

NO. 42047-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS J. MCCOY,

Appellant.

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

The Honorable Rich Melnick, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred in finding that Mr. McCoy's 1978 California assault was a serious offense as it pertained to the first degree unlawful possession of a firearm charge.

2. As there was insufficient evidence that Mr. McCoy's California assault was a serious offense, the trial court erred in entering a judgment against Mr. McCoy for first degree unlawful possession of a firearm.

3. The trial court erred in scoring the first degree unlawful possession of a firearm as a current offense because there was insufficient proof of the charge.

4. As Mr. McCoy's 1978 California assault conviction is not comparable to a Washington felony, the trial court erred including it in Mr. McCoy's offender score.

5. The trial court miscalculated Mr. McCoy's offender score.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is Mr. McCoy's 1978 California assault conviction equivalent to a 1978 Washington second degree assault with a deadly weapon?

2. Did the trial court err in entering a guilty finding for first degree unlawful possession of a firearm against Mr. McCoy when his California assault with a deadly weapon conviction was not equivalent to a serious offense?

3. Did the trial court err in calculating the offender score by including the non-comparable California assault conviction in Mr. McCoy's offender score calculation?

C. STATEMENT OF THE CASE

In May 2006, Thomas McCoy, as a qualifying patient, had legal authority to grow and possess marijuana. RP ("Report of Proceedings") at VI-B¹ 487-94; RCW 69.51A.010(4); Trial Exhibit 1 (Supplemental Designation of Clerk's Papers). Despite this legal authority, a jury found that Mr. McCoy violated the law in three ways: by manufacturing marijuana in violation of RCW 69.50.401(1), (2); by possessing marijuana with intent to deliver in violation of RCW 69.50.401(1), (2); and by possessing more than 40 grams of marijuana in violation of RCW 69.50.4013(1). CP (Clerk's Papers) 37, 40, 43.

Related to the above charges, the jury also found Mr. McCoy guilty of first degree unlawful possession of a firearm in violation of RCW 9.41.040(1)(a). CP 45. In its Information, the State alleged that Mr. McCoy could not legally possess a firearm because he had a prior conviction for a "serious offense." CP 1-2. The State specified the conviction was a 1978 California conviction for assault with a deadly weapon. CP 2.

¹ The report of proceeding volume is identified by the volume number in which the specific page appears.

Prior to trial, Mr. McCoy argued that the California assault was neither factually nor legally comparable to a Washington assault. RP V-A 110-128. As such, the conviction was not a serious offense and could not be used to establish a required element of first degree unlawful possession of a firearm. *Id.* The trial court deferred making a specific decision regarding comparability. *Id.* at 128. Instead, it found that the California assault must be comparable to some Washington felony assault. RP V-B at 131-131.

At trial, as a consequence of the trial court's ruling, Mr. McCoy acquiesced to a stipulation. He agreed to stipulate that the California assault was comparable to a Washington felony. RP V-B at 275-76. During cross-examination, Mr. McCoy acknowledged having a prior unspecified felony conviction. RP VI-B at 531.

Outside the presence of the jury, Mr. McCoy continued to object to the assault's comparability. RP VII at 573, 575. After the jury heard all of the evidence, and immediately before closing argument, the trial court ruled that the California assault was comparable to a Washington second degree assault with a deadly weapon. *Id.* at 574-75. To avoid having the jury hear the name of the prior conviction, he stipulated that had a prior conviction for a serious offense. *Id.* at 575. The court read the stipulation to the jury. *Id.* at 582.

At sentencing, Mr. McCoy objected to the comparability of the California conviction as it related to inclusion in his offender score. RP VIII 691-99; See also Supplemental Designation of Clerk's Papers (sub. nom. 105, State's Cover Sheet for Prior Convictions). The trial court reiterated its prior ruling that the California assault was equivalent to a Washington second degree assault with a deadly weapon. *Id.* at 705. As such, in calculating Mr. McCoy's offender score, the trial court added a prior point for the California assault. *Id.* at 705-08.

Mr. McCoy makes a timely appeal to all portions of his judgment and sentence. CP at 60-74.

D. ARGUMENT

THE TRIAL COURT ERRED IN FINDING A CALIFORNIA ASSAULT CONVICTION COMPARABLE TO A WASHINGTON FELONY AND USING IT (1) TO SATISFY AN ELEMENT OF THE FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM CHARGE AND (2) AS A COMPARABLE WASHINGTON OFFENSE TO INCREASE MR. MCCOY'S OFFENDER SCORE.

RCW 9.41.040(1)(a) forbids possession of firearms if a person has, "previously been convicted in this state or elsewhere of any serious offense as defined in this chapter." Out-of-state convictions are classified according to the comparable offense definitions and sentences provided in Washington law. RCW 9.94A.525(3). The legislative purpose of this statute is to give the out-of-state convictions the same effect as in-state

feelings. *People v. Rocha*, 3 Cal. 3d 893, 899, n. 12, 479 P.2d 373 (1971).

The elements are proved by “the least touching.” *Id.*

The crime of assault in California, generally, and more specifically assault with a deadly weapon, is a general intent crime and requires only that injury be a foreseeable result of a person’s willful act. The California Supreme Court has held that to convict a person of assault “the intent to cause any particular injury...is not necessary.” *Rocha*, 3 Cal. 3d at 899. The California Supreme Court subsequently held that neither recklessness nor negligence were sufficient, but reaffirmed that a general intent is required: “a defendant...must be aware of facts that would lead a reasonable person to realize that a battery would directly, naturally, and probably result from his conduct.” *People v. Williams*, 26 Cal. 4th 779, 788, 29 P.3d 197 (2001). Thus the State need not prove a defendant “specifically intended to cause injury.” *People v. Miller*, 164 Cal. 4th 643, 662, 78 Cal. Rptr. 3d 918 (2008).

Mr. McCoy was convicted of assault, not battery. Supplemental Designation of Clerk’s Papers (sub nom. 105, see plea document dated November 17, 1978). California does not require the infliction of injury to sustain an assault conviction; instead that constitutes the separate crime of battery. Compare Cal. Penal Code §240; Cal. Penal Code §242. In Washington, the only general intent version of assault is actual battery.

Because Mr. McCoy was convicted of assault and not battery, the relevant question is whether assault in California is comparable to assault by attempted battery or assault by creation of fear in Washington. Because it does not require a specific intent to cause injury, as does assault by attempted battery in Washington, the definition of “assault” in California is substantially broader than in Washington. Mr. McCoy’s California assault conviction is not legally comparable to a crime in Washington.

Because there is no specific intent required to prove assault with a deadly weapon, California does not permit a defendant to raise voluntary intoxication or diminished capacity as a defense to an assault charge. *People v. Hood*, 1 Cal. 3d 444, 458-59, 462 P.2d 370 (1969). In Washington, both defenses are available at a minimum to any charge where specific intent is required. See, *State v. Thomas*, 123 Wn. App. 771 779-82, 98 P.3d 1258 (2004). The availability of defense in the foreign jurisdiction is a necessary consideration determining the comparability of an out-of-state conviction.

In *In re the Personal Restraint Petition of Lavery*, the defendant had been convicted of federal bank robbery, and this offense was used to impose a sentence of life without the possibility of parole under the Persistent Offender Accountability Act (POAA). *In re the Personal Restraint Petition of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005).

Federal bank robbery is a general intent crime, but under Washington law, specific intent to steal is an essential element of the crime of second degree robbery. *Id.* at 255-56 (citation omitted). Thus there are several defenses available under Washington law that could not be raised in a federal bank robbery prosecution such as intoxication, diminished capacity, duress, insanity and claim of right. *Id.* at 256. It is for this reason that any effort to establish factual comparability in such a circumstance will violate due process, as the defendant may have raised a defense were he charged under Washington law that he could not have raised in the foreign jurisdiction. *Id.*, at 258 (“*Lavery* had no motivation in the earlier conviction to pursue defenses that would not have been available to him under the robbery statute but were unavailable in the federal prosecution”).

Similarly, because Mr. McCoy was precluded from raising an intoxication or diminished capacity defense to an assault charge in California that he could have raised in Washington, the California offense cannot be legally comparable.

Mr. McCoy’s California assault conviction is also not factually comparable to a Washington assault.

If the elements of the foreign conviction are different from or broader than the elements of the parallel crime in Washington, the court

must determine whether the underlying facts, necessarily proven beyond a reasonable doubt or expressly admitted by the defendant, make the offense comparable. *Lavery*, 154 Wn.2d at 258. This factual question involves an inquiry into the elements of the offenses, the proven facts underlying the prior offense, and the accused's incentive to contest the issues that would have made him not guilty in Washington. *Lavery*, 154 Wn.2d at 258.

Because of that:

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Id; see also, *Shepard v. United States*, 544 U.S. 13, 24, 125 S.Ct. 1254, 161 L.Ed.2d 205(2005) (Sixth Amendment concerns require a similar limitation of federal court's ability to examine facts of prior conviction).

Thus, in assessing the factual comparability of Mr. McCoy's California conviction, the court is limited to consideration of the facts specifically agreed to in Mr. McCoy's guilty plea. *State v. Freeburg*, 120 Wn. App. 192, 198-99, 84 P.2d 292 (2004); *State v. Bunting*, 115 Wn. App. 135, 141, 61 P.3d 375 (2003). But the State did not make Mr. McCoy's guilty plea available to the trial court.

The only document relevant to the assault plea in the State's packet of Mr. McCoy's criminal history² is the judgment and criminal complaint.

VIOLATION OF SECTION 245(a) OF THE PENAL CODE, a felony.

The said defendant, on or about June 21, 1978, did willfully and unlawfully commit assault upon ROBERT GERALD JOHNSON, with a deadly weapon, to wit, a shotgun.

It is further alleged that the commission and attempted commission of the above offense, that said defendant personally used a firearm to wit: a shotgun, within the meaning of Penal Code Section 12022.5.

Supplemental Designation of Clerk's Paper's (sub nom. 105). The only competent "facts" provided to the trial court were the allegations in the Complaint. That statement does not indicate facts which establish assault by an actual battery nor facts which establish the specific intent to establish assault or attempted battery. Additionally, the judgment paperwork reflects that the firearm enhancement, §12022.5, was not found as part of the plea. Supplemental Designation of Clerk's Paper's (sub nom. 105), see judgment at 2(d)(1)).

In the end, the problem is precisely the same as *State v. Bunting*. Each of those cases held that where the language of a foreign statute does not establish a comparable offense, an indictment which merely parrots that statutory language is inadequate to establish factual comparability.

² See Supplemental Designation of Clerk's Paper's, sub. nom. 105

See e.g., Bunting, 115 Wn. App. at 135. Because the admitted facts are merely a recitation of the statutory language, there is no indication that Mr. McCoy admitted facts which establish either a specific intent to harm or an actual infliction of harm.

In order to prove first degree unlawful possession of a firearm, the State had to prove that Mr. McCoy had a disqualifying conviction for “serious offense.” RCW 9.41.040(1)(a). A serious offense is defined at 9.41.010(16) and includes any crime of violence. But the State failed in its attempt to make Mr. McCoy’s California assault comparable to a Washington second degree assault, a crime of violence. Without adequate proof of the disqualifying conviction, the State’s proof failed and the first degree unlawful possession of a firearm must be reversed and dismissed.

Furthermore, RCW 9.94A.525(3) provides in relevant part:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.

As with other issues at sentencing, due process and the Sentencing Reform Act (SRA) require that where the State alleges a defendant’s criminal history contains out-of-state felony convictions, the State must prove the existence and comparability of those convictions by a preponderance of the evidence. RCW 9.94A.525; *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Consistent with due process,

A criminal defendant is simply not obligated to disprove the State's position, at least insofar as the State has failed to meet its primary burden of proof. The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.

Ford, 137 Wn.2d at 482.

A prior out-of-state conviction may not be used to increase an offender score unless the State proves the conviction would be a felony under Washington law. *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). To determine whether a foreign conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. *Ford*, 137 Wn.2d at 479. The goal under the SRA is to match the out-of-state crime to the comparable Washington crime and “to treat a person convicted outside the state as if he or she had been convicted in Washington”. *State v. Berry*, 141 Wn.2d 121, 130-31, 5 P.3d 658 (2000).

If the evidence of prior out-of-state convictions is sufficient to support classification under comparable Washington law, that evidence should be presented to the court for consideration. If the evidence is insufficient or incomplete, the State should not be making assertions regarding classification which it cannot substantiate.

Ford, 137 Wn.2d at 482.