

FILED  
COURT OF APPEALS  
DIVISION II

08 AUG 25 PM 12:22

STATE OF WASHINGTON  
BY W  
DEPUTY

NO. 36931-1-II  
Cowlitz Co. Cause NO. 06-1-00824-1

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

**KENNETH EUGENE ASHMAN,**

Appellant.

---

**BRIEF OF RESPONDENT**

---

SUSAN I. BAUR  
Prosecuting Attorney  
JAMES B. SMITH/WSBA #35537  
Deputy Prosecuting Attorney  
Attorney for Respondent

Office and P. O. Address:  
Hall of Justice  
312 S. W. First Avenue  
Kelso, WA 98626  
Telephone: 360/577-3080

PM 8/27/08

**TABLE OF CONTENTS**

Page

**I. INTRODUCTION..... 1**

**II. STATEMENT OF THE CASE..... 1**

**III. ISSUES ASSERTED ON APPEAL..... 3**

**i. The Trial Court Did Not Abuse Its Discretion by Admitting a  
    Photograph of the Appellant..... 3**

**ii. The Trial Court Did Not Err by Finding the Appellant’s  
    Conviction for Attempted Assault in the Second Degree Was  
    Comparable to a Washington Felony..... 7**

**a. The Appellant’s Conviction For Attempted Assault in the  
        Second Degree Is Comparable to a Washington Offense..... 8**

**b. If This Court Finds the Proof of Comparability Insufficient,  
        Remand is Necessary as the Appellant Has Raised a New Issue  
        Not Presented to the Trial Court..... 10**

**IV. CONCLUSION..... 12**

## TABLE OF AUTHORITIES

Page

### Cases

<u>Spinelli v. Economy Stations, Inc.</u> , 71 Wn.2d 503, 429 P.2d 240 (1967)	12
<u>State v. Baldwin</u> , 109 Wn.App. 516, 37 P.3d 1220 (2001) .....	4
<u>State v. Davis</u> , 119 Wn.2d 657, 835 P.2d 1039 (1992).....	8
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999) .....	8, 11, 12
<u>State v. McCorkle</u> , 88 Wn.App. 485, 945 P.2d 736 (1997).....	11
<u>State v. McIntyre</u> , 112 Wn.App. 478, 49 P.3d 151 (2002) .....	7
<u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1255 (2001) .....	4
<u>State v. Solomon</u> , 73 Wn.App. 724, 870 P.2d 1019 (1994) .....	6
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997) .....	4
<u>Warren v. Hart</u> , 71 Wn.2d 512, 429 P.2d 873 (1967).....	5, 6

### Statutes

RCW 9.94A.570.....	1
--------------------	---

### Other Authorities

ORS 161.405.....	9
------------------	---

## **I. INTRODUCTION**

The appellant was charged with assault in the second degree with a deadly weapon enhancement against Joseph Galyan<sup>1</sup>. CP 1-2. The case came on for trial on August 28, 2006, before the Honorable Judge James Stonier. After hearing the evidence, the jury convicted the appellant.

After trial, the appellant's competency became an issue, and he was sent to Western State Hospital for a lengthy stay. Eventually, the appellant was restored to competency and he returned for a sentencing hearing. At this hearing on October 25<sup>th</sup>, 2008, Judge Stonier found the appellant had two prior convictions for most serious offenses in the state of Oregon and imposed a sentence of life in prison without the possibility of early release, pursuant to the Persistent Offender Accountability Act. RCW 9.94A.570; CP 140-151. The instant appeal timely followed.

## **II. STATEMENT OF THE CASE**

On June 26<sup>th</sup>, 2006, Valerie Edwards returned to her office located in downtown Longview, Washington. Ms. Edwards was coming back from lunch, and was walking through the parking lot when an altercation caught her attention. RP 21. Ms. Edwards turned and saw a small man in his twenties being chased by an older man. RP 21-22. The younger man, Joseph Galyan, was described as a "very, very timid little man." RP 21. As

---

<sup>1</sup> The transcript spells Mr. Galyan's name phonetically as "Galleon." The correct spelling is reflected on the information.

Ms. Edwards watched, the older man, who was wearing a brown vest over a t-shirt, drew a large butcher knife and continued the chase. RP 22. The younger man fled through the parking lot, but eventually tripped and fell to the ground. The older man then stood over him with the knife and continued to yell at him. RP 24. The older man then fled the scene, and Ms. Edwards attempted to help the younger man. Ms. Edwards noticed that the young man had scraped his elbow when he fell to the ground. RP 35. Ms. Edwards testified that the appellant was the older man she had observed with the knife. RP 25.

Curtis Jackson, who worked at a body shop in downtown Longview, also observed this incident. Mr. Jackson saw an older man with a large knife in his hand chase a younger man across a parking lot. RP 48. The older man yelled, “don’t ever threaten me again” as he chased the young man through the area. During the chase, the young man fell down and the older man “flinched” him with the knife. Id. Mr. Jackson explained that this meant the older man used the knife to scare the younger man as he lay on the ground. RP 49. Mr. Jackson stated that the older man was wearing a jacket, and was unable to testify that the appellant was the person with the knife. RP 50-51.

The police responded to the scene and were given a description of the older man as a white male wearing a brown vest, dark shirt, and dark

pants. RP 38. Officer Michael Rabideau observed an individual matching this description seated on a bench not far from the scene. RP 39. Officer Rabideau arrested this person, and identified the appellant as the person he placed under arrest. RP 40-41. After the arrest, two photographs were taken of the appellant, these were marked as exhibits 3 and 4. RP 45.

Mr. Galyan did not testify at trial. After the State rested, the appellant testified that Mr. Galyan approached him and a dispute arose over a bag of trash the appellant was sifting through. RP 86-87. The appellant claimed Mr. Galyan made an aggressive gesture towards him, at which point he drew a knife from within his vest. RP 87-88. The appellant stated that Mr. Galyan fled through the parking lot, and that he gave chase with the knife. RP 100-101. The appellant testified that after the incident he left the knife somewhere because he “didn’t want it anymore.” RP 97.

### **III. ISSUES ASSERTED ON APPEAL**

#### **i. The Trial Court Did Not Abuse Its Discretion by Admitting a Photograph of the Appellant**

The appellant argues that the trial court’s decision to admit a photograph to establish identity is manifestly unreasonable. The appellant argues at length that admission of this photograph was somehow tantamount to opinion evidence on the issue of guilt. However, the

appellant's arguments are unpersuasive and this Court should reject the claim.

Preliminarily, the appellant claims that two photographs of him were admitted into evidence. Exhibit 3 was a photograph of the front of his body, and exhibit 4 was a photograph of his back. Exhibit 4 also showed the appellant was handcuffed. RP 78. The appellant claims that both exhibits were admitted into evidence. On this point the appellant is simply mistaken. After argument, the trial court admitted exhibit 3 and refused exhibit 4. RP 72, 78. Thus, the trial court did not admit the most prejudicial photograph, which showed the appellant in handcuffs. This basic unfamiliarity with the facts of the case severely undermines the appellant's argument on this point.

On appeal, this Court reviews the admission of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

The appellant argues at length that admission of the photograph, or apparently even mention of the fact the appellant was arrested for a crime, is opinion evidence of guilt and therefore reversible error.

Unsurprisingly, the appellant offers no authority for the extraordinary claim that it is improper in a criminal case for there to be testimony the defendant was actually arrested for a crime. The appellant cites to Warren v. Hart, 71 Wn.2d 512, 429 P.2d 873 (1967), but this case provides no support for the absurd claim that it is improper to inform the jury in a criminal trial that the defendant was arrested for a crime.<sup>2</sup>

Warren held that it was improper, in a civil case, for counsel to argue that there was no liability because the officer at the scene of a accident had held a “little baby court” and did not issue a citation. 71 Wn.2d at 518. That this is misconduct is unremarkable. That this holding does not mean what the appellant construes it to mean is undeniable.

Turning to the question of whether the trial court abused its discretion by admitting exhibit 3, it is clear that the trial court carefully considered the issues before it when making its ruling. The trial court noted that identity was an issue before the jury, and that the photograph was probative evidence on this issue. RP 71. Contrary to the appellant’s claims, there was no stipulation at trial that the appellant was in fact the

---

<sup>2</sup> If the appellant’s argument were carried to its logical conclusion, a jury would not be informed that the prosecution had filed charges against the defendant, because this too would constitute an opinion that the person was guilty. Evidently in the system urged by the appellant, the jury would remain unaware why they were there and would have to conclude on their own whether they were serving on a criminal case or a civil action. The appellant’s theory would also prevent the trial court from referring to the person on trial as “the defendant” lest this also constitute a grave and irrevocable comment on guilt. While it is amusing to consider the appellant’s argument, it is not supported by the law or logic.

same person who had assaulted Mr. Galyan. At the time the exhibit was admitted, the appellant had not testified and stated he committed the act in self-defense. To claim that identity was not in issue is to simply misstate the record of the trial. In any prosecution, the State must prove that the person accused is the one who actually committed the acts in question. See State v. Solomon, 73 Wn.App. 724, 728, 870 P.2d 1019 (1994).

Exhibit 3 showed an individual matching the description of the person observed chasing Mr. Galyan with a butcher knife. Mr. Galyan himself did not testify, thus raising the possibility that the jury may believe there was some question as to identity. Indeed, the sole direct evidence of identity in the State's case was Ms. Edwards in court identification of the appellant. Moreover, Ms. Edwards and Mr. Jackson gave differing descriptions of the clothing worn by the assailant. Exhibit 3 corroborated Ms. Edwards' identification of the appellant as the same person observed assaulting Mr. Galyan, and thus shored up the State's case before the jury and for any motion on the sufficiency of the evidence.

The trial court noted this, stating that "the State is entitled to prove their case and [defense counsel] says there's no issue as to identity. I don't know if there's an issue as to identity in the minds of the jurors." RP 71. It strains credulity to argue that this ruling amounts to a manifestly

unreasonable decision. The decision to admit exhibit 3 was not an abuse of discretion, and this Court should reject any claim otherwise.

**ii. The Trial Court Did Not Err by Finding the Appellant's Conviction for Attempted Assault in the Second Degree Was Comparable to a Washington Felony**

At sentencing, the trial court found that the appellant had two prior convictions from the state of Oregon, and that these offenses were comparable to most serious offenses under Washington law. Specifically, the trial court found the appellant had previously been convicted of robbery in the third degree and attempted assault in the second degree. The appellant does not contest the comparability of the robbery conviction, likely because this Court has previously held this offense is comparable to robbery in the second degree under Washington law. State v. McIntyre, 112 Wn.App. 478, 49 P.3d 151 (2002).

The appellant's claim is instead that the attempted assault in the second-degree conviction is not comparable to a most serious offense in Washington. This argument is based on a claim that the conviction was for a knowing, rather than intentional, assault, and that the assault is therefore not comparable to a most serious offense. The State would note that this argument was not raised before the trial court. See RP 199-213. Instead, the argument before the trial court focused on whether a

“dangerous weapon” under Oregon law was comparable to a “deadly weapon” in Washington. RP 204.

When viewed completely, the record establishes that the appellant’s conviction was for an intentional act. However, if this Court should disagree, the proper remedy is for remand to the trial court under State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), as the appellant has raised a new issue not argued at the lower court.

**a. The Appellant’s Conviction For Attempted Assault in the Second Degree Is Comparable to a Washington Offense**

The State agrees with the appellant that the case law has clearly established that an assault with a deadly weapon must still be an intentional act. See State v. Davis, 119 Wn.2d 657, 835 P.2d 1039 (1992). The omission of this element from the statutory scheme is of no import. However, the State disagrees with the appellant’s claim that there is no proof the conviction at issue was the result of an intentional act.

The appellant was charged by information in Washington County, Oregon as follows:

That the above named defendant(s) on or about 1<sup>st</sup> day of August, 1990, in Washington County, Oregon, did unlawfully and knowingly cause physical injury to Kirk R. Norfolk by means of a dangerous weapon, to-wit: a 1981 Ford Mustang by throwing the said Kirk R. Norfolk from the automobile and causing the said Kirk R. Norfolk to be dragged from the moving automobile.  
Sentencing exhibit 4a.

The appellant later pled guilty to attempted assault in the second degree for this incident, a lesser included offense under Oregon law. Sentencing exhibit 4b. In Oregon, attempted offenses are governed by statute much as in Washington. The relevant statute is ORS 161.405. This statute states:

- (1) A person is guilty of an attempt to commit a crime when the person *intentionally engages in conduct* which constitutes a substantial step toward commission of the crime. (Emphasis added).

The appellant's sole argument against comparability is that the conviction was not for an intentional act. The appellant claims the conviction was only for a "knowing" act and not an "intentional" act. However, this argument ignores the fact the conviction is for an attempted assault. Oregon law clearly states that a conviction for an attempted crime requires proof of an intentional act. ORS 161.405 states a person is guilty of an attempted crime only if "the person intentionally engages in conduct." This statute rules out any possibility that the appellant's conviction was for an unintentional act, as it is impossible under Oregon law to have an attempt conviction unless the person acted intentionally. When this element of the crime is considered, it cannot be said the appellant's conviction was not based on an intentional act as required by Washington law.

This conclusion becomes even more inescapable when the charging information is viewed carefully. The appellant was convicted for an incident where he threw another person from a car and caused the person to be dragged by the moving car. Sentencing exhibit 4a. It is difficult to imagine how this act could have been knowing and yet unintentional. How can a person unintentionally throw someone from a car?

The implausibility of this situation, along with Oregon's requirement that an attempt be intentional, rules out any possibility the appellant's conviction was for an unintentional act. As the act he committed was intentional, the conviction is comparable to attempted assault in the second degree under Washington law, a most serious offense. Given this, the trial court did not err when it found the appellant to be a persistent offender.

**b. If This Court Finds the Proof of Comparability Insufficient, Remand is Necessary as the Appellant Has Raised a New Issue Not Presented to the Trial Court**

In the instant appeal, the appellant argues against comparability on the basis the conviction was not for an intentional act. However, before the trial court, the appellant only argued the distinction between "dangerous weapons" under Oregon law and "deadly weapons" under

Washington law. As the appellant is now contesting an issue that was never addressed to the sentencing court, remand is proper under Ford, 137 Wn.2d 472, if this Court finds insufficient prove of comparability.

In Ford, the Supreme Court held that under certain situations, the property remedy for a sentencing dispute is a remand to the lower court for further proceedings to determine the comparability or existence of prior convictions. The court noted that:

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 re-sentencing without allowing further evidence to be adduced. *See State v. McCorkle*, 88 Wn.App. 485, 500, 945 P.2d 736 (1997). Under the present facts, however, while we necessarily hold that a sentence based on insufficient evidence may not stand, we recognize that defense counsel has some obligation to bring the deficiencies of the State's case to the attention of the sentencing court.

Id. at 458-459 (emphasis added). The court went on to hold that where “the defendant fails to specifically put the court on notice” of defects, remand for evidentiary hearing is appropriate. Id. at 485.

This holding was based on the concern that otherwise defendants would “purposefully fail to raise potential defects at sentencing in the hopes the appellate court will reverse without providing the State further opportunity to make its case.” Id. at 486. This decision comports with the general principle that an appellate court will require a specific objection at

the trial level, so that the lower court has been afforded an opportunity to correct the error. Spinelli v. Economy Stations, Inc., 71 Wn.2d 503, 508, 429 P.2d 240 (1967).

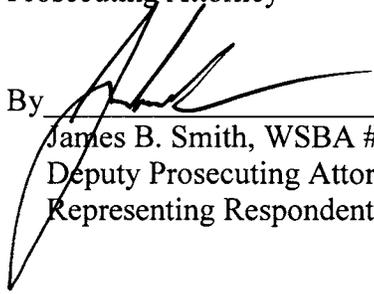
Here, the issue of intentional assaults versus knowing assaults was not briefed or argued before the sentencing court. While comparability was disputed, the appellant did not specifically object on the ground that is currently being argued. Given this, Ford is controlling and the proper remedy is remand for further evidentiary hearing on this issue.

#### IV. CONCLUSION

Based on the preceding argument, the State asks the Court to deny the appeal. The trial court did not abuse its discretion by admitting a photograph that tended to prove identity. Also, the record shows that the appellant's foreign conviction for attempted assault in the second degree is comparable to a most serious offense. The State respectfully requests this Court affirm the trial court's rulings.

Respectfully submitted this 21<sup>st</sup> day of August, 2008.

Susan I. Baur  
Prosecuting Attorney

By 

James B. Smith, WSBA #35537  
Deputy Prosecuting Attorney  
Representing Respondent

