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No. 66475-1-I

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

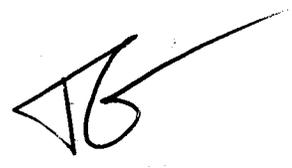
STATE OF WASHINGTON,

Respondent,

v.

JOHN A. JONES, III.,

Appellant.



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

The Honorable George N. Bowden

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

John Jones was convicted of second degree assault and the trial court imposed an exceptional sentence. That sentence was subsequently reversed on appeal by this Court. On remand, the court again imposed an exceptional sentence, basing the sentence on California convictions which were not comparable and factors not included in the exclusive list of aggravating factors nor proven to a jury beyond a reasonable doubt. Mr. Jones submits this Court must reverse his sentence and remand for a standard range sentence without the California convictions.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Jones' California convictions for first degree murder and attempted first degree murder comparable to Washington felony offenses.

2. The trial court erred in including the California convictions in Mr. Jones' criminal history.

3. The trial court erred in imposing an exceptional sentence above the standard range.

4. In the absence of substantial evidence, the trial court erred in entering Finding of Fact for an Exceptional Sentence which states:

The defendant has prior criminal history that includes crimes of violence; specifically murder, attempted murder, and assault, which he boasted about to the victim.

5. In the absence of substantial evidence, the trial court erred in entering Finding of Fact for an Exceptional Sentence which states:

The defendant has a prior history of domestic abuse.

6. The trial court violated Mr. Jones' constitutionally protected rights to a jury trial and to proof of every element beyond a reasonable doubt in imposing the exceptional sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Prior out-of-state convictions may be included in the offender score if they are found to be comparable to Washington offenses. The court must determine whether the offenses are legally comparable by examining the elements, and if not legally comparable, whether they are factually comparable by looking at the facts underlying the foreign conviction that have been admitted to, stipulated, to, or proven beyond a reasonable doubt. The court here found Mr. Jones' California convictions for first degree murder and attempted first degree murder comparable despite the fact the California offenses are broader than similar Washington offenses.

In addition, the facts admitted by Mr. Jones failed to establish his conduct was sufficient for comparability. Did the trial court err in finding the California convictions comparable thus requiring reversal of Mr. Jones' sentence?

2. An exceptional sentence based upon facts that were not proven to a jury or proven beyond a reasonable doubt violates the Sixth and Fourteenth Amendments. The court here based the imposition of the exceptional sentence on, among other things, facts which were not proven to a jury or proven beyond a reasonable doubt. Is Mr. Jones entitled to reversal of his exceptional sentence and remand for imposition of a standard range sentence?

D. STATEMENT OF THE CASE

Following a jury trial, John Jones III was convicted of one count of second degree assault involving domestic violence. CP 181. The jury also found in a special verdict that Mr. Jones committed the assault within sight or sound of the victim's minor child. CP 184. The trial court imposed an exceptional sentence of 120 months, the statutory maximum for that offense. CP 184. Mr. Jones appealed his conviction and sentence and this Court reversed and remanded for resentencing, finding the trial court

erred in including Mr. Jones' California convictions in his offender score without conducting the proper comparability analysis. CP 186-87.

On remand, the State supplemented the record with voluminous material regarding the California convictions. CP 32-131. Mr. Jones objected to the inclusion of the California convictions in his offender score. CP 132-49. The trial court failed once again to engage in the comparability analysis on the record, and merely included the prior convictions in Mr. Jones' offender score without comment. The court imposed the same 120 month exceptional sentence. CP 16-29; RP 11-12.

With respect to the offender score, I will find that the score is a 7. I will allow the State to supplement the record on resentencing here today. I've also considered a statement - - I guess, actually a second statement - - provided by [the victim] which I'll hand down for filing.

My decision to impose an exceptional sentence and particularly an exceptional sentence at the maximum of 120 months was not based on Mr. Jones' offender score. It was based on the fact of his history as disclosed to the victim. That is to say, I think the evidence was that she was aware of his murder conviction because it seemed that at least at the time he took some pride in that. But, I've recounted the reasons for the exceptional sentence. I won't belabor that. I think those same reasons are summarized in the appellate opinion from the Court of Appeals which I would incorporate by reference.

And that said, I will impose the same 120-month sentence I did previously.

CP 11-12.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN RULING THAT MR. JONES' CALIFORNIA FIRST DEGREE MURDER AND TWO ATTEMPTED FIRST DEGREE MURDER CONVICTIONS WERE COMPARABLE TO WASHINGTON FELONY OFFENSES

- a. The State is required to prove the California convictions were comparable to current Washington felony offenses. To properly calculate a defendant's offender score, the Sentencing Reform Act (SRA) requires that sentencing courts determine a defendant's criminal history based on his prior convictions. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The criminal sentence is based upon the defendant's offender score and seriousness level of the crime. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). "The offender score measures a defendant's criminal history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses." *Id.*

When a defendant's criminal history includes out-of-state or federal convictions, the SRA requires classification "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State must prove the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of the evidence. *Ross*, 152 Wn.2d at 230. This Court reviews the classification of an out-of-state conviction *de novo*. *State v. Jackson*, 129 Wn.App. 95, 106, 117 P.3d 1182 (2005), *review denied*, 156 Wn.2d 1029 (2006).

Generally, when engaging in the comparability analysis, the sentencing court must compare the elements of the prior out-of-state offense with the elements of the potentially comparable current Washington offenses. *In re the Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the crimes are comparable, a sentencing court must treat the defendant's out-of-state conviction the same as a Washington conviction. *Lavery*, 154 Wn.2d at 254. If, on the other hand, the comparison reveals that the prior offense did not contain one or more elements of the current crime as of the date of the offense (legal comparability), it is then necessary to determine from the out-of-state record whether

the out-of-state court found each fact necessary to liability for the Washington crime (factual comparability). *Morley*, 134 Wn.2d at 605-06. “If a factual analysis is necessary, the court considers only facts admitted or stipulated by the defendant, or proved beyond a reasonable doubt.” *State v. Johnson*, 150 Wn.App. 663, 676, 208 P.3d 1265 (2009). See also RCW 9.94A.530(2) (“In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.”).

b. The California first degree murder statute and attempt offenses are broader than Washington’s offenses. The trial court here erred in concluding the California convictions were comparable to Washington offenses because the California convictions contained additional elements and the State’s proof failed to show Mr. Jones’ actions would have fallen within a Washington offense.

i. The California offense of first degree murder

contains additional manners of committing the offense. Murder is defined in California as follows:

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

Cal. Penal Code § 187.

California separately defines the degrees of murder; first degree murder is defined as:

All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

As used in this section, "destructive device" means any destructive device as defined in Section 12301, and "explosive" means any explosive as defined in Section 12000 of the Health and Safety Code.

As used in this section, "weapon of mass destruction" means any item defined in Section 11417.

To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the

defendant maturely and meaningfully reflected upon the gravity of his or her act.

Cal. Penal Code § 189.

In addition to the statutory definition of murder, California has a unique doctrine that serves as the basis for first degree murder called the “provocative act.” “The provocative act murder doctrine has traditionally been invoked in cases in which the perpetrator of the underlying crime instigates a gun battle, either by firing first or by otherwise engaging in severe, life-threatening, and usually gun-wielding conduct, and the police, or a victim of the underlying crime, responds with privileged lethal force by shooting back and killing the perpetrator's accomplice or an innocent bystander.” *People v. Cervantes*, 26 Cal.4th 860, 867, 111 Cal.Rptr.2d 148, 29 P.3d 225 (2001)(citation omitted). *See also* *People v. Concha*, 47 Cal.4th 653, 663, 101 Cal.Rptr.3d 141, 218 P.3d 660 (2009) (the provocative act murder doctrine is shorthand “for that category of intervening-act causation cases in which, during commission of a crime, the intermediary (i.e., a police officer or crime victim) is provoked by the defendant's conduct into [a response that results] in someone's death.”).

Under this doctrine, “ [w]hen the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. In such a case, the killing is attributable, not merely to the commission of a felon, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life.” *Cervantes*, 26 Cal.4th at 868.

In contrast, in Washington, a person is guilty of murder in the first degree when:

- (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or
- (b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or
- (c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants

RCW 9A.32.030. Washington does not have a similar “provocative act” means for committing murder.

Thus, in reviewing the California and Washington offenses, and in light of the additional means of committing murder in California, it is clear the offenses are not legally comparable as California’s first degree murder statute is significantly broader.

ii. Attempted murder is similarly broader in California than Washington. In California, “[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.” *People v. Lawrence*, 177 Cal.App.4th 547, 556, 99 Cal.Rptr.3d 324, 332 (Cal.App.,2009) (citation omitted), *quoting People v. Lee*, 31 Cal.4th 613, 623, 3 Cal.Rptr.3d 402, 74 P.3d 176 (2003).

Washington defines as follows: a person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(a). Thus, a person is guilty of attempted first degree murder if, with intent to commit first degree murder, the defendant does any act that is a substantial step toward the commission of that crime. *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978).

As argued *supra*, the California first degree murder statute differs significantly from the Washington murder statute as it relates to the doctrine of “provocative act.” Thus, *attempted* first degree murder suffers from the same infirmity and is not legally comparable.

c. The California convictions were not factually comparable to Washington first degree murder or attempted first degree murder offenses. Since the elements of the California offenses are broader than the Washington definition of the particular offenses, this Court must look to the defendant’s conduct to determine whether that conduct would have violated a comparable Washington statute. *Morley*, 134 Wn.2d at 606. In so doing, this Court may look to any facts in the record either admitted or stipulated to, or found by the trier of fact beyond a reasonable doubt. *State v. Thomas*, 135 Wn.App. 474, 482, 144 P.3d 1178 (2006).

The California convictions were the result of Mr. Jones’ guilty pleas. CP 77-88. There is nothing in either Mr. Jones’ guilty plea form or the transcript of the change of plea hearing that indicates Mr. Jones’ conduct. There are various other documents submitted by the State, primarily documents from the Alameda County

Probation Department, which document the acts which constituted these offenses. Yet these documents were neither stipulated to or admitted by Mr. Jones nor found by the trial court to be proven beyond a reasonable doubt. In addition, the Amended Information contains no facts whatsoever establishing what occurred in the California prior convictions. Since there are no facts to indicate what conduct resulted in the Mr. Jones' convictions, the convictions could very well have been based upon a "provocative act." As a result, the convictions were not legally or factually comparable and the trial court erred in including them in Mr. Jones' offender score. *Lavery*, 154 Wn.2d at 258.

d. Remand for resentencing without the foreign prior convictions is the remedy for the trial court's error. In *Ford, supra*, the Supreme Court found that where "the evidence is insufficient to support the conclusion that the disputed convictions would be classified as felonies under Washington law" resentencing was required. 137 Wn.2d at 485. The Court stated, "In the normal case, where the disputed issues have been fully argued to the sentencing court, we would hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced." *Id.*

The Court reiterated the *Ford* holding in *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002), where the court held that “a remand for an evidentiary hearing is appropriate only when the defendant has failed to specifically object to the State's evidence of the existence or classification of a prior conviction.” 147 Wn.2d at 520.

Here, this matter was before the trial court specifically to allow the court to reexamine its prior sentencing and afford the State an opportunity to supplement the record with additional proof of the prior conviction. Mr. Jones specifically objected to the inclusion of the California convictions in his offender score, arguing that the convictions were not comparable. The State possessed the burden of proving the comparability of the prior convictions but once again provided insufficient evidence to prove comparability. The remedy is to reverse the sentence and remand for resentencing without the California convictions. *Ford*, 137 Wn.2d at 485. Further, because the issues have been fully argued to the sentencing court and the State has been given *two* opportunities to prove comparability, the State is barred from providing additional information regarding the California convictions. *Id.*

2. THE TRIAL COURT'S REASONS FOR IMPOSING AN EXCEPTIONAL SENTENCE WERE NOT SUPPORTED BY THE RECORD AND SHOULD BE STRICKEN

The jury returned a special verdict that the offense involved domestic violence and occurred within the sight or sound of the victim's minor child. CP 184.¹ At the resentencing, in imposing the exceptional sentence, the trial court relied primarily on the fact Mr. Jones boasted about his criminal history of murder and attempted murder to the victim. RP 11-12. In its written findings of fact, the court listed several reasons for the exceptional sentence: the jury's verdict on the aggravating factor and Mr. Jones' boasting of his criminal history as well as the fact Mr. Jones' criminal history included murder, attempted murder, and assault, and the fact Mr. Jones had a prior history of domestic abuse. CP 25.

¹ This is a statutory factor listed in RCW 9.94A.535(3)(h), which states:

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

a. The court's reasons for imposing the exceptional sentence violated Mr. Jones' right to a jury trial and proof beyond a reasonable doubt. At the sentencing hearing, the trial court emphasized the reason it was imposing an exceptional sentence was the fact Mr. Jones disclosed his criminal history to the victim and bragged about it. RP 12. In its written findings, the court relied on Mr. Jones' history of domestic abuse. CP 25. Neither of these bases are included in RCW 9.94A.535 and, since neither factor was ever presented to the jury or proven beyond a reasonable doubt, their use in imposing an exceptional sentence violated Mr. Jones' right to a jury trial and right to proof beyond a reasonable doubt.

The Sixth Amendment guarantees a criminal defendant the right to a trial by jury. *Blakely v. Washington*, 542 U.S. 296, 302, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). This right includes the Fourteenth Amendment right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.* If the State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found

by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 482-83, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

As a result of the decisions in *Blakely* and *Apprendi*, the Legislature enacted RCW 9.94A.535, which establishes an *exclusive* list of aggravating factors which authorize the imposition of an exceptional sentence. RCW 9.94A.535(3). The two facts utilized by the trial court in its oral ruling at sentencing, the fact Mr. Jones boasted about his criminal history to the victim and his history of domestic abuse, are not included in the exclusive list of aggravating factors listed in RCW 9.94A.535 and thus, cannot be the basis for an exceptional sentence. Further, since the trial court utilized these factors to increase Mr. Jones' sentence beyond the standard range without the State proving this factor to a jury beyond a reasonable doubt, the imposition of the exceptional sentence also violated Mr. Jones's Sixth Amendment and Fourteenth Amendment rights under *Blakely* and *Apprendi*.

b. The court failed to properly calculate Mr. Jones' offender score when it included the California convictions. It is axiomatic that a sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. See *State v. Brown*, 60 Wn.App. 60, 70, 802 P.2d 803

(1990), *review denied*, 116 Wn.2d 1025 (1991), *overruled on other grounds*, *State v. Chadderton*, 119 Wn.2d 390, 832 P.2d 481 (1992) (“[f]ailure to base a sentence on the proper offender score . . . contravenes the stated purpose of the Sentencing Reform Act of 1981”).

An exceptional sentence is reviewed to see if either (a) the reasons for the exceptional sentence are not supported by the record or do not justify an exceptional sentence, or (b) the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585(4). Thus, this Court reviews the record to see if the exceptional sentence has a factual basis in the record, is a legally justified reason, and is not too excessive or lenient. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

In imposing an exceptional sentence, the court must first correctly determine the defendant's standard range. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). The remedy for the trial court's failure to correctly calculate the standard range is to remand for resentencing unless it is clear the court would have imposed the same sentence anyway. *Id.*

Here, the court based its finding on three facts, two of which were not factually supported. Initially, there is nothing in the record

to support the court's finding that Mr. Jones had a history of domestic abuse. He was originally charged with eight counts of offenses from different degrees of assault to harassment, almost all based on domestic violence. CP 204-06. The jury found Mr. Jones not guilty of all but one count. CP 19. In addition, the State presented nothing at sentencing which established a prior history of domestic violence. The only prior convictions listed in the Judgment and Sentence were the California murder, attempted murder, and possession of controlled substances convictions; there were no prior convictions for domestic violence. Thus, the court's finding of fact is not supported by the record and should be stricken.

In addition, it is clear that the trial court assumed the California murder and attempted murder convictions were comparable and based the exceptional sentence to a great extent on that fact. CP 25 ("The defendant has prior criminal history that includes crimes of violence; specifically murder, attempted murder and assault, which he boasted about to the victim."). But, as argued *supra*, the California convictions were not comparable, thus the court's finding that Mr. Jones' prior criminal history contained

these convictions is also not supported by the record and should be stricken.

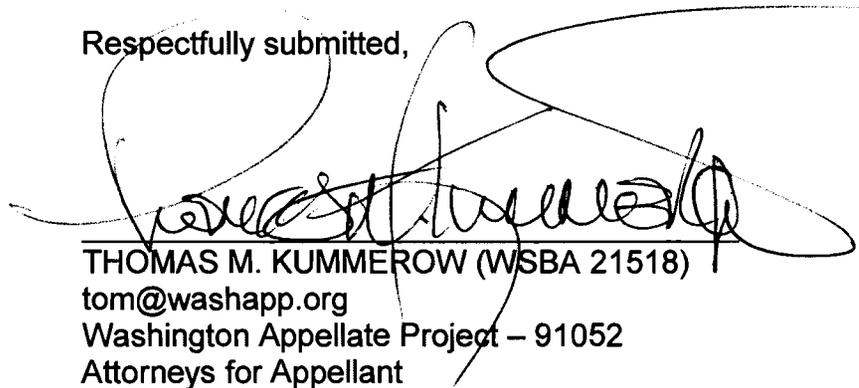
This Court must vacate the unlawful portion of the sentence, and reverse and remand for resentencing without allowing further evidence to be presented. *Ford*, 137 Wn.2d at 485.

F. CONCLUSION

For the reasons stated, Mr. Jones requests this Court reverse his sentence, find the California convictions were not comparable, and remand for resentencing without the California convictions.

DATED this 25th day of April 2011.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over a horizontal line. The signature is highly cursive and loops around the text below it.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66475-1-I
)	
JOHN JONES, III,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 25TH DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** 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:

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SIGNED IN SEATTLE, WASHINGTON, THIS 25TH DAY OF APRIL, 2011.

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