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NO. 34031-3-II

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

STATE OF WASHINGTON, Respondent, v. LAURENTIU GIOVANI MIHALACHE, Appellant.
FROM THE SUPERIOR COURT FOR CLARK COUNTY THE HONORABLE JOHN P. WULLE CLARK COUNTY SUPERIOR COURT CAUSE NO. 04-1-02223-1
BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney's Office
Franklin Center
1013 Franklin Street
PO Box 5000
Vancouver, WA 98666-5000
Telephone (360) 397-2261 and (360) 397-2183

TABLE OF CONTENTS

I. STATEMENT OF FACTS 1

II. RESPONSE TO ASSIGNMENTS OF ERROR 1

III. CONCLUSION.....8

TABLE OF AUTHORITIES

Cases

<u>Morley</u> , 134 Wn.2d at 606.....	3
<u>State v. Cabrera</u> , 73 Wn.App. 165, 168, 868 P.2d 179 (1994).....	3
<u>State v. Ford</u> , 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999).....	2
<u>State v. McCorkle</u> , 137 Wn.2d 490, 495, 973 P.2d 461 (1999).....	2
<u>State v. Morley</u> , 134 Wn.2d 588, 606, 952 P.2d. 167 (1998).....	3

I. STATEMENT OF FACTS

In September, 2005, the defendant pled guilty to a domestic violence felony here in the State of Washington. Specifically, he pled guilty to a felony violation of a domestic violence court order with the named victim, Claritza De Leon. The issue raised in this case deals with the scoring of an Attempted Assault in the Second Degree which occurred in the State of Oregon with the same victim.

The practical difference in the case is that if the Oregon conviction is scored as a gross misdemeanor, his standard range is 12 to 14 months. If it counts as a felony conviction, his standard range is 13 to 17 months. He received a sentence of 17 months by the court. This appeal is dealing with the difference of three months.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The assignment of error raised by the defendant is that the definition of an assault in the state of Washington is that it is an intentional act and in the state of Oregon, it is an intentional and

knowing act. The State offered, at the time of sentencing, exhibits which were the certified copies of the documentation from the state of Oregon: specifically, the Oregon indictment and the Oregon Judgment of Conviction and Sentence. The defendant acknowledged that the conviction in Oregon was his. The domestic violence paperwork entered in the state of Oregon indicates that the victim of the assault in that state was the same victim as indicated in our state. Unfortunately, the paperwork from Oregon doesn't give a lot of detail as to specifically what occurred.

The argument raised in this appeal is that because there is no indication in the paperwork as to whether or not this was an intentional versus knowing act that therefore is that in Oregon this could be a knowing assault as opposed to an intentional attack.

The State bears the burden of proving by a preponderance of the evidence, the existence of the prior conviction. State v. Ford, 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999). Part of this obligation is that the State must establish that the prior convictions from another jurisdiction are comparable to the Washington crime. State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). While the best evidence of a prior conviction is a certified copy of the Judgment, which was done in this case, the State may also

introduce documents or other evidence of the prior proceedings to establish the defendant's criminal history. State v. Cabrera, 73 Wn.App. 165, 168, 868 P.2d 179 (1994). To classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of comparable Washington offenses. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d. 167 (1998). If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, the trial court must review the record of the out-of-state convictions to determine whether or not the defendant's conduct would have violated the comparable Washington offense. Morley, 134 Wn.2d at 606.

In our situation, the defendant acknowledged the criminal conviction from the State of Oregon as his. The victim of the Washington crime (violation of the domestic violence no contact order) is the same person as the Attempted Assault in the Second Degree in the state of Oregon. Although the issue at the time of sentencing appeared to be an argument that the State was estopped from using this conviction because of an unpublished decision from the Court of Appeals dealing with this individual, it was obvious from that opinion that the Court of Appeals had not

ruled on this specific issue. The defendant had previously appealed a finding of guilt by a jury of one count of Attempting to Elude a Pursuing Police Vehicle. The appeal to Division II was under appellate number 29700-1-II. Issues about the applicability of the attempted assault were not decided by the appellate court and were sent back for further work at the trial court level. Once it got back to the trial court level, a compromise was reached so the issues were never addressed.

The comparability question raised on this appeal is whether or not the Oregon conviction is comparable because it also contains a knowing concept. If this were an intentional assault by the defendant, the State submits it would qualify as an out-of-state conviction that would count in the Washington scoring .

At the time of sentencing, the victim, Ms. DeLeon, was present in court and addressed the court. As part of her recitation of information dealing with her history with this defendant, she talks about the assault with the cane that occurred in the state of Oregon. The State submits that this was proper information for the trial court to consider and clearly establishes that this was an intentional act by the defendant. There was a long history between

these people which started in Romania and continued into the United States. Her comments, where germane, are as follows:

“THE COURT: I’m listening, go ahead.

MS. DeLEONE: Okay, no, I just -- it’s hard to explain. I don’t understand at all what you’re trying to prove if he’s a convicted felon or not. Because he knocked out my teeth in Romania. He didn’t let me come back to this country –

MR. CANE: So I object, Your Honor.

THE COURT: Noted.

MS. DeLEONE: -- for a month, because I asked him to come back to the United States and he knocked out my teeth, and he held me against my will, and all my children –

THE COURT: Uh-huh.

MS. DeLEONE: He swears that as soon as he gets out he’s gonna come back and get me. He’s – he’s been in and out of jail since about 2002. Every time he’s come out, he’s contacted me within the first day.

He put on record that he will not obey any no-contact order because he thinks he owns me and my children. And he swears that if I don’t help him get out he’s gonna kill me, and I have no reason to doubt him, because if I could approach you, I can show you the scars on my head, the – injuries that I have for the rest of my life because of the things he’s done to me (indicating left arm).

He’s not gonna leave me alone. He swore if he can’t have me, he will kill me. Six blows to the back of the head is not an attempted assault. To me,

if it would have been a crowbar it would have been murder, because that cane cracked on my head. If it would have been a crowbar, my head would have been cracked.

And I'm lucky, I even got back from Romania. I tried to help him, I bailed him out myself, because if I didn't, I was gonna get it.

But I can't anymore. I can't help him. And he said the day I don't help him when he gets out, I'm gonna be sorry.

When I was helping him I was sorry, I still got beat up. This has been seven years of – of – of torment, I've been telling him I don't want to be with him. He doesn't care.

Ask his pastor (*indicating) . I – I've been – they paid for an apartment for me to leave him. He came right back and got me. He doesn't – he doesn't care about anything anybody tells him, he's gonna come after me.

He wants to take my children, he kidnapped my children to California already. He had me arrested for kidnapping. And when the FBI did their investigation, they released me and told me to get a restraining order on him, and they give me a ride home to my kids.

And this guy says that there's something minor happened in Portland (indicating Mr. Cane). He put me in the hospital. He disabled me. He – I cannot use my hand. When I told Giovanni, I said, "Giovanni, don't you understand, my hand is gonna be painful for the rest of my life?" He said, "Good." Look at his hand. Have you seen his hand? He said, "Good," because he lives with pain.

And now I can remember him with this pain no matter what I do for the rest of my life.

So he's proud of hurting me. He's proud he knocked out my teeth, 'cause he thinks he taught me a lesson. He's not gonna – he's not gonna let up.

And he shouldn't even be in this country, we shouldn't even be here today. He should be in Romania. His asylum should be revoked, because he took me hostage in Romania, he refused to let me come back to my home. Why is he sitting here with asylum? He shouldn't be in this country. He entered illegally just to come and – and torment me.

He – he's – he's not – doesn't have any remorse. He doesn't have any spirit to me. He's just – he's just a bad, bad person.

THE COURT: Thank you." (RP 50, L. 15 – 53, L. 23).

The State submits that when this additional information is supplied to the sentencing court, it becomes obvious that the Oregon assault was an intentional act on his part. Thus, it would fit the Washington statutes and be comparable to the Washington crime of Attempted Assault in the Second Degree.

III. CONCLUSION

The State submits that it has proven by a preponderance of the evidence the classification of the out-of-state conviction. The defendant was properly sentenced within the standard range.

DATED this 18 day of July, 2006.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

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DECLARATION OF TRANSMISSION
BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On July 20, 2006, I deposited in the mails of the United States of America properly stamped and addressed envelopes directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

DATED this 20th day of July, 2006.

	Laurentiu Giovanni Mihalache 4716 NE 39 th Street Vancouver, WA 98665	Lisa E. Tabbut Attorney at Law 1402 Broadway Longview, WA 98632
TO:	David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	

DOCUMENTS: BRIEF OF RESPONDENT

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

Carol J. Appert
Date: July 20, 2006.
Place: Vancouver, Washington.