

COA NO. 71134-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN GARRISON,

Appellant.

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

The Honorable Carol Schapira, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

RECEIVED
NOV 24 2014
KING COUNTY SUPERIOR COURT
RECEIVED

NOV 24 2014
KING COUNTY SUPERIOR COURT
RECEIVED

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. IMPROPER ADMISSION OF PRIOR SEXUAL MISCONDUCT EVIDENCE PREJUDICED THE OUTCOME OF THE TRIAL.....	1
a. <u>The Court Committed Reversible Error In Not Balancing The Probative Value of ER 404(b) Evidence Against Its Prejudicial Effect On The Record</u>	1
b. <u>The Court Committed Reversible Error In Admitting The ER 404(b) Evidence To Show Absence Of Mistake Or Accident</u>	6
2. THE STATE DID NOT PROVE THE PRIOR TEXAS OFFENSE WAS COMPARABLE TO A WASHINGTON CLASS B FELONY, AND THEREFORE THE TEXAS OFFENSE CANNOT BE CONSIDERED A STRIKE OFFENSE FOR SENTENCING PURPOSES.	8
a. <u>The Texas Manslaughter Conviction Is Not Legally Or Factually Comparable To The Washington Offense Of First Degree Manslaughter.</u>	8
b. <u>The Texas Manslaughter Conviction Is Not Legally Or Factually Comparable To The Washington Offense Of Second Degree Assault</u>	13
B. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Clark v. Baines,</u> 150 Wn.2d 905, 84 P.3d 245, 251 (2004).....	3
<u>DeHeer v. Seattle Post-Intelligencer,</u> 60 Wn.2d 122, 372 P.2d 193 (1962).....	9
<u>Holland v. City of Tacoma,</u> 90 Wn. App. 533, 954 P.2d 290, <u>review denied,</u> 136 Wn.2d 1015, 966 P.2d 1278 (1998)	4
<u>In re Detention of Cross,</u> 99 Wn.2d 373, 662 P.2d 828 (1983).....	5
<u>In re Pers. Restraint of Cadwallader,</u> 155 Wn.2d 867, 880, 123 P.3d 456 (2005).....	11
<u>State v. Britton,</u> 27 Wn.2d 336, 178 P.2d 341 (1947).....	7
<u>State v. Carleton,</u> 82 Wn. App. 680, 919 P.2d 128 (1996).....	4
<u>State v. Coe,</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	2
<u>State v. Dewey,</u> 93 Wn. App. 50, 966 P.2d 414 (1998), <u>overruled on other grounds by</u> <u>State v. DeVincentis,</u> 150 Wn.2d 11, 74 P.3d 119 (2003).....	6
<u>State v. Evans,</u> 45 Wn. App. 611, 726 P.2d 1009 (1986).....	5
<u>State v. Failey,</u> 165 Wn.2d 673, 201 P.3d 328 (2009).....	13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Hovig</u> , 149 Wn. App. 1, 202 P.3d 318 (2009), <u>review denied</u> , 166 Wn.2d 1020, 217 P.3d 335 (2009)	14
<u>State v. Jackson</u> , 102 Wn.2d 689, 689 P.2d 76 (1984).....	2
<u>State v. Maesse</u> , 29 Wn. App. 642, 629 P.2d 1349 (1981).....	6
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	13
<u>State v. Roth</u> , 75 Wn. App. 808, 881 P.2d 268 (1994).....	6
<u>State v. Salinas</u> , 87 Wn.2d 112, 549 P.2d 712 (1976).....	14
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982).....	2
<u>State v. Thieffault</u> , 160 Wn.2d 409, 158 P.3d 580 (2007).....	10, 16
<u>State v. Ward</u> , 125 Wn. App. 138, 104 P.3d 61 (2005).....	4
<u>State v. Womac</u> , 130 Wn. App. 450, 123 P.3d 528 (2005), <u>aff'd in part, rev'd in part on other grounds</u> , 160 Wn.2d 643, 160 P.3d 40 (2007).....	6
<u>State v. Young</u> , 51 Wn. App. 517, 754 P.2d 147 (1988).....	3

TABLE OF AUTHORITIES

Page

FEDERAL CASES

North Carolina v. Alford,
400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)..... 2

United States v. Williams,
741 F.3d 1057 (9th Cir. 2014) 3

OTHER STATE CASES

Burrell v. State,
526 S.W.2d 799 (Tex. Crim. App. 1975) 12

Breaux v. State,
16 S.W.3d 854 (Tex. Ct. App. 2000)..... 9

Curry v. State,
30 S.W.3d 394, 399 (Tex. Crim. App. 2000)..... 11, 12

Dinnery v. State,
592 S.W.2d 343 (Tex. Crim. App. 1979) 9

Ex parte Williams,
703 S.W.2d 674 (Tex. Crim. App. 1986)..... 9

Franklin v. State,
659 S.W.2d 831 (Tex. Cr. App. 1983)..... 12

Lugo-Lugo v. State,
650 S.W.2d 72 (Tex. Crim. App. 1983) 8, 14, 15

McGill v. State,
200 S.W.3d 325 (Tex. Ct. App. 2006)..... 10

Menefee v. State,
287 S.W.3d 9 (Tex. Crim. App. 2009) 10

TABLE OF AUTHORITIES

Page

OTHER STATE CASES

Peterson v. State,
659 S.W.2d 59 (Tex. Ct. App. 1983)..... 14

Upchurch v. State,
703 S.W.2d 638 (Tex. Crim. App. 1985) 12

Windham v. State,
638 S.W.2d 486 (Tex. Cr. App. 1982)..... 12

RULES, STATUTES AND OTHER AUTHORITIES

ER 404(b)..... 1, 3-6

Former RCW 9A.36.020(1)(b) (1975)..... 14

Former RCW 9A.36.021(1)(a) (1987)..... 14

Former V.T.C.A., Penal Code § 19.02(a)(2) (1974)..... 8, 14

GR 14.1(a) 13

Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice (5th ed. 2007).
..... 6

Laws of 1988, ch. 266 § 2..... 14

Persistent Offender Accountability Act..... 16

A. ARGUMENT IN REPLY

1. IMPROPER ADMISSION OF PRIOR SEXUAL MISCONDUCT EVIDENCE PREJUDICED THE OUTCOME OF THE TRIAL.

a. The Court Committed Reversible Error In Not Balancing The Probative Value of ER 404(b) Evidence Against Its Prejudicial Effect On The Record.

The State claims the trial court properly balanced the probative value of the ER 404(b) evidence against its prejudicial effect on the record, thus avoiding error in the admission of this evidence. Brief of Respondent (BOR) at 14-16. But a thorough review of the record shows the trial court did not fulfill its obligations. Before the court admits ER 404(b) evidence in a sex case that will condemn a man to life in prison without release, it needs to explain why that evidence is admissible under the requisite evidentiary rule.

The court stated with regard to the A.F. allegations that "[t]here's no question, it is highly prejudicial to have any mention of sexual impropriety with a young person. But at the same time I think the State has come forward with considerable amount of similarities." 1RP 168-69. The court thus recognized the existence of prejudice and the existence of similarities, but did not articulate *why* or *how* the probative value of the similarities outweighed the prejudicial effect.

A little later on, the prosecutor stated "for the record, the Court is finding that the evidence which you have just set forth, [its] probative value is not outweighed by its unfair prejudice." 1RP 174. The court responded, "That's correct." 1RP 174. The evidence that the court "just set forth" was that related to A.F. 1RP 173. And again, the court did not articulate *why* or *how* the probative value of this evidence outweighed its prejudicial effect. Simply agreeing to the prosecutor's recitation of the boilerplate rule for admission is unsatisfactory. The judge must *enunciate* the reasons for her decision, which involves careful consideration and intelligent weighing of both relevance and prejudice on the record, especially in sex cases. State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984); State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984); State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). That did not happen here.

Moreover, in arguing for the admission of prior acts regarding A.F., the State made an offer of proof that included Garrison's Alford¹ plea to second degree assault against A.F. 1RP 134-35. The trial court referenced the plea before admitting the evidence. 1RP 166-67. But in Washington, an Alford plea is not treated as probative evidence because it

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

is not an admission of the underlying facts. United States v. Williams, 741 F.3d 1057, 1060 (9th Cir. 2014) (citing State v. Young, 51 Wn. App. 517, 754 P.2d 147 (1988); Clark v. Baines, 150 Wn.2d 905, 84 P.3d 245, 251 (2004)). This lends further force to Garrison's argument that the court did not properly balance the probative value against the prejudicial effect on the record.

The record in regard to the A.W. allegation is even sparser. The trial court admitted the A.W. evidence without making any reference to whether its probative value outweighed its prejudicial effect — not even a rote recitation of the legal standard. 1RP 130-31. The court altogether failed to identify the purpose of admission for this evidence at the time it was admitted. Id. As argued in the opening brief, without identifying a purpose for admission, a court cannot carefully balance the probative value against the prejudicial effect of the evidence because the probative value of the evidence is inextricably linked to why it is admitted. When the court later identified the purpose for admission deep into trial (5RP 11), it again made no effort to balance the probative value of this evidence against its prejudicial effect on the record. The court thus erred in admitting the ER 404(b) evidence related to A.W.

The State makes much of the fact that the court took care to exclude evidence of other incidents where A.W. woke up with her

clothing in disarray as too indefinite and highly prejudicial. BOR at 15-16. But that does not make up for the lack of balancing the probative value and prejudicial effect of the evidence that was admitted. In Carleton, "the court carefully sorted through the State's proffered evidence, and did not admit all of it" but nonetheless committed error in failing to conduct the requisite balancing on the record in admitting other ER 404(b) evidence. State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996). Garrison's case involves the same dynamic.

The State argues this Court can determine that the trial court would have admitted the ER 404(b) evidence if it had balanced the probative value against the prejudicial effect on the record. BOR at 16-17. But it makes no reasoned argument to that effect. Id. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290, review denied, 136 Wn.2d 1015, 966 P.2d 1278 (1998). Garrison's opening brief, citing Carleton, sets forth the reasoned argument for why this Court cannot be confident that the trial court would have admitted the evidence anyway. Brief of Appellant at 24-27.

The State does not argue the result would have been the same even if the trial court had not admitted the evidence. Carleton, 82 Wn. App. at 686-87. By failing to argue this point, the State has conceded it. See State

v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) ("The State does not respond and thus, concedes this point."); In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it").

Even if the ER 404(b) evidence related to A.F. was properly admitted, the erroneous admission of the ER 404(b) evidence related to A.W. still prejudiced the outcome. The common scheme evidence involving A.F. was remote in time, occurring 10 years before the charged crime against A.W. While lapse of time does not categorically prohibit admission of the evidence, it affects the weight given to that evidence by the jury. State v. Evans, 45 Wn. App. 611, 617, 726 P.2d 1009 (1986). A reasonable jury could discount the force of the A.F. evidence because it was so long ago. In contrast, evidence that Garrison recently touched A.W.'s thigh increased its persuasive force, due to its timing and the fact that the prior act related to the charged victim. Jurors could be swayed into concluding Garrison must have committed the charged crime by improperly admitted evidence that he touched A.W. in a sexual manner shortly before the charged crime involving the same person.

b. The Court Committed Reversible Error In Admitting The ER 404(b) Evidence To Show Absence Of Mistake Or Accident.

The State claims the Court of Appeals has "upheld the admission of ER 404(b) evidence to disprove accident or mistake even where the defendant did not specifically raise that defense," citing State v. Maesse, 29 Wn. App. 642, 649, 629 P.2d 1349 (1981). BOR at 17. Garrison disagrees with the State's interpretation of that case. In Maesse, evidence that other fires were intentionally set "rebutted any defense of mistake or accident" for the charged arson. Maesse, 29 Wn. App. at 649. This necessarily implies that a defense of mistake or accident was raised in that case. Otherwise, there would be nothing to rebut.

In the 30 plus years since Maesse was decided, it has never once been cited for the proposition that ER 404(b) evidence is admissible to show lack of mistake or accident even where the defendant has not raised a defense of mistake or accident. Authority cited in the opening brief shows the defendant must affirmatively raise such a defense before ER 404(b) evidence can be admitted to rebut it. Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice § 404.21 (5th ed. 2007); State v. Roth, 75 Wn. App. 808, 819, 881 P.2d 268 (1994); State v. Dewey, 93 Wn. App. 50, 58, 966 P.2d 414 (1998), overruled on other grounds by State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003); State v. Womac, 130 Wn.

App. 450, 452, 457, 123 P.3d 528 (2005), aff'd in part, rev'd in part on other grounds, 160 Wn.2d 643, 160 P.3d 40 (2007).

The State further contends any error in admitting the ER 404(b) evidence to show lack of mistake or accident is harmless because the court properly admitted the evidence to show common scheme or plan and there was actually no difference between the two grounds for admission. BOR at 18-19, 22-24. The problem is that the jury was allowed to consider both purposes in evaluating the significance of this evidence and one of those purposes was illegitimate.

"A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). The court's limiting instruction, by differentiating between common scheme and lack of accident/mistake, informed the jury that the two concepts were to be treated differently. CP 50. The jury, as trier of fact, may have discounted the persuasive force of a common scheme theory while finding the lack of mistake/accident theory to be persuasive. Under these circumstances, the error in admitting the ER 404(b) evidence to show lack of accident/mistake cannot be considered trivial, formal or merely academic.

2. THE STATE DID NOT PROVE THE PRIOR TEXAS OFFENSE WAS COMPARABLE TO A WASHINGTON CLASS B FELONY, AND THEREFORE THE TEXAS OFFENSE CANNOT BE CONSIDERED A STRIKE OFFENSE FOR SENTENCING PURPOSES.
 - a. The Texas Manslaughter Conviction Is Not Legally Or Factually Comparable To The Washington Offense Of First Degree Manslaughter.

The State concedes that the prong of Texas's voluntary manslaughter statute under which Garrison was convicted (circumstances that would constitute murder under former V.T.C.A., Penal Code §19.02(a)(2)) is not legally comparable to Washington's first degree manslaughter offense. BOR at 28, 32. The State, however, claims the two offenses are factually comparable. BOR at 28. According to the State, when Garrison pled guilty, he admitted the allegation in the indictment that he intended and knew his conduct was clearly dangerous to human life. BOR at 30-31. The State is mistaken.

Language in the indictment that Garrison "intentionally and knowingly commit[ted] an act clearly dangerous to human life" is not an essential element of voluntary manslaughter under 19.02(a)(2). Lugo-Lugo v. State, 650 S.W.2d 72, 80-82 (Tex. Crim. App. 1983). The State cites no Texas case where a defendant, by entering into a guilty plea, is deemed to have admitted not only the elements of the crime but also facts that are unnecessary to establish the elements. "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). Garrison did not, by entering his plea, admit to facts alleged in the indictment that were not necessary to establish the commission of the offense for which he was charged.

The peculiarities of Texas plea law further foreclose the State's argument. "A plea of guilty is an admission of guilt of the offense charged, but it does not authorize a conviction in a bench trial upon such plea unless there is evidence offered to support such plea and the judgment to be entered." Dinnery v. State, 592 S.W.2d 343, 351 (Tex. Crim. App. 1979). As a matter of federal due process, "[t]he entry of a valid plea of guilty has the effect of admitting all material facts alleged in the formal criminal charge" such that collateral attack to a plea on sufficiency of evidence grounds will not be entertained. Ex parte Williams, 703 S.W.2d 674, 682-83 (Tex. Crim. App. 1986). But a guilty plea is not authorized under Texas law unless and until the State introduces supporting evidence that "embrace[s] every essential element of the offense charged." Breaux v. State, 16 S.W.3d 854, 857 (Tex. Ct. App. 2000). This may be accomplished through the use of a defendant's evidentiary stipulation or a

"judicial confession" that cover the elements of the crime. Menefee v. State, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009).

We have no evidence in this record as to what evidence the State of Texas introduced as part of Garrison's plea that embraced the essential elements of the voluntary manslaughter offense. The State of Washington in the present case produced no evidence at sentencing of an evidentiary stipulation or judicial confession. It produced no evidence that the State of Texas introduced any evidence that embraced non-essential facts, such as the allegation that Garrison intended and knew his conduct was clearly dangerous to human life.

Furthermore, while the State must introduce evidence showing guilt in a guilty plea case where the defendant has waived his right to a jury trial, there is no requirement that the supporting evidence prove the defendant's guilt beyond a reasonable doubt. McGill v. State, 200 S.W.3d 325, 330 (Tex. Ct. App. 2006). This is significant because, in making its factual comparison, the sentencing court may only rely on facts in the foreign record that are "admitted, stipulated to, or proved beyond a reasonable doubt." State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). There is no proof beyond a reasonable doubt as to the unnecessary allegation contained in the indictment. And there are no facts in the

foreign record that show Garrison stipulated to or admitted the unnecessary allegation.

The State also contends that, under an exception to the surplusage doctrine, unnecessary language in a charging document cannot be disregarded when it is "descriptive" of an element of the offense, and therefore Garrison admitted he intended to cause serious bodily injury when he struck the head and body of his victim and knew his conduct was clearly dangerous to human life. BOR 31-32.

In light of the State's response, the citation to Curry v. State, 30 S.W.3d 394 (Tex. Crim. App. 2000) and the surplusage doctrine in the opening brief may have unintentionally clouded the issue rather than clarified it. The salient point is that defendants in Texas, by entering into a guilty plea, do not admit to facts alleged in the indictment that are unnecessary to establish the elements of the crime. Garrison need not resort to the surplusage doctrine to make the point. Rather, all he need do is point out that no Texas case holds that defendants in Texas, simply by entering into a guilty plea, admit to facts alleged in the indictment that are not necessary to establish the elements of the crime. The State bears the burden of proving comparability. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 880, 123 P.3d 456 (2005). The lack of Texas authority to support the State's argument is fatal to its position.

Furthermore, no Texas court has applied the exception to the surplusage doctrine to guilty pleas. When unnecessary language in an indictment is descriptive of that which is legally essential to charge a crime, "[s]uch language 'must be proven as alleged, even though needlessly stated.'" Curry, 30 S.W.3d at 399 (quoting Upchurch v. State, 703 S.W.2d 638, 640 (Tex. Crim. App. 1985)). But when is that proposition applicable?

The Texas exception to the surplusage doctrine applies to what the State must prove to the trier of fact at trial. See, e.g., Franklin v. State, 659 S.W.2d 831, 832-34 (Tex. Crim. App. 1983) (reversing conviction for insufficient evidence following jury trial where State failed to prove unnecessary matter included in indictment that was descriptive of legally essential aspect of offense); Windham v. State, 638 S.W.2d 486, 487-88 (Tex. Crim. App. 1982) (same); Burrell v. State, 526 S.W.2d 799, 800, 803-04 (Tex. Crim. App. 1975) (same). Undersigned counsel cannot find any Texas case that applies the exception to the surplusage doctrine to guilty pleas. The State has cited to none. The State fails to acknowledge its unjustified conceptual leap in drawing a connection between what the State must prove at trial when the surplusage exception applies and what the defendant admits by entering a plea.

b. The Texas Manslaughter Conviction Is Not Legally Or Factually Comparable To The Washington Offense Of Second Degree Assault.

For the first time on appeal, the State claims that the Texas manslaughter conviction is comparable to the current Washington offense of second degree assault, a class B felony. BOR at 34. The State's comparability analysis rests on the incorrect premise that courts must compare the foreign offense to the Washington offense as it is currently defined by statute.² BOR at 33-34.

To determine if a foreign crime is comparable to a Washington offense, "the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed." State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). The Texas offense was committed in 1981. CP 260. We must look to how the statute defined the Washington offense of second degree assault in 1981. At that time, a person was guilty of second degree assault

² The State's citation to the unpublished portion of State v. Floyd, 178 Wn. App. 402, 316 P.3d 1091 (2013) is inappropriate. BOR at 34; see GR 14.1(a) ("A party may not cite as an authority an unpublished opinion of the Court of Appeals. "). The State's citation is also misplaced because comparison with the offense as currently defined occurs when the comparability of a prior Washington offense is at issue, not when the comparability of a foreign offense is at issue. See State v. Failey, 165 Wn.2d 673, 676-78, 201 P.3d 328 (2009) (involving the former scenario).

if he "[s]hall knowingly inflict grievous bodily harm upon another with or without a weapon." Former RCW 9A.36.020(1)(b) (1975).³

The Washington second degree assault offense in 1981 is not comparable to the Texas offense of voluntary manslaughter. The Texas offense is broader in terms of mens rea.

To be convicted of second degree assault, the person must "knowingly" inflict grievous bodily harm upon another. But there is no such mens rea counterpart to the Texas manslaughter offense. There is no culpable mental state for the act alleged to be "clearly dangerous to human life that causes the death of an individual" under former V.T.C.A., Penal Code §19.02(a)(2). Peterson v. State, 659 S.W.2d 59, 61 (Tex. Ct. App. 1983); Lugo-Lugo, 650 S.W.2d at 80-82. The statute only requires the specific intent to cause serious bodily injury, while "the act clearly dangerous to human life" is an objective standard untied to any culpable mental state. Lugo-Lugo, 650 S.W.2d at 81-82. In other words, the intent

³ "Grievous bodily harm," as used in the former assault statute, means (1) "a hurt or injury calculated to interfere with the health or comfort of the person injured"; and (2) "atrocious, aggravating, harmful, painful, hard to bear, and serious in nature." State v. Hovig, 149 Wn. App. 1, 11, 202 P.3d 318 (2009) (quoting State v. Salinas, 87 Wn.2d 112, 121, 549 P.2d 712 (1976)), review denied, 166 Wn.2d 1020, 217 P.3d 335 (2009). In 1987, the legislature changed the definition of second degree assault to "[i]ntentionally assaults another and thereby inflicts substantial bodily harm." Former RCW 9A.36.021(1)(a) (1987). In 1988, the word "recklessly" was added before "inflicts." Laws of 1988, ch. 266 § 2.

to inflict a certain level of injury is uncoupled from any mens rea tied to the commission of the act. As a result, a person could be guilty of voluntary manslaughter under Texas law if he intends to cause serious bodily injury, even if he does not knowingly commit an act that is clearly dangerous to human life that causes the death of an individual. Stated in different terms, a person could be guilty of voluntary manslaughter if he intends to cause serious bodily injury but then recklessly or negligently commits an act that is clearly dangerous to human life.

The Texas statute does not add a culpable mental state to the conduct that caused the harm (death). The Washington statute adds a culpable mental state to the conduct that caused the harm (grievous harm). The Texas statute is therefore broader than the Washington second degree assault statute in terms of the mens rea required for the commission of the act that causes the harm. A person could commit the Texas offense of voluntary manslaughter without committing the Washington offense of second degree assault. The offenses are not legally incomparable.

The State cannot prove factual comparability because, as set forth in A.2.a., supra, Garrison did not admit to the unnecessary charging language consisting of "intentionally and knowingly" committing an act clearly dangerous to human life, "to-wit: striking the head and body of the said [T.M.C.], thereby causing the death of an individual, namely:

[T.M.C.]" The record does not otherwise factually show that Garrison stipulated to this unnecessary language or that the State proved the unnecessary allegation beyond a reasonable doubt.

Only foreign convictions that are either legally or factually comparable may count as a strike under the Persistent Offender Accountability Act. Thieffault, 160 Wn.2d at 415. The State has not proven the comparability of the Texas offense. The State at sentencing conceded the Texas conviction would wash out if it was comparable to a class C felony. 9RP 18. Garrison's persistent offender sentence must be vacated and the case remanded for resentencing within the standard range.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Garrison requests reversal of the conviction. In the event the Court declines to reverse the conviction, Garrison requests remand for resentencing within the standard range as a non-persistent offender.

DATED this 24th day of November 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.


CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71134-2-I
)	
KEVIN GARRISON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] KEVIN GARRISON
DOC NO. 991241
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF NOVEMBER 2014.

X *Patrick Mayovsky*

NOV 24 11:18 AM '14
STATE OF WASHINGTON
COURT OF APPEALS DIVISION ONE