

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *[Signature]*

NO. 37361-1-II

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

*806/8
PM*

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH EUGENE HOWE, III,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against the defendant for failure to register because substantial evidence does not support this charge.

2. The trial court violated the defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and under United States Constitution, Fifth Amendment, when it twice entered judgment against him for the same offense

3. The trial court erred when it calculated the defendant's offender score because the state failed to prove that the defendant's California convictions were comparable to Washington felonies.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment against the defendant for failure to register when substantial evidence does not support this charge?

2. Does a trial court violate a defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and under United States Constitution, Fifth Amendment, if it twice enters judgment against the defendant for the same offense?

3. Does a trial court err if it includes a foreign conviction in a defendant's offender score when the state fails to prove that the foreign conviction was comparable to a Washington felony?

STATEMENT OF THE CASE

Factual History

On October 12, 2004, the defendant Kenneth Eugene Howe, III, appeared at the Vancouver Sex Offender Registration Office for the Clark County Sheriff and reported that he had moved into Clark County from Stockton, California, and that he had a 2002 California conviction for lewd acts with a child. RP 304-307¹; Exhibit 3A. At that time, the defendant gave his address as 1844 N.E. 104th Street, Apartment 7, in Vancouver. *Id.* The next day, the defendant appeared at the Clark County jail to have his photograph taken as part of the sex offender registration process. RP 304-307; Exhibit 3. The defendant also has a 2004 California conviction for failure to register as a sex offender. Exhibit 1.

About 10 or 11 days after the defendant registered in Clark County, Washington Department of Corrections Officer Filli Matua and a U.S. Deputy Marshall went to Patricia Howe's house at 6621 Idaho Street in Vancouver in an attempt to serve arrest warrants on the defendant. RP 331-335. Officer Matua and the U.S. Deputy Marshall are members of the Clark County Interagency Career Criminal Apprehension Team. RP 326. Patricia Howe is the defendant's sister. RP 331-335. Once at 6621 Idaho Street, the

¹The record in this case includes four volumes of continuously number verbatim reports designated herein as "RP."

officers contacted Patricia Howe at her front door and asked if the defendant was present. *Id.* Patricia stated that he was not. *Id.* Upon request, Patricia gave the officers permission to enter and look for themselves. *Id.* They did so, but did not find the defendant. *Id.* However, they did see a man's clothing sitting on the living room couch. *Id.* They also saw that the back sliding door was wide open, even though it was a cool day. *Id.*

On October 30, 2008, seven agents of the Interagency Career Criminal Apprehension Team returned to Patricia Howe's house and surrounded it. RP 101-1-4. Vancouver Police Detective Bryan Acee, another member of the Apprehension Team then knocked on the door, which Patricia answered. *Id.* Patricia again denied that the defendant was present but again said that they could again come in and look. *Id.* All of the officers then entered, and two of them found the defendant hiding behind the washing machine in the laundry room. RP 338-340. They placed him in handcuffs and told him he was under arrest on two probation violation warrants. *Id.* Detective Acee also found men's clothes stacked on the front room couch, along with folded blankets and a pillow. RP 104-105. After seeing these items, he transported the defendant to the Clark County jail. RP 113.

According to Detective Acee, once he and the defendant arrived at the sally port of the jail, the defendant made a number of statements to him after Detective Acee read the defendant his *Miranda* warnings. RP 115-117.

These statements included the following: (1) that up until October 4th, the defendant was living in Modesto, California, at a location arranged for him by his California Probation Officer, (2) that at that time he was a registered sex offender in California, (3) that on October 4th, he met his sister in Modesto, he cut off the ankle bracelet he had to wear as part of his California probation, and he then drove to Vancouver with his sister, (4) that from the time they arrived in Washington he had been staying with his sister at her house, and (5) that he knew he was supposed to register as a sex offender in Washington. RP 156-159.

Procedural History

By information filed November 7, 2007, the Clark County Prosecutor charged the defendant with one count of failure to register as a sex offender.

CP 1. The information alleged as follows:

That [the defendant] . . . in the County of Clark, State of Washington, between October 4, 2007, and October 30, 2007, having been convicted on or about November 7, 2002, of a sex offense that would be classified as a felony under the laws of Washington, to-wit: Lewd Acts upon a Child, San Joaquin County, California, Case Number SF084473A, and being required to register pursuant to RCW 9A.44.130, did knowingly fail to register with the county sheriffs for the counties in which the defendant resided; contrary to Revised Code of Washington 9A.44.130(4)(b) and 9A.44.130(11)(a).

CP 1.

The state later amended to add a second count of failure to register as a sex offender. CP 14-15. The second count was identical to the first except

as to the offense date of the underlying offense *Id.* The following quotes Count II with those parts deleted from Count I shown with a line stricken through those deleted words, and the new portions of the text not in Count I given in italics and in bold.

That [the defendant] . . . in the County of Clark, State of Washington, between October 4, 2007, and October 30, 2007, having been convicted on or about ~~November 7, 2002~~, ***April 12, 2006*** of a sex offense that would be classified as a felony under the laws of Washington, to-wit: ~~Lewd Acts upon a Child~~, ***Failure To Register as Sex Offender*** San Joaquin County, California, Case Number ~~SF084473A~~, ***SF097641*** and being required to register pursuant to RCW 9A.44.130, did knowingly fail to register with the county sheriffs for the counties in which the defendant resided; contrary to Revised Code of Washington 9A.44.130(4)(b) and 9A.44.130(11)(a).

CP 15 (modified).

The case later came on for trial before a jury, with the state calling five witnesses, including Detective Acee and Officer Matua. CP 95, 189, 242, 297, 325. These witnesses testified to the facts contained in the previous *Factual History*. In addition, the state also introduced the following documents into the record as trial exhibits to prove, *inter alia*, the comparability between the Defendant's California convictions and Washington sex offenses:

Exhibit 1: A certified copy of an "Abstract of Judgement" from San Joaquin County, California, indicating that on 4-12-06 "Kenneth Howe" pled guilty to and was convicted of "FAILURE TO REGISTER: INITIAL REGISTRATION/ADDR" under "Section Number" 290(A)(1)(A), in San Joaquin County Superior Court, along with a copy of the complaint that charged that offense;

Exhibit 2: A certified copy of an “Abstract of Judgement” from San Joaquin County, California, indicating that on 11-04-02 “Kenneth Eugene Howe” pled guilty to and was convicted of “LEWD ACTS UPON A CHILD” under “Section Number” 288(A) AND “FTA FELONY CHARGE” under “Section Number” 1320(B), in San Joaquin County Superior Court Cause, along with a copy of the complaint that charged these and other offenses;

Exhibit 3: A Clark County Sheriff’s Office Enforcement Intelligence Information Sheet for the defendant dated 10-13-06;

Exhibit 3A: A Clark County Sex Offender Registration form for the defendant dated 10-12-06;

Exhibit 3B: A Clark County Sex Offender Registration form for the defendant dated 10-12-06;

Exhibit 4: Certified Copies of the Defendant’s Records from the California Department of Corrections and Rehabilitation;

Exhibit 5: A certified copy of the judgment and sentence in *State of Washington v. Kenneth E. Howe*, Clark County No. 02-1-01554-9, showing that on August 22, 2002, the defendant was convicted of Theft in the Second Degree;

Exhibit 5A: A certified copy of the Statement of Defendant on Plea of Guilty in *State of Washington v. Kenneth E. Howe*, Clark County No. 02-1-01554-9;

Exhibit 5B: An information alleging Second Degree Theft in *State of Washington v. Kenneth E. Howe*, Clark County No. 02-1-01554-9;

Exhibit 5C: A copy of a Clark County Sheriff’s Office Enforcement Intelligence Information sheet on the defendant; and

Exhibit 6: A fingerprint card for the defendant.

See Trial Exhibits.

During trial, the state also called two fingerprint technicians who

testified that they had compared the defendant's fingerprints to the fingerprints on the trial exhibits, and found them to come from one and the same person. CP 189-240, 297-324. In addition, following argument from counsel and examination of the exhibits, the trial court ruled that the defendant's California convictions for Lewd Acts on a Child and Failure to Register constituted sex offenses under Washington law, and the court so instructed the jury. RP 343-357; CP 32, 33. After calling its five witnesses, the state rested its case. RP 360. The defense then rested without calling any witnesses. *Id.*

After the court gave instructions, the jury retired for deliberations, later returning verdicts of guilty on both counts. CP 37-38. At a later sentencing hearing, the court calculated the defendant's offender score at five points, which included one point for a California conviction entitled "Felony FTA." CP 104. Although the defense disputed that this offense constituted an equivalent Washington felony, the court none the less assigned one point for this conviction. CP 104; RP 426. However, the court determined that Counts I and II constituted the same criminal conduct and did not assign any points for concurrent convictions, even though the court did impose two 24 month concurrent sentences for counts I and II, which was within the standard range on five points. CP 91-104. The defendant thereafter filed timely notice of appeal. CP 107.

ARGUMENT

I. THE TRIAL COURT VIOLATED DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT FOR FAILURE TO REGISTER BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the context of this case, the defense does not dispute that the record includes substantial evidence to support a conclusion that the defendant failed to register as is required under RCW 9A.44.130. What the defense does argue, is that substantial evidence does not support a conclusion that the defendant was required to register. In other words, the defendant argues that the state failed to prove that the two California convictions underlying the failure to register charges were, in fact, sex offenses under Washington law. The following addresses this argument.

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Under RCW 9A.44.130(1), any person convicted of a “sex offense” must register with the county sheriff of the county in which he or she resides. In RCW 9A.44.130, the legislature provided a definition for the term “sex offense” as it is used in subsection (1). This definition is found in subsection 10(a) of the statute, which provides as follows:

(a) “Sex offense” means:

(i) Any offense defined as a sex offense by RCW 9.94A.030;

(ii) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree);

(iii) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes);

(iv) Any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense under this subsection; and

(v) Any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030 or this subsection.

RCW 9A.44.130(10)(a).

In the case at bar, subsections (i), (ii), (iii) and (v) do not apply because the alleged qualifying offenses were committed in California, and these sections specifically include named Washington offenses under the definition for “sex offenses.” Thus, the only subsection under which the defendant’s California offenses could be qualified a “sex offenses” is

subsection (iv), which states that a foreign conviction is a sex offense if “under the laws of this state” that foreign conviction “would be classified as a sex offense” under RCW 9A.44.130(1)(a). As the following explains, in order to make this decision, the court must engage in a “comparability analysis.”

In “comparability analysis”, the court must determine whether or not a foreign conviction counts either as a prior conviction for the purpose of calculating a defendant’s offender score under RCW 9.94A.525(3) or the court must determine whether or not a prior conviction qualifies as a sex offense under RCW 9A.44.130. Comparability is always first a legal question, and then possibly a factual question. *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998). If the supposed equivalent Washington statute defines the offense with elements that are identical to or more inclusive than the foreign statute, then the foreign conviction is necessarily comparable to the Washington offense. *Id.* In other words, if every violation of the foreign statute would necessarily be a violation of the supposed equivalent Washington statute, then the foreign statute is comparable. In this situation, no factual analysis is necessary.

By contrast, if the Washington statute defines the offense more narrowly than the foreign statute, then the court must determine whether or not the defendant’s specific conduct, as evidenced in the records of the

foreign conviction, would have violated the Washington statute in question. *Morley*, 134 Wn.2d at 606. Thus, under the factual analysis, the specific facts underlying the foreign conviction must have been admitted or proved to the finder of fact in the foreign jurisdiction beyond a reasonable doubt. *State v. Farnsworth*, 133 Wn.App. 1, 130 P.3d 389 (2006).

The State normally bears the burden of proving the foreign conviction comparable by a preponderance of evidence. *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004). Absent such proof, the court is barred from using the foreign conviction either as a prior conviction for the purpose of calculating offender score or from using it as an underlying “sex conviction.” *Id.* As the following explains, in the case at bar, the state failed to prove by a preponderance of the evidence that the defendant’s two identified California convictions were comparable to a Washington sex offense, either legally or factually.

(1) The State Failed to Prove That the Defendant’s California Conviction for Lewd Acts upon a Child Was Comparable to a Washington Sex Offense.

In the case at bar, the state first claimed that the defendant’s California conviction for lewd conduct with a child was the equivalent to the Washington offense of second degree child molestation. At trial, the state presented two documents that identify this offense: Exhibit 2 and Exhibit 4. These two documents each contain judgment abstracts that indicate that the

defendant pled guilty on 11-04-02 to the crime of "lewd acts upon a child" under "section 288(a)." Exhibit 2 also contains an "amended complaint" charging the defendant in Count I with "unlawful sexual intercourse" under section 261.5(d) and in Count II with "lewd acts upon a child" under section 288(a).

Count II of the amended complaint alleged the following:

On or about February 2002 through April 11, 2002, the crime of Lewd Act upon a Child, in violation of Section 288(a), of the Penal Code, a Felony, was committed by Kenneth Eugene Howe, who at he time and place last aforesaid, did willfully, unlawfully, and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of "Jane doe", date of birth 04-12-88 a child under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant and the said child.

Exhibit 2, page 14.

The abstract contained in Exhibit II states that the defendant pled guilty to Count II and in return the court dismissed Count I upon the state's motion. However, these documents do not contain either the written statement of defendant on plea of guilty or a transcript of the guilty plea colloquy. Consequently, the record in this case is silent as to the specific conduct the defendant committed in the California case when he pled guilty.

Section 288(a) of the California Penal Code states the following:

(a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member

thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

California Penal Code, Section 288(a).

The gravamen of this offense is to physically touch a child under 14 years of age in any manner whatsoever “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” *People v. Marquez*, 28 Cal.App. 4th 1315, 33 Cal.Rptr. 2d 821 (1994). The “Part 1” referred to in this statute is California Penal Code, Title 9, which defines all sexual offenses. The touching may also constitute “any of the acts constituting other crimes provided for in Part 1” but it need not. The decision in *Marquez, supra*, explains that any type of touching of any part a child is sufficient to constitute the offense if it is done with sexual intent.

In *Marquez*, the defendant was convicted of lewd conduct with a child under section 288(a), and he appealed, arguing in part that the trial court’s use of patterned instruction CALJIC 10.41 was in error because it allowed the jury to convict him for “any” touching of the child rather than for a “lewd” or “lascivious” touching. The defendant specifically assigned error to the following portion of the instruction:

A “lewd or lascivious act” is defined as *any touching* of the body of

a child under the age of 14 years with the specific intent to arouse, appeal to, or gratify the sexual desires of either party. To constitute a lewd or lascivious act, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.

CALJIC 10.41 (in part, emphasis added).

In its opinion, the Court of Appeals first noted that the California Supreme Court had previously addressed this argument and rejected it. The court stated:

According to the California Supreme Court, a lewd act for purposes of section 288 requires “a touching of the body of a child under the age of 14, with the specific intent of arousing, appealing to, or gratifying the lust of the child or the accused. [Citations.] Touching of a sexual organ is not required.” *People v. Raley*, (1992) 2 Cal. 4th 870, 907, [8 Cal. Rptr. 2d 678, 830 P.2d 712], *italics added; see also People v. Gilbert* (1992) 5 Cal. App. 4th 1372, 1380 [7 Cal. Rptr. 2d 660] [“The ‘lewd and lascivious’ act need not be inherently sexual in nature nor need it be shown that the offender touched the child’s private parts. [Citation.] The crime is committed by any touch of a child with the requisite intent.” [T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done.” [Citations.]; *People v. O’Connor* (1992) 8 Cal. App. 4th 941, 947 [10 Cal. Rptr. 2d 530] [“The prohibition of [Penal Code section] 288 is not limited to genital touchings. Made criminal is a lewd touching of ‘the body, or any part or member thereof . . .’ when the intent is sexual arousal.” (italics in original)]; *People v. Pitts* (1990) 223 Cal. App. 3d 606, 889 [273 Cal. Rptr. 757] [“It is settled that the private parts of the victim’s body need not be touched in order to sustain a [Penal Code section] 288 conviction”].

People v. Marquez, 28 Cal.App. 4th at 1322.

The court in *Marquez* then went on to affirm the conviction, holding that the instruction was a correct statement of the law. The court held:

In our view, that language does not remove any element of the offense from the jury's consideration. The instruction expressly requires the jury to find (1) a lewd or lascivious act; (2) upon the body of a minor; and (3) with the requisite specific intent. Further, the definition of a "lewd or lascivious act" contained in CALJIC No. 10.41 does not permit an accused to be punished for his thoughts regardless of his deeds. (11 Cal. App. 4th at pp. 578-579.) On the contrary, the instruction requires a union or joint operation of act (i.e., any touching) and criminal intent (i.e., the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the child or of the accused).

People v. Marquez, 28 Cal.App. 4th at 1325.

As the *Marquez* decision and the cases cited therein explain, any physical touching of a child under 14-years-old done with sexual intent constitutes the crime of lewd conduct with a child in violation of section 288(a) of the California Penal Code. The touching need not be of the sexual or intimate parts and it need not be inherently sexual in nature. As the following explains, this statute is far more expansive than the conduct that constitutes second degree child molestation under RCW 9A.44.086.

Under RCW 9A.44.086, the crime of second degree child molestation is defined as follows:

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the second degree is a class B felony.

RCW 9A.44.086.

In RCW 9A.44.010(2), the Washington legislature gave the term “sexual contact” a specific definition for the use of that term in RCW 9A.44.130 and all other statutes contained in RCW 9A.44. The definition is:

As used in this chapter:

. . . .
(2) “Sexual contact” means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2).

Just what constitutes the “sexual or other intimate parts” of a person’s body for the purposes of determining the existence of “sexual contact” is not itself specifically defined. However, the phrase must have some meaning other than “any” part of the body as is used in the California lewd conduct on a child statute, otherwise the term “sexual or intimate parts” would have no meaning at all. In *State v. R.P.*, 67 Wn.App. 663, 838 P.2d.701 (1992), the court addressed this issue.

In *State v. R.P.*, *supra*, the defendant appealed his conviction for indecent liberties, arguing that the state did not present substantial evidence that he committed the crime. Specifically, the defendant argued that his conduct in kissing the victim on her neck did constitute “sexual contact” under RCW 9A.44.100(1)(a), which defines indecent liberties as “knowingly

caus[ing] another person . . . to have sexual contact with [the defendant] . . . or another.” In making this claim, the defendant argued that kissing a person on the neck did not constitute “any touching of the sexual or other intimate parts of a person done” because the neck is not a “sexual or other intimate part.” Thus, in this case, the court was called upon to provide a definition for the phrase “sexual or other intimate part” as it is used in RCW 9A.44.010(2).

In addressing the defendant’s argument, the court first noted the following concerning the meaning of the phrase “sexual or other intimate part.”

“The determination of which anatomical areas apart from the genitalia and breasts are intimate is a question to be resolved by the trier of facts.” *In re Adams*, 24 Wn.App. 517, 520, 601 P.2d 995 (1979). That determination is not, however, left solely to the unfettered discretion of the trier of fact. In *In re Adams*, the court interpreted the term “intimate parts” to have a broader connotation than the word “sexual” and to include parts of the anatomy “in close proximity to the primary erogenous areas.” *In re Adams*, at 519-21, 601 P.2d 995. See also *State v. Powell*, 62 Wn.App. 914, 917 n. 3, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992).

The term “intimate parts” is not specifically defined in the criminal code. Nevertheless, “[t]he rule of *ejusdem generis* provides that specific terms modify and restrict general terms where both are used in sequence.” *State v. Young*, 63 Wn.App. 324, 331, 818 P.2d 1375 (1991). Under RCW 9A.44.010(2), the area touched must be “the sexual or other intimate parts of a person” to constitute sexual contact. Given this sequence, the phrase “intimate parts” must refer to parts of the human body commonly associated with sexual intimacy. See *State v. Woodley*, 306 Or. 458, 760 P.2d 884, 886

(1988) (“‘Intimate parts’ are more than ‘sexual parts,’ but in context the words refer to parts that evoke the offensiveness of unwanted sexual intimacy, not offensive touch generally.”)

State v. R.P., 67 Wn.App at 668.

Having provided this definition for the phrase “sexual or other intimate parts,” the court applied it to the facts at hand and rejected the defendant’s argument. The court noted:

Here, it is undisputed that R.P. kissed C.C. on the neck. Stated another way, C.C.’s neck was forced to come into direct physical contact with R.P.’s lips. The lips are a part of the human anatomy which are often associated with acts of sexual intimacy. Given the extremes of individual and cultural standards regarding the common social custom of kissing, lips can be an intimate part of the body under RCW 9A.44.010(2). Since sexual contact in this case is measured in terms of what is “intimate”, the offensiveness of the contact may ultimately depend upon not only the area of the body touched but also the duration of the contact. The kiss in this case lasted long enough to leave a bruise on C.C.’s neck. The trial court concluded that R.P. had sexual contact with C.C. by engaging in this type of conduct. While there may be many occasions in which the act of kissing a person on the neck would not constitute the offense of indecent liberties, the trial court here did not err in finding R.P. guilty of indecent liberties. *See State v. Allen*, 57 Wn.App. 134, 138-39, 787 P.2d 566 (1990).

State v. R.P., 67 Wn.App at 668 (footnote omitted).

As the decision in *State v. R.P.* explains, just what constitutes a “touching of the sexual or other intimate parts” can be a difficult question to answer. However, what is certain is that it does not include all types of physical touching. Thus, this phrase as it is used in RCW 9A.44.010 is much more restrictive than the “any touching” of “any part of the body” that,

combined with the requisite intent, constitutes the crime of lewd conduct with a child from section 288(a) of the California Penal Code. Consequently, there could be any number of offenses committed under section 288(a) of the California Penal Code that would not constitute a sex offense in Washington. This means that under Washington comparability analysis, section 288(a) of the California Penal Code is not comparable to the Washington offense of second degree child molestation or any other Washington felony sex offense.

Under Washington Comparability analysis, the court should now turn to the factual question whether or not the actual conduct the defendant committed in California would constitute a sex offense under Washington law. As was mentioned previously, in order to undertake this type of analysis, the record before this court must include the specific facts underlying the foreign conviction, which must have been admitted or proved to the finder of fact in the foreign jurisdiction beyond a reasonable doubt. *State v. Farnsworth, supra.*

However, in the case at bar, the record before the trial court and the record on appeal includes no proof on the actual acts the defendant was found to have committed and that constituted the crime of lewd conduct on a child. Thus, this court cannot perform this factual analysis. Since the State in this case bore the burden of proving the foreign conviction comparable by a preponderance of evidence, its failure to present any supporting facts at the

trial level is fatal to its claim that the defendant's California conviction for lewd conduct on a child constitutes the equivalent of a sex offense in Washington. *See State v. Ross, supra*. As a result, substantial evidence does not support this essential element on Count I and this court should vacate the conviction and remand with instructions to dismiss the charge.

(2) The State Failed to Prove That the Defendant's California Conviction for Failure to Register Was Comparable to a Washington Sex Offense.

In the case at bar, the state also introduced evidence through a number of exhibits that the defendant had been convicted in California on 04-12-06 of "Failure to Register: Initial Registration/Addr" under California Penal Code section 290(a)(1)(A). Although somewhat in question for a while, a number of very recent decisions indicate that the offense of failure to register under RCW 9A.44.130, is itself a "sex offense" and also triggers a separate registration requirement. *See e.g. State v. Albright, 2008 WL 2027458 (Div. II 2008)*. Thus, in the case at bar, the issue arises whether or not the defendant's California conviction for failure to register is comparable to a failure to register under RCW 9A.44.130 and therefore a sex offense. If it is, then substantial evidence supports the defendant's conviction in Count II. However, as the following explains, under the facts of this case, the state failed to prove that the defendant's California failure to register conviction is the equivalent of a Washington failure to register.

California Penal Code Section 290(a)(1)(A), under which the defendant was convicted, states as follows:

Every person described in paragraph (2), for the rest of his or her life while residing in California, or while attending school or working in California, as described in subparagraph (G), shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides.

California Penal Code, Section 290(a)(1)(A).

Paragraph (2) of section 290(a) gives a lengthy list of those person who must register as a sex offender. The subsection of this statute relevant to this appeal states:

(2) The following persons shall be required to register pursuant to paragraph (1): (A) Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state . . . of a violation of Section 288a

California Penal Code, Section 290(a)(2)(A).

In the case at bar, Exhibit 1 not only includes an abstract of the defendant's conviction for failure to register, but it includes a copy of the complaint under which he pled. It stated:

Count: 001, On or about 09/23/2005 the crime of FAILURE TO REGISTER; INITIAL REGISTRATION, AFTER ADDRESS CHANGE, in violation of Section 290(a)(1)(A) of the Penal Code, a

FELONY, was committed by KENNETH HOWE, being a person required to register upon coming into, and changing residence and location within a jurisdiction, based on a felony conviction; did willfully and unlawfully violated the registration provisions of Penal Code section 290.

Exhibit 1, pages 6-7.

Count I in the complaint included a statement of the underlying offense that the state alleged triggered the defendant's registration requirement. It stated:

It is further alleged that said defendant KENNETH HOWE, was on and about 11/04/2002 in the SUPERIOR Court for the County of SAN JOAQUIN, State of CALIFORNIA, convicted of the crime of LEWD ACTS UPON A CHILD, a violation of Section 288(A) of the PENAL Code, within the meaning of Penal Code Sections . . .

Exhibit 1, page 7.

Under Washington comparability analysis, as was already discussed previously, the first question in determining whether or not the defendant's California failure to register conviction under California Penal Code section 290 was comparable to a Washington conviction under RCW 9A.44.130, is to determine whether or not the California statute is broader or more restrictive than the Washington Statute. The answer to this legal question is that California's registration statute is broader than the Washington Registration Statute. The reason is that it includes a requirement that all defendant's convicted under California Penal Code Section 288(a) register as sex offenders, while only some of those offenders would necessarily have

committed an equivalent Washington sex offense. *See discussion infra.* Thus, the fact that the defendant in the case at bar was convicted of failure to register under California Penal Code section 290(A)(1)(a) with the underlying offense being a violation of California Penal Code section 288(a) does not necessarily mean that the defendant was convicted of an equivalent Washington sex offense as that term is defined in RCW 9A.44.130.

The fact that California's failure to register statute is not legally equivalent to Washington's failure to register statute is not necessarily fatal to a finding of comparability. As was previously discussed, at the trial level the state had the opportunity to present competent evidence of the facts underlying the defendant's conviction for lewd conduct with a child under section 288(a). Had the state done so, and had those facts necessarily constituted a Washington sex offense, then both the offense underlying the defendant's California failure to register offense and the failure to register itself would be equivalent Washington sex offenses sufficient to support a registration requirement under RCW 9A.44.130. However, at trial in this case, the state made no attempt to meet its burden to prove the facts underlying the defendant's California conviction for lewd conduct with a child. Thus, not only is this California conviction not comparable to a Washington sex offense, but the defendant's California conviction for failure to register is also not comparable to a Washington sex offense. As a result,

substantial evidence does not support Count II in this case and this court should vacate this conviction and remand with instructions to dismiss.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNDER UNITED STATES CONSTITUTION, FIFTH AMENDMENT, WHEN IT TWICE ENTERED JUDGMENT AGAINST HIM FOR THE SAME OFFENSE.

The double jeopardy prohibitions found in both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989); *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

In order for two prosecutions or punishments to violate double jeopardy, they must both have arisen out of the same offense. *Blockberger v. United States*, 284 U.S. 299, 76 L.Ed.2d 306, 52 S.Ct. 180 (1932). In *Blockberger*, the United States Supreme Court adopted a "same elements" test to determine whether or not the two punishments or prosecutions arose out of the same offense. In this case, the court stated as follows:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied is whether *each* provision requires proof of an additional fact which the other does not A single act may be an offense against two statutes; and *if each statute requires proof of an additional fact which the other does not*, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Blockburger, 76 L.Ed. at 309 (emphasis added; citations omitted).

By definition, a lesser included offense does not constitute one for which “additional facts” are required. On this issue, the Washington Supreme Court has stated as follows.

A person is not put in second jeopardy by successive trials unless they involve not only the *same act*, but also the *same offense*. There must be substantial identity of the offenses charged in the prior and in the subsequent prosecutions both in fact and in law. . . .

The rule is, however, subject to the qualification that the offenses involved in the former and in the latter trials need not be identical as entities and by legal name. It is sufficient to constitute second jeopardy if one is necessarily included within the other, and in the prosecution for the greater offense, the defendant could have been convicted of the lesser offense.

State v. Roybal, 82 Wn.2d 577, 582, 512 P.2d 718 (1973) (quoting *State v. Barton*, 5 Wn.2d 234, 237-38, 105 P.2d 63 (1940)); *See also State v. Laviollette*, 118 Wn.2d 670, 675, 826 P.2d 684 (1992) (“If the elements of each offense are identical, or if one is a lesser included offense of the other, then a subsequent prosecution is barred.”) (citing *Brown v. Ohio*, 432 U.S.

161, 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977)).

For example, in *State v. Culp*, 30 Wn.App. 879, 639 P.2d 766 (1982), the Court of Appeals found a violation of double jeopardy in subsequent prosecutions for DWI and Negligent Homicide out of the same incident. In this case the defendant had been charged in Municipal Court with Negligent Driving and Driving While Intoxicated out of an incident in which a person was injured, and later died. Defendant eventually plead guilty to the DWI and a reduced charge from the Negligent Driving. Later she was charged with negligent homicide out of the same incident, and the State appealed the ultimate dismissal of the charges as a violation of double jeopardy. However, the court affirmed, noting that since the DWI and Negligent Driving charges contained no elements independent of the elements for the negligent homicide charge, allowing the state to pursue the latter after having prosecuted on the former would twice put the defendant in jeopardy on the former charges. Thus, the trial court correctly ruled that the state was barred from bringing the negligent homicide charges. *State v. Culp*, 30 Wn.App. at 882.

In the case at bar, the state charged the defendant in Counts I and II with failure to register for the same conduct over the same period of time. The only difference between the two convictions is that the state cites different prior convictions that the state alleges trigger a registration

requirement in Washington. However, in RCW 9A.44.130, the legislature simply made it a crime in failure to register for a person who had an underlying conviction that triggered a registration requirement. The statute does not create a separate offense for each underlying conviction. Thus, in the case at bar, since the two convictions have the same elements, they are the same offense for purposes of double jeopardy, and the trial court's decision to sentence both as separate crimes violates both Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment. As a result, this court should vacate one of the convictions and remand with instructions to dismiss.

III. THE TRIAL COURT ERRED WHEN IT CALCULATED THE DEFENDANT'S OFFENDER SCORE BECAUSE THE STATE FAILED TO PROVE THAT THE DEFENDANT'S CALIFORNIA CONVICTIONS WERE COMPARABLE TO WASHINGTON FELONIES.

In argument I, appellant set out the law on comparability analysis, which sets out the rules for determining whether or not a foreign conviction will qualify as an equivalent Washington offense, either for the purpose of determining whether the foreign conviction constitutes a "sex offense" for the purpose of triggering a Washington registration requirement, or for the purpose of determining whether or not the foreign conviction will be included in the defendant's offender score under RCW 9.94A.525(3). This statute provides:

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3).

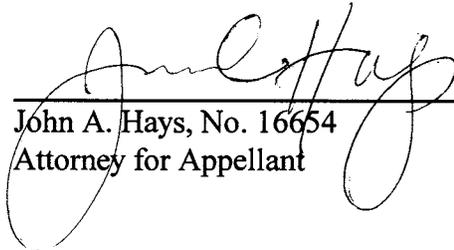
At sentencing in the case at bar, the state claimed that the defendant had a prior California conviction for "FTA felony", which the state alleged was an equivalent Washington felony. The defense disputed this claim and argued that this offense was not an equivalent Washington felony. In spite of this dispute, the state presented no evidence or argument to support its comparability claim. Thus, under the decision in *State v. Ross, supra*, the trial court erred when it decided to include this conviction in the defendant's offender score. As a result, this court should vacate the sentences in this case and remand for resentencing with the defendant's prior California conviction for FTA deleted from the offender score.

CONCLUSION

This court should dismiss counts I and II because the state failed to prove that either of the defendant's prior California offenses was comparable to a Washington felony sex offense. In the alternative, this court should dismiss one count as violative of the defendant's right to be free from double jeopardy and remand the other count for resentencing with the defendant's California conviction for FTA deleted from the offender score.

DATED this 4th day of August, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

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AUG 06 2008

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

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

STATE OF WASHINGTON,
Respondent,

CLARK CO. NO: 07-1-01972-3
APPEAL NO: 37361-1-II

vs.

AFFIDAVIT OF MAILING

HOWE, Kenneth E., III,
Appellant

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AUG 20 2008

STATE OF WASHINGTON)
COUNTY OF CLARK) vs.

CATHY RUSSELL, being duly sworn on oath, states that on the 4TH day of AUGUST, 2008, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

KENNETH E. HOWE, III. #845240
AIRWAY HEIGHTS CORRECTION CENTER
P.O. BOX 1809
AIRWAY HEIGHTS, WA 99001

and that said envelope contained the following:

1. BRIEF OF APPELLANT
2. AFFIDAVIT OF MAILING
3. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

DATED this 4TH day of AUGUST, 2008.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 4 day of AUGUST, 2008.



[Signature]
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 4/3/2012

AFFIDAVIT OF MAILING - 1

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