

NO. 44857-2-II

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

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TIMOTHY R. RESTORFF,

Appellant.

RESPONDENT'S BRIEF

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not abuse its discretion when it inquired into Restorff's dissatisfaction with his court-appointed counsel and determined that appointment of substitute counsel was not warranted; the trial court also did not err in calculating Restorff's offender score.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

A. Did the trial court abuse its discretion when it inquired into Restorff's complaints about his court-appointed counsel and determined that appointment of substitute counsel was not warranted?

B. Did the trial court correctly calculate Restorff's offender score?

III. STATEMENT OF THE CASE

Around noon on January 7, 2013, 61-year-old David Robinson pulled into the Kelso Safeway gas station to put gas into his Kia Rio. RP at 40-41, 42. While Mr. Robinson was pumping gas into his car, Timothy Restorff pulled in behind him in a truck with a camper. RP at 44, 46. Restorff pulled in so close that there was only a foot to a foot-and-a-half's distance between his truck and Robinson's car. RP at 45. In order to have room to drive his car out, Robinson asked Restorff to pull his truck back. RP at 46. Restorff responded by pulling his car back and antagonistically

telling him to pull his pants up. RP at 48. In response, Robinson yelled back at Restorff and then walked closer to Restorff's truck. RP at 48.

Restorff exited his truck with a knife in his hand. RP at 50. Seeing Restorff exit with the knife caused Robinson to back away from him. RP at 50. Restorff attempted to kick Robinson then came at him with the knife. RP at 50. Restorff stabbed at Robinson with the knife, and Robinson put his hand up to block it. RP at 51. Restorff stabbed Robinson in the hand with the knife. RP at 52. Robinson tried to call for help on his phone, but Restorff knocked it to the ground and then stomped on it. RP at 56. Restorff's attack on Robinson ended when a woman ran over and said something to Restorff; after her interruption Restorff returned to his truck. RP at 56.

Jennifer Radcliffe was at the gas station that day putting gas into her vehicle. RP at 66. She observed Restorff's truck pulled up close behind Robinson's car, and then Robinson motion to Restorff to pull back. RP at 70. Radcliffe heard yelling and profanity in the conversation between Robinson and Restorff. RP at 70. Radcliffe observed Restorff exit with the knife in his hand. RP at 72. She then observed Restorff attempt to kick Robinson. RP at 72. She observed Robinson backing away from Restorff, then Restorff coming at Robinson holding the knife in the air. RP at 73-74. She was unable to see what occurred next as the gas

pump blocked her view. RP at 75. Shortly thereafter, she observed Robinson with his hand bleeding. RP at 77.

Shelly Timm was also at the gas station that day. RP at 87, 89. Timm observed Robinson and Restorff arguing. RP at 90. She saw Restorff strike at Robinson and saw Robinson raise his hand to block it. RP at 90-91. Timm also observed the puncture wound to Robinson's hand immediately after the incident. RP at 93.

Police responded, interviewed witnesses, obtained the knife, and took pictures. RP at 101-02, 120. They observed that Restorff reeked of alcohol and was agitated and angry. RP at 102, 112. Officer Tim Gower of the Kelso Police Department attempted to obtain video surveillance of the incident; however the surveillance cameras did not capture the area where the assault had occurred. RP at 103. Restorff claimed he had never made any movements with the knife, just kept it by his side the whole time. RP at 113. Restorff was charged with assault in the second degree with a deadly weapon enhancement.

On February 12, 2013, Restorff's attorney asked the court to continue his pretrial hearing one week, to allow for additional time to discuss a plea offer with Restorff. RP at 1. Restorff told the court that he had spoken with his attorney the night before and then said, "[i]t didn't get me nowhere." RP at 1. The court asked Restorff about his attorney's

request to set the pretrial over one week to give them additional time to discuss the case. RP at 1. Because Restorff had previously asked the court if he could speak, and declined to confer with his attorney first, the court allowed Restorff to speak. RP at 1. Restorff complained about his attorney's attempts to determine whether his prior Oregon conviction counted as a strike offense and not having obtained video surveillance. RP at 2. After listening to Restorff's concerns, the court set the pretrial over one week so that Restorff and his attorney could obtain additional information, and informed Restorff that if he had other concerns he could raise them at the subsequent pretrial. RP at 3. At this point, Restorff announced to the court, "I'm not going to talk to this man." RP at 3. Restorff also said, "I have nothing further to say to him." RP at 4. The hearing then concluded. RP at 4.

A week later, on February 19, 2013, the case proceeded to pretrial. RP at 5. During this hearing, Restorff announced to the court that he had been trying to fire his attorney. RP at 6. The court responded by asking Restorff, "Why is that?" RP at 6. Restorff then claimed that his attorney had been misleading him by initially telling him he was facing three strikes and for failing to obtain video surveillance. RP at 6. The court then asked, "[W]hat's misleading about that?" RP at 6. Restorff then complained about his attorney providing him conflicting information

about whether a prior conviction from Oregon was a “strike offense” and that he was dissatisfied with his initial plea bargain offer. RP at 6-7.

The court asked whether this was a “third strike” case. RP at 7. The prosecutor reviewed Restorff’s criminal history, and informed the court that there was one prior sex conviction in Oregon that could possibly be categorized as a most serious offense in Washington. RP at 7. The court then asked Restorff’s attorney for input. RP at 8. Restorff’s attorney informed the court that in reviewing the Oregon paperwork he was still unsure of whether the Oregon conviction was a strike offense, so he had informed Restorff that it may be a strike. RP at 8. The court then explained to Restorff that it appeared his attorney was providing the information that he had. RP at 8.

Restorff then complained about his attorney giving him conflicting information and stated, “I don’t want to even talk to this man anymore.” RP at 8. Restorff went on to complain that his attorney had not obtained video surveillance. RP at 8-9. Restorff’s attorney informed the court that his investigator had gone to the Safeway gas station in an attempt to obtain video surveillance, however he was unable to obtain anything that would have been helpful. RP at 9-10. The court then explained to Restorff that his attorney’s inability to produce video surveillance which did not exist and to have determined with certainty whether his prior Oregon conviction

was a “strike offense” was not an indication that his performance was deficient. RP at 10. The judge then advised Restorff to have a long talk with his attorney. RP at 10.

Restorff did not bring any further complaints about his attorney. RP at 12-173. In fact, during a conversation about whether Restorff would be waiving a CrR 3.5 hearing, Restorff acknowledged that his lawyer knew more about the issue, and that he was putting his trust in him. RP at 13-14. He also informed the court that his only problem was that there was no video, and then indicated that it was neither “here nor there now.” RP at 14. On March 12, 2013, the case proceeded to trial, and the jury found Restorff guilty as charged. RP at 12, 243.

Prior to sentencing, the parties came to an agreement regarding Restorff’s criminal history. RP at 256. Restorff agreed that he committed the crimes listed in his criminal history, and for purposes of determining his offender score, these included four burglaries, a sexual abuse in the first degree conviction out of Oregon, and an assault in the third degree that had “washed out” for scoring purposes.¹ RP at 254-56. This criminal history was made part of his judgment and sentence and included his sentence and release date on the assault in the third degree conviction as being August 6, 2003. CP at 5. Restorff agreed that each of the four

¹ While the assault in the third degree conviction did not count as a point, its existence kept the prior offenses from washing out of Restorff’s offender score.

burglaries and the sexual abuse in the first degree conviction counted in his offender score. RP at 254-55. The only point of disagreement was whether the sexual abuse in the first degree conviction was comparable to child molestation in the first degree in Washington, which would count as two points rather than one when scoring his assault in the second degree conviction. RP at 254-55.

The court reviewed the indictment from Oregon that resulted in Restorff's conviction for sexual abuse in the first degree. RP at 267; CP at 73; Sentencing Exhibit 2. The indictment listed Restorff's date of birth as June 10, 1961. On the count that Restorff was convicted of, the indictment indicated the victim was under 12 years old. Count III of the same indictment stated that the same victim was "unmarried." The court compared the Oregon statute of sexual abuse in the first degree that Restorff was convicted of in 1991 with the Washington statute for child molestation in the first degree as it existed at the time. RP at 272. While both statutes criminalized sexual contact with a person under the age of 12, the Washington statute also required that the defendant not be married to the victim and be at least 36 months older than the victim. RP at 272-73. Because the indictment provided that Restorff was 29 or 30 years of age on the date of the offense and the victim was under 12 years of age, the court found the 36-month age requirement was clearly established. RP

at 273. The court also found that the Oregon statutes precluded a person under 12 years of age from being married in Oregon. RP at 273-74. For this reason, the judge found Restorff's conviction for sexual abuse in the first degree was comparable to child molestation in the first degree in Washington. RP at 274.

With the deadly weapon enhancement included, this finding made Restorff's sentencing range 45-55 months. RP at 276. The court sentenced Restorff to a prison term of 53 months. RP at 280.

IV. ARGUMENT

Restorff's conviction and sentence should be affirmed. The trial court did not abuse its discretion by failing to inquire into Restorff's complaint regarding his counsel, because it conducted a proper inquiry, and there was no showing that substitute counsel was warranted. Restorff was correctly sentenced because his Oregon conviction for sexual abuse in the first degree was comparable to the crime of child molestation in the first degree, and his affirmative acknowledgement of his criminal history permitted the court to include these crimes in his offender score.

A. The trial court did not abuse its discretion when, after conducting an inquiry and hearing no claim warranting substitute counsel, it refused to appoint substitute counsel for Restorff.

The trial court did not abuse its discretion when it inquired into Restorff's complaints about his court-appointed counsel and determined that substitute counsel was unnecessary. The standard of review for Restorff's claim is abuse of discretion: "The trial court's determination of whether a defendant's dissatisfaction with court-appointed counsel warrants appointment of substitute counsel is discretionary and will not be overturned on appeal absent an abuse of discretion." *State v. Rosborough*, 62 Wn.App. 341, 346, 814 P.2d 679 (1991) (citing *State v. Stark*, 48 Wn.App. 245, 252, 738 P.2d 684, *review denied*, 109 Wn.2d 1003 (1987)). When Restorff expressed dissatisfaction with his court-appointed counsel, the court inquired into the issues he raised. Because there was insufficient evidence of deficient performance, a complete communication breakdown, or an irreconcilable conflict to warrant substitution of counsel, the court did not abuse its discretion by refusing to appoint substitute counsel.

Although entitled to counsel, a defendant "cannot force substitute counsel simply by raising an ineffective assistance claim." *State v. Davis*, 125 Wn.App. 59, 68, 104 P.3d 11, n.31 (2005) (citing *Rosborough*, 62 Wn.App. at 346). As the Court of Appeals has explained, there is a

practical reason for this safeguard: “[I]f a defendant could force the appointment of substitute counsel simply by expressing a desire to raise a claim of ineffective assistance of counsel, then the defendant could do so whenever he wished for whatever reason. We decline to adopt such a rule.” *Stark*, 48 Wn.App. at 253 (internal citation omitted). Of course, it is well-established that “[a] defendant does not have an absolute, Sixth Amendment right to choose any particular advocate.” *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997) (citing *State v. DeWeese*, 117 Wash.2d 369, 375–76, 816 P.2d 1 (1991))). To justify appointment of new counsel, a defendant “must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” *Id.* (quoting *Stenson*, 132 Wn.2d at 734). Generally, a defendant’s loss of confidence or trust in his counsel is not sufficient reason to appoint new counsel. *Id.* (citing *Stenson*, 132 Wn.2d at 734 (citing *Johnston v. State*, 497 So.2d 863, 868 (Fla.1986))).

“The trial court’s determination of whether a defendant’s dissatisfaction with court-appointed counsel warrants appointment of substitute counsel is discretionary and will not be overturned on appeal absent an abuse of discretion.” *Rosborough*, 62 Wn.App. at 346 (citing

Stark, 48 Wn.App. at 252). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons.” *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). “An abuse of discretion occurs only ‘when no reasonable judge would have reached the same conclusion.’” *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). In determining whether the trial court abused its discretion when refusing to appoint substitute counsel the following factors are considered: “(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.” *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (citing *State v. Moore*, 159 F.3d 1154, 1158-59, (9th Cir.1994)).

Here, the court inquired thoroughly into Restorff’s complaints about his attorney and determined that there was not a conflict. On February 12, 2013—Restorff’s initial pretrial date—when Restorff first complained about his attorney, the court provided him the opportunity to confer with his attorney before speaking. RP at 1. Then, after Restorff declined to do so, the court listened to Restorff’s concerns. RP at 2. At this time, Restorff complained about his attorney’s prior attempts to obtain video surveillance and his inability to conclusively determine the status of

his Oregon sex offense as it would apply toward being a persistent offender. RP at 2; *see generally* RCW 9.94A.570. There was no showing of a complete breakdown in communication, irreconcilable conflict, or deficient performance. Rather than jump to a conclusion, the court set the matter over a week for Restorff's attorney to obtain additional information to advise him with. RP at 3. The court also did not close the inquiry, as it also advised Restorff that at the following week's hearing he could raise any concerns if he still had them. RP at 3.

At his pretrial on February 19, 2013, Restorff told the court he had been trying to "fire" his attorney.² RP at 6. The court did not ignore this statement, but rather specifically asked Restorff, "Why is that?" RP at 6. The court gave Restorff another opportunity to voice his complaints. Restorff claimed that his attorney was misleading him because he had initially told him he was facing "three strikes" and because he had failed to obtain video surveillance. RP at 6. The court inquired further, asking Restorff what was misleading and again provided Restorff with the opportunity to speak. RP at 6. Restorff said his attorney had provided him conflicting information as to whether his Oregon offense would count as a "strike offense" and that he was dissatisfied with his initial plea bargain. RP at 6-7. The court inquired of the prosecutor as to whether the

² As Restorff was not paying for his attorney's services, it is questionable whether or not he could have fired his attorney.

case was a “third strike” case. RP at 7. The prosecutor informed the court that Restorff had was one possible strike offense, if the Oregon case was found comparable to a most serious offense under Washington’s statute. RP at 7-8. After this, the court asked Restorff’s attorney for additional information. RP at 8. Restorff’s attorney informed the court that after having reviewed the Oregon paperwork, he was still unclear as to whether the Oregon offense was a strike, and he had informed Restorff that it may be a strike offense. RP at 8. Thus, with regard to advice regarding the scoring of his prior offense, the court listened to Restorff’s complaint, inquired into what his specific issues were, then investigated by questioning the attorneys as to the validity of Restorff’s concerns. Only after doing so did the court tell Restorff that it appeared his attorney had provided him with the information he had. RP at 8.

The court then listened as Restorff complained that his attorney had not obtained video surveillance. RP at 8-9. After hearing from Restorff, the court listened to his attorney on this issue. RP at 9-10. Restorff’s attorney informed the court that his investigator had gone to the location of the incident but had been unable to obtain any video surveillance that would have been helpful. RP at 9-10. After considering this information, the court explained to Restorff that the inability to provide nonexistent video evidence and a failure to provide information

that had not yet been obtained regarding scoring status of his Oregon offense did not indicate that his attorney's performance was ineffective. RP at 10. Thus, by listening to Restorff's concerns and to the attorneys' explanations as to these concerns, the court inquired sufficiently as to Restorff's dissatisfaction with his attorney. Because the video Restorff sought did not exist and his attorney accurately advised him by giving him the information he currently had regarding the scoring status of his Oregon offense, there was no evidence of deficient performance. At this point, rather than appoint substitute counsel, the court advised Restorff to have a "long talk" with his attorney. RP at 10.

Restorff appeared to take the court's advice seriously, because at the trial he acknowledged his lawyer's greater legal knowledge and stated that he was putting his trust in him. RP at 13-14. He also informed the court that his previous complaint regarding the lack of video surveillance was no longer an issue, stating that it was neither "here nor there now." RP at 14. Thus, not only did the court inquire as to whether there was deficient performance, but the court also appears to have aided Restorff in cooperating with his attorney. By doing so, the court helped alleviate a potential communication breakdown and avoided any notion of an irreconcilable conflict. For these reasons, the court did not abuse its discretion when it declined to appoint substitute counsel.

B. The trial court correctly calculated Restorff's offender score.

The trial court correctly calculated Restorff's offender score. RCW 9.94A.530(2) states: "In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged or proven pursuant to RCW 9.94A.537[.]" At his sentencing hearing Restorff agreed that his criminal history as presented by the State was accurate. Restorff's only disagreement at the time of sentencing was whether his prior conviction for sexual abuse in the first degree in Oregon was comparable to child molestation in the first degree in Washington. Now, for the first time on appeal, Restorff argues that several of his prior convictions no longer count as part of his offender score. Restorff's arguments fail. First, the trial court properly found that his conviction for sexual abuse in the first degree was comparable to child molestation in the first degree. *See* former ORS 163.425 (1987); RCW 9A.44.083. Second, the trial court did not err in calculating Restorff's offender score when it relied on Restorff's affirmative acknowledgement that the convictions listed in his criminal history were correct.

1. **The trial court did not err in finding that Restorff's Oregon conviction for sexual abuse in the first degree was comparable to child molestation in the first degree.**

The trial court did not err when it found that Restorff's Oregon conviction for sexual abuse in the first degree was comparable the Washington crime of child molestation in the first degree. When sentencing a defendant with a foreign conviction: "[i]f the foreign conviction is comparable to a Washington crime, it counts toward the offender score as if it were the equivalent Washington offense." *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). Because Restorff was convicted of sexual abuse in the first degree for having sexual contact with a person under 12 years of age under former ORS 163.425 (1987), and this conduct would also constitute the crime of child molestation in the first degree under RCW 9A.44.083, the offenses are comparable.

The *Morely* Court provided the procedure for analyzing comparability: "To determine if a foreign crime is comparable to a Washington offense, the court must first look to the elements of the crime. More specifically, the elements of the out-of-state crime must be compared to the elements of the Washington criminal statutes in effect when the foreign crime was committed." *Id.* at 605-06.

If the elements are not identical, or if the foreign statute is broader than the Washington definition of the particular crime, the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute.

Id. at 606. Accordingly, first a court compares the elements of the two statutes to determine if they are the same. Then if the foreign statute has a broader definition than a Washington statute, the sentencing court looks at the defendant's conduct underlying the foreign conviction to determine whether it is factually comparable to the Washington crime.

"It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence." *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012) (citing *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999)). Although a certified copy of a judgment is the best evidence when proving a prior conviction, "the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history." *Id.* at 910. "The existence of a prior conviction is a question of fact." *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540 (2010) (citing *State v. Thorne*, 129 Wn.2d 736, 783, 921 P.2d 514 (1996)). When reviewing a sentence, the appellate court will "review the trial court's factual determination for abuse of discretion and its calculation of the

offender score de novo.” *State v. Ortega*, 120 Wn.App. 165, 171, 84 P.3d 935 (2004), *vacated on remand*, 131 Wn.App. 591, 128 P.3d 146 (2006) (citing *State v. Garza*, 150 Wn.2d 360, 366, 77 P.3d 347 (2003); *State v. McCorkle*, 88 Wn.App. 485, 493, 945 P.2d 736 (1997), *aff’d* 137 Wn.2d 490, 973 P.2d 461 (1999)). While it is error for a sentencing court to consider facts of prior convictions that were not found beyond a reasonable doubt, *Ortega*, 120 Wn.App at 174, “the sentencing court may look at the defendant’s conduct, as evidenced by the indictment or information to determine if the conduct itself would have violated a comparable Washington statute.” *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

When determining comparability of a conviction, the sentencing court must obviously consider the law as it existed at the time of the conviction and reason accordingly. For example, in *State v. Stockwell*, 159 Wn.2d 394, 395-99, 150 P.3d 82 (2007), the Washington Supreme Court was presented with the issue of whether Washington’s former crime of first degree statutory rape, which did not mention marital status, was comparable to the current crime of rape of a child in the first degree, which includes the requirement that the defendant and victim not be married. *See generally* former RCW 9A.44.070 (1986), repealed by Laws of 1988, ch. 145 § 24(1); RCW 9A.44.073(1). The court stated: “We

agree with Division Two that it is simply inconceivable that the legislature would expect that children 10 years old or less would marry. Nonmarriage is an implied element of the crime of first degree statutory rape.” *Id.* at 399. The court then held that the prior Washington statutory rape in the first degree statute, which did not expressly include the language “not married,” was comparable to the current Washington statute of rape of a child in the first degree, which did include the language “not married.” *Id.* at 400; *see* RCW 9A.44.073(1).

Here, on October 4, 1991, Restorff was charged by indictment in Oregon with two counts of sexual abuse in the first degree and one count of endangering the welfare of a minor for conduct occurring on and between June 13, 1991 and July 2, 1991. CP at 73; Sentencing Exhibit 2. The indictment listed his date of birth as June 10, 1961. The dates listed for all three offenses were the same. The victim listed for all three offenses, Jocelyn Soriano, was the same. Count III stated that Jocelyn Soriano was an “unmarried person.” CP at 73; Sentencing Exhibit 2. The indictment listed the statute for Counts I & II as ORS 163.425 and Count III as ORS 163.575. Restorff pled to Count I of the indictment which stated:

That the above named defendant, on and between June 13, 1991 and July 2, 1991, in Washington County, Oregon, did unlawfully and knowingly subject Jocelyn Soriano, a

person under the age of twelve years, to have sexual contact, by touching the breasts, a sexual and/or intimate part of the victim for the purpose of arousing and gratifying the sexual desires of the defendant and victim;

CP at 73; Sentencing Exhibit 2.

To determine whether Restorff's Oregon conviction for sexual abuse in the first degree was comparable to Washington's crime of child molestation in the first degree, the court was required to examine the elements of both of these crimes as they existed when Restorff committed the crime. At the time Restorff committed the crime, Oregon defined the crime of sexual abuse of a minor in the first degree as follows:

- (1) A person commits the crime of sexual abuse in the first degree when that person:
 - (a) Subjects another person to sexual contact; and
 - (A) The victim is less than 12 years of age; or
 - (B) The victim is subjected to forcible compulsion by the actor; or
 - (b) Subjects another person to sexual intercourse, deviate sexual intercourse or except as provided in ORS 163.412, penetration of the vagina, anus or penis with any object not a part of the actors body, and the victim does not consent thereto.
- (2) Sexual abuse in the first degree is a Class C felony.

Former ORS 163.425 (1987).

At the same time, the crime of child molestation in the first degree was defined in Washington as:

- (1) A person is guilty of child molestation in the first degree when the person has sexual contact³ with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.
- (2) Child molestation in the first degree is a class A felony.

Former RCW 9A.44.083 (1990). At first glance, it appears that the crime of sexual abuse in the first degree was broader than the crime of child molestation in the first degree for two reasons. First, the Oregon crime does not expressly state a nonmarriage requirement. Second, the Oregon crime does not include a 36-month age difference. However, the first of these concerns is illusory.

On the date of the offense, ORS 106.010 (1975) defined marriage in Oregon as follows: “Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable and solemnized in accordance with ORS 106.150

³ Interestingly, the former definition of sexual contact in Oregon under former ORS 163.305(7) stated: “‘Sexual contact’ means any touching of the sexual or intimate parts of a person not married to the actor....” Former ORS 163.305(7). Thus, at an earlier time sexual contact was expressly limited to persons who were not married to each other. *See State v. Nye*, 273 Or. 825, 826, 543 P.2d 1041 (1975).

(Form of solemnization).” Marriage in Oregon is further limited by the fact that parental consent is required for those seeking to marry under the age of 18, and no marriage is permitted by person under the age of 17. ORS 106.060 (1987) states: “A marriage license shall not be issued without the written consent of the parent or guardian, if any, of an applicant who is less than 18 years of age, *nor in any case unless the parties are each of an age, as provided by ORS 106.010[.]*” ORS 106.060 (1987) (emphasis added). The age limit provided by ORS 106.010 is 17 years of age. *See* ORS 106.060 (1987). Thus, in 1991, no person was permitted to be married in Oregon under the age of 17. Consistent with *Stockwell*, the element of nonmarriage is implied by ORS 163.425 for a victim 11 years old or younger, because in 1991 no person under the age of 17 was permitted to be married in Oregon. For these reasons, as to the issue of nonmarriage, the statutes are comparable.

Recently the Court of Appeals found that when determining factual comparability of the Oregon crime of rape in the third degree to the Washington crime of rape of a child in the third degree, the sentencing court was not permitted to infer from Oregon’s marriage laws that the victim could not have been married to the defendant. *State v. Arndt*, -- Wn.App. --, 320 P.3d 104 (2014). These crimes both included an age requirement that the victim be between 14 and 16 years of age, however as

with child molestation in the first degree, the Washington crime also required that the victim not be married to the defendant. *See id.*; ORS 163.355; RCW 9A.44.079. In *Arndt*, the sentencing court erred by relying on the Oregon statute's prohibition of marriage for individuals under 17 years when finding that factually the defendant and victim were not married. *See id.* However, there are two important distinctions between the prior conviction discussed in *Arndt* and Restorff's prior conviction. First, the court's error was in attempting to find factual comparability by an inference drawn from a statute. The trial court erred in *Arndt* by attempting to legally reason a fact underlying a conviction. Oregon's statutory prohibition on marriage for every person under the age of 17 establishes legal comparability between the two statutes, not factual comparability, which entails a different type of analysis. In Restorff's case, the nonmarriage is an implied element of the offense; therefore with regard to nonmarriage; the two statutes are comparable. Second, there is a great difference between a victim between the ages of 14 and 16 years of age and a victim who is 11 years or younger.⁴ As in *Stockwell*, it is

⁴ Except for an allowance for judicial permission, it appears that no state permits marriage involving a child who is 11 or younger. *See generally U.S. v. Windsor*, -- U.S. --, 133 S.Ct. 2675, 2691 (2013). However, with regard to Oregon no such exception for judicial permission exists. In Oregon, the youngest age a person can marry at is 17 years of age with parental consent; otherwise the minimum age for marriage in Oregon is 18 years of age. *See* ORS 106.060; ORS 106.010.

inconceivable that in 1991, the Oregon legislature would have permitted persons 11 years and younger to marry.⁵

With regard to the age requirement, a factual comparability analysis is required; however because the necessary age differential was demonstrated by the indictment, the court did not err in finding factual comparability. Restorff agreed that he was the person convicted of the Oregon offense of sexual abuse in the first degree. RP at 256. His date of birth is listed on his Oregon indictment as June 10, 1961. CP at 73; Sentencing Exhibit 2. Further, the judgment and sentence he signed in this case listed his date of birth as June 10, 1961. CP at 3. Because Restorff was born in June 10, 1961, he was 30 years of age between June 13, 1991 and July 2, 1991, when he committed the crime of sexual abuse in the first degree. He pled to sexual contact with a victim under the age of 12. Sentencing Exhibit 1. Thus, Restorff was necessarily more than 36 months older than the victim at the time he committed the crime of sexual abuse in the first degree. Because his conduct would have violated the Washington statute of child molestation in the first degree at the time he

⁵ Further, if the issue was one of factual comparability, the fact that the indictment to which Restorff pled includes a count where the same victim is stated to be an unmarried person is evidence the court could consider in finding by a preponderance of the evidence that the victim of the sexual abuse count was unmarried. As stated in *Morely*, the sentencing court may “look at the defendant’s conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute.” 134 Wn.2d at 606.

committed the offense, the two crimes are comparable. Because the crimes were comparable, the trial court did not err in calculating his offender score accordingly.

2. The trial court did not include offenses that had “washed out” in Restorff’s offender score.

Because Restorff affirmatively acknowledged that his criminal history was accurate at sentencing, the trial court did not err when it sentenced him accordingly. At sentencing, while the State has the burden of proving prior convictions by a preponderance of the evidence, this burden is relieved “if the defendant *affirmatively* acknowledges the alleged criminal history.” *Hunley*, 175 Wn.2d at 917 (emphasis in original). A “defendant’s mere failure to object to State assertions of criminal history does not result in acknowledgement.” *Id.* at 912 (citing *Ford*, 137 Wn.2d at 482-83). However, an affirmative acknowledgement of the facts and information alleged at sentencing will relieve the State of its evidentiary obligations. *See id.*

Here, at sentencing, Restorff affirmatively acknowledged that his criminal history as presented in the prosecutor’s statement of his criminal history was correct. RP at 256. The trial court specifically went through each of the crimes that were being used to calculate his offender score, and asked if the parties were in agreement. RP at 256. Restorff’s attorney

affirmed that Restorff was in agreement. RP at 256. By representing to the court that the criminal history was correct, Restorff relieved the State of its evidentiary obligations as to these convictions. His new claim on appeal that his agreement was merely to the having committed the crime but not to the dates listed is disingenuous. No such qualification was made in court. By agreeing to the convictions as counting toward his criminal history, Restorff also necessarily agreed to the corresponding dates that were listed. Because Restorff affirmatively acknowledged his history, the court did not err in relying on these convictions for sentencing.

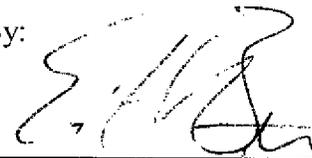
V. **CONCLUSION**

For the above stated reasons, Restorff's conviction and sentence should be affirmed.

Respectfully submitted this ^{11th} ___ day of April, 2014.

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By:



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Deputy Prosecuting Attorney
Representing Respondent

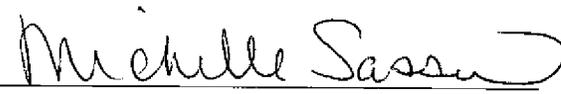
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on April 4th, 2014.


Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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