

**NO. 42565-3-II**

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

**DIVISION II**

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**KENNETH R. NORDSTROM,**

**Appellant.**

---

**BRIEF OF APPELLANT**

---

**John A. Hays, No. 16654  
Attorney for Appellant**

**1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084**

**TABLE OF CONTENTS**

|   | Page      |
|---|-----------|
| A. TABLE OF AUTHORITIES .....   | iii       |
| B. ASSIGNMENT OF ERROR  |           |
| 1. Assignment of Error .....  | 1         |
| 2. Issue Pertaining to Assignment of Error .....  | 2         |
| C. STATEMENT OF THE CASE  |           |
| 1. Factual History .....  | 3         |
| 2. Procedural History .....   | 6         |
| D. ARGUMENT   |           |
| <b>I. THE TRIAL COURT’S REFUSAL TO REDACT<br/>    IRRELEVANT, PREJUDICIAL EVIDENCE FROM A 911<br/>    CALL DENIED THE DEFENDANT A FAIR TRIAL UNDER<br/>    WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND<br/>    UNITED STATES CONSTITUTION, FOURTEENTH<br/>    AMENDMENT .....</b>          | <b>13</b> |
| <b>II. THE TRIAL COURT’S REFUSAL TO ALLOW THE<br/>    DEFENDANT TO PRESENT RELEVANT TESTIMONY ON<br/>    SURREBUTTAL DENIED THE DEFENDANT DUE<br/>    PROCESS UNDER WASHINGTON CONSTITUTION,<br/>    ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION,<br/>    FOURTEENTH AMENDMENT .....</b> | <b>19</b> |
| <b>III. THE PROSECUTOR COMMITTED MISCONDUCT<br/>    WHEN SHE REPEATEDLY ARGUED THAT THE JURY<br/>    SHOULD CONVICT BASED UPON THE DEFENDANT’S<br/>    FAILURE TO CALL CERTAIN WITNESSES .....</b>  | <b>22</b> |
| <b>IV. THE TRIAL COURT ERRED WHEN IT IMPOSED AN<br/>    EXCEPTIONAL SENTENCE THAT WAS CLEARLY<br/>    EXCESSIVE .....</b>   | <b>26</b> |

**V. THE TRIAL COURT ERRED WHEN IT INCLUDED AN OREGON CONVICTION IN THE DEFENDANT'S OFFENDER SCORE BECAUSE THE STATE FAILED TO PROVE THAT IT WAS LEGALLY OR FACTUALLY COMPARABLE TO A WASHINGTON FELONY ..... 29**

E. CONCLUSION ..... 42

F. APPENDIX

1. Washington Constitution, Article 1, § 3 ..... 43

2. United States Constitution, Fourteenth Amendment ..... 43

3. RCW 9.94A.525 ..... 43

4. RCW 9A.08.010(1) ..... 44

5. RCW 9A.36.021(1) ..... 45

6. ORS 161.085(6)-(10) ..... 46

7. ORS 163.175 ..... 47

**TABLE OF AUTHORITIES**

Page

*Federal Cases*

*Bruton v. United States*,  
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) ..... 13

*Chambers v. Mississippi*,  
410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) ..... 19

*In re Winship*,  
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ..... 22

*State Cases*

*State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004) ..... 14, 15

*State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983) ..... 22

*State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001) ..... 14

*State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991) ..... 23, 25

*State v. Bush*, 102 Wn.2d 372, 9 P.3d 219 (2000) ..... 30

*State v. Cameron*, 80 Wn.App. 374, 909 P.2d 309 (1996) ..... 31

*State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003) ..... 23

*State v. Cleveland*, 58 Wn.App. 634, 794 P.2d 546 (1990) ..... 23

*State v. Crosby*, 342 Or. 419, 154 P.3d 197 (2007) ..... 40

*State v. Davis*, 119 Wn.2d 657, 835 P.2d 1039 (1992) ..... 35

*State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981) ..... 20

*State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998) ..... 19

|   |        |
|---|--------|
| <i>State v. Fisher</i> , 108 Wn.2d 419, 739 P.2d 1117 (1987) .....    | 27     |
| <i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 472 (1999) .....       | 13, 30 |
| <i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983) .....        | 19     |
| <i>State v. Kendrick</i> , 47 Wn.App. 620, 736 P.2d 1079 (1987) ..... | 14     |
| <i>State v. McCraw</i> , 127 Wn.2d 281, 898 P.2d 838 (1995). .....    | 30     |
| <i>State v. Morley</i> , 134 Wn.2d 588, 952 P.2d 167 (1998) .....     | 30, 40 |
| <i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001) .....       | 14     |
| <i>State v. Pogue</i> , 108 Wn.2d 981, 17 P.3d 1272 (2001) .....      | 15-17  |
| <i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995) .....     | 19     |
| <i>State v. Robinson</i> , 58 Wn.App. 599, 794 P.2d 1293 (1990) ..... | 36     |
| <i>State v. Sample</i> , 52 Wn.App. 52, 757 P.2d 539 (1988) .....     | 35, 36 |
| <i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963) .....     | 13     |
| <i>State v. Thomas</i> , 98 Wn.App. 422, 989 P.2d 612 (1999) .....    | 40     |

***Constitutional Provisions***

|  |            |
|--|------------|
| Washington Constitution, Article 1, § 3 .....          | 13, 19, 20 |
| United States Constitution, Fourteenth Amendment ..... | 13, 19, 20 |

*Statutes and Court Rules*

ER 403 ..... 13, 15

ORS 161.085 ..... 37, 38

ORS 163.175 ..... 34, 36

RCW 9.94A.360(3) ..... 31

RCW 9.94A.525(3) ..... 29

RCW 9.94A.585 ..... 27

RCW 9A.08.010 ..... 37-39

RCW 9A.36.021 ..... 34, 36

*Other Authorities*

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) ..... 14

## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court's refusal to redact irrelevant, prejudicial evidence from a 911 call denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

2. The trial court's refusal to allow the defendant to present relevant testimony on surrebuttal denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

3. The prosecutor committed misconduct when she repeatedly argued that the jury should convict based upon the defendant's failure to call certain witnesses.

4. The trial court erred when it imposed an exceptional sentence that was clearly excessive.

5. The trial court erred when it included an Oregon conviction in the defendant's offender score because the state failed to prove that it was legally or factually comparable to a Washington felony.

*Issues Pertaining to Assignment of Error*

1. Does a trial court's refusal to redact irrelevant, prejudicial evidence from a 911 call deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when the jury would have acquitted had the evidence been redacted?

2. Does a trial court's refusal to allow the defendant to present relevant testimony on surrebuttal deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when the inclusion of that evidence would have resulted in an acquittal?

3. Does a prosecutor commit misconduct if she repeatedly argues that the jury should convict based upon the defendant's failure to call certain witnesses equally available to the state?

4. Does a trial court err if it imposes an exceptional sentence that is clearly excessive?

5. 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*

About ten years ago, Mary Decknadel of Vancouver met the defendant Kenneth Nordstrom and had a brief relationship with him. RP 236-240.<sup>1</sup> They then fell out of touch until about two years ago when they met again. *Id.* Within a week or two of seeing each other again the defendant moved into Mary's two bedroom apartment at 3102 Harney Street in Vancouver. *Id.* At the time, Mary lived there with her two daughters, her sister, her sister's boyfriend, and her sister's daughter. RP 321-322. From this point in time, the defendant lived off and on with Mary. RP 236-240, 321-327, 493-497. He also stayed with friends in Portland, where he kept a number of his possessions. RP 176-180. Eventually, Mary's sister, her sister's boyfriend and her sister's daughter moved out, leaving Mary with her two daughters and the defendant. RP 321-322. According to Mary, at one point the defendant had a key to the apartment but no longer had one by September of 2010. RP 244. According to the defendant, he always had a key to the apartment. RP 515.

From the beginning of their relationship, the defendant did not get along well with Mary's daughter Amy. RP 241-247, 322-327. He believed

---

<sup>1</sup>The record on appeal includes seven continuously numbered volumes of verbatim reports referred to herein as "RP [page #]."

she was lazy, disrespectful and abusive to her mother Mary. RP 501-516. He also believed her friends were gang members and that she was out of control. *Id.* On her part, Amy believed that the defendant was abusive and disrespectful to her. RP 322-327. On one occasion, the defendant found a mess that Amy had left in the kitchen. RP 512-513, According to Amy, the defendant took a bowl with spaghetti in it and threw it all over her bed. RP 333-336. According to the defendant, he took the empty bowl and other dirty dishes that Amy had left out and put them on top of her bed. RP 512-513, On another occasion, one of Amy's classmates became upset with her, came over, and broke Amy's nose when the two of them got into a fight. RP 359-363. This occurred in April of 2010. *Id.*

The situation eventually came to a head one evening when Amy and her mother Mary were arguing, and Amy took the telephone and hit her mother with it. RP 257-258. Amy's mother then called the police, who came to the apartment and arrested Amy. *Id.* Amy later admitted that she resented the defendant because she believed that he had called the police and had her arrested. RP 364. For a number of weeks after that incident, Amy stayed with her grandmother, who lived a few blocks away. RP 241-247. However, once school started, Amy moved back in with her mother and the defendant. RP 331-332. According to Amy, the defendant spent the majority of his time at the apartment (six out of seven days per week) and would come in without

knocking. RP 354-357. However, the two of them usually avoided contact with each other. *Id.*

On Sunday, September 12, 2010, Amy had her friend Ashley Grant over for the night as her mother was working until later Monday. RP 119, 333-336. Amy and her friend Ashley were both 16-years-old as of that date. *Id.* According to Amy, she did not think the defendant would be coming over that night. *Id.* That evening Amy and Ashley watched some programs on television, and then fell asleep on adjoining couches in the living room. *Id.* According to Amy, sometime during the early morning hours, she awoke to find the defendant standing over her in the living room. RP 338-341. As she woke up, he began to strike her about the head and face. *Id.* He then went over to where her friend Ashley was sleeping and hit her a few times as she tried to get up. *Id.* When he did this, Amy went into the kitchen to call the police. *Id.* As she did, the defendant kicked her and hit her a number of further blows. *Id.* He then left the apartment. *Id.*

Ashley also claimed that the defendant had woken them up in the apartment by assaulting Amy and then assaulting her. RP 119-124. According to Ashley, after the defendant hit her a few times, he went back to hitting Amy. *Id.* As he did, Ashley took her cell phone, ran downstairs and called 911. *Id.* Within a few minutes, the police and an aide crew arrived. RP 124-125. The aide crew took both of the young women to the

emergency room, where they treated Amy and determined that she had a slight nasal fracture, along with bruises about her head and face. RP 157-165, 166-172, 222-224. At the time this occurred, Ashley Grant was a few months pregnant, a fact known to the defendant. RP 113-115, 506. According to both Amy and Ashley, the defendant did not like Ashley because she was African-American. RP 112, 326.

Later that Monday, the police were able to locate and arrest the defendant at his friend's house in Portland. RP 193-194. Upon arresting him, they looked at his hands for evidence that he had been in a recent fight. RP 385-389. They did not note anything unusual about his hands. *Id.* They also searched his vehicle for trace amounts of Amy's blood, since she had bled profusely from her broken nose. RP 385-391. The police did not find anything of evidentiary value in the defendant's vehicle. *Id.* The defendant denied having been at Mary's apartment that night and denied having assaulted either Amy or Ashley. RP 428-429.

#### ***Procedural History***

By information filed September 14, 2010, the Clark County Prosecutor charged the defendant with one count of first degree burglary, and one count of second degree assault against Amy Decknadel. CP 1-2. Four days before trial, the state moved to amend the information to add a count of fourth degree assault against Ashley Grant, and to add a special allegation to

the first degree burglary charge that at the time of the offense the defendant knew that one of the victims was pregnant. CP 67-67, 69-70. The court granted the motion to amend over the defendant's objection. RP 1-6.

Following *voir dire* on the first day of trial, the court listened to a recording of Ashley Grant's 911 call, upon the state's motion to admit the recording in its entirety, and upon the defendant's motion to exclude it in its entirety, or to redact a number of portions from it. RP 47-61, 62-66. The court ruled that the jury would be allowed to hear the tape in its entirety, including the following statement Ashley Grant made to the 911 operator:

Her mom is a fucking drug addict. They're both tweakers. They both do meth. So, she's crazy and he's crazier. And they are just both crazy. That's the only thing about it. I really don't know why she let him in the house.

RP 56, 152-153, 345, 690.

During the trial, the state played this tape on two separate occasions for the jury. RP 152-153, 345. The first was during Ashley Grant's testimony. RP 152-153. The second time was during Amy Decknadel's testimony. RP 345.

Following argument on the admission of the 911 tape, the state presented its case in chief by calling 14 witnesses, including Ashley Grant, Mary Decknadel, and Amy Decknadel, as well as a number of police officers and hospital personnel. RP 74-412. These witnesses testified to the facts

contained in the preceding factual history. *See* Factual History. The defense then called two witnesses: a radiologist and the defendant. RP 485, 493. The radiologist testified to the difficulty in dating nasal fractures as compared to fractures in other bones. RP 485-492. The defendant then took the stand and denied that he had gone to Mary's apartment the night in question and denied ever striking either Amy or Ashley. RP 516-534. In fact, he testified that on that particular Sunday night, he had been at a job site with a friend sleeping in his car. *Id.*

Following the close of the defendant's case-in-chief, the state called Mary Decknadel in rebuttal. RP 575. During this testimony, she stated that during the pendency of the case, the defendant had called her from the jail and stated that on the night in question he had been with friends by the names of Shannon and Carl at Carl's house a number of blocks from Mary's apartment. RP 610-611. During her testimony, the state played a portion of the recorded jail telephone call to which Mary referred. RP 545-577.

After the state presented its rebuttal evidence, the defense proposed calling the defendant in sur-rebuttal, and did so by way of offer of proof outside the presence of the jury. RP 624-629. During this offer of proof, the defendant admitted that he had made the telephone call the jury had just heard, but he claimed that the reference to Shannon had nothing to do with a claim of alibi. RP 624-628. After the defense presented this offer of proof,

the court refused to allow the defendant to testify in sur-rebuttal. RP 629.

At this point, the court instructed the jury without objection from either party. RP 629-639. The parties then presented their closing arguments. RP 660-755. During closing argument and over defense objection, the prosecutor commented on the defendant's failure to call any alibi witnesses. RP 690. The state's specific argument went as follows on this point.

What he testified to is that he went out somewhere in Portland. Ran into some random friend and that it was his friend. This was one of his friends. They go back – they go so far back, this person that he was with. But, you didn't hear from him today. You didn't hear from Shannon Wink either, the person that he told Mary Ann on the phone that he was with. You know, his friends.

RP 690:1-8.

During rebuttal and again over defense objection, the state twice again commented on the defendant's failure to call witnesses. The state's first argument on this issue during rebuttal went as follows:

This work site he was at. It was at somebody's house. Somebody – somebody – Gary would have woken up and found this man at his house. But, you didn't hear from Gary. Nor did you hear from Carl.

RP 748.

The state's second comment during rebuttal on the defendant's failure to call witnesses included the following remarks:

The State absolutely has the burden of proof in this case. But, when you present a defense and the person that you have – if the

witnesses that you are using that you decide to raise in your defense are in your control then it –

RP 749.

Following the state's rebuttal argument, the jury retired for deliberation, eventually returning verdicts of guilty on each count, along with a special verdict that during the commission of the first degree burglary the defendant was aware that Ashley Grant was pregnant. RP 761-763; CP 107-111.

A little more than a month after the trial, the court called the case for hearing on the defendant's motion for a new trial, and for sentencing. RP 767-870. Following argument, the court denied the defendant's motion for a new trial. RP 767-778. The court then proceeded to sentencing. *Id.* Although the defendant did not dispute the state's claim as to his criminal history, he did argue that his Oregon conviction for second degree assault was neither legally or factually comparable to a felony assault in the State of Washington. RP 773-774, 793-829.

During sentencing, the state produced the following two documents from Oregon in an attempt to prove that the defendant's Oregon conviction for second degree assault was comparable to a Washington felony: (1) the defendant's no contest plea in Multnomah County Cause No. 95-03-31530 and (2) the Indictment from Multnomah County Cause No. 95-03-31530.

Sentencing Exhibits 3 and 10. The latter of these two documents stated as follows:

COUNT 1  
ASSAULT IN THE FIRST DEGREE

The said defendant, on or about August 22, 1994, in the County of Multnomah, State of Oregon, did unlawfully and intentionally cause serious physical injury to DAVID A. RAKE by means of a dangerous weapon, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that the above-named victim did not substantially contribute to the commission of the above-described offense by precipitating the attack.

COUNT 2  
ATTEMPTED MURDER

The said defendant, on or about August 22, 1994, in the County of Multnomah, State of Oregon, did unlawfully and intentionally attempt to cause the death of another human being, to-wit: DAVID A. RAKE, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

Sentencing Exhibit 10.

However, while the State of Oregon indicted the defendant for first degree assault and attempted murder, it only obtained a conviction for second degree assault, as is set out in the defendant's "Petition to Plead No Contest and Waiver of Jury Trial" as shown in sentencing Exhibit 3. *See* Exhibit 3. This document merely stated that the defendant was pleading no contest to "Assault II" without any reference to which section of the statute was applicable. *Id.* Neither did the document contain any factual statement. *Id.*

Following argument on this issue, the court found the Oregon conviction comparable, and included it in the defendant's offender score, which was nine points with the Oregon conviction included. CP 167-183. The court then sentenced the defendant to the top end of the standard range on both felony counts, and then added 40 months to the first degree burglary sentence based upon the aggravating fact found by the jury. *Id.* The defendant thereafter filed timely Notice of Appeal. CP 194.

## ARGUMENT

### I. THE TRIAL COURT'S REFUSAL TO REDACT IRRELEVANT, PREJUDICIAL EVIDENCE FROM A 911 CALL DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

The due process clauses under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do not guarantee every person accused of a crime a perfect trial. *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968); *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). However, they do guarantee all defendants a fair trial untainted by inadmissible, unreliable or unfairly prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403, a court should consider the following: (1) the importance of the fact that the

evidence is intended to prove, (2) the strength and length of the chain of inferences necessary to establish the fact, (3) whether or not the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial,

the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

*State v. Acosta*, 123 Wn.App. at 426 (footnote omitted).

In addition, as reference to the decision in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), illustrates, evidence that merely demonstrates a

general propensity to commit the crime charged and is more prejudicial than probative and the admission of that evidence violates both due process as well as ER 403. The following reviews the decision in *Pogue*.

In *Pogue, supra*, the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was.

Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

*State v. Pogue*, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

Turning to the case at bar, the trial court allowed the state, over defense objection, to play the entire 911 tape to the jury on three separate occasions without redacting the following statement by Ashley Grant.

Her mom is a fucking drug addict. They're both tweakers. They both do meth. So, she's crazy and he's crazier. And they are just both crazy. That's the only thing about it. I really don't know why she let him in the house.

RP 56, 152-153, 345, 690.

The only possible relevance this evidence had was to argue that the defendant was a person addicted to methamphetamine, and that as such a

person he was more likely than not to commit crimes such as those alleged in the state's case. As such, it was inadmissible propensity evidence that put the defendant in a terrible light for the jury. It also had the effect of substantially undercutting the defendant's credibility in the eyes of any reasonable juror. Thus, to the extent this evidence had any relevance at all, that slight relevance was grossly outweighed by its unfair prejudicial effect. As a result, the trial court erred when it refused to redact this statement from the 911 tape.

In addition, this failure caused prejudice to the defendant because the only evidence that the defendant was present and caused any injuries to either complaining witness came from the testimony of those two complaining witnesses. No physical evidence supported their claims that the defendant was the perpetrator. In fact, the lack of physical evidence, such as cuts or bruises on the defendant's hands or blood in his vehicle, actually undercut the state's claims identifying the defendant as the perpetrator of the offenses. Given this lack of evidence, the admission of the highly prejudicial statement by Ashley Grant on the 911 tape, repeated three separate times to the jury, was sufficient to secure guilty verdicts for the state. As a result, the defendant is entitled to a new trial.

**II. THE TRIAL COURT’S REFUSAL TO ALLOW THE DEFENDANT TO PRESENT RELEVANT TESTIMONY ON SURREBUTTAL DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

As part of the due process right to a fair trial under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, a defendant charged with a crime has the right to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). As with other constitutional rights, a defendant denied the right to present relevant, exculpatory evidence is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not “harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

The decision in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), examines a case in which a defendant was denied the right to present relevant, exculpatory evidence. In this case, a defendant charged with

aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his due process right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments, to present relevant evidence supporting his defense.

In the case at bar, the defendant testified at length before the jury stating that he could not have perpetrated the alleged offenses because he was in Portland at the time with a co-worker, sleeping in a car at a job site waiting to work in the morning. In order to rebutt this claim, the state called Amy Decknadel to authenticate a call the defendant made to her while in the jail in this case. In that tape, which the state played to the jury, the defendant appears to be claiming that he was with another person by the name of Shannon at a house a few blocks from Mary Decknadel's apartment at the relevant time. The effect of this evidence was to (1) call the defendant's claim of alibi into serious question, and (2) generally taint the defendant's credibility, particularly as to his claim that he had not perpetrated the offenses described in the state's evidence. As such, it was critical to the defense to undercut Mary Decknadel's rebuttal evidence as supported by the jail tape.

In this case, the defendant proposed to take the witness stand in sur-rebuttal to Mary Decknadel's claims and in sur-rebuttal to her interpretation of the recorded conversation from the jail. As the defendant's offer of proof illustrated, he intended to do just this by testifying in sur-rebuttal that the Shannon he spoke of in the jail conversation was not the Shannon to which Mary Decknadel referred, and that the recorded jail telephone call did not have anything to do about his claim of alibi. As such, this evidence directly

rebutted the state's evidence and was both relevant and admissible. In spite of its clear relevance, the trial court refused to allow the defense to present this evidence. In so doing, the court denied the defendant a fair trial by prohibiting the defense from presenting critical evidence to undercut the state's argument that he had lied about his alibi. Given the fact that a large portion of this case turned on which witnesses the jury found more credible (Ashley Grant and Amy Decknadel for the state verses the defendant), the state cannot prove that the trial court's error in excluding this evidence was harmless beyond a reasonable doubt. As a result, the defendant is entitled to a new trial.

### **III. THE PROSECUTOR COMMITTED MISCONDUCT WHEN SHE REPEATEDLY ARGUED THAT THE JURY SHOULD CONVICT BASED UPON THE DEFENDANT'S FAILURE TO CALL CERTAIN WITNESSES.**

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, 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. In addition, since the burden rests upon the state to prove every element of the crime charged beyond a reasonable doubt, it is prosecutorial misconduct for the state to comment upon the defendant's failure to testify, to call witnesses, or to present any defense at all. *State v. Cleveland*, 58 Wn.App. 634, 794 P.2d 546 (1990).

There are certain limited exceptions to the rule prohibiting the state from commenting upon the defendant's failure to call an available witness. Under the "missing witness rule," if the defendant testifies or puts on evidence that refers to the existence of witness who is "particularly available" to the defendant and who the defense would logically call to corroborate the defendant's testimony, then the state may properly comment on the defendant's failure to call that witness. *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003). In *Cheatam*, the court states the rule as follows:

Under this doctrine, where a party fails to call a witness to provide testimony that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party. The inference only arises where the witness is peculiarly available to the party, i.e., peculiarly within the party's power to produce. In addition, the testimony must concern a matter of importance as opposed to a trivial matter, it must not be merely cumulative, the witness's absence must not be otherwise explained, the witness must not be incompetent or his or her testimony privileged, and the testimony must not infringe a defendant's constitutional rights. If the prosecutor properly invokes the missing witness doctrine, no prosecutorial misconduct occurs.

*State v. Cheatam*, 150 Wn.2d at 652-653.

For example, in *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991), the defendant was charged with delivery of a controlled substance. During its case-in-chief, the state introduced evidence that the defendant possessed “buy and owe” sheets setting out the names of persons to whom he sold drugs along with amounts that those persons owed him. Following the close of the state’s case, the defendant took the stand and testified that the names and amounts of money on the papers the police seized memorialized personal loans that he had made to friends. In closing, the state commented upon the defendant’s failure to call any of the persons listed on the sheets of papers.

Following conviction, the defendant appealed, arguing in part that the state had improperly shifted the burden of proof by commenting on his failure to call witnesses when he had no duty to do so. In response, the state argued that under the missing witness rule it was not misconduct to refer to the defendant’s failure to call witnesses to whom he referred in his own testimony and who were only known to him. The Washington Supreme Court agree with the state’s argument, holding as follows:

Here, nothing in the prosecutor’s comments said that the defendant had to present any proof on the question of his innocence. The prosecutor was entitled to argue the reasonable inference from the evidence presented. Defendant testified. In so doing, he waived his right to remain silent. He specifically testified about the notations on the slips of paper. He testified he knew, at the time he was arrested, how to locate the people listed on the slips. Only their first names

were listed, and according to his testimony he had a business or personal relationship with the people listed. Under these circumstances, the prosecutor's comments about defendant's failure to call the witnesses were not error.

*State v. Blair*, 117 Wn.2d at 492.

In *Blair*, the basis for the court's holding was twofold: (1) the defendant specifically referred to the existence of these witnesses in the defendant's case, and (2) the witnesses were "particularly available" to the defense because only the defendant knew who they were and the state did not.

By contrast, in the case at bar, on three separate occasions the state commented upon the defendant's failure to call witnesses that were also available to the state. This first occurred during closing argument, when the prosecutor stated the following:

What he testified to is that he went out somewhere in Portland. Ran into some random friend and that it was his friend. This was one of his friends. They go back – they go so far back, this person that he was with. But, you didn't hear from him today. You didn't hear from Shannon Wink either, the person that he told Mary Ann on the phone that he was with. You know, his friends.

RP 690:1-8.

It occurred a second time during rebuttal when the prosecutor argued as follows:

This work site he was at. It was at somebody's house. Somebody – somebody – Gary would have woken up and found this man at his house. But, you didn't hear from Gary. Nor did you hear from Carl.

RP 748.

It occurred a third time during rebuttal when the prosecutor made the following remarks:

The State absolutely has the burden of proof in this case. But, when you present a defense and the person that you have – if the witnesses that you are using that you decide to raise in your defense are in your control then it –

RP 749.

The error in this instance came from the falsity of the prosecutor's last statement that the witnesses were in the unique control of the defense. In fact there is no evidence in the record that either "Carl" or "Gary" were unknown to the state. In addition, as the evidence presented at trial revealed, the state knew exactly who "Shannon" was and could have called this witness had the state chosen to do so. As a result, unlike the case in *Blair*, the state's three arguments in this case directly commented on the defendant's failure to call witnesses and thereby shifted the burden of proof to the defendant. As previously argued, since this case largely involved a credibility contest between the defendant and the state's two complaining witnesses, the state's improper argument during closing caused significant prejudice to the defendant's case. At a minimum it was far from "harmless beyond a reasonable doubt." As a result, the defendant is entitled to a new trial.

#### **IV. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE THAT WAS CLEARLY EXCESSIVE.**

In order to obtain reversal of a sentence in excess of the standard range, the appealing party has the burden of proving either “that the reasons supplied by the sentencing judge are not supported by the record which was before the judge, or that these reasons do not justify a sentence outside the standard range for that offense . . .” RCW 9.94A.585(4). The former is a question of fact reviewed under a clearly erroneous standard. *State v. Fisher*, 108 Wn.2d 419, 739 P.2d 1117 (1987) (citing *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 1117 (1980)). The latter is a question of law and should be independently reviewed by this Court. *Id.* In addition, either party may obtain reversal of a sentence outside the standard range if that sentence is either “clearly excessive or clearly too lenient.” RCW 9.94A.585(4)(b). In the case at bar, the defendant makes this latter argument that his sentence is clearly excessive.

A trial court has broad discretion to determine the appropriate length of a sentence outside the standard range, once it determines that a departure from the standard range is legally available and appropriate. *State v. Tauala*, 54 Wn.App. 81, 771 P.2d 1188 (1989). However, the court must have a rational basis for the length of sentence it imposes. *State v. S.S.*, 67 Wn.App. 800, 840 P.2d 891 (1992).

For example, in *State v. Duncan*, 90 Wn.App. 808, 960 P.2d 941 (1998), the trial court declared a manifest injustice sentence and set the length of the sentence based upon the psychological expert's opinion of the time necessary for treatment. However, this recommendation was based, in part, upon the evaluator's belief that the defendant would possibly be eligible for early release, thereby requiring a longer sentence. On review, the Court of Appeals reversed the sentence, finding that the consideration of the early release possibility was not a rational basis upon which to base the length of the sentence.

In the case at bar, the trial court imposed an exceptional sentence based upon the jury's finding under RCW 9.94A.535(3)(c), that Ashley Grant, one of the victims of the first degree burglary, was pregnant at the time the defendant committed the offense. This provision states:

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

RCW 9.94A.535(3)(c).

In this case, the trial court added 40 months to the top end of the standard range of 116 months based upon this finding. The defendant argues that, under the facts of this case, there is no rational basis for imposing such a severe sentence. These facts include the following: (1) the defendant was also convicted of assault against Amy Grant and had already been punished

for this conduct as well as having been punished for the burglary, (2) the defendant's conduct was not initially directed towards Amy Grant, (3) there is no evidence that Amy Grant's pregnancy was the focus of the defendant's conduct, (4) there was no evidence that the defendant in any way compromised Amy Grant's pregnancy, or intended to do so, and (5) the physical harm the defendant did to Amy Grant was slight at most, and did not involve the use of or attempted use of any type of weapon. In fact, the 40 months the trial court added to the defendant's sentence exceeded the sentence he would have received had he committed a third degree felony assault against her. It was also three and one-half times the maximum the court could have imposed for the actual crime for which he was convicted against Amy Grant, which was fourth degree assault. Under these facts, the trial court abused its discretion and imposed a sentence that was "clearly excessive" when it added 40 months in prison based upon this finding. As a result, this court should vacate the sentence for first degree burglary and remand for resentencing.

**V. THE TRIAL COURT ERRED WHEN IT INCLUDED AN OREGON CONVICTION IN THE DEFENDANT'S OFFENDER SCORE BECAUSE THE STATE FAILED TO PROVE THAT IT WAS LEGALLY OR FACTUALLY COMPARABLE TO A WASHINGTON FELONY.**

The inclusion of foreign convictions in a defendant's offender score is controlled by RCW 9.94A.525(3), which states:

(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) (formerly codified as RCW 9.94A.360(3)).

Washington case law interpreting this statute indicates that in determining the effect of a foreign conviction, the sentencing court must first compare the elements of the foreign conviction to elements of any comparable Washington statute. *State v. Ford, supra*. If the elements are identical, then the analysis ends. *State v. Bush*, 102 Wn.2d 372, 9 P.3d 219 (2000). However, if the foreign statute defines the offense in broader terms, the sentencing court must then look to the actual conduct to determine the equivalent Washington offense. *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998).

Evidence setting out the conduct that led to the foreign conviction can be found in supporting documents such as the Indictment, the Statement of Defendant on Plea of Guilty (if the defendant pled guilty), the Jury Instruction (if the defendant went to a jury trial), or the Judgment and sentence. Upon determining the conduct proven, the court should then determine what crime, if any, it would constitute under Washington law.

*State v. Morley, supra.* The state had the burden of producing sufficient evidence to prove by a preponderance of the evidence that the actual conduct constituted a particular offense in Washington. *State v. Ford, supra.* The appellate courts conduct a de novo review of this determination by the trial court. *State v. McCraw*, 127 Wn.2d 281, 898 P.2d 838 (1995).

For example, in *State v. Cameron*, 80 Wn.App. 374, 909 P.2d 309 (1996), the defendant pled guilty to delivery of heroin. At sentencing, the defendant stipulated that he had a prior federal conviction for conspiracy to possess marijuana with intent to deliver. However, he argued that it had washed because he subsequently spent more than five consecutive years in the community crime free. The state agreed with the defendant's factual assertion, but argued that the conviction counted toward the defendant's offender score because (1) a ten year wash out period applied, and (2) the defendant had not spent ten years crime free (which fact the defendant conceded). The trial court agreed with the state's analysis, counted the prior federal conviction as three points, and sentenced the defendant to 36 months on a range of 36 to 48 months. The defendant then appealed, arguing that the correct range was from 21 to 27 months in prison.

In its analysis, the Court of Appeals first noted that in determining the applicability of a foreign conviction under RCW 9.94A.360(3), the court was required to analyze the elements of the foreign offense and compare it to the

comparable Washington crime. Upon doing this, the court held that the federal conviction had the same elements as conspiracy to possess marijuana with intent to deliver under RCW 69.50.401(a)(1)(ii), which is a class C felony with a maximum term of five years in prison.

The Court of Appeals then addressed the state's argument that the prior federal conviction was a second drug offense, and that under RCW 69.50.408, the maximum applicable term was doubled to ten years in prison. The Court of Appeals responded that it agreed with the state's legal analysis. However, it disagreed with the state's factual analysis, finding that the record indicated that the prior federal conviction had not been treated as a subsequent offense. Thus, the court held that the trial court should have applied the five year period, thus washing out the federal conviction. As a result, the court reversed and remanded for resentencing.

In the case at bar, the state argued that the court should include the defendant's Oregon conviction for second degree assault in his offender score as comparable to a Washington conviction for second degree assault. The defense argued that the offense was not comparable. In an attempt to prove comparability, the state produced two documents from Oregon: (1) the defendant's no contest plea in Multnomah County Cause No. 95-03-31530 (Sentencing Exhibit 3), and (2) the Indictment from Multnomah County Cause No. 95-03-31530 (Sentencing Exhibit 10). The latter of these two

documents stated as follows:

COUNT 1  
ASSAULT IN THE FIRST DEGREE

The said defendant, on or about August 22, 1994, in the County of Multnomah, State of Oregon, did unlawfully and intentionally cause serious physical injury to DAVID A. RAKE by means of a dangerous weapon, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that the above-named victim did not substantially contribute to the commission of the above-describe offense by precipitating the attack.

COUNT 2  
ATTEMPTED MURDER

The said defendant, on or about August 22, 1994, in the County of Multnomah, State of Oregon, did unlawfully and intentionally attempt to cause the death of another human being, to-wit: DAVID A. RAKE, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

Sentencing Exhibit 10.

However, while the State of Oregon indicted the defendant for first degree assault and attempted murder, it only obtained a conviction for second degree assault, as is set out in the defendant's "Petition to Plead No Contest and Waiver of Jury Trial" as shown in sentencing Exhibit 3. This document merely states that the defendant was pleading no contest to "Assault II" without any reference to which section of the statute was applicable. *Id.* Neither did the document contained any factual statement. *Id.*

The Oregon statute for second degree assault, under which the

defendant apparently pled, states as follows:

163.175 Assault in the second degree.

(1) A person commits the crime of assault in the second degree if the person:

(a) Intentionally or knowingly causes serious physical injury to another;

(b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or

(c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

(2) Assault in the second degree is a Class B felony.

ORS 163.175.

Section (1)(b) of this statute is similar to, but not identical to section (1)(c) of RCW 9A.36.021. This statute states as follows:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

RCW 9A.36.021(1).

The legislature's failure to include a specific mental intent under the (1)(c) alternative is certainly incongruent. However, our case law is clear that the term "assault" as used in our criminal statute implicitly carries the requirement of an "intentional" mental state. Indeed, the failure in a charging document to include the language "intentionally" is not fatal to the notice requirement under the constitution because "assaults" are universally known to be "intentional" acts. *State v. Davis*, 119 Wn.2d 657, 835 P.2d 1039 (1992). Thus, while the legislature did not state "intentionally assaults another with a deadly weapon" under the (1)(c) alternative, the *mens rea* of intent none the less exists as an element of the crime.

For example, in *State v. Sample*, 52 Wn.App. 52, 757 P.2d 539 (1988), this court addressed the issue of what *mens rea* elements were required in the different degrees of assault. In this case, the state had charged the defendant with third degree assault, alleging that he had, with criminal negligence, caused physical injury to another by means of an instrument or thing likely to produce bodily harm. Following a bench trial, the court

acquitted the defendant of third degree assault, but convicted him of fourth degree assault, which the court believed was a lesser included offense. The defendant appealed, arguing that fourth degree assault was not a lesser included offense because fourth degree assault required a higher mental state. This court agreed, and reversed, stating as follows.

Simple assault is a true or common law assault and requires proof of intent. This State's classic definition of an assault is contained in *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 505, 125 P.2d 681 (1942), thusly: "An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented." *See also State v. Jones*, 34 Wn.App. 848, 850, 664 P.2d 12 (1983). Former RCW 9A.36.030(1)(b), however, eliminates the element of intent and takes conduct - negligence- that would not be an assault under common law, and makes it an assault. *Cf. State v. Foster*, 91 Wn.2d 466, 475, 589 P.2d 789 (1979) (criminal negligence statute not unconstitutional because it eliminates intent). Thus, the crime of simple assault requires a more culpable mental state than assault in the third degree by criminal negligence. *See RCW 9A.08.010(1)(a); RCW 9A.08.010(2)*. Here, in arriving at a finding of guilty, the trial court specifically found that [the defendant] intentionally struck (assaulted) [the victim].

Thus, it is possible to commit assault in the third degree by criminal negligence without committing simple assault. If it is possible to commit the greater offense without committing the lesser, the latter is not a lesser included offense.

*State v. Sample*, 52 Wn.App. at 54-55. *See also State v. Jones*, 34 Wn.App. 848, 850, 664 P.2d 12 (1983) (intent is an element of assault); *State v. Robinson*, 58 Wn.App. 599, 606, 794 P.2d 1293 (1990) (intent is an element of simple assault).

As a comparison of the Oregon and Washington statutes reveals, not every second degree assault under ORS 165.175 would necessarily be a second degree assault under RCW 9A.36.021 because the former allows for convictions when one “knowingly” assaults another person with a deadly weapon, while the latter requires the higher mental state of “intentionally.” In fact, the absence of the “knowing” mental state from the definition of second degree assault in Washington is no accident. Rather, as the following explains, the legislature specifically deleted this mental element in 1988.

Under former RCW 9A.36.020(1)(c), a person was guilty of second degree assault if he or she were to “knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm. . . .” Under this provision, the culpable mental state was “knowledge” as the term is defined in RCW 9A.08.010. Furthermore, in order to convict under this provision, the state did not have to prove that the defendant assaulted another with a “deadly weapon,” if the state could prove that the defendant used an “other instrument or thing likely to produce bodily harm.” However, effective July 1, 1988, the legislature adopted the current definition for this crime, which requires the state to prove that the defendant “assaults another with a deadly weapon.” RCW 9A.36.021(1)(c). Thus, while one may commit second degree assault in Oregon by “knowingly” assaulting another with a deadly weapon, one must “intentionally” assault another with a deadly weapon

before this conduct is a second degree assault in Washington.

In this case, the state may argue that under Oregon law, “intentionally” and “knowingly” are the same mental element. However, any such argument would be incorrect, because under ORS 161.085(6)-(10), the Oregon legislature adopted a *mens rea* hierarchy strikingly similar to the *mens rea* hierarchy the Washington legislature adopted in RCW 9A.080.010(1). The former statute provides:

(6) “Culpable mental state” means intentionally, knowingly, recklessly or with criminal negligence as these terms are defined in subsections (7), (8), (9) and (10) of this section.

(7) “Intentionally” or “with intent,” when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.

(8) “Knowingly” or “with knowledge,” when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.

(9) “Recklessly,” when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(10) “Criminal negligence” or “criminally negligent,” when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the

circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

ORS 161.085(6)-(10)

The Washington Statute on levels of culpability states as follows:

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) RECKLESSNESS. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.08.010(1).

Although the language of the two statutes is not identical in words,

it is identical in meaning, particularly as it relates to the mental states of “intentional” and “knowing.” Under the Oregon statute, one acts “intentionally” when one “acts with a conscious objective to cause the result.” Under the Washington statute, one acts “intentionally” when one “acts with the objective or purpose to accomplish a result.” Under the Oregon statute, one acts “knowingly” when one “acts with an awareness that the conduct of the person is of a nature so described. . . .” Under the Washington statute, one acts “knowingly” when one “is aware of a fact, facts, or circumstances or result. . . .” In Oregon, “knowingly” is a less culpable mental state while “intentionally” is a more culpable mental state. *State v. Crosby*, 342 Or. 419, 154 P.3d 197 (2007). In Washington, “knowingly” is also a less culpable mental state and “intentionally” is a more culpable mental state. *State v. Thomas*, 98 Wn.App. 422, 989 P.2d 612 (1999). Thus, second degree assault in Oregon is not the equivalent to second degree assault in Washington when the criminal liability in Oregon arose from “knowingly” assaulting a person with a deadly weapon because in Washington second degree assault requires that one “intentionally” assault another with a deadly weapon.

Under comparability analysis, this court should now determine whether the state met its burden of proving that the conduct that led to the Oregon second degree assault conviction would necessarily have constituted

the crime of second degree assault under Washington law. The reason is that since the two statutes are not identical in elements and some Oregon convictions for second degree assault would not be second degree assaults under Washington law, the second step in the analysis is required. *See Morley, supra.*

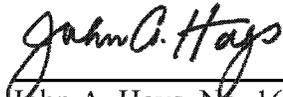
The only other documents the state offered to prove the facts of this conviction were the original indictment and the defendant's statement of "no contest." The problem with the indictment is that it originally charged first degree assault and attempted murder and the defendant did not plead to either charge in the indictment. Consequently, the language of the indictment is not evidence concerning the facts of the offense to which the defendant pled. The second document is equally as defective because it (1) fails to indicate the section of the statute under which the defendant plead, and (2) it fails to include any factual statement at all. Thus, the state failed to prove factual comparability, and the court erred when it included this conviction in the defendant's offender score. As a result, the court should vacate the defendant's sentences and remand for resentencing employing the correct offender score.

## CONCLUSION

The defendant is entitled to a new trial based upon (1) the trial court's admission of irrelevant, unfairly prejudicial evidence, (2) the trial court's refusal to allow the defendant to present relevant, exculpatory evidence, and (3) prosecutorial misconduct. In the alternative, the defendant's sentences should be vacated and the case remanded for resentencing based upon (1) the trial court's inclusion of a non-comparable foreign conviction in the defendant's offender score, and (2) the trial court's imposition of a clearly excessive exceptional sentence.

DATED this 21st day of May, 2012.

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.

**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.

**RCW 9.94A.525(3)**

(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 9A.08.010(1)**

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) RECKLESSNESS. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

**RCW 9A.36.021(1)**

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

**ORS 161.085(6)-(10)**

(6) “Culpable mental state” means intentionally, knowingly, recklessly or with criminal negligence as these terms are defined in subsections (7), (8), (9) and (10) of this section.

(7) “Intentionally” or “with intent,” when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.

(8) “Knowingly” or “with knowledge,” when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.

(9) “Recklessly,” when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(10) “Criminal negligence” or “criminally negligent,” when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

**ORS 163.175**

(1) A person commits the crime of assault in the second degree if the person:

(a) Intentionally or knowingly causes serious physical injury to another;

(b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or

(c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

(2) Assault in the second degree is a Class B felony.



# HAYS LAW OFFICE

May 21, 2012 - 5:36 PM

## Transmittal Letter

Document Uploaded: 425653-Appellant's Brief.pdf

Case Name: State v. Nordstrom

Court of Appeals Case Number: 42565-3

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

Sender Name: Cathy E Russell - Email: [jahayslaw@comcast.net](mailto:jahayslaw@comcast.net)

A copy of this document has been emailed to the following addresses:

[jennifer.casey@clark.wa.gov](mailto:jennifer.casey@clark.wa.gov)