guilty] that would not also support a conviction" under the allegedly comparable statute).

b. Texas Statutes And Caselaw Confirm That Garrison's Texas Offense Is Narrower Than Manslaughter In The Second Degree.

The conclusion that Garrison's Texas manslaughter conviction entails criminal negligence as defined in Washington is reinforced by the fact that Texas's penal code classified voluntary

manslaughter as one of five types of "criminal homicide,"[4] and stated, "A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual." Former Tex. Penal Code § 19.01 (1973). In other words, under Texas law, all forms of homicide, including voluntary manslaughter, required proof that the defendant caused the death of an individual with some level of mens rea equal to or higher than criminal negligence. Texas's definition of criminal negligence is almost identical to, and is in fact slightly narrower than, Washington's. Compare former Tex. Penal Code § 6.03(d) (1973) with RCW 9A.08.010(d).[5]

---

[4] In 1981, the five types of criminal homicide were capital murder, murder, voluntary manslaughter, involuntary manslaughter, and criminally negligent homicide. Former Tex. Penal Code § 19.01(b) (1973). Whereas voluntary manslaughter and murder required at least the intent to cause serious bodily injury, involuntary manslaughter required only recklessly causing a death, and criminally negligent homicide required causing a death with criminal negligence, which is identical to Washington's manslaughter in the second degree. Former Tex. Penal Code §§ 19.02, 19.04, 19.05, 19.07 (1973).

[5] RCW 9A.08.010(d) states:

> A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Tex. Penal Code § 6.03(d) has been unchanged since 1973, and states:

> A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the

Consistent with this, Texas courts have determined that Texas's "criminally negligent homicide" is a lesser-included offense of Garrison's offense. Saunders v. State, 913 S.W.2d 564, 565 (Tex. Crim. App. 1995) (noting agreement that criminally negligent homicide is a lesser-included offense of former Tex. Penal Code § 19.02(a)(2)); State v. Meru, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013) (if the elements of the greater offense necessarily establish the elements of a lesser offense, the latter is a lesser-included offense). Texas's definition of criminally negligent homicide has not changed since 1973 and is functionally identical to Washington's manslaughter in the second degree. Tex. Penal Code § 19.05 (defining criminally negligent homicide as "caus[ing] the death of an individual by criminal negligence"); former Tex. Penal Code § 19.07 (1973) (same); Tex. Penal Code § 6.03(d) (1973) (defining criminal negligence slightly more narrowly than Washington does; see footnote 5 above). Thus, Texas law establishes that the elements of Garrison's Texas manslaughter conviction prove that he caused the victim's death by criminal negligence.

---

failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Both Texas law and a plain reading of the elements of Garrison's Texas manslaughter conviction and their necessary implications establish that the elements of the Texas offense satisfy, as a matter of law, the elements of Washington's manslaughter in the second degree. The two offenses are therefore legally comparable. In holding otherwise, the Court of Appeals improperly focused exclusively on the way the elements of the Texas offense are phrased rather than considering their practical effect and the relevant Texas caselaw and statutes interpreting them, and departed from this Court's precedent requiring only substantial similarity rather than identicality.

2. THE PROPER STANDARD FOR COMPARABILITY OF FOREIGN CONVICTIONS IS A MATTER OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT.

Ensuring that offenders are sentenced with a correct offender score is a matter of substantial public interest. State v. Crocker, 196 Wn. App. 730, 733 n.1, 385 P.3d 197 (2016). There is an even greater public interest in ensuring that the comparability of foreign offenses to Washington "strike" offenses is accurately assessed, so that the intent of the SRA is carried out. The Court of Appeals' refusal to acknowledge the comparability of Garrison's

Texas manslaughter conviction to Washington's second degree manslaughter goes too far down the road toward requiring identicality of offenses rather than substantial similarity. Although the opinion is unpublished, it is likely to influence future courts that consider the comparability of similar statutes. See GR 14.1. Review by this Court is needed to correct the error and clarify the proper standard.

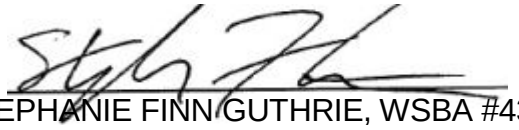
F. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to grant review of the Court of Appeals decision in this case.

DATED this 20th day of June, 2018.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 75895-1-I
	)	
Appellant,	)	(Consolidated with
	)	No. 75885-3-I)
v.	)	
	)	UNPUBLISHED OPINION
KEVIN LEE GARRISON,	)	
	)	
Respondent.	)	FILED: April 16, 2018
	)	

LEACH, J. — This is the second appeal challenging Kevin Lee Garrison's sentence. Both Garrison and the State appeal his sentence. The State challenges the trial court's conclusion that a 1981 Texas conviction for voluntary manslaughter is not comparable to a "most serious offense" in Washington and, therefore, it could not sentence Garrison as a persistent offender. Garrison challenges two provisions in his judgment and sentence about a curfew and sex offender registration.

We agree that the Texas offense is not legally comparable to manslaughter in the second degree. We do not reconsider our earlier conclusion, which is the law of this case, that the Texas offense is not factually comparable to manslaughter in the first degree or assault in the second degree. For these reasons, we affirm the trial court's conclusion that it could not sentence

Garrison as a persistent offender.

We remand, however, so the trial court can strike the community custody provision imposing a curfew and amend the sex offender registration notice. We otherwise affirm.

BACKGROUND

A jury found Garrison guilty of child molestation in the second degree, as charged.[1] At sentencing, the State presented evidence of three earlier felony convictions, including a 1981 Texas manslaughter conviction. The trial court found the Texas manslaughter conviction comparable to the Washington crime of manslaughter in the first degree, a "most serious offense" in Washington. The trial court relied on this conclusion to sentence Garrison as a persistent offender to life without the possibility of release.

On appeal, we reversed.[2] We decided that the Texas offense is not legally comparable to Washington's offense of manslaughter in the first degree or, for purposes of a "most serious offense" analysis, to Washington's assault in the second degree.[3] We also concluded that the Texas offense is not factually

---

[1] The facts of the crime are not relevant to this appeal. They are set forth in detail in our opinion in State v. Garrison, No. 71134-2-I, slip op. at 2-5 (Wash. Ct. App. Sept. 8, 2015) (unpublished), http://www.courts.wa.gov/opinions/pdf/711342.pdf.

[2] Garrison, slip op. at 1.

[3] Garrison, slip op. at 23, 28-31.

comparable to these Washington offenses.[4] Finally, after noting that the parties agreed that the Texas offense is comparable to Washington's manslaughter in the second degree, we held that the offense had "washed out" and could not be counted as a "most serious offense."[5] Thus, we held that Garrison lacked the prior convictions necessary to sentence him as a persistent offender and remanded for resentencing.[6]

On remand, the State produced evidence to show that the Texas conviction had not washed out. The trial court decided, however, that the Texas offense was not comparable to second degree manslaughter in Washington and did not reach the washout issue. Because the court decided that the Texas conviction was not comparable to a "most serious offense" in Washington, it did not sentence him as a persistent offender. The court imposed a standard range sentence.

The State appeals Garrison's sentence. It claims that the trial court should have sentenced him as a persistent offender. Garrison also appeals, challenging issues related to his sentence. This court consolidated the appeals.

---

[4] Garrison, slip op. at 23, 31.
[5] Garrison, slip op. at 31-33; RCW 9.94A.525(2).
[6] Garrison, slip op. at 33.

ANALYSIS

Persistent Offender Sentencing

First, the State challenges the trial court's conclusion that Garrison's Texas manslaughter conviction is not comparable to a "most serious offense" in Washington. We agree with the trial court.

A "persistent offender" is an offender who:

> (a)(i) Has been convicted in this state of any felony considered a most serious offense; and
>
> (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525.[7]

To be a strike offense for persistent offender sentencing, an earlier conviction must be included in the defendant's offender score and must be a "most serious offense" as defined by RCW 9.94A.030.[8] To decide whether to count an out-of-state conviction, Washington courts use a two-part test.[9] A court first considers whether the offenses are legally comparable by comparing the elements of the foreign offense with those of the Washington offense.[10] When the elements of the foreign offense are broader than the Washington offense, the

---

[7] RCW 9.94A.030(38).
[8] State v. Morley, 134 Wn.2d 588, 603, 952 P.2d 167 (1998).
[9] State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).
[10] Thiefault, 160 Wn.2d at 415.

court must decide if the offenses are factually comparable.[11] The State has the burden of proving out-of-state convictions are comparable to Washington crimes.[12] We review the classification of an out-of-state conviction de novo.[13]

Here, the law of the case doctrine prevents us from reconsidering our previous holding about factual comparability of Washington's manslaughter in the first degree and assault in the second degree. We also decide that the Texas offense is not legally comparable to manslaughter in the second degree. Thus, the State has failed to show that the Texas offense was a "most serious offense." The trial court properly decided that Garrison was not a persistent offender.

Manslaughter in the First Degree

First, the State asks us to reconsider our earlier holding that the Texas offense is not factually comparable to manslaughter in the first degree. Following the law of the case doctrine, we do not reconsider this decision. "The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation."[14] The doctrine "seeks to promote finality and efficiency in the judicial process."[15]

---

[11] Thiefault, 160 Wn.2d at 415.

[12] In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); see also Thiefault, 160 Wn.2d at 421 (Sanders, J., concurring).

[13] State v. Beals, 100 Wn. App. 189, 196, 997 P.2d 941 (2000).

[14] State v. Schwab, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008) (citing Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)).

[15] Roberson, 156 Wn.2d at 41.

But under RAP 2.5(c)(2), "[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review." Courts have recognized two applications of this exception: (1) cases where the court's earlier decision is "'clearly erroneous'" and that "'erroneous decision would work a manifest injustice to one party'" and (2) cases where there has been some intervening change in the law.[16] Even then, application of this exception is discretionary.[17] Here, the State contends that this court's conclusions were clearly erroneous because they were the result of a misunderstanding of Texas law. We disagree.

We previously concluded that the Texas offense was not legally comparable to Washington's manslaughter in the first degree.[18] To prove manslaughter in the first degree, the State had to prove that the defendant knew of and disregarded a substantial risk that a homicide may occur.[19] Texas, by contrast, does not require the same culpable mental state.[20] The State does not

---

[16] Schwab, 163 Wn.2d at 672-73 (quoting Roberson, 156 Wn.2d at 42).
[17] Schwab, 163 Wn.2d at 672.
[18] Garrison, slip op. at 23 & n.7.
[19] RCW 9A.32.060(1)(a); RCW 9A.08.010(1)(c); State v. Gamble, 154 Wn.2d 457, 467, 114 P.3d 646 (2005).
[20] Lugo-Lugo v. State, 650 S.W.2d 72, 81-82 (Tex. Crim. App. 1983).

challenge these conclusions.[21] It asserts, however, that it introduced evidence to show factual comparability.

We previously rejected the State's factual comparability argument because we decided that the State had not introduced facts that show comparability. To decide factual comparability, courts examine the conduct underlying the offense and may consider the "facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt."[22] The State had introduced the charging information and the judgment and sentence to show that Garrison had the requisite mental state and establish factual comparability. The information alleged that Garrison "intending to cause serious bodily injury to [the victim], intentionally and knowingly commit[ed] an act clearly dangerous to human life, to-wit: striking the head and body of [the victim], thereby causing the death of [the victim]." (Emphasis added.) Thus, the State argued, the information established facts to show the necessary mental state. But as we

---

[21] The State cites an unpublished portion of an opinion by this court for its holding that a 1992 Texas conviction for voluntary manslaughter is comparable to Washington's manslaughter in the first degree. State v. Jordan, 158 Wn. App. 297, 241 P.3d 464 (2010), aff'd, 180 Wn.2d 456, 325 P.3d 181 (2014). But this decision is not relevant to this case for several reasons, including the fact that Jordon ruled on the question of legal comparability of manslaughter in the first degree, which is not before the court. The State conceded this issue in the first appeal. See Garrison, slip op. at 23 ("The State concedes on appeal that the prong of Texas's voluntary manslaughter statute under which Garrison was convicted is not legally comparable to Washington's offense of manslaughter in the first degree.").

[22] Thiefault, 160 Wn.2d at 415.

stated in State v. Thomas,[23] sentencing courts may not simply assume the facts in a charging document that are not directly related to the elements of the charged offense have been proved or admitted. To conclude a defendant admits to the facts in a charging document when he pleads guilty, the court must consider the effect of the guilty plea under the applicable state law.[24]

Relying on Thomas, we decided that the charging document did not establish the necessary facts.[25] We reasoned that under Texas law, a defendant does not admit the charging allegations with a guilty plea.[26] We relied on the Texas decision Menefee v. State.[27]

> In Texas, on a plea of guilty before a judge, "the defendant may consent to the proffer of evidence in testimonial or documentary form, or to an oral or written stipulation of what the evidence against him would be, without necessarily admitting to its veracity or accuracy." Menefee v. State, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). Alternatively, a defendant "may enter a sworn written statement, or may testify under oath in open court, specifically admitting his culpability or at least acknowledging generally that the allegations against him are in fact true and correct." Menefee, 287 S.W.3d at 13.
>
> The State produced no evidence herein of an evidentiary stipulation or "judicial confession" in Garrison's Texas case. The Texas paperwork related to the manslaughter conviction sets forth

---

[23] 135 Wn. App. 474, 486, 144 P.3d 1178 (2006).

[24] See State v. Releford, 148 Wn. App. 478, 488, 200 P.3d 729 (2009) (concluding that an Oklahoma offense was factually comparable to a Washington offense because, in Oklahoma, a plea of guilty admits the facts pleaded in the information).

[25] Garrison, slip op. at 23-26.

[26] Garrison, slip op. at 23-26.

[27] 287 S.W.3d 9 (Tex. Crim. App. 2009).

> no underlying facts of the crime that were admitted, stipulated to, or proven beyond a reasonable doubt.[28]

The State contends that our reliance on Menefee is misplaced. It cites a number of other Texas cases, which it claims stand for the proposition that a guilty plea has the effect of admitting all material facts alleged in the formal criminal charge.[29] These cases cite Ex parte Williams.[30]

Williams is consistent with Menefee and does not undermine our earlier conclusion. Williams stated, "The entry of a valid plea of guilty has the effect of admitting all material facts alleged in the formal criminal charge."[31] But Williams made this statement while explaining the federal constitutional requirement, so it does not undermine our earlier interpretation of Texas law.[32] Williams observed that Texas has an additional procedural safeguard, and its explanation about the different standards for corroborating evidence for a guilty plea supports our interpretation.[33] In a misdemeanor case, for example, a defendant admits every

---

[28] Garrison, slip op. at 25-26.

[29] E.g. Torres v. State, 493 S.W.3d 213, 217 (Tex. App. 2016); Flores-Alonzo v. State, 460 S.W.3d 197, 203 (Tex. App. 2015); Ex parte Jessep, 281 S.W.3d 675, 679 (Tex. App. 2009); Tijerina v. State, 264 S.W.3d 320, 322-23 (Tex. App. 2008). The State cites two Texas cases in particular, but they also do not support its position. First, Jessep was a habeus corpus petition where legal sufficiency of evidence could not be challenged and, thus, was not at issue. 281 S.W.3d at 680. Second, in Tijerina, the defendant had judicially confessed to the crime, thus satisfying the State's factual burden. 264 S.W.3d at 324.

[30] 703 S.W.2d 674, 682 (Tex. Crim. App. 1986).

[31] Williams, 703 S.W.2d at 682.

[32] Williams, 703 S.W.2d at 682.

[33] Williams, 703 S.W.2d at 678.

element of an offense in a guilty plea, with or without evidence to support the plea.[34] The same is true in felony cases where a defendant pleads guilty before a jury.[35] By contrast, as occurred in this case, and as Menefee explained, when a defendant enters a plea of guilty before the court, the State must offer sufficient evidence to support the judgment.[36] Williams acknowledges the same factual burden that we considered before. Thus, Williams supports rather than undermines our decision in Garrison's first appeal.

Because the State introduced no evidence of facts that were admitted, stipulated to, or proved beyond a reasonable doubt in the Texas proceeding, the State cannot establish factual comparability. The State does not show that this court's previous decision was clearly erroneous. Further, the State fails to explain how it produces a manifest injustice.[37] For these reasons, we do not review our earlier decision on factual comparability of Washington's manslaughter in the first degree.

---

[34] Williams, 703 S.W.2d at 678.
[35] Williams, 703 S.W.2d at 678.
[36] Williams, 703 S.W.2d at 678.
[37] Roberson, 156 Wn.2d at 42 (stating that "application of the [law of the case] doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party" (emphasis added)).

Assault in the Second Degree

The State also asks us to reconsider our earlier conclusion that the conviction is factually comparable to assault in the second degree. But we decline to do so for the same reason we decline to reconsider the factual comparability of manslaughter in the first degree.

We previously held that for purposes of the "most serious offense" inquiry, the Texas offense was not legally comparable to assault in the second degree in Washington.[38] We observed that the injury component of the Texas offense could be shown by a protracted loss or impairment, regardless of severity, but Washington required a substantial loss or impairment.[39] We decided that because the State produced no evidence of facts of the Texas offense that were admitted, stipulated to, or proved beyond a reasonable doubt, the State could not establish factual comparability of Washington's assault in the second degree and the Texas offense. As explained above, the State has not shown this decision was clearly erroneous.

Manslaughter in the Second Degree

Next, the State asserts that the Texas offense is comparable to manslaughter in the second degree. As a preliminary matter, both parties rely on the law of the case doctrine to assert that the trial court was bound by holdings in

---

[38] Garrison, slip op. at 28-31.
[39] Garrison, slip op. at 29-30.

our first opinion. Because our earlier decision does not include a holding about comparability of manslaughter in the second degree, the law of the case doctrine does not apply.

To support its position, the State relies on our statement that "[t]he parties agree that Garrison's 1981 Texas voluntary manslaughter conviction is comparable to Washington's offense of manslaughter in the second degree."[40] The State mischaracterizes this statement as a holding. We accepted the parties' agreement that the offenses are comparable to reach the washout issue on which we resolved the case.[41] The law of the case doctrine does not bind the trial court in the way the State suggests.

Garrison also contends that the law of the case doctrine binds the trial court on the issue of legal comparability of manslaughter in the second degree. We disagree with this contention as well. In our first opinion, we noted the State's concession that the Texas offense is not legally comparable to manslaughter in the first degree. In a footnote, we explained why we agreed.

> We agree. Under the Texas statute, no culpable mental state attaches to the result. By contrast, the Washington statute does require a culpable mental state—recklessness—with respect to the result. A person could be convicted of Texas voluntary manslaughter without having any culpable mental state connected to the result of death, whereas the Washington offense of first degree manslaughter requires that a person recklessly cause a

[40] Garrison, slip op. at 31.
[41] Garrison, slip op. at 31-33.

> person's death. Thus, the Texas statute is broader than the Washington statute, and the offenses are not legally comparable.[42]

Garrison asserts that our conclusion that no mental state attaches to the result also applies to manslaughter in the second degree. But in the first appeal, we considered the culpable mental state of first degree manslaughter, which is recklessness. The culpable mental state for manslaughter in the second degree is criminal negligence.[43] Thus, we cannot rely on our limited earlier analysis of this issue and must inquire further.

Because the law of the case doctrine does not apply, we must consider whether the Texas offense is legally comparable to manslaughter in the second degree. To determine legal comparability, a court must decide if the elements of the foreign offense are substantially similar to the elements of the Washington offense.[44] Offenses are not legally comparable if the elements are different or if the Washington statute defines the offense more narrowly than the foreign statute does.[45] To decide whether it can include the conviction in the offender score analysis, the trial court must compare the elements of the out-of-state crime with the elements of potentially comparable Washington crimes as defined

---

[42] Garrison, slip op. at 23 n.7.

[43] RCW 9A.32.070(1). "[C]riminal negligence is distinct from recklessness." State v. Smith, 31 Wn. App. 226, 230, 640 P.2d 25 (1982).

[44] Thiefault, 160 Wn.2d at 415.

[45] State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005).

on the date the out-of-state crime was committed.[46] To decide if the conviction is a "most serious offense," the court compares the foreign offense to Washington offenses that would have constituted "most serious offenses" at the time that the defendant committed the offense for which he is being sentenced.[47] Here, the relevant language is substantially the same at the time Garrison committed the Texas offense and current offense. Thus, only one legal comparability analysis is required.[48]

In 1981, the Texas offense of "voluntary manslaughter" was defined as follows: "A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 19.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause."[49] The referenced "Section 19.02" required the State to prove that the defendant intended to "cause serious bodily injury" and committed an act "clearly dangerous to human life."[50] In Lugo-Lugo v. State,[51] Texas's highest criminal court clarified that the State need prove only that the act was objectively clearly dangerous to human life and was done with

---

[46] Lavery, 154 Wn.2d at 255.

[47] State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

[48] Compare RCW 9A.08.010(1)(d) with former RCW 9A.08.010(1)(d) (1975) and RCW 9A.32.070(1) with former RCW 9A.32.070(1) (1975) (adding gender neutral language).

[49] Former TEX. PENAL CODE ANN. § 19.04(a) (1973).

[50] Former TEX. PENAL CODE ANN. § 19.02(a) (1973).

[51] 650 S.W.2d 72, 81-82 (Tex. Crim. App. 1983).

intent to cause serious bodily injury. The State did not need to prove that the defendant knew the act was clearly dangerous to human life. [52]

For Washington's manslaughter in the second degree, however, the culpable mental state attaches to the result. In Washington, "[a] person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person."[53] A person

> acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.[54]

Division Two has reasoned that criminal negligence for second degree manslaughter requires failure to be aware of a substantial risk that a homicide may occur.[55] As Division Two observed, this is consistent with the reasoning of our Supreme Court in State v. Gamble.[56] Gamble considered the mens rea element of first degree manslaughter.[57] First degree manslaughter requires that

---

[52] Lugo-Lugo, 650 S.W.2d at 81-82.

[53] RCW 9A.32.070(1).

[54] RCW 9A.08.010(d).

[55] State v. Latham, 183 Wn. App. 390, 405-06, 335 P.3d 960 (2014) (assuming without holding that criminal negligence for second degree manslaughter required a failure to be aware of a substantial risk that a *homicide* may occur) (quoting State v. Henderson, 180 Wn. App. 138, 149, 321 P.3d 298 (2014)); Gamble, 154 Wn.2d at 467-68.

[56] 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005).

[57] Gamble, 154 Wn.2d at 467-68.

the defendant "recklessly cause[d] the death of another person."[58] A person acts recklessly when he "knows of and disregards a substantial risk that a wrongful act may occur."[59] Because the "wrongful act" in manslaughter in the first degree is homicide, Gamble reasoned that Washington law required the State to prove that the defendant "'[knew] of and disregard[ed] a substantial risk that a [*homicide*] may occur.'"[60] We apply this logic to conclude that to prove manslaughter in the second degree, the State must show that the defendant failed to be aware of a substantial risk that a homicide may occur.

Because Washington's manslaughter in the second degree requires a culpable mental state in connection with the homicide and the Texas offense does not, Washington law is narrower and the offenses are not legally comparable.[61]

The State passingly asserts that the Texas offense is factually comparable to manslaughter in the second degree in Washington. But, as we have explained, the State introduced no facts that were admitted, stipulated to, or

---

[58] RCW 9A.32.060(1)(a).

[59] RCW 9A.08.010(1)(c).

[60] Gamble, 154 Wn.2d at 467-68 (alterations in original) (quoting RCW 9A.08.010(c)).

[61] Garrison also contends that the Texas conviction is not comparable to the Washington offense of second degree manslaughter because Texas law is broader on the element of causation. But we need not consider this argument because we decide that the offenses are not comparable on a difference basis.

proved beyond a reasonable doubt. Thus, we have no information on which we could base a conclusion that the offenses are factually comparable.

Community Custody Condition

Garrison challenges the following community custody condition: "Abide by a curfew of 10pm – 5am unless directed otherwise. Remain at registered address or address previously approved by CCO [community custody officer] during these hours."[62] Garrison contends and the State concedes that the court did not have statutory authority to impose this condition because it is not crime-related. The Sentencing Reform Act of 1981[63] authorizes the trial court to impose "crime-related prohibitions and affirmative conditions" as part of a sentence.[64] A condition is "crime-related" if it "prohibit[s] conduct that directly relates to the circumstances of the crime for which the offender has been convicted."[65] "This court reviews a trial court's imposition of crime-related community custody conditions for abuse of discretion."[66] Here, the crime occurred in the home where Garrison resided. Thus, the curfew is not directly

---

[62] Garrison raises this challenge for the first time on appeal. But we permit defendants to challenge illegal or erroneous sentences for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

[63] Ch. 9.94A RCW.

[64] State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014) (quoting former RCW 9.94A.505(8) (1975), recodified as RCW 9.94A.505(9)).

[65] RCW 9.94A.030(10).

[66] State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

related to the crime. We agree that the trial court abused its discretion when it imposed this prohibition.

Sex Offender Registration

Next, Garrison contends that the trial court improperly linked the end of Garrison's sex offender registration requirement to action by the court or sheriff's office. A person convicted of a sex offense must register with the county sheriff.[67] Because he was convicted of a class B felony, Garrison's duty to register ends 15 years after release from confinement if he spends 15 years in the community without being convicted of a disqualifying offense.[68] However, the court included the following statement in the notice of registration requirements, appendix J to the judgment and sentence: "Your duty to register does not end until you have obtained a court order specifically relieving you of the duty to register or you have been informed in writing by the sheriff's office that your duty to register has ended."

As Garrison asserts and the State admits, under RCW 9A.44.140(2), the duty to register ends automatically by operation of law after 15 years without committing a disqualifying offense. Courts are required to notify offenders of the

---

[67] RCW 9A.44.130(1).

[68] RCW 9A.44.086(2) ("Child molestation in the second degree is a class B felony."); former RCW 9A.44.140(2) (LAWS OF 2010, ch. 267 § 4).

registration requirement.[69] When they fail to provide this notice, the remedy is to provide the notice promptly upon discovery of the oversight.[70] We hold that the trial court must also correct an error in the notice by promptly providing accurate notice to the defendant. The trial court should correct this inaccuracy on remand.

CONCLUSION

We affirm in part and reverse in part. The trial court correctly decided that the Texas offense is not legally comparable to a most serious offense in Washington and cannot be used as a predicate offense for the purpose of a persistent offender sentence. We reverse on the community custody and sex offender registration issues, however, and remand for further proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Mann, A.C.J.

Schindler, J.

[69] "The court shall provide written notification to any defendant charged with a sex offense or kidnapping offense of the registration requirements of RCW 9A.44.130. Such notice shall be included on any guilty plea forms and judgment and sentence forms provided to the defendant." RCW 10.01.200.

[70] State v. Munds, 83 Wn. App. 489, 494-95, 922 P.2d 215 (1996); State v. Clark, 75 Wn. App. 827, 833, 880 P.2d 562 (1994).

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

June 20, 2018 - 2:07 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Appellant v. Kevin Lee Garrison, Respondent (758951)

The following documents have been uploaded:

- PRV_Petition_for_Review_20180620140615SC575714_2638.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 75895-1 - Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- ann.summers@kingcounty.gov
- grannisc@nwattorney.net

Comments:

Sender Name: Bora Ly - Email: bora.ly@kingcounty.gov
Filing on Behalf of: Stephanie Finn Guthrie - Email: stephanie.guthrie@kingcounty.gov (Alternate Email:)

Address:
King County Prosecutor's Office - Appellate Unit
W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
Phone: (206) 477-9499

Note: The Filing Id is 20180620140615SC575714