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NO. 65950-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDWARD MARTINEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

BRIEF OF RESPONDENT

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DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIDGETTE E. MARYMAN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. In State v. Hall,[1] the Washington Supreme Court held that the "unit of prosecution" for witness tampering is the ongoing attempt to persuade a witness not to testify in a single proceeding. Here, Martinez made multiple calls in his attempt to prevent his ex-wife from testifying. Because evidence supports on a single count of witness tampering, should this court reject that argument that a unanimity instruction was required?

2. Proof of the chain of custody for an evidentiary item is not required when the item is readily identifiable and sufficiently authenticated. At trial, the State offered a CD containing several jail call recordings. Although the person who burned the CD did not testify, the victim identified all of the voices on the recordings and the procedures for burning the CD ensured that it was not susceptible to tampering. Did the trial court properly admit the CD?

3. For sentencing purposes, out-of-state convictions are properly included in an offender score if the elements are comparable to a Washington offense. Martinez had two armed robbery convictions from Florida. The Florida and Washington

[1] 168 Wn.2d 726, 230 P.3d 1048 (2010).

robbery statutes have identical elements, with only minor differences in the wording of the statutes. Did the trial court properly include Martinez's robbery convictions in his offender score?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Edward Martinez was charged by amended information with assault in the second degree-domestic violence (count I), assault in the fourth degree-domestic violence (count II), reckless endangerment (count III), domestic violence violation of a court order (count IV), and witness tampering-domestic violence (count V). CP 6-8. The State further alleged that count I occurred within sight or sound of a minor child. Id.

Trial occurred in July of 2010. The jury acquitted Martinez of reckless endangerment, but found him guilty on all other charges, including the aggravating factor. CP 90-95.

Martinez's offender score on count I was 5, giving him a standard range of 22 to 29 months. CP 143, 145. His offender score on count V was 3, giving him a standard range of 9 to 12

months.[2] CP 144-45. The court imposed an exceptional sentence of 33 months on count I and imposed standard-range sentences of 12 months on counts II, IV, and V, with all counts running concurrently. CP 96-107.

2. SUBSTANTIVE FACTS.

Kelly Raley and Edward Martinez were married in 1995. 2RP 110. They lived in Florida with their four children: Jazmyn (age 15); Kaitlyn (age 14); Eddie (age 12); and Madeline (age 8). 2RP 108.[3] The couple divorced in 2006. 2RP 110. The divorce was not amicable. 2RP 112. Although there was a visitation schedule allowing for the children to see their father, Martinez did now always maintain the scheduled visits. 2RP 112-15. Unbeknownst to Raley and the children, Martinez moved to Washington state in the summer of 2009. 2RP 114. Raley and the children did not learn about the move until Jazmyn contacted Martinez on Myspace.com in October of 2009. Id.

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[2] Both standard ranges are based on Florida convictions for two counts of robbery and one count of grand theft. CP 143-45.

[3] The verbatim report of proceedings consists of four volumes, which will be referred to as follows: 1RP (7/12/2010); 2RP (7/14/2010); 3RP (7/15/2010); and 4RP (7/19/2010, 8/13/2010, and 8/20/2010).

After Martinez's move, he and Raley began talking on the phone and rekindling their relationship. 2RP 119. Eventually, Martinez convinced Raley to move to Washington. In February of 2010, Raley and the children moved into Martinez's sister's house in Kent. 2RP 120. Martinez also had custody of his one-year-old son, Joshua, whose mother was in Florida. 2RP 123.

At first, Martinez and Raley were happy to be living together again. 2RP 123. However, finances became difficult as Raley struggled to find a job and a permanent home. 2RP 125-26. After a few weeks, Raley discovered that Joshua's mother, Heather, was pregnant again. 2RP 126. Despite Martinez's previous assurances that his relationship with Heather was over, Martinez appeared happy about the pregnancy and immediately began making plans for Heather to move to Washington. 2RP 127.

Raley was upset to find out that Martinez still had feelings for Heather, but felt "stuck" because she had nothing to return to in Florida. 2RP 134. The conflict between Raley and Martinez came to a head on February 26, 2010, when they were in the process of moving into a rental house in Renton. 2RP 136. Jazmyn and Joshua were the only children present at that time. 2RP 145. Martinez and Raley began to argue. When Jazmyn urged her

parents to stop fighting, Martinez gestured as if he was going to hit her. 2RP 146. Raley warned Martinez not to raise his hand at Jazmyn; in return, Martinez grabbed Raley by the throat. Id. Although Raley could still breathe, Martinez pushed her hard enough to bend her backwards over the waist-high sink. 2RP 147.

Martinez left to pick up more luggage from his sister's house. 2RP 149. Upon his return, Martinez and Raley continued their argument. Id. Again, Jazmyn yelled at them to stop. Id. In response, Martinez hit Jazmyn in the nose. Id. When Raley tried to intervene, Martinez grabbed her by the throat, pushing her against the wall. Id. This time, Martinez squeezed hard enough to prevent Raley from breathing. Id. Although it lasted less than a minute, Raley was scared by Martinez's escalating violence. 2RP 150.

After Martinez stopped choking Raley, he left the house and returned a while later with the rest of the children. 2RP 150-52. The entire family then headed back to Martinez's sister's house in Martinez's truck. 2RP 154. Martinez drove, with Raley, Joshua, and Madeline in the cab; the rest of the children rode unsecured in the truck bed. 2RP 152-54. As Martinez and Raley continued to argue, Jazmyn banged on the window, telling them to stop.

2RP 156. Martinez suddenly slammed on the brakes, sending the children flying towards the front of the truck. Id. Martinez slowed down and ordered everyone but Joshua out of the truck, abandoning them on the side of the road. 2RP 157-58. A bystander called 911. 2RP 159.

Martinez was arrested and charged with two counts of assault and one count of reckless endangerment. On March 16, 2010, the trial court issued a no contact order, prohibiting Martinez from contacting Raley and the children while the case was pending. Ex. 12. While in custody, Martinez called Raley and tried to convince her not to testify. Ex. 23. Martinez also called Heather twice and asked her to pressure Raley into not testifying. Ex. 23.

C. ARGUMENT

1. THE TRIAL COURT WAS NOT REQUIRED TO GIVE A UNANIMITY INSTRUCTION BECAUSE MARTINEZ COMMITTED ONLY ONE ACT OF WITNESS TAMPERING.

Martinez argues that a jury unanimity instruction was required because the trial court admitted multiple jail calls in which he attempted to prevent Raley from testifying. Martinez is incorrect. Under Hall, the "unit of prosecution" for witness tampering is per

witness, per proceeding, regardless of the number of attempts. Because there was only one act of witness tampering, a jury unanimity instruction was not required.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged has been committed. State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, rev. denied, 129 Wn.2d 1016 (1996). Where the State charges a single count of criminal conduct and presents evidence of more than one criminal act that can support the charge, there is a danger that a conviction may not be based on a unanimous jury finding that the defendant committed any given single criminal act. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Where such a situation exists--where there are multiple acts that could support the charge--to ensure jury unanimity, the State must elect a single act upon which it will rely for conviction, or the jury must be instructed that all jurors must agree as to what act or acts were proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part on other grounds by, Kitchen, supra. Such an instruction is commonly referred to as a unanimity or

Petrich instruction.[4] See State v. Huckins, 66 Wn. App. 213, 836 P.2d 230 (1992), rev. denied, 120 Wn.2d 1020 (1993). The "Petrich rule applies only to multiple act cases (those cases where several acts are alleged, any one of which could constitute the crime charged)." State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (finding a unanimity instruction was not required where multiple assaults occurred over a short period of time; the "continuous conduct" constituted the single act and the jury would only need to be unanimous as to whether this conduct occurred).[5] A defining characteristic of a multiple acts case is not only that a single count could be proved by evidence of any of the acts, but also that each act could support a distinct charge. State v. Furseth,

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[4] The current WPIC "Petrich" instruction, WPIC 4.25, reads as follows:

> The [State][County][City] alleges that the defendant committed acts of _____ on multiple occasions. To convict the defendant [on any count] of _____, one particular act of _____ must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of _____.

[5] The Court in Crane contrasted other cases wherein several distinct acts occurred, any one of which could constitute the crime charged. See Crane, 116 Wn.2d at 325 (citing Kitchen, supra (several separate sexual acts could support the charge of rape) and State v. Gitchel, 41 Wn. App. 820, 822, 706 P.2d 1091 (1985) (two separate sexual acts could support statutory rape charge), rev denied, 105 Wn.2d 1003 (1985)).

156 Wn. App. 516, 522, 233 P.3d 902, rev. denied, 170 Wn.2d 1007 (2010).

Martinez contends that a unanimity instruction was required here. While Martinez may have been correct prior to the Washington Supreme Court's decision in Hall, 168 Wn.2d 726, he is incorrect now. The Supreme Court held in Hall that "obstruction of justice is the evil that RCW 9A.72.120 was designed to forestall," and that the unit of prosecution for witness tampering is the ongoing attempt to persuade a witness not to testify in a single proceeding. Hall, 168 Wn.2d at 737.[6]

Here, the State offered three phone calls to prove the charge of witness tampering. In two calls, Martinez asked Heather to help convince Raley not to testify and suggested how to go about convincing her. Ex. 23. In the third call, Martinez talked directly with Raley and tried to pressure her not to testify. Ex. 23. The calls, which were made over the course of a week, were all clearly a part of Martinez's ongoing attempts to avoid conviction by

[6] Hall was decided on April 22, 2010. In response to Hall, the legislature amended RCW 9A.72.120, defining the unit of prosecution as "each instance of an attempt to tamper with a witness." See Laws of 2011, ch. 165, § 3. However, those amendments do not take effect until July 22, 2011.

preventing Raley from testifying.[7] Under Hall, all attempts--whether 1, 3, or 1,200--to influence "a" witness not to testify at a single proceeding constitute one crime of witness tampering. Id. at 737. Where the State could not have charged Martinez with multiple, separate counts of witness tampering, a unanimity instruction was not required. See Furseth, 156 Wn. App. at 522.

This Court's holding in Furseth is instructive. The State charged Furseth with one count of possession of child pornography. Id. at 518. At trial, the State introduced several images of child pornography that were found on Furseth's computer. Id. at 519. The State did not elect a particular image on which it relied for conviction and the trial court did not give a unanimity instruction. Id. On appeal, Furseth argued that his conviction was invalid because the jury was not instructed that it had to unanimously find that a single, particular image constituted child pornography. Id. This Court rejected Furseth's argument, holding that the Washington Supreme Court's decision in State v. Sutherby[8] "makes clear that, regardless of the number of images

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[7] Neither the State nor Martinez ever planned to call Heather as a witness. See CP 126-34; 1RP 15.

[8] 165 Wn.2d at 882, 204 P.3d 916 (2009).

an individual might possess at one time, such an individual may be prosecuted for only one act of possession of child pornography." Furseth, at 521-22. "Because the State could not have charged Furseth with multiple, separate counts of possession of child pornography, evidence that he possessed multiple images does not constitute evidence of multiple criminal acts." Id. at 522. Consequently, this Court ruled that a unanimity instruction was not required. Id.

Just as Sutherby dictated that Furseth was not a multiple acts case, under Hall, Martinez's case is not a multiple acts case.

The result that Martinez's multiple attempts to prevent Raley from testifying constituted but one act in which a unanimity instruction is not required is entirely consistent with similar types of cases, for example, possession of controlled substances.

In Love, the defendant challenged his conviction for one count of possession of a controlled substance with intent to deliver. He asserted that the trial court erred in failing to give a unanimity instruction because multiple acts supported the charge. Love, 80 Wn. App. at 360. This Court disagreed. "Where the State presents evidence of multiple acts," this Court said, "which indicate a 'continuing course of conduct' ... neither an election nor a unanimity

instruction is required." Id. at 361 (citing State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989)). This Court held that Love's possession of cocaine on his person and the possession of cocaine in his home constituted a continuous course of conduct, a single act for which a unanimity instruction was not required. Love, at 362-63; see also Handran, supra, (multiple acts of assault upon a single victim in an attempt to secure sexual relations constitutes a single act); State v. Gooden, 51 Wn. App. 615, 754 P.2d 1000 (unanimity that the defendant promoted prostitution was all that was required as the individual acts constituted but one continuing act), rev. denied, 111 Wn.2d 1012 (1988).

Similarly, in State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1294 (1995), the defendant was charged and convicted of a single count of delivery of cocaine despite the fact that he provided cocaine to an informant in a restaurant and later in a store parking lot. Like here, the defendant argued the trial court was required to give the jury a unanimity instruction. This Court rejected this argument, finding that the two acts were a continuing course of conduct amounting to but "one transaction." Fiallo-Lopez, 78 Wn. App. at 725.

Because Martinez's calls were all part of his continuing efforts to prevent Raley from testifying, he could not have been charged with multiple counts of witness tampering. Therefore, a unanimity instruction was not required.

2. THE TRIAL COURT PROPERLY ADMITTED MARTINEZ'S JAIL CALLS AFTER THE STATE AUTHENTICATED THE CALLS.

Martinez argues that the State failed to adequately establish the chain of custody for a CD of recorded calls that he made from the jail. Therefore, he argues, the trial court abused its discretion in allowing the CD to be admitted into evidence. Martinez's argument should be rejected because the voice recordings were readily identifiable and they were not susceptible to tampering. Any minor concerns regarding chain of custody go to weight, rather than admissibility.

a. Relevant Facts.

Prior to testifying, Raley listened to the jail recordings and recognized the voice of the caller as Martinez's voice; she also recognized herself and Heather as the call recipients. 2RP 173-74.

Sergeant Catey Hicks of the King County Jail testified about the procedures used for recording jail calls and responding to requests from law enforcement for copies of the recordings. All calls made by inmates are automatically recorded onto hard drives. 3RP 312. When a member of law enforcement requests recordings, they provide the phone number and a date range. 3RP 313. Hicks or her partner, Sergeant Pierson, burn all of the calls onto a CD. 3RP 314. They do not listen to the calls or try to identify the caller. Id. Along with the CD, they provide a phone log, listing the location of the phone used, and the time, date and duration of each call. 3RP 315. They also provide a "classification sheet," listing where the inmates have been housed. 3RP 314.

In this case, Pierson burned the requested calls onto a CD and initialed the label on the CD. 3RP 315. Although Pierson did not testify at trial, Hicks identified her partner's initials on the CD, as well as Martinez's CCN number[9] and name. 3RP 315-16. The original CD was admitted as exhibit 17. 3RP 318. The recordings were redacted in order to comply with motions in limine and only the redacted CD was played for the jury. Ex. 7; 3RP 398.

[9] The Computer Control Number ("CCN") is a unique identification number that stays with an inmate for every booking in the jail.

b. The Jail Call Recordings Were Properly Admitted.

Martinez claims that Hicks's testimony was not sufficient to establish the chain of custody and that the State was required to have Pierson testify because he actually burned the CD. Martinez's reliance on the chain of custody rule is misplaced. Evidence is generally admissible if it is relevant and if there is sufficient reason to believe that the evidence is what the proponent claims it to be. ER 402; ER 901(a). If the proffered evidence is unique, readily identifiable and relatively resistant to change, "the foundation need only consist of testimony that the evidence is what its proponent claims." United States v. Cardenas, 864 F.2d 1528, 1531 (10th Cir.), cert. denied, 491 U.S. 909 (1989); State v. Roche, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). Evidence that is unique and readily identifiable may be identified by a witness who can state that the item is what it purports to be. 5 Karl B. Tegland, Wash. Prac. § 402.31 (1999). A more stringent foundation detailing the chain of custody is required only when the evidence is not readily identifiable and is susceptible to alteration by tampering or contamination. Cardenas, 864 F.2d at 1531; Roche, 114 Wn. App. at 436.

Before a trial court can admit a recording of a human voice, the person speaking must be identified. ER 901(b)(5); State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007). The State can satisfy ER 901 by producing evidence sufficient to support the identification; direct identification of the voice by someone who participated in the call is not required. Williams, 136 Wn. App. at 499-501. Evidentiary rulings are reviewed for abuse of discretion. State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

Here, Raley identified Martinez as the caller in all of the recordings. 2RP 173. Raley had known Martinez for over 15 years. Her testimony was certainly sufficient to establish that the evidence was what the State claimed it was: recordings of calls made by Martinez.[10] Moreover, the procedures outlined by Hicks do not indicate that the recordings were susceptible to tampering. Because the evidence was readily identifiable and not susceptible to tampering, it was not necessary for the State to show the chain of custody. See Roche, 114 Wn. App. at 436.

Even if the State was required to establish chain of custody for the recordings, the trial court properly admitted the recordings.

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[10] Martinez does not challenge the jail calls on the basis of authentication or foundation. See App. Br. at 16 n.3.

This more stringent test requires the proponent to establish a chain of custody "with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with." Cardenas, 864 F.2d at 153. Factors to be considered include the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration. Campbell, 103 Wn.2d at 21. The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution. Id. at 21. "[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of the evidence, not its admissibility." Id.

Martinez's sole objection to the chain of custody is based on the fact that Hicks did not burn the CD that was admitted at trial. At most, this was a minor concern. Hicks explained how the CD was created and identified who created it. Although Martinez objected based on chain of custody, he did not appear to have concerns about tampering or alteration, as he never questioned Hicks about tampering during cross examination. 3RP 320-22. Any concerns about chain of custody are minor and go to weight, rather than admissibility.

3. THE TRIAL COURT PROPERLY INCLUDED MARTINEZ'S FLORIDA CONVICTIONS FOR ROBBERY IN THE FIRST DEGREE IN HIS OFFENDER SCORE.

Martinez argues that the State failed to prove that his convictions for armed robbery from Florida were comparable to a Washington crime for purposes of calculating his offender score.[11] Specifically, Martinez claims that Florida's robbery statute is broader than Washington's robbery statute. This argument is without merit because the elements of the crime of first degree robbery in Florida and Washington are comparable as a matter of law.

To properly calculate a defendant's offender score, the sentencing court must determine the defendant's criminal history based on his or her prior convictions and the seriousness level of the current offense. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The sentencing court must include all current and prior convictions in calculating the offender score. RCW 9.94A.589. A defendant's offender score establishes the range a sentencing court may use in determining the sentence. RCW 9.94A.530.

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[11] See CP 143-45.

The Sentencing Reform Act requires that prior out-of-state convictions be classified "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). "[T]he sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes." State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The State has the burden of proving by a preponderance of the evidence the existence and comparability of a defendant's prior out-of-state conviction. Id. at 482-83.

In determining whether a foreign conviction is comparable to a Washington felony, the court has devised a two-part test for comparability. In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the sentencing court compares the elements of the out-of-state offense with the elements of the apparently comparable Washington crime. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the results of the comparison show that the elements of the crimes are comparable as a matter of law, or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction counts toward the defendant's offender score for the present crime. Ford, 137 Wn.2d at 479-80. If the elements are not identical or the

Washington statute defines the offense more narrowly than does the foreign statute, the court may proceed to conduct a factual comparability analysis. State v. Farnsworth, 133 Wn. App. 1, 17-18, 130 P.3d 389 (2006); Morley, 134 Wn.2d at 606.

At the time of Martinez's crime, the relevant section of the Florida robbery statute provided:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another 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.
>
> * * *
>
> (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.

Fla. Stat. § 812.13 (1991). Although the 1991 robbery statute did not include an expressed intent element, Florida courts have long

recognized that robbery includes an implied element of intent to either permanently or temporarily deprive. Daniels v. State, 587 So.2d 460, 461-62, 16 Fla. L. Weekly S654 (1991).[12]

In Washington, a person commits robbery when he or she:

> 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....

RCW 9A.56.190. A person is guilty of robbery in the first degree if, in the commission of a robbery or during the immediate flight therefrom, he or she displays what appears to be a firearm or other deadly weapon. RCW 9A.56.200.[13]

Both states define robbery as the use or threatened use of force, violence or fear to obtain or retain the property of another. Fla. Stat. § 812.13(1) and (3)(b); RCW 9A.56.190. Additionally, the

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[12] In his brief, Martinez cites the current version of Fla. Stat. § 812.13. The difference between the 1991 statute and the current statute does not change the analysis here, as Florida's definition of robbery has not changed. Following Martinez's conviction, the Florida legislature amended the definition of robbery to include an express intent element, thus codifying the intent element that courts had recognized.

[13] The relevant provisions of RCW 9A.56.190 and .200 have not been amended since the time of Martinez's offense.

definition of first degree robbery in both Florida and Washington includes the use of an actual firearm or other deadly weapon in the course of the robbery, although Washington's statute is slightly broader because it includes the display of "what appears to be a firearm." Fla. Stat. § 812.13(2) and (3)(a); RCW 9A.56.200. Therefore, the trial court properly determined that the two statutes were comparable as a matter of law.

Nonetheless, Martinez argues that Florida's statute is broader than Washington's because under Florida law, the forceful act may be committed subsequent to the taking of property. Martinez's argument is meritless.

As discussed in State v. Manchester, both Washington and Florida recognize the transactional view that a robbery can be proven by evidence of force used to elude the victim or to retain the victim's property once it has been taken. 57 Wn. App. 765, 770, 790 P.2d 217 (1990). Importantly, when force is used after a peaceful taking, both Washington and Florida require that the force must be connected with the taking. See State v. Johnson, 155 Wn.2d 609, 610, 121 P.3d 91 (2005) (robbery conviction could not be based upon force used to escape after peaceably-taken

property was abandoned); Simmons v. State, 551 So.2d 607, 608, 14 Fla. L. Weekly 2609 (1989) (same).

Martinez also argues that Florida's intent to steal element is broader than Washington's intent to steal. Under Florida law, a defendant must act "with intent to either permanently or temporarily deprive the person or the owner of the money or other property." Fla. Stat. § 812.13(1). Citing to the dissent in State v. Allen, 159 Wn.2d 1, 12, 147 P.3d 581 (2006), Martinez claims that Washington law requires an intent to *permanently* deprive. App. Br. at 23-24. Therefore, Martinez argues, Florida's statute is broader than Washington's. Martinez is incorrect. Intent to *permanently* deprive is not an element of the crime of robbery. State v. Komok, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989).

Because the elements of robbery in the first degree in Florida are legally comparable to Washington's robbery in the first degree statute, the trial court properly included Martinez's prior convictions in his offender score.

However, even if trial court erred when it included Martinez's robbery convictions in his offender score, the case need not be remanded for resentencing. Ordinarily, imposition of an exceptional sentence requires a correct determination of the standard range.

State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). However, remand is not necessary when the record makes clear that the trial court would impose the same sentence regardless of the offender score. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). Here, the trial court found that it would impose the same exceptional sentence regardless of Martinez's offender score on the charge of assault in the second degree. CP 148-50. Under Tili, even if Martinez's offender score were incorrect, remand is unnecessary.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Martinez's conviction and sentence.

DATED this 21 day of July, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Bridgette E Maryman
BRIDGETTE E. MARYMAN, WSBA #38720
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. EDWARD MARTINEZ, Cause No. 65950-2-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name

Done in Seattle, Washington

Date 07-22-11