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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. MR. AQUIL'S RIGHT TO CONFRONTATION WAS NOT VIOLATED BY ADMISSION OF THE 911 TAPE.
- II. THE TRIAL COURT PROPERLY ADMITTED THE 911 TAPE UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE.
- III. NO IMPROPER OPINION TESTIMONY WAS OFFERED BY LAW ENFORCEMENT OFFICERS.
- IV. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE.
- V. MR. AQUIL COMPLAINS, AND THE STATE CONCEDES, THAT HIS CONVICTIONS FOR ATTEMPTED MURDER AND ASSAULT FIRST DEGREE MERGE AND HIS CONVICTION FOR ASSAULT FIRST DEGREE MUST BE VACATED.
- VI. THE TRIAL COURT PROPERLY INCLUDED THREE VIRGINIA CRIMES IN MR. AQUIL'S OFFENDER SCORE.

B. STATEMENT OF THE CASE

Barry Maletsky and Tiara Carroll were married. RP Vol. 2, p. 119. In early April of 2009 some of Tiara's relatives from Baltimore came to visit her in Vancouver. Id. The relatives included Tiara's aunt, Elma Myles, as well as her cousins Ashley Myles and Ibn Aquil, the defendant. Id. At the time of this incident Mr. Maletsky was was sixty-eight years old. RP Vol. 2, p. 139. Tiara was 32. Id. Mr. Maletsky and Tiara built a home in the Hockinson area of Vancouver which was a little over 8,000

square feet. RP 2, p. 139-40. A few days before Mr. Maletsky was nearly murdered, Mr. Aquil, Tiara, and Ashley had a conversation about life insurance, and Tiara told Mr. Aquil and Ashley that if Mr. Maletsky died she would receive 2.5 million dollars. RP Vol. 2, p. 228-29.

On the morning of April 13, 2009 only five people were inside Mr. Maletsky's home: Himself, Tiara, Ashley, Elma, and Mr. Aquil. RP Vol. 2, p. 212-13. Mr. Maletsky had fallen asleep on the couch, and awoke sometime after 6:30 a.m. because he was being strangled by a black man whom he identified as Ibn Aquil. RP Vol. 2, p. 126, 145. He heard a woman screaming in the background, saying something like "no" or "not now." RP 2, p. 126. The next memory he had was of being transported in an ambulance. RP 2, p. 127. The strangulation left Mr. Maletsky with a broken hyoid bone in his neck as well as a crushed trachea. RP 2, p. 128, 133. He has continuing difficulty getting air into his lungs as a result. RP 2, p. 133. Mr. Maletsky was also severely beaten about the head and face. RP Vol. 1, p. 46, Vol. 2, p. 129.

Tiara called 911. RP Vol. 1, p. 44-59. During this call to 911 Tiara was screaming and hysterical throughout, and the dispatcher had great difficulty getting her to calm down and answer questions. Id. During the call, Tiara told the dispatcher that her husband had been hit and was going to die. RP Vol. 1, p. 44-45, 54. She said he was bleeding from his head.

RP Vol. 1, p. 46. She said her husband's attacker was still at the house. RP Vol. 1, p. 46, 47, 58. She identified her husband's attacker as Mr. Aquil. RP 1, p. 58. She also described him as having a slight build. RP 1, p. 56. Tiara did not testify at the trial.

Mr. Aquil was apprehended after fleeing the Maletsky home and climbing onto the roof of a neighbor's house. RP 3, p. 311-12. The neighbor, Mary Head, who was home with her daughter, heard him on her roof and called 911. RP 3, p. 310, 315-16. He then jumped on her back deck. RP 315. Ms. Head described him as being of slight build. RP 3, p. 312. As he lay on the deck, Mr. Aquil said he "surrendered." RP 3, p. 316. When he was apprehended Mr. Aquil was soaking wet as a result of having jumped into the Maletsky's pool prior to fleeing the home, and he was muddy, shaking, and had no shoes on. RP Vol. 2, p. 197, RP 3, p. 445. He begged the police to shoot him, and said he wanted to die. RP 2, p. 197-98. He also said "I fucked up," and asked the officers to tell Tiara he was sorry. *Id.* at 197.

The trial court admitted the 911 tape over Mr. Aquil's objection, holding that the statements on the 911 call were admissible both under the excited utterance and present sense impression exceptions to the hearsay rule. See ER 803 (a) (2). The trial court also ruled that admission of the statements on the 911 tape did not violate Mr. Aquil's Sixth Amendment

right to confrontation. RP 1, p. 67. The court found that the statements were made by the victim's wife for the purpose of rendering aid to her husband. Id. The court found that the situation was an ongoing emergency, where it was necessary to determine whether the assailant was still on the premises (he was) and whether he had weapons. Id. The court further found that the nature of the questions were to resolve the present emergency and not merely to learn about a completed criminal act. RP Vol. 1, p. 68. The court concluded the statements were not testimonial. RP Vol. 1, p. 68, 103.

Dr. Marilyn Ronnei, a psychologist at Western State Hospital, testified to the benefit of both parties. RP Vol. 2, p. 289-308. She testified, without objection from Mr. Aquil, that she evaluated him to determine whether he suffered from diminished capacity at the time of the assault. RP 2, p. 290. She testified that he possessed the capacity to form the mental state required to commit the crimes for which he was charged. RP 2, p. 303. Dr. Ronnei also testified that Mr. Aquil told her he did not have a very good memory of the event. RP 2, p. 295. He also told Dr. Ronnei that he had been drinking vodka during the evening previous to the event. RP 2, p. 296-97. Mr. Aquil told Dr. Ronnei that he believed he had been drugged without his knowledge because after waking from a period of sleep on that evening, he saw two cups on the table in front of him and

didn't know which one was his. RP 2, p. 297. He grabbed one and took a drink, quickly discovering that it tasted funny. Id. He looked down and saw gray flakes floating in the liquid. Id. Mr. Aquil told Dr. Ronnei that at that point the room got very big and his eyes felt kind of weird, and his vision was blurred and he felt as though he had tunnel vision. Id. After that, he remembered very little. RP 2, p. 298. Mr. Aquil told Dr. Ronnei that his behavior that night was a result of him being "involuntarily drugged." RP 2, p. 300. Through Dr. Ronnei, the jury heard that Mr. Aquil had a blood alcohol level of .166 when he was tested at the hospital after his arrest. RP 2, p. 301.

Mr. Aquil was convicted of both attempted murder and assault in the first degree. CP 57, 58. The parties agreed that convictions on both charges violated double jeopardy because they were based on the same criminal transaction. RP Vol. 4, p. 565-69, 571-73. The judge was concerned that if he vacated the assault first degree conviction it might not be revivable in the event the attempted murder conviction were reversed¹, but didn't want to leave the assault first degree conviction off the judgment and sentence because he believed that Mr. Aquil would thereby

¹ The sentencing hearing in this case occurred before the Supreme Court's decision in State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (Aug. 2010).

be prevented from appealing the conviction on that count.² Id. In the event this Court upholds Mr. Aquil's conviction for attempted murder, the State agrees that the conviction for assault first degree must be vacated.

C. ARGUMENT

I. MR. AQUIL'S RIGHT TO CONFRONTATION WAS NOT VIOLATED BY ADMISSION OF THE 911 TAPE.

The Confrontation Clause of the Sixth Amendment protects an accused person from use by the government of "testimonial" statements at a criminal trial without an opportunity for confrontation. Davis v.

Washington, 547 U.S. 813, 126 S.Ct. 2266, 2273 (2006); Crawford v.

Washington, 541 U.S. 36, 51, 124 S.Ct. 1354 (2004); U.S. Const. amend.

VI. In Crawford, the Court identified the "core class" of testimonial statements which require confrontation: (1) ex-parte, in-court testimony; (2) "extrajudicial statements...contained in formalized testimonials materials, such as affidavits, depositions, prior testimony, or confessions," and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford at 51-52 (quoting White v.

² This concern is unfounded, based on the decision in Turner, which held that the fact of the conviction alone, whether reduced to judgment or not, determines whether the rule against double jeopardy has been violated. As such, a defendant would never lose his right to appeal the existence of such a conviction even if it is not reduced to judgment. See Turner at 465.

Illinois, 502 U.S. 346, 365, 112 S.Ct. 736 (1992) (Thomas, J., concurring in part). A confrontation clause challenge is reviewed de novo. State v. Koslowski, 166 Wn.2d 409, 416, 209 P.3d 479 (2007); State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). The State bears the burden of establishing that the challenged statements are non-testimonial. Koslowski at 416, n. 3, *citing* United States v. Arnold, 486 F.3d 177, 192 (6th Cir. 2007), *cert. denied*, 552 U.S. 1103 (2008).

In Davis v. Washington the United States Supreme Court further clarified the strictures of Crawford, holding that a statement may be considered non-testimonial where the statement is made to as part of, or to help resolve, an ongoing emergency:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822.

The Court announced the so-called primary purpose test, outlining four factors reviewing courts must utilize to determine whether a statement is made to meet an ongoing emergency:

(1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant. (2) Would a “reasonable listener” conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency. (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe? Davis, 547 U.S. at 827.

Koslowski at 418-19; *Davis* 547 U.S. at 827.

In claiming that admission of the 911 tape violated his right to confrontation, Mr. Aquil cites only to Davis. To the extent that Mr. Aquil briefs this assignment of error at all, he complains that Ms. Carroll had no first hand knowledge of what was going on and hadn't seen the assault, and that Ms. Carroll did not see any weapons. The 911 tape belies the assertion that Ms. Carroll had no first hand knowledge of what was going on. She was screaming hysterically and a believed she was watching her

husband die. At one point she is directed on how to administer aid to Mr. Maletsky so that his airway could be opened. She also knew that the assailant was still on the premises. Because the assailant was still on the premises, he posed a continuing threat to Mr. Maletsky, the person for whom Ms. Carroll sought police protection and medical aid. This is strikingly similar to Davis, where the victim of a domestic violence assault was seeking police assistance and she believed (although she wasn't sure) that the perpetrator remained close by. Davis, 547 U.S. at 827-28.

We needn't rely solely on Davis to resolve this assignment of error, because the Supreme Court has issued its opinion in Michigan v. Bryant, 131 S.Ct. 1143, 179 L.Ed.2d 93 (February 28, 2011). In Bryant, the Supreme Court expanded the admissibility at trial of statements made in response to initial police inquiries under the "ongoing emergency" doctrine. In Bryant, a man was shot and made statements, some 25 minutes after the shooting, identifying the man who shot him. Bryant at 1150. The declarant later died. *Id.* After learning the identity of the shooter, another five to ten minutes passed before paramedics arrived and the police left the scene of the shooting to look for the perpetrator, Mr. Bryant. *Id.*

The Supreme Court ruled that the statements made by the victim were non-testimonial because they were made to meet an ongoing

emergency. That the assault on the victim had ended was of no moment to the Court. Rather, the continuing threat posed to the public and law enforcement by a man who not only possessed a gun but was willing to use it informed the proper scope of the inquiry. Bryant at 1163-66. The Court held that whether “an emergency exists and is ongoing is a highly context-dependent inquiry.” Bryant at 1158. The Court noted that the Michigan Supreme Court stated “repeatedly and incorrectly” that Davis had “defined” an ongoing emergency, when, in the view of the Court, it had done no such thing. *Id.*

The Court announced that whether statements are made to meet an ongoing emergency must be viewed objectively (as they already held in Davis) and must be viewed from the standpoint of a reasonable person in the position of *both* the declarant and the interrogator (typically, the police or a 911 operator):

An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the "primary purpose of the interrogation." The circumstances in which an encounter occurs -- *e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards -- are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained

from the individuals' statements and actions and the circumstances in which the encounter occurred.

Bryant at 1156.

Perhaps most importantly, as the quotation above denotes, the objective observer must evaluate the circumstances *as they appeared at the time*, and not employ hindsight. See Bryant at 1157, n. 8.

Interestingly, the Court reintroduced the concept of reliability, typically the domain of hearsay law, into the confrontation inquiry. The Crawford Court, in overruling Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980), seemingly banished talk of reliability in confrontation analysis. But the Bryant Court has brought it back to life:

When, as in Davis, the primary purpose of an interrogation is to respond to an "ongoing emergency," its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.

Bryant at 1155.

Indeed, the Court made the following comparison between statements made to meet an ongoing emergency and excited utterances:

This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," Fed. Rule Evid. 803(2); see also Mich. Rule Evid. 803(2) (2010), are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood. See Idaho v. Wright, 497 U.S. 805, 820, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990) ("The basis for the 'excited utterance' exception . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation . . . "); 5 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 803.04[1] (J. McLaughlin ed., 2d ed. 2010) (same); Advisory Committee's Notes on Fed. Rule Evid. 803(2), 28 U.S.C. App., p. 371 (same). An ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency.

Bryant at 1157.

Unsurprisingly, Justice Scalia dissented from the majority opinion in Bryant, lamenting "And that which has been taken away from [Bryant] has been taken away from us all." Bryant at 1176. As one observer has noted: "There is no question that Bryant will lead to the admission of most statements made to police at or near the scene of a crime." See John Castellano, "Michigan v. Bryant: Expanded Admissibility of Hearsay Statements," 2011 Emerging Issues 5573, LexisNexis (March 31, 2011).

Whether that prediction proves true or not, turning to Mr. Aquil's claim of error the trial court in this case clearly did not err in admitting the 911 tape. The trial court meticulously applied the four Davis factors, and found that Ms. Carroll's statements were obviously made during the course of an ongoing emergency. The State submits that this Court, in its de novo review, should conclude that the admission of Ms. Carroll's statements was proper. First, the police were not on the scene when Ms. Carroll made her statements and the assailant who had just tried to murder her husband was still in the house. Second, the questions asked of Ms. Carroll by the 911 dispatcher, and her responses, were necessary to determine not only the degree of medical assistance her husband needed but also the degree of danger the officers would face upon arrival.

A reasonable person objectively viewing the situation from the standpoint of both the declarant and the 911 operator, using only the facts known to those parties at the time, Ms. Carroll's statements were indisputably made to meet an ongoing emergency and were therefore non-testimonial. The admission of these statements did not violate Mr. Aquil's right of confrontation under the Sixth Amendment. Likewise, Mr. Aquil's right of confrontation under Article 1, § 22 was not violated because Article 1, § 22 does not afford greater protection of the right of

confrontation than the Sixth Amendment. See State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009).

II. THE TRIAL COURT PROPERLY ADMITTED THE 911 TAPE UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE.

An excited utterance, under ER 803 (a) (2), is an out-of-court statement offered to prove the truth of the matter asserted which relates to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition. State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). “A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event.” Magers at 187-88, citing State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001). A trial court’s decision to admit a statement as an excited utterance is reviewed for abuse of discretion. State v. Thomas, 150 Wn.2d 821, 854, 83 P.3d 970 (2004). Discretion is abused when the decision in question is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex.rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the statements made by Ms. Carroll on the 911 tape plainly are excited utterances. Ms. Carroll was hysterical throughout the call, and clearly related that the startling event which caused her excitement was the

statement her remarks related to, which was the near murder of her husband. The reasons outlined for why Ms. Carroll's remarks constituted an ongoing emergency apply with equal force in the analysis of whether her statements were excited utterances. The trial court did not abuse its discretion in admitting Ms. Carroll's statements as excited utterances.

III. NO IMPROPER OPINION TESTIMONY WAS OFFERED BY LAW ENFORCEMENT OFFICERS.

Mr. Aquil complains generally that the three witnesses, all law enforcement officers, offered improper opinion testimony when they testified that they took statements from the witnesses and allowed each witness to give a full statement. Mr. Aquil does not state how this constituted opinion testimony. He merely cites to ER 401, which pertains to relevance, and ER 701. He does not state how this testimony constitutes opinion testimony nor does he cite any relevant case law authority to support his claim. This testimony was offered in clear response to the claims of Ashley and Elma Myles that their statements to the police were incorrectly recorded or taken out of context. RP 3, p. 219-20, 229-30, 257-61. None of the officers rendered an opinion on the credibility of any witness. This testimony was factual testimony which told the jury how the investigation was conducted. No conclusions were drawn by any witness about the statements made to law enforcement.

This Court should decline to review this claim because it was not adequately briefed or argued. A reviewing court may decline to address any claim of error not supported by authority. See RAP 10.3 (a) (6); State v. Farmer, 116 Wn.2d 414, 432, 805 P.2d 200 (1991).

IV. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE.

When objected to, prosecutorial misconduct is grounds for reversal where there is a “substantial likelihood the improper conduct affected the jury.” State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009) *citing* State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Here, there was no prosecutorial misconduct, much less misconduct that was substantially likely to affect the jury’s verdict.

The specific complaint lodged by Mr. Aquil is that when the prosecutor remarked, during closing argument, that Mr. Aquil had previously considered a defense based on mental impairment, that this fact was not in evidence. A review of the record, however, contradicts this claim. During Dr. Ronnei’s direct testimony she was asked why she evaluated Mr. Aquil and she said that she evaluated him to determine whether he suffered from diminished capacity at the time of the assault. RP 2, p. 290. No objection was lodged in response to this remark. *Id.* This fact was, indeed, in evidence. Mr. Aquil, in fact, did not object at any

point during Dr. Ronnei's testimony because the balance of her testimony weighed in his favor. Mr. Aquil could have chosen not to testify and the jury would still have heard, through Dr. Ronnei, that he was extremely intoxicated after (and, most likely, during) the assault, that he was possibly under the influence of drugs, that his consumption of drugs was, according to him, involuntary, and that he had very little memory of the event. That Mr. Aquil chose to take the stand and offer preposterous testimony which wholly negated any gains he made during Dr. Ronnei's testimony was a mistake of his own making.

Even if this remark were found to constitute prosecutorial misconduct, Mr. Aquil does not demonstrate a substantial likelihood that it affected the jury's verdict. Mr. Aquil states generally that he was prejudiced because the jury heard that he had switched defenses, claiming at trial that some unknown perpetrator (possibly "Grover," or possibly "D.J.") had tried to murder Mr. Maletsky. That he may have suffered prejudice is not, however, the standard. All defendants suffer prejudice when a prosecutor admits evidence against him or her. However, not all prejudice is unfair prejudice. Here, Mr. Aquil fails to demonstrate that misconduct occurred; much less that it prejudiced his right to a fair trial in any way. He was the one who chose to pursue a defense (some other guy did it) which flew in the face of the evidence (e.g., Ms. Carroll and Mr.

Maletsky both identifying him as the assailant, his statement that he “fucked up” and his apology to Ms. Carroll, his desperate flight from the crime scene, his knowledge of Mr. Malesky’s life insurance policy, the fact that no witness ever mentioned “D.J.” until the trial, etc.)

Mr. Aquil fails to demonstrate that the remark in question constituted prosecutorial misconduct or that it affected the jury’s verdict in any way. This Court should reject this claim of error.

V. MR. AQUIL COMPLAINS, AND THE STATE CONCEDES, THAT HIS CONVICTIONS FOR ATTEMPTED MURDER AND ASSAULT FIRST DEGREE MERGE AND HIS CONVICTION FOR ASSAULT FIRST DEGREE MUST BE VACATED.

As noted in the Statement of the Case, the parties and the trial court agreed that Mr. Aquil’s convictions for both attempted murder and assault in the first degree could not stand, they merely disagreed on what they should do in light of the confusion caused by the Supreme Court’s opinion in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007) (the Supreme Court acknowledged, in State v. Turner, supra, that Womac had, indeed, engendered confusion).

The State conceded that in the event this Court upholds his conviction for attempted murder (Count I), his conviction for assault in the first degree (Count II) must be vacated. Because attempted murder is the

more serious offense, it is the conviction that must stand. See Turner at 465.

VI. THE TRIAL COURT PROPERLY INCLUDED THREE VIRGINIA CRIMES IN MR. AQUIL'S OFFENDER SCORE.

Where a defendant's criminal history includes out-of-state convictions, the Sentencing Reform Act of 1981 (SRA) requires these convictions be classified according to the comparable offense definition and sentence provided by Washington law. State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994); State v. Russell, 104 Wn.App. 422, 440, 16 P.3d 664 (2001); State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999). When no effort is made to classify out-of-state convictions to comparable Washington crimes prior to their use in scoring criminal history, the resulting sentence is erroneous. State v. Beals, 100 Wn.App. 189, 196, 997 P.2d 941, *review denied*, 141 Wn.2d 1006 (2000).

Washington courts use a three-step evidentiary hearing analysis when determining the Washington sentencing consequences of an out-of-state conviction. Russell at 440; In re Pers. Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005). The first step is to convert the out-of-state crime into its Washington counterpart. Russell at 440. The second step is to determine the relevant sentencing consequences of the Washington counterpart. Russell at 440. The third step is to assign those

same sentencing consequences to the out-of-state conviction, thus treating a person convicted outside the state as if he or she had been convicted in Washington. Russell at 440.

The State bears the burden of proving, by a preponderance of the evidence, the existence and comparability of a defendant's prior out-of-state convictions. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). Where a defendant acknowledges either the existence of comparability of the convictions, the State's burden has been met. *Id.*

Here, Mr. Aquil affirmatively acknowledged the existence of his prior convictions, and challenged only the comparability of those offenses. See RP Vol. 4, p. 545. The three crimes in question were as follows: One conviction for Arson of a Dwelling and two convictions for Breaking and Enter Burglaries. RP 4, p. 546. All three occurred in Virginia. RP 4, p. 542-43.

With respect to the arson, the State proved that in Virginia, one is required to "feloniously and maliciously" burn or destroy by explosive substance the occupied dwelling of another. RP 4, p. 546. The State noted that under RCW 9A.48.020, which proscribes arson in the first degree, one must be found to have "knowingly and maliciously" caused a fire or explosion to a dwelling. RP 4, p. 546. The Washington statute, therefore, is broader than Virginia's, not narrower. The State produced a "pen pack,"

found in sentencing exhibit 2, which contained a sentencing order for the crime of arson and proved that Mr. Aquil was convicted, in Virginia, of feloniously and maliciously burning or destroying by explosive substance the occupied dwelling of another.

Mr. Aquil complains in his brief that although the sentencing order contains the elements of arson in Virginia, it contains “no factual basis.” But this ignores the fact that a trial court need not engage in an analysis of factual comparability unless it first finds that the convictions are not legally comparable, which they are in this case. Mr. Aquil cites to Virginia Criminal Code Section 18.2-77, which appears to contain no mens rea. See Brief of Appellant at p. 20. But the trial court cited several cases from Virginia which demonstrate that Virginia uses the common law definition of malice, which equates with the mens rea of intent. See e.g. Thomas v. Commonwealth, 279 Va. 131, 160-61, 688 S.E.2d 220 (2010); Lynn v. Commonwealth, 27 Va.App. 336, 344-45, 499 S.E.2d 1 (1998); Winston v. Commonwealth, 268 Va. 564, 601, 604 S.E.2d 21 (2004); Branch v. Commonwealth, 14 Va.App. 836, 841, 419 S.E.2d 422 (1992).

In sum, the State met its burden of proving that Mr. Aquil’s arson conviction in Virginia is legally comparable to a conviction under RCW 9A.48.020, and no factual inquiry was required. This conviction is properly included in Mr. Aquil’s offender score.

With regard to Mr. Aquil's two Virginia burglary convictions, those crimes are also legally comparable residential burglary in Washington, defined in RCW 9A.52.025. The State produced pen packs for those convictions (see sentencing exhibit 2) showing Mr. Aquil was convicted of unlawfully and feloniously breaking and entering in the nighttime to a dwelling of another with the intent to commit larceny. There is an additional common law element in Virginia, e.g. that the breaking and entering be in the nighttime, making Virginia's statute broader, not narrower than Washington. If the statute was narrower, then the trial court would have to engage in an analysis of factual comparability because a broader range of acts would count under Washington's statute than Virginia's. Here, the opposite is true. Mr. Aquil's particular convictions were for breaking and entering for the purpose of committing larceny. See RP 4, p. 550. In Washington, our residential burglary statute is broader because a person would be guilty of entering or remaining unlawfully in the dwelling of another with the intent to commit any crime therein against a person or property. Mr. Aquil complained at the trial court, just as he does in his brief, that *any variance* in the statute triggers the requirement that the trial court engage in an analysis of factual comparability. This is not so. A court need not engage in factual comparability analysis when each of the elements contained in

Washington's statute are necessarily contained in, and compare with, the statute from the state in which the foreign conviction originated. See Lavery at 255-56. Mr. Aquil also mischaracterizes the Virginia statute, claiming that it requires proof that the actor intended to commit a felony therein. See Brief of Appellant at p. 22. But Mr. Aquil acknowledges, just one sentence prior to that statement, that the Virginia statute requires proof of intent to commit a felony or "any larceny" therein. The State proved, using Mr. Aquil's pen packs (found in Exhibit 2) that he was convicted of committing a burglary with the intent to commit a larceny therein. This compares legally to RCW 9A.52.025. No factual inquiry was required, and these convictions were properly include in Mr. Aquil's offender score.

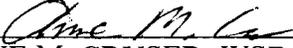
D. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 4th day of April, 2011.

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