

No. 43717-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Raymond Arndt, Jr.**

Appellant.

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Clallam County Superior Court Cause No. 12-1-00031-9

The Honorable Judge S. Brooke Taylor

**Appellant's Reply Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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## ARGUMENT

### **THE PROSECUTION FAILED TO PROVE THAT THE OREGON CONVICTIONS WERE COMPARABLE TO WASHINGTON OFFENSES.**

The prosecution is required to prove the existence and comparability of any out-of-state conviction. RCW 9.94A.525(3); *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). The sentencing court begins by comparing the elements of the out-of-state conviction to the elements of potentially comparable Washington offenses. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

Where the elements are not identical, the court must examine the record of the prior conviction. *Ford*, at 479; *Morley*, at 606. Judicial fact-finding in this context is limited; the court may only consider undisputed facts from the record of the foreign conviction. *State v. Thomas*, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006); *State v. Larkins*, 147 Wn. App. 858, 863, 199 P.3d 441 (2008).<sup>1</sup>

A. The Oregon rape conviction is not comparable to a Washington offense.

In Oregon, third-degree rape requires proof of “sexual intercourse with another person under 16 years of age.” ORS 163.355. The Oregon

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<sup>1</sup> See also *State v. Hayes*, 165 Wn. App. 507, 522, 265 P.3d 982 (2011); *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

statute lacks two elements required for conviction in Washington: that the victim is “not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.” RCW 9A.44.079.

Neither the record of the prior conviction nor Mr. Arndt’s testimony established these two missing elements. RP 70-72; Ex. 1. Without citation to the record, Respondent asserts that “the State informed the sentencing court that the victim was younger than 16 and that Mr. Arndt was 23 at the time of the rape, so the facts showed at least a 48 month age difference.” Brief of Respondent, p. 12.

But any statements made by the prosecutor are not themselves evidence, and cannot support the classification of the Oregon offense. See, e.g., *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012). Nor can Mr. Arndt’s silence on a particular issue be taken as proof of comparability.<sup>2</sup> *Id.* In addition, Mr. Arndt’s date of birth was not a fact necessary for conviction in Oregon. He did not stipulate or otherwise admit to having a particular birthday, thus any references to his date of birth in the Oregon records cannot support a comparability finding. *Thomas*, at 482; *Larkins*, at 863.

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<sup>2</sup> In a footnote, Respondent erroneously suggests that the issues here cannot be raised on appeal. Brief of Respondent, p. 12 n. 1. This is incorrect. Mr. Arndt objected to the Oregon convictions on comparability grounds. This is sufficient to preserve any comparability error for review.

The non-marriage element is equally unsupported. To get around the complete absence of evidence on this point, Respondent suggests that married people always know the true age of their spouses. Brief of Respondent, p. 12. Even if this were true, the sentencing court could not rely on it without violating the rule set forth in *Thomas and Larkins*. It is undisputed that Mr. Arndt did not know the victim's true age; it is not undisputed that the two were unmarried. Again, Mr. Arndt's silence on this point cannot be held against him. *Hunley, supra*.

The Oregon rape conviction should not have been included in Mr. Arndt's offender score. *Ford*, at 480. Mr. Arndt's sentence must be vacated and the case remanded for sentencing. The prosecution is held to the existing record on remand; accordingly, the Oregon rape conviction must be excluded. *In re Cadwallader*, 155 Wn.2d 867, 878, 123 P.3d 456 (2005).

B. The Oregon DUI convictions are not comparable to a Washington DUI.

In Washington, a person is under the influence (for purpose of a DUI conviction) if the person's "ability to drive a motor vehicle is lessened in any appreciable degree." WPIC 92.10 (emphasis added). This differs from the standard for conviction in Oregon, where a person is

guilty if her or his “physical or mental facilities are adversely affected”<sup>3</sup> in “the slightest degree.” See *Dyrdahl v. Dep't of Transp., Driver & Motor Vehicle Services Div.*, 204 Or. App. 509, 515-16, 131 P.3d 770 (2006).

Washington imposes a higher standard on the prosecution: the Washington statute focuses on the ability to drive (which may be unaffected even if a person’s mental or physical facilities are impaired), and requires proof of an “appreciable” effect rather than “the slightest” effect. Oregon thus permits conviction for conduct that would not be criminal in Washington.

Respondent does not argue that the two offenses are factually comparable. Brief of Respondent, pp. 13-14. Instead, Respondent’s position is that the two statutes are close enough. Brief of Respondent, pp. 13-14. This is incorrect.

Without citation to any authority, Respondent claims that Oregon, like Washington, requires “a level of impairment that affects [the] ability to safely drive a motor vehicle.” Brief of Respondent, p. 13. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007). Furthermore, Respondent’s assertion is contradicted by

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<sup>3</sup> *State v. Moody*, 201 Or. App. 58, 63-64, 116 P.3d 935 (2005) on reconsideration, 207 Or.App. 304, 140 P.3d 1171 (2006) (citing ORS 813.010) (emphasis added).

the plain language of the Oregon standard—which requires only “the slightest” impairment to “physical or mental facilities,” regardless of the impact on the person’s ability to drive a motor vehicle. Dyrdaahl, at 515-516; Moody, at 63-64.

The two states’ DUI laws criminalize different conduct. In Oregon, the slightest impairment of mental or physical facilities results in conviction. In Washington, the prosecution must prove an appreciable lessening of the ability to drive a motor vehicle.

Because the prosecution failed to prove legal or factual comparability, the Oregon DUI convictions should not have been included in the offender score. Mr. Arndt’s sentence must be vacated and the case remanded with instructions to exclude the two Oregon DUIs from the offender score. Cadwallader, at 878.

C. The Oregon conviction for attempted second-degree assault is not comparable to a Washington offense.

Different levels of harm are required to prove second-degree assault in Washington and Oregon. Washington requires proof of “substantial bodily harm.” RCW 9A.36.021. Under Oregon law, the crime can be accomplished through physical injury which causes “protracted impairment of health,” among other means. ORS 161.015.

Such impairment need not meet Washington's definition of substantial bodily harm. Cf. RCW 9A.04.110.

Respondent contends that any impairment of "health" is necessarily an impairment of a bodily part or organ. Brief of Respondent, pp. 15-16 ("The State cannot conceive [sic] of a scenario in which the term 'health' can be interpreted more broadly than impairment [sic] of the function of any bodily part or organ") (emphasis in original)

Respondent's inability to conceive of such a scenario demonstrates a lack of imagination. Nothing in the Oregon statute precludes an interpretation that covers mental or emotional health, or a general feeling of malaise that cannot be traced to a particular bodily part or organ. Oregon's broad term (health) is more expansive than Washington's more specific definition; thus offenses in Oregon would not necessarily qualify for conviction in Washington.

Without citation to authority or meaningful analysis, Respondent contends that "'substantial' equates with 'serious.'" Brief of Respondent, p. 15. Respondent is presumed to have searched and found no authority establishing this supposed equivalence. Coluccio, 779. In addition, the phrases "substantial bodily harm" (RCW 9A.36.021) and "serious physical injury" (ORS 161.015) are further defined by statute. Therefore, it is improper to determine their meaning in a vacuum, as Respondent

attempts. Brief of Respondent, p. 15. The definitions are different; that is where the focus must be.

Mr. Arndt does not contend there is no overlap between substantial bodily harm and serious physical injury. Rather, his argument is that the definitions are not equivalent, and that some second-degree assault convictions in Oregon would not qualify for conviction under RCW 9A.36.021.

Respondent does not address Mr. Arndt's argument regarding protracted but insubstantial injuries. See Appellant's Opening Brief, p. 10. Respondent's silence on this point may be treated as a concession. See *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

An attempt to commit second-degree assault in Oregon does not necessarily qualify as a felony in Washington. Nor has the prosecutor established factual comparability in this case: Mr. Arndt admitted to attempting to cause serious physical injury, but his guilty plea makes no mention of what harm was intended or what action was taken. Ex. 2; CP 127-138. Mr. Arndt's sentence must be reversed. The case must be remanded with instructions to exclude the attempted assault from his offender score. *Cadwallader*, at 878.

**CONCLUSION**

Mr. Arndt's sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on February 14, 2013,

**BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



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Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Raymond Arndt, Jr. DOC #846892  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326

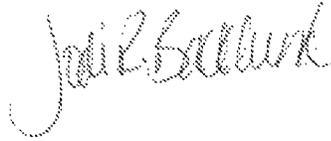
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clallam County Prosecuting Attorney  
lschrawy@co.clallam.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 14, 2013.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**February 14, 2013 - 2:37 PM**

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