

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

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STATE OF WASHINGTON,

Respondent,

v.

EDDIE LEE TRICE,

Appellant.

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

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

An out-of-state conviction may be included in a defendant's criminal history and computation of his offender score only if the elements of the crime are comparable to those of a Washington felony statute in effect at the time of the commission of the out-of-state crime. The State correctly concedes that Eddie Trice's 1995 Florida conviction should not have been included in his offender score. Brief of Respondent at 4 (hereafter BOR). The State's argument concerning that Mr. Trice's 1987 Arkansas conviction is comparable to a Washington first degree robbery, however, is based upon an analysis that ignores the applicable law. Mr. Trice's sentence must be vacated and his case remanded for sentencing based upon an offender score that does not include either conviction.

**Mr. Trice's 1987 Arkansas conviction for aggravated robbery is not comparable to a Washington felony and should not have been included in calculating his criminal history.**

The trial court found that Mr. Trice's 1987 Arkansas conviction for aggravated robbery was comparable to an attempted first degree robbery under Washington law and therefore included the conviction in computing Mr. Trice's offender score. Arkansas's aggravated robbery statute is broader than Washington's first degree robbery because it

does not include the requirement that the defendant take personal property from another person. It is also broader than attempted first degree robbery because it does not require the attempt to commit first degree robbery, but only the attempt to commit theft. For similar reasons, Mr. Trice's conviction is not comparable to second degree robbery or attempted second degree robbery under Washington law. The State's arguments to the contrary must be rejected.

a. The State's analysis ignores Washington's robbery statutes and utilizes the wrong version of the Arkansas statutes. In determining if out-of-state convictions are included in the offender score, the court first determines if the elements of the foreign offense are "substantially similar" to the elements of the Washington offense. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). "More specifically, the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed." Id; State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). The State cites these principles, but ignores them in their legal analysis.

First, the State analyzes Mr. Trice's case based upon the 2013 version of Arkansas's battery and aggravated battery statutes. BOR at

6-13. This Court, however, must compare the elements of the 1987 Arkansas and Washington statutes. See Brief of Appellant at 15-16, Appendix C (hereafter AOB).

Second, the State attempts to compare the elements of the Arkansas and Washington statutes without ever referring to RCW 9A.56.190 or .200. Instead, the State relies upon the current Washington Pattern Jury Instructions. BOR at 8, 11, 12, Appendixes C, F, G, H.

The pattern instructions are not authoritative primary sources of law; instead they restate the law for jurors. Thus, they may not precisely follow the language of the governing statute. Washington State Supreme Court Committee on Jury Instructions, 11 Washington Practice: Pattern Jury Instructions Criminal, WPIC 0.10 (3<sup>rd</sup> ed. 2011) (introduction). The pattern instructions are not binding on any court, but are simply intended to guide the trial courts in drafting instructions appropriate for the individual case. Id. The State's analysis of the comparability of the elements of the Arkansas and Washington statutes is thus based upon an inaccurate understanding of those elements.

b. The State's argument that Mr. Trice's Arkansas conviction is comparable to Washington's first degree robbery statute is not before this Court. At sentencing, the trial court determined that Mr. Trice's Arkansas conviction was comparable to a Washington attempted first degree robbery rather than first degree robbery. RP 50. The State now argues that Arkansas's aggravated battery statute is comparable to first degree robbery in Washington. BOR 5-10. At the sentencing hearing, however, the State agreed with the trial court that the conviction was comparable to attempted first degree robbery. RP 43-44, 46, 48.

Moreover, the State did not file a cross-appeal, and thus cannot appeal the trial court's determination. See Smoke v. City of Seattle, 79 Wn. App. 412, 421-22, 902 P.2d 678 (1995), rev'd on other grounds, 132 Wn.2d 214, 937 P.2d 186 (1997) ("A respondent must cross-appeal when seeking reversal of an adverse ruling on a distinct claim or cause of action.").

c. The State incorrectly urges this Court to base its decision on facts that were not proven or admitted to in Arkansas. "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." In re Personal Restraint of Lavery, 154 Wn.2d

249, 258, 111 P.3d 837 (2005). The State did not produce a certified copy of Mr. Trice's guilty plea statement.<sup>1</sup> Instead, the State asks this Court to look at facts inferred from the charging document, specifically the inclusion of a separate theft count. BOR at 9-10.

When a foreign statute is broader than a Washington statute, the court cannot make inferences from the charging document. Instead, the court may rely only upon facts that the defendant admitted or that were proved beyond a reasonable doubt. Thieffault, 160 Wn.2d at 418-20; Lavery, 154 Wn.2d at 258. Because the Constitution guarantees the rights to due process and a jury trial, any fact that increases the prescribed range of penalties must either be admitted by the defendant or found by a jury beyond a reasonable doubt. Alleyne v. United States, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2151, 2162-63, 186 L. Ed. 2d 314 (2013). Although the fact of a prior conviction may be an exception to this rule, there is no exception allowing courts to find facts underlying prior convictions. Descamps v. United States, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2276, 2288, 186 L. Ed. 2d 438 (2013); Lavery, 154 Wn.2d at 256-57.

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<sup>1</sup> The State bears the burden of proving the existence and nature of any prior offenses by a preponderance of the evidence. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012).

Division One's opinion addressing the use of inferences to establish the comparability of an out-of-state statute is instructive. State v. Larkin, 147 Wn. App. 858, 199 P.3d 441, rev. denied, 163 Wn.2d 1024 (2008). The Ohio burglary statute was broader than Washington's because it permitted conviction based upon the intent to commit any crime inside the building, not just a crime against persons or property within the building. Id. at 863-64. Looking at the facts that Larkin had agreed to, the trial court inferred from the fact that Larkin assaulted someone that the person he assaulted was inside the building when the assault occurred. Id. at 865. The Court of Appeals agreed with Larkin that the court's inference drawn from the fact constituted improper judicial fact-finding. Id.

Here, the trial court engaged in judicial fact finding when it made the inference that the trespass on Lipscomb's property was for the purpose of committing the assault against Lipscomb. The undisputed facts in the indictment before the trial court do not go so far. If the inference does not inevitably follow from the admitted facts, then a sentencing judge cannot rely on that inference, even when the defendant stipulated to underlying facts that might support such an inference.

Id.

The State did not produce Mr. Trice's plea agreement, and thus there are no facts that Mr. Trice agreed to. The indictment and

judgment show that he was charged and plead guilty to aggravated robbery and theft. CP 146-47. While the two crimes occurred on the same day, it is only an inference that they occurred simultaneously. This Court must decline the State's offer to engage in unconstitutional judicial fact-finding by making improper inferences from the indictment and judgment.

d. Mr. Trice's Arkansas conviction is not comparable to a Washington attempted robbery in the first degree. In the alternative, the State argues that the trial court correctly determined that the Arkansas aggravated battery conviction was comparable to attempted first degree robbery in Washington. BOR at 10-11. The State's argument is based upon an incorrect reading of the intent required under the Arkansas and Washington statutes.

In Washington, "[a] person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). An essential element of attempted first degree robbery in Washington is thus the intent to commit first degree robbery. Id. Arkansas's aggravated robbery statute, however, only requires

proof of the intent to commit a theft. Ark. Code §§ 5-12-102, 5-12-103(a) (1987). The offenses are not comparable.

e. The Arkansas statute is not comparable to second degree robbery. The State also argues that Mr. Trice's Arkansas aggravated robbery conviction is comparable to Washington's second degree robbery. BOR at 12-13. The analysis, however, is substantially the same as for first degree robbery.

In Washington, a robbery requires the taking of the personal property of another. RCW 9A.56.190. The Arkansas aggravated robbery statute is not comparable to second degree robbery because it lacks a taking element. Ark. Code § 5-12-102, § 5-12-103(a). In addition, the Arkansas statute it is not comparable to attempted second degree robbery because it does not require the intent to commit second degree robbery. Compare RCW 9A.28.020(1); Ark. Code § 5-12-102, § 5-12-103(a).

The State also improperly relies upon a statement by defense counsel prior to sentencing that the aggravate robbery conviction "might" be comparable to a Washington second degree burglary. BOR at 12 (citing RP 23). At a hearing before Mr. Trice's resentencing hearing, Mr. Trice admitted he was the person convicted of the out-of-

state convictions asserted by the State, and the court tried to determine what issues were in dispute. RP 8-28. The court, however, needed to re-read the briefs and review the documents, and the court did not make any rulings. RP 27. During this general discussion, defense counsel opined that the Arkansas conviction “might be a [Washington] robbery in the second degree.” RP 23 (emphasis added). The issue was never addressed at the sentencing hearing the next month. This off-hand comment was not an admission by the defendant and does not provide the legal basis needed to conclude that the aggravate robbery conviction was comparable to a Washington second degree robbery.

f. Mr. Trice’s sentence must be reversed and remanded for a sentence based upon the correct offender score. Mr. Trice’s Arkansas aggravated robbery statute is not comparable to Washington’s attempted first degree robbery, second degree robbery, or attempted second degree robbery. This court must reverse his sentence and remand for sentencing under the correct offender score and sentence ranges. Lavery, 154 Wn.2d at 262.

## B. CONCLUSION

The State agrees with Mr. Trice that his Florida sexual battery conviction is not comparable to a Washington felony and should not

have been included in his offender score. In addition, Arkansas's aggravated battery statute is not comparable to a Washington felony or attempted felony.

For the reasons stated above and in the Brief of Appellant, Mr. Trice asks this Court to vacate his sentence and remand for sentencing where the Florida and Arkansas convictions are not included in computing his offender score.

DATED this 14<sup>th</sup> day of April 2014.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 44808-4-II
	)	
EDDIE TRICE,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF APRIL, 2014.

X \_\_\_\_\_ 

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# WASHINGTON APPELLATE PROJECT

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