

No. 65950-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

EDWARD MARTINEZ,

Appellant.

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

The Honorable Cheryl Carey

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

1. The defendant's right to jury unanimity was violated.
2. The trial court erred in admitting the CD audio recording of the defendant's alleged telephone calls.
3. At sentencing, the State failed to prove the defendant's offender score.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the defendant's right to jury unanimity was violated in the absence of a Petrich instruction or an election as to the charge of tampering with a witness.
2. Whether the trial court erred in admitting the CD audio recording of the defendant's alleged telephone calls from Jail over the defense objection to chain of custody.
3. Whether the State failed to prove the comparability of two alleged prior Florida robbery convictions for inclusion in the defendant's offender score.

C. STATEMENT OF THE CASE

Mr. Martinez was charged by a first information with second degree assault by strangulation of Kelly Raley, fourth degree

assault of the couple's 15 year-old daughter J.M., and reckless endangerment. CP 1-5, 6-8.

The original charges arose when Renton police officers were called to a house on S.E. 180th St., where complainant Kelly Raley claimed that Mr. Martinez had assaulted her several times. Ms. Raley claimed that she and Mr. Martinez were arguing about his relationship with another woman, and the defendant grabbed her by the throat on two occasions in the house, the second of which caused her to be unable to breathe. CP 4-5 (affidavit of probable cause); 7/14/10RP at 209, 219-20.

Ms. Raley, and the couple's daughter J.M., stated that Mr. Martinez also swung or raised his fist at J.M., and then later struck J.M. CP 4-5; 7/14/10RP at 146-47, 149, 214, 222. The family then drove in Mr. Martinez's truck toward the defendant's sister's house, and Mr. Martinez allegedly drove in a manner that caused J.M. and the couple's other children to be tossed about. CP 4-5; 7/14/10RP at 155-60, 165.

Following the institution of the assault and reckless endangerment charges, the State filed an amended information further alleging an aggravating factor that the second degree

assault was committed within sight or sound of the couple's minor child J.M., and added additional counts alleging that Mr. Martinez violated a post-charging no-contact order as to Ms. Raley, and that he tampered with a witness by telephoning Ms. Raley, and by telephoning his girlfriend "Heather" regarding Ms. Raley, from Jail, on several occasions. CP 6-8; 7/14/10RP at 173-77; Supp. CP ____, Sub # 47A (Exhibit list, State's exhibit 7 (CD recording of calls), State's exhibit 23 (transcript of calls)).

Mr. Martinez testified at trial and denied ever strangling Ms. Raley or assaulting his child J.M., whom he loved very much, during the argument the couple had. 7/15/10RP at 399, 402-03. Mr. Martinez pointed out that it would be impossible for him, at his height of five foot six inches, to ever lift the larger, heavier Ms. Raley up off the floor with one hand, as was alleged by the State's evidence. 7/15/10RP at 400; see 7/14/10RP at 219. This was all the more the case considering that Mr. Martinez suffers from two ruptured discs in his back, requiring treatment and medication, preventing him from lifting anything over 20 pounds. 7/15/10RP at 409-10.

Mr. Martinez also testified that it was Ms. Raley who was in fact assaulting him during their argument in the home, before the family's trip in the vehicle, by hitting him with the handle of a broom. 7/15/10RP at 406.

Following the evidence phase of trial the jury found Mr. Martinez guilty as charged, except that the jury acquitted him on the charge of reckless endangerment. CP 89-94.

The defendant was given an exceptional sentence of 33 months incarceration on the charge of second degree assault, based on an offender score of 5, a standard range of 22-29 months, and the jury-found aggravating factor. CP 96-104. The remaining felony and misdemeanor terms were ordered to be served concurrently. CP 96-104.

Mr. Martinez timely appealed. CP 108 (notice of appeal).

D. ARGUMENT

1. THE JURY'S VERDICT ON THE CHARGE OF TAMPERING WITH A WITNESS LACKS THE ASSURANCES OF UNANIMITY REQUIRED BY STATE V. PETRICH.

a. Right to a unanimous verdict. In support of the charge of Tampering with a Witness pursuant to RCW 9A.72.120, the

State introduced evidence of three telephone calls made by Mr. Martinez; two calls to his girlfriend Heather and one to the assault complainant Kelly Raley, made from Jail on March 19 and 25, 2010, following the original assault charges. 7/15/10RP at 318-19; Supp. CP ____, Sub # 47A (Exhibit list, State's exhibit 7 (CD recording of calls), State's exhibit 23 (transcript of calls)).

In a case where the State, as here, proffers evidence of multiple acts that may constitute proof of the single offense charged, but the trial prosecutor fails to elect in closing argument which incident should be relied on by the jury for conviction on the count, and the trial court does not give a unanimity instruction, the defendant's right to an expressly unanimous jury verdict is violated. State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984); see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (same).¹

The rule of Petrich applies where the State presents evidence of "multiple acts" in support of a single count. Petrich,

¹The unanimity issue in multiple acts cases is one of constitutional magnitude that Mr. Martinez may raise for the first time on appeal, as manifest constitutional error. RAP 2.5(a)(3); State v. Love, 80 Wn. App. 357, 360 and n. 2, 908 P.2d 395 (1996) (multiple acts case).

101 Wn.2d at 571; see State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); see also State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991). Here, the prosecutor argued in closing to the jury only generally, stating that the telephone calls rendered Mr. Martinez guilty, and did not specify which of the three calls the jury was to rely on for the count of Tampering. 7/19/10RP at 479-83. This is an absence of an election. State v. Heaven, 127 Wn. App. 156, 160-61, 110 P.3d 835 (2005) (State's non-exclusive discussion in closing argument of certain acts as supporting certain charged counts was not an election such as to render unanimity instruction unnecessary).

This was, therefore, a multiple acts case, requiring either that election by the prosecutor as to which telephone call amounted to the State's proffer on the count, or a unanimity jury instruction. Although the jury was instructed as to the unanimity requirement with regard to the charges of second and fourth degree assault, see CP 54-83 (Jury instruction no. 6), no unanimity instruction was given as to the Tampering count. See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4 .25, at 110-14 (3d ed. 2008).

These combined circumstances of the State's evidentiary proffer and the lack of a jury unanimity instruction or election violated Mr. Martinez's right as a criminal defendant to an expressly unanimous verdict of guilty. Wash. Const. art. 1, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); U.S. Const. amend. 6; United States v. Payseno, 782 F.2d 832, 836 (9th Cir.1986). This constitutes Petrich error, and here, the error requires reversal.

b. Reversal for the *Petrich* error is required. A Petrich error is presumed to be prejudicial, a presumption that can be overcome only "if no rational juror could have had a reasonable doubt as to any one of the incidents alleged." (Emphasis added.) Kitchen, 110 Wn.2d at 411 (clarifying Petrich). Here, the several factual incidents proffered by the State as supporting the charge of Tampering were controverted, and jurors could have had a reasonable doubt thereon, as to at least one or more of the telephone calls. In addition, at least one of these multiple incidents proffered in support of the court completely failed as sufficient proof of Tampering.

Certainly, it cannot be said that no juror could have had a reasonable doubt as to any of the acts offered in evidence to support the count. Because this Court cannot be sure that no jurors relied for his or her verdict on a telephone call as to which the evidence was controverted or insufficient, the Petrich error was not harmless beyond a reasonable doubt, and reversal of the conviction for Tampering is required. Put another way, under the applicable standard, affirmance of the Tampering count requires this Court to find that no reasonable juror could have done anything other than conclude that every one of the three calls established Tampering beyond a reasonable doubt.

The evidence below was controverted, if not inadequate, with regard to at least one of the calls. In telephone call number 1, Mr. Martinez asks his girlfriend Heather if she had talked to the complainant Kelly Raley “about what I said,” and asks her to give Raley his lawyer’s telephone number. Mr. Martinez then states that “all she [Raley] has to do is tell him [his attorney] that she’s not gonna cooperate with that stuff . . . that . . . prosecutor.” Supp. CP ____, Sub # 47A (Exhibit list, State’s exhibit 7 (CD recording of calls), State’s exhibit 23 (transcript of calls), at pp. 3-4).

In his testimony, Mr. Martinez makes clear that he was not attempting to tamper with Ms. Raley as a witness; rather he was simply expressing his hope that Ms. Raley would tell the truth, because he knew that any testimony by her implicating him would be untruthful. 7/15/10RP at 415-16.

With regard to telephone call number 2, also placed to Heather, Mr. Martinez states with regard to Raley that “she can’t uh cooperate with that stupid uh prosecutor though at all. No more interviews or nothing like that.” Supp. CP ____, Sub # 47A (Exhibit list, State’s exhibit 7 (CD recording of calls), State’s exhibit 23 (transcript of calls), at p. 9). Nowhere in this call does the defendant, expressly or impliedly, request or ask Heather that she speak with or pass on information from him to Raley. Additionally, Mr. Martinez remarks that “all she has to do is call him and be like she’s not gonna go to court.” Supp. CP ____, Sub # 47A (Exhibit list, State’s exhibit 7 (CD recording of calls), State’s exhibit 23 (transcript of calls), at p. 9). Although the defendant appears to refer to a conversation that Heather had with Ms. Raley in the past, this second telephone call includes no request by Mr. Martinez to communicate with Ms. Raley in future.

Finally, in telephone call number 3, Mr. Martinez speaks with the actual complainant Ms. Raley, asks her if she is “going to court,” and remarks, “this whole damn thing it’s wrong and you know it.” Supp. CP ____, Sub # 47A (Exhibit list, State’s exhibit 7 (CD recording of calls), State’s exhibit 23 (transcript of calls), at p. 11). Mr. Martinez also states to Ms. Raley, “If you don’t go they’re gonna throw this shit out.” Supp. CP ____, Sub # 47A (Exhibit list, State’s exhibit 7 (CD recording of calls), State’s exhibit 23 (transcript of calls), at p. 12).

As can be seen, Mr. Martinez’s trial testimony resulted in the evidence of at least one of the telephone calls being controverted as to Tampering. Mr. Martinez in call number 1 expresses hope that Ms. Raley would tell the truth, and also expresses fear that she would lie. By that testimony, the defendant controverted the evidence of the State that he was attempting to induce a person to testify falsely or otherwise committing acts that constituted tampering.

This conflict in the evidence as to call number 1, alone, mandates reversal of the Tampering count. The presumption of required reversal in unanimity cases can be overcome only “if no

rational juror could have a reasonable doubt as to any one of the incidents alleged." (Emphasis added.) Kitchen, 110 Wn.2d at 411 (citing State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn.2d 1011 (1986)). Affirmance of the Tampering count in the face of the Petrich unanimity error requires this Court to find that no reasonable juror could have done anything other than find that every single incident of alleged tampering presented by the State's evidence was proved beyond a reasonable doubt. If the evidence is controverted as to any of the multiple incidents, this standard is not met.

For example, in Kitchen, the Court reversed two defendants' convictions, because multiple acts were placed into evidence and "a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred."

In both Mr. Coburn's and Mr. Kitchen's trials the prosecution placed testimony and circumstantial proof of multiple acts in evidence. There was conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred. For example, some jurors may have based their verdict in State v. Albert Coburn on the testimony of the complaining witness in count 1 that Mr. Coburn

touched her and attempted to touch her cousin when they were in the woods, while others may have based their decision on incidents that allegedly took place in the bedroom.

(Emphasis added.) Kitchen, 110 Wn.2d at 412. Because the evidence of both acts was conflicting – i.e., because the Court could not say that a rational jury could only have found both incidents incontrovertibly proved – the Court was compelled to reverse. See also State v. Brooks, 77 Wn. App. 516, 892 P.2d 1099 (1995) (reversal required where defendant testified one of the criminal acts was committed by another); State v. King, 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1994) (unanimity error required reversal where evidence showed multiple acts of cocaine possession but evidence was conflicting as to defendant's alleged possession of the cocaine in one of the locations).

The harmfulness of the Petrich error is exacerbated by the fact that one or more of the incidents is legally insufficient to

establish Tampering.² The Tampering with a Witness statute provides in pertinent part:

RCW § 9A.72.120. Tampering with a witness

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation . . . to:

- (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
- (b) Absent . . . herself from such proceedings; or
- (c) Withhold from a law enforcement agency information which . . . she has relevant to a criminal investigation[.]

RCW 9A.72.120; see also CP 54-83 (jury instruction nos. 20, 21).

In calls numbers 1 and 2, the defendant's discussions regarding the affect of various actions by Ms. Raley and their affect on his case do not constitute Tampering. See, e.g., State v. Rempel, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990) (defendant's statement that case was going to ruin his life, and request to drop the charges, was not an attempt to induce false testimony, non-cooperation, or any act constituting tampering).

² Evidence is sufficient only if, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found all essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 311, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Furthermore, Mr. Martinez's calls to "Heather," even if they constituted a request that Heather communicate with or influence Raley, do not establish an attempt to induce Ms. Raley to do, or refrain from doing, any of the acts as required for Tampering. But Mr. Martinez's jury was not given an accomplice liability instruction, much less one pertaining to the Tampering count. See CP 54-83. Discussing with a third party what actions or non-action by a potential witness may have an affect on the criminal case is not an attempt to "induce" that witness.

Reversal is required in this case for the unanimity error because one or more incidents, from among the multiple acts proffered in the State's case, was supported only by conflicting, as opposed to uncontroverted, evidence. Here, even if the evidence below was sufficient to establish that some of the telephone calls were commissions of the offense – which it was not -- a court cannot say that a rational jury could have only found that every single call was incontrovertibly proved beyond a reasonable doubt to establish tampering. Only under those circumstances might the Petrich error be excused as harmless, and such circumstances are

not present in his case. Kitchen, 110 Wn.2d at 411; State v. Brooks, 77 Wn. App. at 520.

2. THE TRIAL COURT ERRED IN ADMITTING THE CD AUDIO RECORDING OF THE DEFENDANT'S TELEPHONE CALLS FROM JAIL OVER THE DEFENSE "CHAIN OF CUSTODY" OBJECTION, REQUIRING REVERSAL OF THE TAMPERING CONVICTION.

The audio recordings that formed the bases for the defendant's charges of Tampering with a witness should not have been admitted into evidence. 7/15/10RP at 313-15; see Supp. CP ____, Sub # 47A (Exhibit list, State's exhibit 17 (original unredacted CD recording of calls). At trial, Sergeant Catey Hicks of the King County Jail, who worked in the Special Investigations Unit at the Regional Justice Center in Kent, testified regarding the means by which jail calls made by a Jail inmate are recorded. 7/15/10RP at 310, 312-14. Sergeant Hicks stated that calls are recorded using the RJC's computer hard drives and when criminal litigation arises and a deputy prosecutor requests recordings of telephone calls made by a defendant, the Unit must search for calls by using the

telephone number to whom a call or call were allegedly made.

7/15/10RP at 312.

However, Sergeant Hicks testified that she was not the person who determines that a particular inmate made a given telephone call.³ That assessment is made and the telephone calls in question are transferred from the hard drive to a physical CD (compact disc) medium by other law enforcement personnel.

7/15/10RP at 312. When Sergeant Hicks testified that the original CD of the defendant's calls was in fact prepared, not by her, but by one Sergeant Pierson, Mr. Martinez objected to the exhibit as lacking the requisite proof of chain of custody. 7/15/10RP at 313-15. The trial court overruled the objection. See Supp. CP ____, Sub # 47A (Exhibit list, State's exhibit 17 (original unredacted CD recording of calls).

Admission of the CD over objection was error. In order to be properly admitted into evidence, a physical object connected with the commission of a crime must be satisfactorily identified and shown to be in substantially the same condition as when the crime

³The defendant's objections to the CD recording on the basis of authentication and foundation were later overcome by evidence identifying the defendant as making the telephone calls to "Heather" and to Kelly Raley.

was committed. State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). The court should consider various factors, including (1) “the nature of the article,” (2) “the circumstances surrounding the preservation and custody” of the article, and (3) “the likelihood of tampering” or alteration. Campbell, 103 Wn.2d at 21 (quoting Gallego v. United States, 276 F.2d 914, 917 (9th Cir.1960)).

Minor discrepancies or uncertainty on the part of a witness regarding the location of physical evidence, such as the CD recording offered by the State below, and its preservation from alteration, will affect the weight of the evidence, not its admissibility. Campbell, 103 Wn.2d at 21.

However, here, Sergeant Hicks’s testimony revealed that the CD recording was not prepared by her but was in fact prepared, and had been in the custody of, Sergeant Pierson, a witness who did not testify regarding the preservation and custody of the CD recording. Mr. Martinez argues this was inadequate to show an adequate chain of custody, and so as to allow admissibility.

Mr. Martinez's objection on chain of custody grounds to State's exhibit 7, the CD recording of the telephone calls, should have been sustained, and the exhibit, along with the transcription of

the calls, should have been excluded. Reversal of the tampering conviction is required for this error. The Supreme Court has stated that the courts will reverse due to an error in admitting evidence where the error results in prejudice to the defendant. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (citing State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). In the present case, however, the alleged error materially affected the outcome, because absent the original recording, the Tampering conviction could not be proved. Although Ms. Raley testified that Mr. Martinez called her from Jail, she did not provide testimony as to the substance of the calls so as to provide alternate evidentiary support for the Tampering charge. See 7/14/10RP at 173-76.

**3. THE STATE FAILED TO PROVE
COMPARABILITY OF TWO FLORIDA
CONVICTIONS IN MR. MARTINEZ'S
OFFENDER SCORE.**

(a) Mr. Martinez challenged the State's inclusion of two alleged prior Florida robberies in his offender score At sentencing, the State's pre-sentencing report alleged that Mr. Martinez had been convicted of two counts of robbery in the first degree with a firearm in Florida, under F.R.S. 812.13(2)(a). Supp.

Supp. CP ____, Sub # 57H (Sentencing exhibit list, exhibits 1 and 2). Counsel challenged both the legal and factual comparability of the prior convictions. 8/20/10RP at 525-26. Following the prosecutor's brief argument that the Florida and Washington first degree robbery statutes are "really, really close," the trial court deemed the foreign convictions comparable. 8/20/10RP at 527, 529.

(b). The State failed to prove the comparability of Mr. Martinez's alleged prior convictions for robbery from Florida.

The State must prove the defendant's offender score at sentencing. State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986). Where the State alleges that a defendant's criminal history includes out-of-state felony convictions, the SRA requires the State to prove both the existence and comparability of those convictions. Former RCW 9.94A.360; State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); State v. Hunter, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981).

Mr. Martinez contends that the State failed to prove the comparability of those prior convictions to Washington felonies. To determine whether a foreign conviction is comparable to a

Washington felony offense, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington felony crimes. Ford, 137 Wn.2d at 479. If the elements are identical, the foreign conviction may be included, without more, and the court in so concluding is answering a legal question. In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 11 P.3d 837, 842 (2005); State v. Stockwell, 129 Wn. App. 230, 234, 118 P.3d 395 (2005). But if the foreign statute is different or broader than the Washington statute, the sentencing court must look to the defendant's actual conduct in committing the foreign crime. Lavery, 154 Wn.2d at 258.

Here, the offense of robbery with a firearm in Florida is both different and broader than Washington's definition of robbery.

Florida law provides the following definition of robbery:

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2) (a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not

exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) (a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

Florida Statute § 812.13. In contrast, however, Washington defines robbery and first degree robbery more narrowly. RCW 9A.56.190 defines robbery:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the

knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. The first degree robbery statute provides as follows:

A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he:

- (a) Is armed with a deadly weapon; or
- (b) Displays what appears to be a firearm or other deadly weapon; or
- (c) Inflicts bodily injury.

RCW 9A.56.200.

The differences between the statutes, and the more broadly drawn scope of the Florida statutes, are plainly evident. In Washington, a person can only be convicted of robbery if he commits the taking of property by means of the "threatened use of immediate force, violence, or fear of injury." RCW 9A.56.190. Florida expressly, and merely requires, that a forceful act be committed "contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events." Florida Statute § 812.13(3)(b).

In fact, the Washington Courts have rejected jury instructions in robbery cases where Washington's more narrow

requirements for commission of the offense were improperly communicated to the jury. In State v. Gallaher, 24 Wn. App. 819, 821-22, 604 P.2d 185 (1979), the court found error in a jury instruction that allowed robbery to be found in a case where the defendant threatened force "subsequent to" the taking:

As noted, under the statute defining robbery, a person may commit that crime by means of the "threatened use of immediate force, violence, or fear of injury." RCW 9A.56.190. Of necessity, a threat is always a communication of intent to cause future harm. However, the definition of "robbery" requires that the threatened harm be in the immediate future, i.e., while the robbery is taking place. Here, the challenged instruction is broad enough to cover a threat of harm in the immediate future, but it is not limited to such a threat. Insofar as the instruction includes threats of harm to take place subsequent to the robbery, it is error.

Gallaher, 24 Wn. App. at 821-22. For this reason alone, the Florida robbery statute is different, and broader, than Washington's definition of robbery.

Additionally, Washington robbery includes an implied element of intent to steal. State v. Kjorsvik, 117 Wn.2d 93, 108-10, 812 P.2d 86 (1991). Intent to steal means the "intent to permanently deprive" the owner of the property, including when "the defendant acted with an intention to create an unreasonable

risk of permanent loss to the owner." (Emphasis added.) State v. Allen, 159 Wn.2d 1, 12, 147 P.3d 581 (2006) (citing State v. Burnham, 19 Wn. App. 442, 445, 576 P.2d 917 (1978)). In contrast, Florida imposes only a requirement that the defendant act "with intent to either permanently or temporarily deprive the person or the owner of the money or other property." Florida Statute § 812.13(1). Florida's definition of robbery is patently broader than Washington's.

If the foreign statute is different or broader than the Washington statute, the sentencing court must look to the defendant's actual conduct in committing the foreign crime. Lavery, 154 Wn.2d at 258. The State bears the burden of establishing the classification of prior out-of-state convictions by a preponderance of the evidence. State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). Mr. Martinez argues that the State did not prove comparability, and the trial court did not correctly engage in this comparability analysis. Furthermore, the absence of anything in the trial court record to show that conduct the defendant plead guilty to in Florida amounted to robbery in Washington under the above requirements precluded the trial court from finding

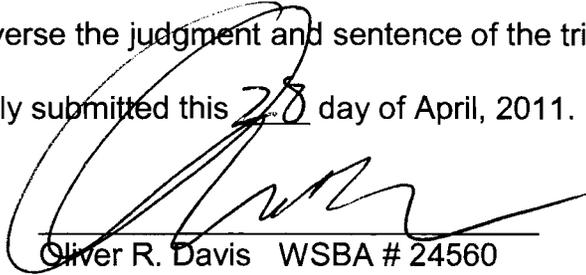
factual comparability. Inclusion of the foreign Florida offenses must fail.

Finally, because the defendant's counsel alerted the sentencing court to the alleged defect in the State's offender score calculation, this Court must reverse Mr. Martinez's sentence and remand for resentencing without inclusion of the Florida convictions, rather than for an evidentiary hearing to permit the State to have a second chance to prove the classification of the disputed out-of-state conviction. See State v. Ford, 137 Wn.2d at 485.

E. CONCLUSION

Based on the foregoing, Mr. Martinez respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 28 day of April, 2011.



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Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 65950-2-I
)	
EDWARD MARTINEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 28th DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **APPELLANT'S OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] EDWARD MARTINEZ 343001 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584-0974	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28th DAY OF APRIL, 2011.

X _____ *JA*

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