FILED
Court of Appeals
Division I
State of Washington
5/19/2020 4:20 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
5/20/2020
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 98570-7
(COA No. 79196-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY MARTIN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Mr. Martin petitions this Court for review of the Court of Appeals opinion in *State v. Martin*, No. 79196-6-I. RAP 13.1(a), 13.3(a)(1), (b), 13.4(b). The opinion (filed April 20, 2020) is attached.[1]

B. ISSUES PRESENTED FOR REVIEW

1. RCW 9.94A.525, the Sixth and Fourteenth Amendments, and article I, sections 3 and 22 prohibit courts from including foreign convictions in a defendant's offender score except where the State proves the convictions are comparable to a Washington felony. The Court of Appeals rejected Mr. Martin's claim he received ineffective assistance of counsel when his attorney agreed to an offender score with three foreign convictions included in it because it found the three foreign convictions were comparable to Washington felonies. Where the court looked beyond the elements of the offenses to Mr. Martin's conduct and relied on an initial indictment that was later superseded, should this Court accept review because the Court of Appeals' opinion conflicts with *In re Personal Restraint Petition of Lavery*[2]?[3] RAP 13.4(b)(1), (3), (4).

[1] Mr. Martin has three separate direct appeals: 77908-7-I, 79191-5-I, and this case (79196-6-I). In this case (79196-6-I), the Court of Appeals resolved the first issue by referring to the opinion in Mr. Martin's first case, 77908-7-I. Therefore, that opinion is attached in the Appendix as well.

[2] 154 Wn.2d 249, 111 P.3d 837 (2005).

[3] The Court is considering this issue in the appeal from Mr. Martin's first case, 77908-7-I, currently pending on this Court's June 2, 2020, motions calendar. *State v. Martin*, 98180-9.

2. RCW 46.20.285(4) requires the Department of Licensing to revoke a driver's license where the court finds the defendant "used" a motor vehicle in the commission of the felony for which he was convicted. In *State v. Batten*,[4] this Court held a finding of use requires proof of "a sufficient relationship" between the motor vehicle and the commission of the crime and that the defendant employed the car to commit the crime. Here, the Court of Appeals affirmed the finding based on the mere fact police found the firearm in the trunk without any proof Mr. Martin used the car to further the possession or any other relationship between the possession and the car. Should this Court grant review where the Court of Appeals misapplied *Batten* and found use where the car was merely incidental to the possession? RAP 13.4(b)(1), (3).

3. Courts must give detained individuals credit for time served, and nothing prevents a court from crediting an individual for time served on one case even if he is also serving a sentence on a separate criminal matter. Here, Mr. Martin's attorney agreed to his "release" on this case, resulting in his transfer from the county jail to another facility in the state, in order to alleviate the financial burden to the county of providing for Mr. Martin's medical care. At sentencing, the court did not order Mr. Martin

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[4] 140 Wn.2d 362, 997 P.2d 350 (2000).

receive credit for the time he was "released" on this case even though he remained in State custody. Should this Court accept review of this matter of substantial public interest? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Bradly Martin pleaded guilty to possession of heroin and unlawful possession of a firearm. CP 114-33; 8/30/17RP 1-6. As part of his plea, Mr. Martin agreed with the State's presentation of his criminal history, resulting in an offender score of ten. CP 115, 125, 130-31. Included in Mr. Martin's criminal history were three out-of-state prior convictions. CP 130. Mr. Martin's attorney agreed to the criminal history without challenging the comparability of the three out-of-state prior convictions.

Mr. Martin later moved to withdraw his plea with the assistance of new counsel. CP 24-27; 10/26/17RP 6. Mr. Martin argued his attorney was ineffective for coercing him to plead guilty and failing to review the plea materials with Mr. Martin, resulting in an involuntary plea. CP 24-27; 2/9/18RP 31-34. His new attorney did not challenge the offender score or the comparability of the three foreign convictions. The court denied Mr. Martin's motion to withdraw his plea. CP 22-23.

After the court denied Mr. Martin's motion, the State moved the court to release Mr. Martin on his personal recognizance. CP 254-59. Mr. Martin, who was gravely ill and in the hospital, was already a sentenced

prisoner on a separate case. CP 254-55. The prosecutor sought Mr. Martin's release so he would be transferred from county custody to state custody, thereby avoiding the "unduly burdensome [cost] to Snohomish County Corrections." CP 255. Mr. Martin's attorney agreed to this without consulting him, and the court ordered Mr. Martin released on his personal recognizance. CP 248-53, 256-59. As a result, Mr. Martin received no jail credit for the time between May 15, 2018, when the court "released" him, and October 1, 2018, when the court reset bail. CP 246-53; 10/1/18RP 52.

The court ultimately sentenced Mr. Martin to 12 months and 1 day of confinement and 12 months of community custody on the possession of heroin conviction and to 51 months of confinement on the firearm conviction. CP 12-13. The court included in Mr. Martin's offender score the three foreign convictions. CP 9, 130-31. The court did not credit Mr. Martin for the 139 days between May 15 and October 1, 2018, when Mr. Martin remained in custody on this case but not receiving jail credit because the court had "released" him on his personal recognizance at the State's request to avoid the costs to the county jail. CP 12. In addition, the court found Mr. Martin used a motor vehicle in the commission of both offenses, triggering a one-year revocation of his driver's license pursuant to RCW 46.20.285. CP 9, 17.

D. ARGUMENT

1. The Court of Appeals' holding that the three foreign convictions were comparable to Washington felonies conflicts with decisions of this Court and the Court of Appeals.

The court sentenced Mr. Martin based on a sentencing range calculated with an offender score of ten. CP 10. In calculating the offender score, the court included three foreign convictions: (1) a 1973 California robbery; (2) a 1997 federal possession of cocaine, methamphetamine, and marijuana; and (3) a 1997 federal felon in possession of a firearm. CP 9. On appeal, Mr. Martin argued his attorney was ineffective for agreeing to an offender score with these prior convictions because the State failed to prove the three convictions were comparable to Washington felonies. RCW 9.94A.525(3); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

The Court of Appeals rejected Mr. Martin's argument by referring to its opinion in *State v. Martin*, 77908-7-I. Opinion at 1, 4-5. The Court found Mr. Martin did not receive ineffective assistance of counsel when his attorney failed to challenge the inclusion of the three foreign offenses. Because the opinion relies on the analysis in *Martin*, 77908-7-I, Mr. Martin refers to that opinion below, for which his petition for review is pending. Opinion at 1, 4-5

In *Martin*, 77908-7-I, the Court of Appeals engaged in a comparability analysis for all three offenses, found each offense comparable, and rejected Mr. Martin's ineffective assistance of counsel claim. *Martin*, 77908-7-I, Opinion at 13-17. However, in assessing the two federal offenses, the court, like the prosecution, looked beyond the elements of the offense to the defendant's conduct and considered facts contained in the original indictment, not the superseding indictment on which the judgment and sentence was based. *Martin*, 77908-7-I, Opinion at 13-17.

"[T]he elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven." *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). "[F]acts in a charging document that are untethered to the elements of a crime are outside the proper scope of what courts may consider." *State v. Davis*, 3 Wn. App. 2d 763, 782, 418 P.3d 199 (2018). Therefore, courts may not assume facts unrelated to elements that were proven or admitted even where those facts are contained within the indictment or other documents. *Descamps v. United States*, 570 U.S. 254, 277-78, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

The court agreed the federal controlled substance and firearm statutes were broader than the relevant Washington statutes but found the offenses "factually comparable." *Martin*, 77908-7-I, Opinion at 15-17. But to do so, the court relied on the original indictment to establish that Mr. Martin was convicted based on specifically identified firearms and controlled substances. CP 167-69. However, this was wrong because the judgment clearly states Mr. Martin pleaded guilty based on "a Superseding Indictment." CP 171. The State never provided this superseding indictment to the sentencing court below, instead relying on the original indictment. CP 167-71. Nor does the judgment contain facts beyond the statutory provisions and titles. CP 171. Without the superseding indictment, the State failed to establish what facts Mr. Martin actually admitted. Therefore, the State has failed to prove Mr. Martin pleaded guilty based on a qualifying firearm or controlled substances. *Descamps*, 570 U.S. at 277-78.

In addition, the Court of Appeals disregarded this Court's holding in *In re Personal Restraint Petition of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005). As *Lavery* makes clear, "Where the foreign statute is broader than Washington's, that examination [of underlying facts] may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense." 154

Wn.2d at 257. For example, on the controlled substance conviction, if Mr. Martin actually possessed only marijuana, that would be sufficient to establish culpability under the federal offense, and so Mr. Martin would have had no reason to challenge the inclusion of cocaine. However, marijuana would not establish culpability under the relevant Washington felony offense. Under such circumstances, this Court has found the inclusion of such information insufficient to establish comparability. *See, e.g., State v. Ortega*, 120 Wn. App. 165, 84 P.3d 935 (2004) (declining to find Texas offense comparable where age of victim not proven beyond a reasonable doubt).

The State failed to provide the superseding indictment on which the plea was based. Because *any* of the three listed controlled substances would be sufficient to establish his culpability for the federal misdemeanor, Mr. Martin had no incentive to contest their inclusion on the judgment or as the basis of his plea. *Descamps*, 570 U.S. at 270; *Lavery*, 154 Wn.2d at 257. Therefore, the State failed to prove the offenses were comparable.

In addition, the court rejected Mr. Martin's challenge to the comparability of the robbery offense because it found Mr. Martin relied on a difference in the definition of an element, not on a difference in the element itself. *Martin*, 77908-7-I, Opinion at 13-14. But where the

meaning of the elements are different, they are not comparable, even if the same word is used. Therefore, the meaning of the elements is crucial to the comparison, and a "definitional" statute may provide information necessary to the comparison. Moreover, what determines if something is an element is not whether it is or is not labeled "definitional" but whether it is a fact "necessary to establish the very illegality of the behavior charged." *State v. Pry*, 194 Wn.2d 745, 755, 452 P.3d 536 (2019) (internal quotations omitted).

At the time of his offense, California defined robbery as, "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal. Penal Code § 211. In addition, "fear" was defined as, "The fear of an unlawful injury to the person or the property of the person robbed, or of any relative of his or member of his family," or, "The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." Cal. Penal Code § 212. Thus, the California statute required fear of immediate injury only when the fear is of injury to another person present during the robbery. The statute contained no temporal requirement of fear of immediate injury when the fear is to the person being robbed himself or

a relative. *Compare* CA Penal Code § 212 subsection (1) *with* subsection (2).

Washington law, conversely, required the fear be of a particular kind – fear of immediate or future injury – in *all* cases. Former RCW 9.75.010 (repealed by Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.92.010, eff. July 1, 1976). Therefore, the court erred in finding the two statutes were comparable.

For all these reasons, the State failed to establish comparability of any of these foreign convictions, and either the court erred in including them in Mr. Martin's offender score or he received ineffective assistance of counsel when his attorney failed to contest their inclusion. This Court should accept review. RAP 13.4(1), (3), (4).

2. The Court of Appeals' opinion conflicts with this Court's decision in *Batten* because it affirms a finding Mr. Martin used a motor vehicle in the commission of the possession of a firearm offense absent proof of a nexus between the vehicle and the possession.

RCW 46.20.285(4) requires the Department of Licensing to revoke a person's driver's license following their conviction for a felony if the court finds the person "used" a motor vehicle in the commission of that felony. In cases where a person possesses a prohibited item while in a motor vehicle, this Court has interpreted "used" to require "a sufficient nexus" between the person's possession of the prohibited item and the use

of the motor vehicle. *State v. Batten*, 140 Wn.2d 362, 365-66, 997 P.2d 350 (2000).

Merely possessing a prohibited item while being present in a motor vehicle is insufficient. Rather, the defendant must "employ" the motor vehicle "in accomplishing the crime." *State v. Hearn*, 131 Wn. App. 601, 609-10, 128 P.3d 139 (2006) (internal quotations omitted). Only where the person uses the vehicle as "an instrumentality of the crime . . . to carry out the crime" does the State establish a sufficient nexus between the vehicle and the prohibited items to satisfy the statute. *State v. B.E.K.*, 141 Wn. App. 742, 748, 172 P.3d 365 (2007).

Here, the Court of Appeals affirmed the finding that Mr. Martin used a motor vehicle in the commission of the unlawful possession of a firearm offense.[5] Opinion at 7-9; CP 9, 17. However, an insufficient nexus exists between Mr. Martin's possession of the firearm and his use of the motor vehicle. The court relied on the fact police found the firearm in the locked trunk of the car. Opinion at 8. But an item's location in a car alone does not establish a sufficient nexus between the crime and the car to satisfy "use."

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[5] The Court of Appeals reversed the finding the Mr. Martin used a motor vehicle in the commission of the possession of a controlled substance offense. Opinion at 9.

The Court of Appeals affirmed based on nothing more than the presence of the firearm in the trunk of the car. Opinion at 7-9. This Court requires more. In *Batten*, the Court upheld the use finding where the defendant possessed a weapon within the car. 140 Wn.2d at 366. But there, the defendant admitted he was using his car to store, conceal, and transport the weapon. 140 Wn.2d at 363-64. He also admitted he kept the weapon in his car for several days. *Id.* This Court relied on those admissions, plus the location of the weapon hidden in the car's console, to find the defendant "used" the vehicle in the commission of the possession offense. *Id.*

Mr. Martin's case is more like *Hearn*. In *Hearn*, the defendant was charged with possession of a controlled substance. 131 Wn. App. at 610. Following several traffic stops, the police found drugs in the defendant's vehicle among her personal effects. *Id.* at 605-06. There was no evidence she was using the vehicle to store and conceal the drugs. The court held "the drugs did not have a reasonable relation to the operation of the vehicle and the use of the vehicle did not contribute in some reasonable degree to the commission of the crime." *Id.* at 611.

Here, like *Hearn* and unlike *Batten*, additional indicia that Mr. Martin "used" the car to accomplish the possession is absent. No evidence establishes Mr. Martin was using the car to store and conceal the firearm.

Mr. Martin made no such admission. And the firearm's location in the trunk, as opposed to the cabin, fails to demonstrate Mr. Martin used the car to possess the firearm. The police merely stated they recovered the firearm from the trunk of the car. CP 134.

Mr. Martin did not use his motor vehicle in the commission of the offense. Instead, Mr. Martin's driving of his car was "merely incidental" to his possession of a firearm. *State v. Wayne*, 134 Wn. App. 873, 875, 142 P.3d 1125 (2006). This Court should accept review because the Court of Appeals opinion conflicts with this Court's decision in *Batten*. RAP 13.4(b)(1).

3. The Court of Appeals' opinion denying a detained defendant jail credit because he was "released" to state custody to alleviate a financial burden to the county warrants review as a matter of substantial public interest.

A defendant is entitled to credit for the time he serves in custody on a case before the imposition of the sentence towards his eventual sentence. U.S. Const. amend. XIV; Const. art. I, §§ 3, 12; RCW 9.94A.505(6); *In re Pers. Restraint Petition of Costello*, 131 Wn. App. 828, 830, 129 P.3d 827 (2006). A court must give a person credit for the time confined prior to sentence where he was confined only on that case. RCW 9.94A.505(6). Moreover, nothing prohibits a court from giving a

person credit where he remains incarcerated on both a pre-sentence and a post-sentence matter.

In this case, Mr. Martin was in custody on three cases, two pre-sentence and one post-sentence. The court "released" Mr. Martin on the two pre-sentence cases. CP 246-47, 252-53; 10/1/18RP 52. Relying on *State v. Lewis*, the Court of Appeals affirmed the denial of credit for the time while Mr. Martin was "released" but still in custody because it held he was not constitutionally entitled to that time. Opinion at 6 (citing *State v. Lewis*, 184 Wn.2d 201, 355 P.3d 1148 (2015)).

The Court's reliance on *Lewis* does not resolve the issue. In *Lewis*, this Court rejected the defendant's equal protection challenge to the calculation of his multiple sentences and held he was not constitutionally entitled to credit on one case when he is serving a sentence on a different case. 184 Wn.2d at 205-06. But nothing in *Lewis* precludes a court from granting a defendant credit for multiple concurrent sentences in both pre-sentence and post- sentence phases.

Even if Mr. Martin was not constitutionally entitled to receive credit for this time, the court was permitted to order he receive credit. This is not, for example, a case where the court imposed consecutive sentences, in which case it would be appropriate for Mr. Martin to receive credit only on one cause number. *See, e.g., Costello*, 131 Wn. App. at

834. Mr. Martin did not voluntarily absented himself from confinement, in which case he could not receive credit. *See, e.g.,* RCW 9.94A.171(1). And Mr. Martin is not arguing he should receive credit on a case where he was never in custody. *See, e.g., State v. Stewart*, 136 Wn. App. 162, 166, 149 P.3d 391 (2006) (holding defendant not entitled to credit on each of six cases for time he was not actually charged and in custody on all six). Mr. Martin is simply asking to receive credit for time he was in custody but transferred from county to state custody due to his "release."

Here, Mr. Martin's attorney agreed to his "release" to avoid costs to the county jail even though Mr. Mr. Martin remained incarcerated. CP 254-59. The court's order "releasing" Mr. Martin on bail when he was still in custody deprived him of his ability to receive credit for 139 days between May 15 and October 1, 2018. By agreeing to his "release," Mr. Martin's attorney all but guaranteed he would not receive credit for that time. The court could have ordered Mr. Martin receive jail credit for the time he was incarcerated on this case but "released" to State custody, even if it was not constitutionally required to. Therefore, Mr. Martin's attorney was ineffective in agreeing to his release. The Court of Appeals erred in rejecting Mr. Martin's challenge. This Court should accept review. RAP 13.4(b)(4).

E. CONCLUSION

For the reasons set forth above, Bradley Martin respectfully requests this Court grant review.

DATED this 19th day of May, 2020.

Respectfully submitted,

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APPENDIX A

April 20, 2020, Opinion

State v. Martin, 79196-6-I

FILED
4/20/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRADLEY MICHAEL MARTIN, Appellant.	No. 79196-6-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — Bradley Martin pleaded guilty to one count of possession of a controlled substance and one count of unlawful possession of a firearm. He appeals his Judgment and Sentence, claiming (1) his attorney performed ineffectively by not arguing for a lower offender score, (2) the trial court erred by failing to give him credit for time served for the time between the court releasing him and sentencing him, (3) we should amend his Judgment and Sentence to strike the provision imposing interest and to add a statement protecting his social security disability benefits, and (4) the court erred by finding he used a motor vehicle in the commission of the crimes.

We previously rejected Martin's ineffective assistance of counsel claim in State v. Martin, No. 77908-7-I (Wash. Ct. App. Dec. 16, 2019) (unpublished) http://www.courts.wa.gov/opinions/pdf/779087.pdf. Martin raises the same arguments now. We agree with the analysis in our previous decision and again reject his ineffective assistance claim. We also reject Martin's request for credit

Citations and pin cites are based on the Westlaw online version of the cited material.

for time served because he was confined for another conviction during the time period at issue, and determine the court did not err by finding he used a motor vehicle in the commission of unlawful possession of a firearm because he stored the weapon in the trunk. But because the police found the heroin on Martin's person, the court erred by finding he used a vehicle in the commission of possession of a controlled substance. Accordingly, we affirm in part and reverse in part. Additionally, we remand for the trial court to amend the Judgment and Sentence to strike the statement regarding interest and to add a provision indicating that any funds subject to the Social Security Act's antiattachment statute[1] may not be used to satisfy his legal financial obligations.

I. BACKGROUND

Marysville police stopped Martin on March 11, 2017 because his vehicle displayed expired registration. Because Martin's license was suspended, the police arrested him. A search incident to arrest yielded heroin on Martin's person. Later, after obtaining a search warrant, the police discovered a firearm in the trunk.

On August 30, 2017, Martin pleaded guilty to one count of possession of a controlled substance and one count of unlawful possession of a firearm in the second degree. As part of the plea, Martin agreed with the State's understanding of his criminal history, which included a 1974 California conviction for robbery, a 1999 federal conviction for possession of cocaine, and a 1999 federal conviction for felon in possession of a firearm.

[1] 42 U.S.C. § 407(a).

Through new counsel, Martin moved to withdraw his plea on January 26, 2018. Martin claimed that the court should permit him to withdraw his plea agreement under CrR 4.2(f)[2] to correct a manifest injustice. Martin argued that his attorney had failed to review his plea agreement with him, including his criminal history and offender score. The court denied Martin's motion, determining that he made his plea knowingly, voluntarily, and intelligently.

On May 15, 2018, the State moved to release Martin on his personal recognizance prior to his sentencing. But because on December 7, 2017 the court had sentenced Martin to 63 months of confinement in a separate case, releasing him would place him in the custody of the Department of Corrections, as opposed to releasing him to the community. The State explained that it sought to arrange for Martin's release because, as he was in the hospital, "the expense associated with a lengthy hospital stay [was] unduly burdensome to Snohomish County Corrections." Martin's attorney "[was] in agreement with the State's motion." The court ordered Martin's release.

On October 12, 2018, the court sentenced Martin to 12 months and one day of confinement and 12 months of community custody on count one (heroin

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[2] CrR 4.2(f) provides:

> **(f) Withdrawal of Plea.** The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.431 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.401-.411, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

possession) and 51 months of confinement on count two (firearm possession) to run concurrently. The court further imposed a $500 victim penalty assessment and interest from the date of assessment until payment in full. The court did not provide for Martin to receive credit for the time between when it released him and when it sentenced him. Finally, because the court determined that Martin used a motor vehicle in the commission of both offenses, RCW 46.20.285 required revocation of his driver's license.

Martin appeals.

II. ANALYSIS

A. Offender Score

Martin asserts that his trial counsel performed ineffectively by failing to argue that the calculation of his offender score should not have included the three non-Washington convictions. Because we agree with the reasoning in our previous opinion resolving this issue, we determine that Martin's trial counsel did not perform ineffectively.

In a separate case, State v. Martin, No. 77908-7-I, slip op. at 12-17, (Wash. Ct. App. Dec. 16, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/779087.pdf, this court rejected Martin's argument that his trial counsel performed ineffectively by failing to argue that his 1974 California conviction for robbery, 1999 federal conviction for possession of cocaine, and 1999 federal conviction for felon in possession of a firearm should not be considered in calculating his offender score because the convictions were not

comparable to Washington felonies. Because Martin makes the same arguments in this case and we agree with the analysis contained in our previous opinion, we again conclude that his trial counsel did not perform ineffectively by not challenging the inclusion of the non-Washington convictions in his offender score.

B. Credit for Time Served

Martin claims the court erred by not giving him credit for time served for the time between May 15, 2018—the date the court ordered his release—and October 12, 2018—the date the court sentenced him. The State contends Martin is not entitled to credit for time served for this time period because he was serving time for another conviction. We agree with the State.

Martin asserts he has a constitutional and statutory right to receive credit for the time served between May 15, 2018 and October 12, 2018. We review de novo both constitutional and statutory interpretation issues. State v. Ramos, 187 Wn.2d 420, 433, 387 P.3d 650 (2017) ("Constitutional interpretation is a question of law reviewed de novo."); NW. Cascade, Inc. v. Unique Constr., Inc., 187 Wn. App. 685, 697-98, 351 P.3d 172 (2015) (noting that courts review de novo issues of statutory interpretation).

Under RCW 9.94A.505(6), "The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced." If a defendant is confined pursuant to a sentence, as opposed to because of an

inability to make bail, however, then they are not constitutionally entitled to credit for time served in a separate matter after they began serving the sentence. State v. Lewis, 184 Wn.2d 201, 205, 355 P.3d 1148 (2015).

Because the court sentenced Martin on another case on December 7, 2017, and he began serving that sentence that same day, he was not constitutionally entitled, in this case, to credit for time served for the time after his December 7, 2017 sentence. Additionally, because any confinement after December 7, 2017 would not have solely related to his offenses in the current case, he was not statutorily entitled to credit for any confinement after that date. The trial court did not err by declining to provide for credit for time served for the period between May 15, 2018 and October 12, 2018.[3]

C. Amendments to Judgment and Sentence

Martin argues that we should remand for the trial court to amend his Judgment and Sentence to strike the interest imposed on his legal financial obligations and to denote that legal financial obligations cannot be collected from protected funds. The State agrees that these amendments to the Judgment and Sentence are proper. We agree as well.

[3] Martin alternatively argues that his counsel was ineffective by agreeing to his release if doing so would deprive him of receiving credit for time served. But this claim fails because, as Martin was not entitled to receive credit for that time, his attorney agreeing to his release did not prejudice him. Martin further asserts in his Reply Brief that, if we determine Martin was not entitled to credit for time served after his December 7, 2017 sentence, that "[his] attorney was ineffective for permitting him to be sentenced on the first case before this case." But we do not consider arguments raised for the first time in a reply because it deprives the opposing side of a fair opportunity to respond. State v. Peerson, 62 Wn. App. 755, 778, 816 P.2d 43 (1991).

First, as to interest, the legislature amended RCW 10.82.090 to eliminate interest on non-restitution legal financial obligations. See LAWS OF 2018, ch. 269, § 1. Because the amendment took effect on June 7, 2018, several months before the court sentenced Martin, it applies to his Judgment and Sentence. See LAWS OF 2018, ch. 269, §§ 1-2. As the trial court did not impose any restitution as part of Martin's sentence, we strike the statement in the Judgment and Sentencing that reads "the financial obligations imposed in this judgment shall bear interest from the date of judgment until payment in full."

Second, as to the protected funds, the federal Social Security Act protects social security funds from being used to satisfy even mandatory funds, including a victim penalty assessment. State v. Catling, 193 Wn.2d 252, 264, 438 P.3d 1174 (2019) (citing 42 U.S.C. § 407(a)). Martin receives social security disability benefits. As such, it is proper to include a provision in his amended Judgment and Sentence indicating that any funds subject to the Social Security Act's antiattachment statute may not be used to satisfy his legal financial obligations. Catling, 193 Wn.2d at 266.

D. Motor Vehicle Finding

Martin argues the trial court erred by finding that he used a motor vehicle in the commission of his offenses pursuant to RCW 46.20.285. The State asserts the trial court properly determined that Martin used a vehicle in commission of unlawful possession of a firearm. We determine that while the court properly determined that Martin used a vehicle in the commission of

possession of a firearm, it erred when it made that finding in regards to his possession of a controlled substance.

We review de novo the trial court's application of RCW 46.20.285. State v. Wayne, 134 Wn. App. 873, 875, 142 P.3d 1125 (2006).

RCW 46.20.285 requires the Department of Licensing to revoke a person's license for one year if they are convicted of any felony in which a motor vehicle is used. The statute applies if the defendant employed the vehicle to accomplish the crime. State v. Hearn, 131 Wn. App. 601, 610, 128 P.3d 139 (2006). For possession crimes, courts "have found a sufficient nexus to invoke the statute where the defendant used a vehicle as a repository to store contraband." State v. B.E.K., 141 Wn. App. 742, 746-47, 172 P.3d 365 (2007); see also State v. Batten, 140 Wn.2d 362, 366, 997 P.2d 350 (2000) ("Employing a vehicle as a place to store and conceal the weapon, in our judgment, creates a sufficient relationship between the use of the vehicle and the crime of unlawful possession of the weapon to bring the possession of the weapon within the reach of the statute.").

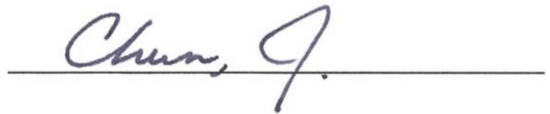
Here, the police located the firearm in the trunk of Martin's car. Because Martin thus used the vehicle as a place to store the weapon, the trial court properly determined that the statute applied. Though Martin attempts to distinguish our Supreme Court's decision in Batten by arguing that no evidence suggests how long or why the firearm was in the vehicle, nothing in Batten indicates that its holding was dependent on such facts. Instead, under Batten,

keeping the firearm in the trunk of the vehicle suffices for the statute to apply. 140 Wn.2d at 366. The trial court did not err by finding Martin used a motor vehicle in commission of unlawful possession of a firearm.

Martin additionally argues that the trial court erred by determining that he used a motor vehicle in commission of possession of a controlled substance (count one). Though the State asserts the court did not make such a finding, Martin's Judgment and Sentence shows the court found he used a vehicle in commission of both counts one and two.

"The use of the car is merely incidental if possession is with the person rather than the car." Wayne, 134 Wn. App. at 875 (citing Hearn, 131 Wn. App. at 610-11). Because the police discovered the heroin on Martin's person, the court erred by determining that he used a vehicle in commission of count one.

We affirm in part, reverse in part, and remand for the trial court to amend Martin's Judgment and Sentence consistent with this opinion.



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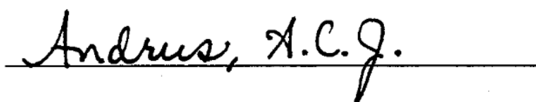

APPENDIX B

December 16, 2019, Opinion

State v. Martin, 77908-7-I

FILED
12/16/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRADLEY MICHAEL MARTIN, Appellant	No. 77908-7-I DIVISION ONE UNPUBLISHED OPINION FILED: December 16, 2019

APPELWICK, C.J. — Martin appeals his burglary conviction, his sentence, and the imposition of certain LFOs. He argues that the State presented insufficient evidence that he was an accomplice to the burglary. He further argues that the trial court impermissibly commented on the evidence in the accomplice liability jury instruction. He argues that the State committed prosecutorial misconduct by mischaracterizing the law and shifting the burden of proof during closing argument. He also argues that he received ineffective assistance of counsel because his lawyer improperly included three foreign convictions in calculating his offender score. Last, he argues that the trial court erred in ordering him to pay a DNA fee, criminal filing fee, victim assessment fee, and interest on those fees. We affirm his conviction and sentence, but remand to the trial court to: strike the DNA fee, criminal filing fee, and interest on the LFOs and to add language indicating the victim assessment fee may not be enforced against his SSI income.

FACTS

At 4:00 a.m. on April 28, 2016, a motion detector in Janet Anderson's driveway alerted her neighbor, Douglas Dahl, to movement on the property. Dahl went to investigate the disturbance. He heard what he believed to be the sound of items being put in the bed of a truck. Upon hearing this, he retreated to his property to call 911 and report a burglary in progress. After the call, Dahl again moved close to Anderson's property. After about five minutes, Dahl witnessed a truck exiting Anderson's property. He was unable to see the license plate, but was able to get to his car and pursue the truck. He caught up with the truck about 900 feet down the street. It had been pulled over by sheriff's deputies.

Sheriff's deputies discovered three people in the truck: Trevor Bush, Bradley Martin, and Gabriel Vogan. Bush was driving the truck. Vogan was in the passenger seat. Martin was sitting in the back seat behind Vogan, at an angle facing towards the driver seat.

Police recovered a flashlight from Bush. They recovered a headlamp from the driver's seat. And, they recovered a headlamp from Vogan. There were gloves and other equipment in the cab of the truck. There was a pair of gloves in the center console. Clothing and multiple pairs of gloves were strewn on the driver's side in the back seat. On the floor on passenger side where Martin had been sitting was a pair of gloves and an asp. An asp is an extendable baton most commonly used as an impact weapon.

The bed of the truck contained several items that Anderson identified as having come from her shop. Anderson had not given anyone permission to take

the items from the shop. The items included a rototiller, a saw sharpener, and a box of her son's personal belongings. The rototiller weighed about 250 pounds. The saw sharpener was very tall and had most of the weight distributed at the top. It took multiple sheriff's deputies to lift these machines out of the truck.

Deputy Jacob Navarro took photos of the truck, and impounded it and its contents. A sheriff's deputy also accompanied Anderson to her property and took several photos of the shop where the break-in had occurred. They did not attempt to collect fingerprint or DNA (deoxyribonucleic acid) evidence from the truck or shop. Deputy Jonathan Krajcar testified that they did not believe that usable fingerprints could be gathered from the shop. He further testified that their policy is not to conduct DNA testing for property crimes due to cost.

The State charged Martin with one count of second degree burglary. The State's theory of the case was that Martin was present and ready to assist with the burglary. The State attempted to illustrate this point in closing argument by saying, "Some people should still be held accountable when they're present and they see a crime happen and those people are distinguishable because they are ready to assist by their presence in aiding the commission of the crime."
Also during closing, the prosecutor asserted that conducting DNA testing under these circumstances would not be reasonable. Specifically, she stated, "There wasn't a single expert witness that said that's a reasonable thing to do or that any valuable information could have been gleaned from that. DNA on a glove doesn't put an individual person inside the shop. Nothing could."

The to convict instruction listed elements that the jury must find beyond a reasonable doubt in order to return a guilty verdict. The first element stated, "That on or about the 28th day of April, 2016, the defendant or a person to whom the defendant was an accomplice entered or remained unlawfully in a building."

A jury found Martin guilty as charged. The trial court sentenced Martin to 63 months of confinement. This sentence was based on an offender score of 10. The court included three foreign convictions in Martin's offender score. The court also ordered Martin to pay a $500 victim assessment, $200 criminal filing, and $100 DNA fee, despite finding Martin was indigent.

Martin appeals.

DISCUSSION

Martin raises essentially six issues on appeal. First, he contends that the State failed to present sufficient evidence to support his conviction. Second, he argues that the court impermissibly commented on the evidence in the to convict instruction. Third, he asserts that the prosecutor impermissibly shifted the burden of proof in her closing arguments. Fourth, he contends that the prosecutor impermissibly mischaracterized the law in her closing arguments. Fifth, he asserts that the court improperly calculated his offender score by including three foreign convictions that were not comparable to Washington offenses. Last, he argues that the court should strike all legal financial obligations (LFOs) and interest from his sentence due to his indigency.

I. Sufficiency of the Evidence

Martin argues that the State failed to present sufficient evidence to support his conviction.

Sufficiency of the evidence is a question of constitutional law that this court reviews de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The State is required to prove all elements of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Evidence is sufficient to support a conviction if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted). In reviewing the sufficiency of the evidence, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In conducting this review, circumstantial evidence and direct evidence carry equal weight. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability. Id.

Conviction for burglary in the second degree requires proof beyond a reasonable doubt that a person entered or remained unlawfully in a building other than a vehicle or a dwelling and that he did so with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1); Apprendi, 530 U.S. at 477. A person is guilty of a crime committed by another if they are an accomplice

in the commission of that crime. RCW 9A.08.020(1), (2)(c). Mere presence with knowledge that criminal activity is taking place is insufficient to establish accomplice liability. State v. Truong, 168 Wn. App. 529, 540, 277 P.3d 74 (2012). However, accomplice liability may be established if the defendant is present and ready to assist in the commission of the crime. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951.

Martin contends that the evidence proves only that he was present in the truck, and therefore cannot support accomplice liability. He dismisses any inference of knowledge or readiness to assist as "pure speculation."

Martin was apprehended at 4:30 a.m. in a truck with stolen property, as the truck was driving away from the scene of the theft. The location was remote and rural. The stolen property was so heavy and large that it required multiple sheriff's deputies to lift it out of the bed of the truck. There was a pair of gloves and a weapon on the floor next to Martin.

The evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Martin was present at the robbery and ready to assist. We affirm the jury's verdict.

II. Judicial Comment on the Evidence

Martin contends that the trial court impermissibly commented on the evidence in the "to convict" instruction. We review jury instructions de novo within the context of the jury instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Any remark that has the potential effect of suggesting that

the jury need not consider an element of an offense could qualify as a judicial comment. Id.

The to convict instruction provided that, in order to convict the defendant, the jury must find certain facts proved beyond a reasonable doubt. The instruction then listed the facts that must be proven:

> (1) That on or about the 28th day of April, 2016, the defendant or a person to whom the defendant was an accomplice entered or remained unlawfully in a building;
>
> (2) That the entering or remaining was with the intent to commit a crime of theft against property therein; and
>
> (3) That the acts occurred in the State of Washington.

(Emphasis added.)

Martin argues that the emphasized language constituted a judicial comment on the evidence because it presupposed that the defendant was an accomplice to whomever committed the burglary. Martin instead urges that the court should have adopted the more common "the defendant or an accomplice" language, rather than "the defendant or a person to whom the defendant was an accomplice." The use of the phrase "the defendant or an accomplice" is an approved, but not required practice. State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003).

The jury instruction here did not imply that either Martin or a person to whom he was an accomplice were the perpetrators of the burglary. It simply stated what the jury must find proved beyond a reasonable doubt in order to find Martin guilty. For this reason, we hold that the to convict instruction did not constitute judicial comment on the evidence.

III. Prosecutorial Misconduct

Martin raises two instances of what he claims are prosecutorial misconduct. First, he claims that the State mischaracterized the law of accomplice liability during closing argument. Second, he claims that the State impermissibly shifted the burden of proof by implying he had a duty to present witnesses. Martin did not object to these comments at trial.

When a defendant fails to object to the challenged argument at trial, the claim is waived unless the argument is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Reviewing courts focus less on whether the conduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

A. Mischaracterization of the Law

Martin first alleges that the State mischaracterized the law of accomplice liability in closing argument. Martin specifically objects to the following language:

> The law in the State of Washington recognizes that somebody could be present and observe a crime happening, but not be an accomplice. And for that reason -- because it would be fundamentally unfair in some circumstances to convict somebody because they see a crime happen. However, the law also recognizes a difference. Some people should still be held accountable when they're present and they see a crime happen and those people are distinguishable because they are ready to assist by their presence in aiding the commission of the crime.

(Emphasis added.)

Martin alleges that this language mischaracterized the law by implying that mere presence plus knowledge is sufficient to establish accomplice liability.

Martin's argument is predicated on taking one half of one sentence in isolation. He seemingly ignores the second half of the sentence: ". . . those people are distinguishable because they are ready to assist by their presence in aiding in the commission of a crime." The full sentence accurately states that a person who is present with knowledge that a crime is occurring and is ready to assist in the commission of the crime may be convicted based on accomplice liability.

Martin urges that a subsequent correct statement of the law is insufficient to cure the original misstatement. That argument is predicated on the idea that the sentence can be split into two separate assertions. The fairest reading of the statement is that it was structured to draw the jury's attention to the critical element of whether or not Martin was ready to assist.

We hold that the State did not mischaracterize the law of accomplice liability.

B. Shifting the Burden of Proof

Martin next contends that the prosecutor impermissibly shifted the burden of proof in her closing. Specifically, Martin objects to the following language:

> [T]he jury instructions, the to convict instruction, are not a referendum on police work. It's not a policy determination about should they have tried to test the gloves for DNA. There wasn't a single expert witness that said that's a reasonable thing to do or that any valuable information could have been gleaned from that. DNA on a glove doesn't put any individual person inside that shop. Nothing could.

(Emphasis added.)

Martin urges that this language shifted the burden of proof by suggesting that Martin was obligated to call an expert to support his argument. The State counters that it was referring to the two police officers who did testify at trial. Each of these officers testified as to the reasons that DNA and fingerprint testing were not feasible in this case.

However, because Martin did not object at trial, the proper inquiry is whether that error was so flagrant and ill-intentioned that it could not be cured with a jury instruction. Russell, 125 Wn.2d at 86. Had an objection been made, the trial court could have readily told the jury that Martin was under no duty to present evidence, which would have cured any potential prejudice. We therefore hold that Martin waived this objection by failing to raise it at trial.

IV. Martin's Offender Score

Martin next argues that the court improperly calculated his offender score during sentencing. Specifically, he argues that it was improper to include three foreign convictions that were not comparable to Washington offenses. The State counters that Martin's attorney affirmatively acknowledged these convictions in his own calculations of Martin's offender score to the court. Martin disputes this, but argues in the alternative that he received ineffective assistance of counsel to the extent that his attorney failed to object to the inclusion of the foreign convictions.

The defendant has a two-part burden in proving ineffective assistance of counsel: he must show first that counsel's performance was unreasonably ineffective, and second, that such ineffectiveness prejudiced the results of the case. State v. Davis, 3 Wn. App. 2d 763, 783, 418 P.3d 199 (2018). Failure to

object to an improper comparability analysis is ineffective assistance of counsel. Id. This deficiency is prejudicial if it increases the defendant's offender score. Id. Therefore, the proper inquiry for this court is whether the trial court would have reached the same result had it properly conducted the comparability analysis. See id. at 783-84. This court reviews calculation of a defendant's offender score de novo. State v. Olson, 180 Wn.2d 468, 472, 325 P.3d 187 (2014). The State bears the burden of proving the comparability of out-of-state convictions by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). However, foreign convictions may be included without further analysis by the trial court if they are included in the defense's proffered offender score calculation. Id. at 483 n.5.

A. Defense Counsel's Acknowledgment of Foreign Convictions

The State contends that the trial court was not required to do a comparability analysis of the three foreign convictions because Martin's counsel included these convictions in his own offender score calculation. In his sentencing memorandum, defense counsel stated, "Martin has seven prior adult felony convictions. The prior convictions range from 1974-2010. . . . His offender score for the purposes of this case is a seven." In its sentencing order, the court included seven convictions from 1974-2010, including the three foreign convictions at issue here. The State also included seven convictions, including the three foreign convictions, in its sentencing memorandum. The court added additional convictions by hand in its sentencing order. This brought the offender score from 7 to 10.

Though defense counsel did not specifically reference the three foreign convictions, his reference to seven convictions from 1974-2010 clearly included these convictions. Both the court and the State identified the seven convictions from that time period as including the three foreign convictions. Defense counsel did not indicate that he was referencing a different set of convictions.

We therefore find that Martin included the three foreign convictions at issue here in his proffered offender score. As a result, the trial court properly included these conviction in calculating Martin's offender score.

B. Ineffective Assistance of Counsel

Martin urges us to find that his attorney's inclusion of the three foreign convictions in his offender score was ineffective assistance of counsel. The court must find ineffective assistance of counsel if defense counsel included foreign convictions in his offender score calculations that were not comparable to Washington offenses. Davis, 3 Wn. App. 2d at 783.

Martin's three foreign convictions were for robbery, possession of cocaine, and felon in possession of a firearm. The State concedes that the inclusion of the three foreign convictions increased Martin's offender score. Our inquiry is therefore limited to whether the inclusion of the foreign convictions was improper. Davis, 3 Wn. App. 2d at 783-84. If so, Martin's attorney's inclusion of these convictions constituted ineffective assistance of counsel. Id.

We engage in a two part inquiry to determine comparability. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, we compare the elements of the crimes. Id. If the elements of the crime are not substantially

similar, we may look to the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute. Id.

1. 1974 California Robbery

Martin argues that his 1974 California robbery charge in is not comparable to a Washington felony. He argues that the statutory definition of "fear" utilized in the California statute is broader than its Washington counterpart.

The Washington Supreme Court found the California statute Martin was convicted of violating (California Penal Code (CPC) § 211 (1872)) was comparable to the Washington robbery statute (RCW 9A.56.190 (2011), the current version) in State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012). Martin urges us to find differently, because he claims the 1993 and 1997 versions (former RCW 9A.56.190 (1975)) are different from the 1973 statute (former RCW 9.75.10 (1909)). He does not explain how they are different. The elements compared by the court in Sublett are identical to those of the statute in effect in 1973. Compare RCW 9A.56.190, with former RCW 9.75.10 (1909) (recodified as former RCW 94A.56.190 (1975)). Sublett therefore controls.

Martin urges the court not to apply the holding in Sublett because the court there did not analyze the differences in the statutory definitions of "fear" in California and Washington. Case law requires that the elements of the crime are substantially similar. See Lavery, 154 Wn.2d at 255. It is well established in Washington law that "definitions" are not the same as "elements." See State v. Johnson, 180 Wn.2d 295, 307-08, 325 P.3d 135 (2014) (the requirement that an

information contain all "elements" of a crime did not mean that the information must also include statutory definitions). Martin cites no authority for the proposition that an analysis of statutory definitions is also required. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Even considering the definition of "fear" in the context of the elements of the statutes, Washington's definition of "fear" is broader than California's. Both statutes contemplate that the "fear" definition can be satisfied by fear of injury to the person being robbed, a member of the victim's family, or anyone in the victim's company at the time of the robbery. Compare former RCW 9.75.10 (1909), with CPC § 212. In Washington, the harm feared can be of immediate or future injury in all cases. Former RCW 9.75.10 (1909). The California statute requires fear to be immediate if the injury feared is to a person in the victim's company at the time of the robbery. CPC § 212(2). However, it allows fear of injury to the victim or a member of the victim's family to be immediate or future. CPC § 212(1). So, if one caused fear of future injury to a person in the victim's company, that individual could be convicted under the Washington statute, but not the California statute. The California definition is not broader than the Washington definition.

We find the 1974 California robbery conviction comparable to its Washington counterpart.

2. <u>1999 Federal Convictions</u>

Martin pleaded guilty to two federal crimes in 1999: possession of cocaine, methamphetamine, and marijuana (12 U.S.C. § 844), and felon in possession of a firearm (18 U.S.C. §§ 922(g)(1) and 18 U.S.C. 924(a)(2). He alleges that these two charges are not legally or factually similar to a Washington crime.

He argues first that the federal statute is broader than its Washington counterpart, because it classifies possession of cocaine and methamphetamine as a misdemeanor, as well as possession of marijuana. The comparable Washington statute, on the other hand, classified possession of all other controlled substances as a felony.

The federal statute classified possession of all controlled substances as a misdemeanor for first time offenders. 21 U.S.C. § 844(a). RCW 9.94A.525(3) provides that federal convictions shall be classified according to comparable Washington offense definitions and sentences.[1] So, the federal offense should be classified according to its Washington counterpart: possession of marijuana is a misdemeanor, while possession of other controlled substances is a felony. Former RCW 69.50.401(d)-(e) (1996).

Therefore, Martin argues that the State must prove that Martin pleaded guilty to possession of a substance other than marijuana in order for his crime to

[1] An exception applies if there is no comparable Washington offense. RCW 9.94A.525(3). In those cases, the crime is classified as a class C felony so long as it was a felony under federal law. RCW 9.94A.525(3). That exception is not applicable here because the federal crime is a misdemeanor. 21 U.S.C. § 844(a).

be considered a felony and counted towards his offender score. He contends that the State has not done so.

The State introduced the judgment for the charge, which listed the nature of the offense as "Possession of Cocaine, Methamphetamine, and Marijuana." The use of the conjunctive "and" rather than the disjunctive "or" indicates that Martin had pleaded guilty to possession of all three substances. The original indictment, which the State provided, also indicates that he was charged with possession of all three substances.

The judgment indicates that Martin pleaded guilty to counts 1 and 4 of the superseding indictment. The State provided only the original indictment. Nevertheless, the use of the word "and" in the judgment combined with the factual allegations in the original indictment are sufficient to prove that Martin was pleading guilty to possession of all three substances. Convictions for cocaine and methamphetamine are federal felonies, comparable to Washington law. The fact that he also possessed marijuana does not alter the conclusion.

Martin also contends that his 1999 conviction for felon in possession of a firearm is not legally or factually comparable to a Washington charge.

The federal charge to which Martin pleaded guilty criminalizes possession of firearms and ammunition. 18 U.S.C. § 922(g)(1); 18 U.S.C. § 924(a)(2). The comparable Washington statute criminalizes only possession of a firearm. RCW 9.1.040. The parties agree that because the federal statute is broader, it is not legally comparable.

The State nevertheless argues that Martin's conduct is factually comparable to conduct criminalized by RCW 9.41.040(1). It points first to the language describing the nature of the offense in the judgment. The judgment lists the nature of the charge as "[f]elon in possession of a firearm." The State asserts that the use of the word "firearm" rather than "ammunition" indicates that Martin was in fact in possession of a firearm rather than ammunition.

The State further points to the allegations in the original indictment. The original indictment alleges that Martin was in possession of several firearms. As noted above, Martin pleaded guilty to counts in the superseding indictment. The language of the judgment, combined with the factual allegations set forth in the original indictment was sufficient to prove that the superseding indictment did not change the charge and that Martin had pleaded guilty to possession of firearms rather than ammunition.

The three foreign convictions were comparable. We reject Martin's claim of ineffective assistance of counsel.

V. Legal Financial Obligations

Martin argues last that all LFOs should be stricken from his judgment and sentence. Martin was ordered to pay a $200 criminal filing fee and a $100 biological sample fee. The court also ordered a $500 victim assessment fee. The court further ordered that interest accrue on the LFOs from the date of judgment until paid in full.

The court found Martin indigent. Martin argues that under House Bill 1783[2] and State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), the criminal filing fee cannot be imposed on indigent defendants. He further contends that the legislature has amended the statute to prohibit imposition of the DNA collection fee on indigent defendants if their DNA has already been collected as a result of a prior conviction. Finally, he argues RCW 10.82.090(1) prohibits interest on nonrestitution LFOs.

Because Martin was found indigent and has already provided a DNA sample, we hold that the criminal filing and DNA collection fees should be stricken. Because RCW 10.82.090(1) prohibits interest on nonrestitution LFOs, the interest provision should be stricken.

Martin also argues that the victim assessment fee should be struck, because his only source of income is Supplemental Security Income (SSI) benefits. He relies on State v. Catling, 2 Wn. App. 2d 819, 826, 413 P.3d 27, reversed on other grounds in part by 191 Wn.2d 1001, 422 3d 915 (2018). At the time Martin filed his brief, the Catling court ordered remand of a victim assessment fee assessed against a defendant whose sole source of income was SSI benefits. Id. The court reasoned that since LFO payments may not be enforced against SSI benefits, the trial court should revise the sentence to indicate that the LFO could not be enforced against any funds subject to 42 U.S.C. § 407(a). Id. However, the court ruled that the anti-attachment provision of the Social Security Act[3] did not

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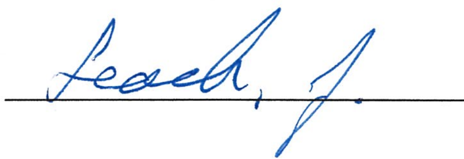
[2] ENGROSSED SECOND SUBSTITUTE H.B. 1783, §§ 17(2)(h), 18, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783).
[3] 42 U.S.C. § 407(a).

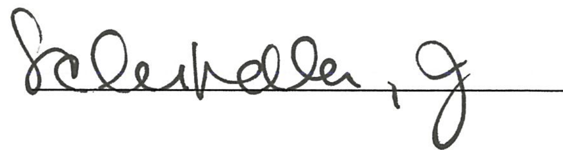
prevent a court from imposing the fee altogether. Id. Since Martin filed his brief, the Washington Supreme Court has affirmed this reasoning. Catling, 193 Wn.2d at 264.

Martin's financial declaration identified SSI as his sole source of income. Accordingly, we decline to strike the victim assessment fee. But, we remand to amend the judgment and sentence to include language indicating that the victim assessment fee many not be enforced against his SSI income.

We affirm, but remand to the trial court to strike the criminal filing fee, DNA fee, and interest on the nonrestitution LFOs, and to add language indicating that the victim assessment fee may not be enforced against his SSI income.

WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

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[kwebber@co.snohomish.wa.us]
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Snohomish County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 19, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

May 19, 2020 - 4:20 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	79196-6
Appellate Court Case Title:	State of Washington, Resp v. Bradley Michael Martin, App
Superior Court Case Number:	17-1-00628-3

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