

NO. 45753-9-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

RYAN J. SMITH,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE GORDON GODFREY, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONDENT'S COUNTER STATEMENT OF THE CASE**

The State is satisfied with the statement of the factual and procedural history in Defendant's brief.

### **RESPONSE TO ASSIGNMENTS OF ERROR**

- 1. The trial court correctly counted Defendant's prior Oregon felony assault conviction towards his offender score because the Oregon assault law in question is narrower than Washington's definition of "assault."**

#### **Introduction.**

Defendant asserts that his prior Oregon conviction should not count towards his offender score because it is not equivalent to a Washington felony. This is incorrect because the assaultive act as described in the Oregon statute is far narrower than Washington's definition of "assault," requiring physical injury. In a factual analysis the events charged in the Oregon Information would most certainly count as an Assault in the Third Degree in Washington. Defendant's claim that, because he was charged with "knowingly" assaulting the Oregon police officer (rather than "intentionally") the crime is not comparable fails because Washington case law does establish that assault can be a "knowing" act.

**Standard of review.**

“Questions regarding the comparability of offenses present issues of law that we review *de novo*.” *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181, 183 (2014) (citing *State v. Stockwell*, 159 Wash.2d 394, 397, 150 P.3d 82 (2007).)

**Washington courts conduct a two-step comparability analysis.**

Washington law employs a two-part test to determine the comparability of a foreign offense. A court must first query whether the foreign offense is legally comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute.

*State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580, 583 (2007) (citing *State v. Morley*, 134 Wash.2d 588, 606, 952 P.2d 167 (1998).)

“Comparability is both a legal and a factual question.” *State v. Collins*, 144 Wn. App. 547, 553, 182 P.3d 1016, 1019 (2008) (citing *Morley*.)

**Oregon’s Assaulting a Public Safety Officer is comparable to Washington’s felony of Assault in the Third Degree**

“A person commits the crime of assaulting a public safety officer if the person intentionally or knowingly causes physical injury to the other person, knowing the other person to be a peace officer... and while the

other person is acting in the course of official duty.” ORS 163.208(1).

This is essentially a simple assault committed against a police officer.

*Compare* ORS 163.208(1) *with* ORS 163.160(1)(a).

“A person is guilty of assault in the third degree if he or she... [a]ssaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault...” RCW 9A.36.031(1)(g). This is also a fourth degree (or simple) assault committed against a law enforcement officer.

*Compare* RCW 9A.36.041.

If the elements of the victim being an on-duty police officer are comparable, then the only question will be whether the assault elements are comparable.

**A “Peace Officer” in Oregon is a “Law Enforcement Officer” in Washington.**

Defendant does not challenge that a “peace officer” as defined by ORS 161.015(4) (and referenced in ORS 163.208, the statute Defendant was convicted of committing) is a “law enforcement officer” in Washington, and there is no reason to make such an assertion. Oregon defines a “peace officer” as, in relevant part, “[a] sheriff, constable, marshal, municipal police officer or reserve officer as defined in ORS

133.005... [or a]ny other person designated by law as a peace officer.”  
ORS 161.015(4)(b) & (e). “Law enforcement officer” does not appear to have any special definition in Title 9A, but clearly Oregon’s definition of “peace officer” encompasses “law enforcement officer.”

Factually, in the instant case Defendant was charged with assaulting “Officer Kyle S. Williams of the Eugene Police Department, knowing that person to be a police officer acting in the course of official duty....” Officer Williams would no doubt be a “law enforcement officer” for the purposes of Washington’s Third Degree Assault law.

There also appears to be no substantive difference in the “on duty” provisions of the statute. The real issue is whether the “Assault” in Oregon’s statute is comparable to Washington’s definition of the term “assault.”

**Washington Assault.**

“Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.”  
*State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439, 442 (2009). If a “simple” assault is committed against an on-duty law enforcement officer

it becomes a violation of RCW 9A.36.031(1)(g), a Class C felony, and counts towards an offender score. *See* RCW 9.94A.525(2)(c).

### **Oregon Assault.**

“Assault” in Oregon does not have a generally applicable definition. *See* ORS 161.015. Rather, each Oregon assault statute requires “causing physical injury to another,” with various *mens rea* and other elements for the more serious degrees (such as use of a weapon or with an accomplice.) *Compare*, ORS 163.160(1) (Assault in the Fourth Degree) *with* ORS 163.165(1) (Assault in the Third Degree) *with* ORS 163.175(1) (Assault in the Second Degree) *with* ORS 163.185(1) (Assault in the First Degree). “Physical injury means impairment of physical condition or substantial pain.” ORS 161.015(7). The crime Defendant was convicted of in Oregon defines the assault as “intentionally or knowingly causing physical injury to another.” ORS 163.208(1).

ORS 163.208 appears to make the law a specific intent crime, because a plain reading appears to apply the *mens rea* to the result. *See generally State v. Edmon*, 28 Wn. App. 98, 104, 621 P.2d 1310, 1314 (1981). However, the Oregon Supreme Court has ruled that “[u]nlike the definitions for ‘intentionally,’ ‘recklessly,’ and ‘criminally negligent,’ the definition of ‘knowingly’ addresses only ‘conduct’ and ‘circumstances’

and does not also include a reference to ‘result.’” *State v. Barnes*, 329 Or. 327, 337, 986 P.2d 1160, 1166 (1999). “[T]he state needs to prove only that defendant was aware of the assaultive nature of his conduct and that his conduct in fact caused the victim... physical injury.”<sup>1</sup> *Id.* at 338. Therefore, under the “knowing” prong, this crime would be a general intent crime.

In sum and in relevant part, an assault in Oregon for purposes of Assaulting a Public Safety Officer is, “an intentional or knowing assaultive act that causes impairment of physical condition or substantial pain to another.”

**Legally, Oregon’s assault is narrower than Washington’s.**

Defendant appears to try to simply compare the elements of the two crimes, as if determining whether two statutes from the same criminal code are lesser-included crimes. This approach fails to take into account the differences in the structure of the respective criminal codes. “Legal comparability analysis is not an exact science...” *State v. Stockwell*, 159 Wn.2d 394, 397, 150 P.3d 82, 84 (2007).

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<sup>1</sup> In *Barnes* the defendant was charged with “unlawfully and knowingly caus[ing] *serious* physical injury. *Barnes* at 330 (alteration in original, emphasis added.) The difference between this charge and a “simple” assault is only whether the physical injury was “serious.” Compare ORS 163.160(1)(a) with ORS 163.174(1)(a).

Oregon and Washington take completely different routes to establish an assault. Part of the difference is attributable to Washington's embrace of the common law to supplement the criminal code. *See* RCW 9A.04.060. In comparison, Oregon's 1971 criminal code revision (based on New York's adoption of the Model Penal Code) purposefully supplanted the common law definition of "assault." *See State v. Garcias*, 296 Or. 688, 693-95, 679 P.2d 1354, 1355-57 (1984). As a result of these differences, in Washington, "assault" is a term with a definition. In Oregon the definition depends on the statute charged. The definition as charged should be distilled from the applicable statutes, and then compared to Washington's definition of assault.

The Oregon assault statute in question essentially boils down to an assault being "an intentional or knowing assaultive act that causes impairment of physical condition or substantial pain to another." *Supra*. This is a common-law battery with resulting injury, far narrower than Washington's assault. In Oregon a person may grab, shove, slap, hit or otherwise offensively or hurtfully touch an on-duty police officer *as long as no provable physical injury results*. This is in stark contrast to Washington's laws, which criminalize all such touches, whether any injury occurs or not.

Because the assault as defined by ORS 163.208 is far narrower than a Washington assault the sentencing court correctly included Defendant's Oregon conviction for Assaulting a Public Safety Officer in the offender score. This court should affirm that decision.

**Factual Comparability Analysis.**

If a crime is not legally comparable, courts resort to a factual comparison. *Thiefault, supra*. “[T]he 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.” *Morley* at 606 (quoting *State v. Duke*, 77 Wash.App. 532, 535, 892 P.2d 120 (1995).)

In the instant case the record of Defendant's conviction consists of two-count Information and a Judgment & Sentence finding Defendant guilty of those two counts. The State of Oregon alleged that Defendant “...on or about November 12, 2005, in Lane County, Oregon, did unlawfully and knowingly cause physical injury to Officer Kyle S. Williams of the Eugene Police Department, knowing that person to be a

peace officer acting in the course of official duty...”<sup>2</sup> Supplemental Clerk’s Papers, Exhibits #8 & 9.

Oregon required Defendant’s assaultive act to actually cause a physical injury to the officer.<sup>3</sup> In Washington Defendant’s conduct would constitute Assault in the Third Degree whether an injury occurred from the assault or not. There is no conceivable scenario in which the language of this Information does not constitute a violation of RCW 9A.36.031(g).

Based on the Oregon Information, the offense is factually comparable to a felony in Washington and the trial court properly counted it towards Defendant’s offender score. This court should affirm the calculation and Defendant’s sentence.

**Washington’s “knowingly” is broader than Oregon’s.**

In Washington, “intentional” means, “when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). In Oregon, intentionally “means that a person acts with a conscious objective to cause the result or to engage in the conduct

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<sup>2</sup> Count 2, Resisting Arrest, is omitted here for simplicity.

<sup>3</sup> Oregon requires that the officer be “acting in the course of official duty,” while Washington requires that the officer “was performing his or her official duties...” Defendant has not asserted that there is a difference.

so described.” ORS 161.085(7). Oregon and Washington’s definitions of “intentional” are nearly identical, albeit reversed.

As to “knowingly,” in Washington,

A person knows or acts knowingly or with knowledge when... (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or... (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b).

In Oregon, “Knowingly or with knowledge... 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.” ORS 161.085(8).

Washington’s definition of “knowingly” is broader because it allows for a defendant who is in possession of the facts that would lead a reasonable person to know to be found to have knowledge, whereas Oregon does not.

**That Defendant was charged with a “knowing” act does not make the charge broader than Washington’s assault.**

Defendant claims that, because he was charged with “knowingly” assaulting Officer Williams the Oregon conviction does not count because Washington requires the *mens rea* of “Intentionally.” However, many

cases establish that an assault in Washington does not require the *mens rea* of “intentionally” as defined in RCW 9A.08.010(1)(a).

“[A]ssault also includes the court implied element of intent.” *State v. Davis*, 119 Wn.2d 657, 662, 835 P.2d 1039, 1042 (1992) (citing *State v. Robinson*, 58 Wash.App. 599, 606, 794 P.2d 1293 (1990), *review denied*, 116 Wash.2d 1003, 803 P.2d 1311 (1991).) However, the Washington Supreme Court “has previously said that language alleging assault contemplates *knowing, purposeful* conduct.” *State v. Hopper*, 118 Wn.2d 151, 158, 822 P.2d 775, 779 (1992) (citing *State v. Osborne*, 102 Wash.2d 87, 94, 684 P.2d 683 (1984) (emphasis added.) “The word “assault” is not commonly understood as referring to an unknowing or accidental act.” *Id.* at 158 (quoting *Osborne*.)

In *Hopper* a charging instrument omitted the statutory element of “knowing” from a second-degree assault charge under former RCW 9A.36.021(1)(c). *Hopper* at 154. The Supreme Court, citing to a 1971 copy of Webster’s Third New International Dictionary, found that “...the term ‘assault’ conveys the necessary element of ‘knowingly’...” *Id.* at 159. In *Davis*, citing to *Hopper*, the Supreme Court held that the rule applied to the court-implied element in a fourth-degree assault. *See Davis* at 662 (citing *State v. Robinson*, 58 Wash.App. 599, 606, 794 P.2d 1293

(1990) (*overruled on other grounds by State v. Taylor*, 140 Wn.2d 229, 996 P.2d 571 (2000).) Clearly, assault in Washington can be a “knowing” crime as well as “intentional” and “purposeful.”

Additionally, it is often pointed out that the definition of “assault” comes from the common law. *See Elmi* at 215, *State v. Abuan*, 161 Wn. App. 135, 154, 257 P.3d 1, 10 (2011), *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320, 323 (1994). The common law clearly predates RCW 9A.08.010, which was enacted in 1975. *See* Laws of 1975, 1<sup>st</sup> Ex.Sess., ch 260. Also instructive is that the *Hopper* court turned to a 1971 dictionary to define “assault.” *Hopper* at 159, *supra*. Surely the common law and this dictionary did not anticipate RCW 9A.08.010(1)(a). An assault in Washington does not require an element of “Intentionally” as defined in that statute.

Also, from a factual comparability standpoint, it seems impossible for a person to have *knowingly* battered someone to the point of causing “impairment of physical condition or substantial pain,” without having *intentionally* assaulted that person, as Assault is defined in Washington. Here any offensive or hurtful touching of an on-duty police officer is a felony, unless the act was unknowing or accidental. A scenario where a

knowing assaultive act that results in physical impairment or substantial pain, but does not involve an intentional assault is difficult to conceive.

This court should reject Defendant's argument that the alleged "knowing" behavior of Defendant prevents his conduct from counting as a felony under Washington law and affirm his sentence.

**Assaulting a Public Safety Officer is a felony in both Oregon and Washington.**

Defendant also asserts that his Oregon conviction is not comparable because "ORS 163.208(1) is a: (1) class A misdemeanor..." Brief of Appellant at 5. This is irrelevant and incorrect.

"When considering out-of-state convictions, the SRA provides that '[o]ut-of-state convictions for offenses shall be classified according to the *comparable* offense definitions and sentences provided by Washington law.'" *Jordan* at 461 (quoting RCW 9.94A.525(3), emphasis supplied.) "The purpose of the comparability analysis is to ensure that defendants with equivalent prior convictions are treated the same way regardless of whether those prior convictions were incurred in Washington or elsewhere." *State v. DeVincentis*, 112 Wash.App. 152, 163-4, 47 P.3d 606, 612 (2002).; *also see State v. Weiland*, 66 Wash.App. 29, 34, 831 P.2d 749 (1992). "[A] crime's elements, not its maximum punishment,

determine whether a crime is comparable.” *State v. Wiley*, 124 Wn.2d 679, 684, 880 P.2d 983, 985 (1994).

Thus, the question is not what label or punishment Oregon decides to apply to the crime and Defendant’s argument fails.

This argument is also factually incorrect. Assault of a Public Safety Officer is a Class C felony in Oregon. ORS 163.208(2). The offense is designated as such on the face of the Information. SCP, Exhibit #8.

### **CONCLUSION**

In a factual comparability analysis Washington’s definition of “assault” wholly encompasses the “assault” Defendant was convicted of in Oregon. The definition of “police officer” is not substantively different, and Oregon’s assault is far narrower than Washington’s definition. Defendant’s offense is also factually comparable, because the record reflects that Defendant knowingly caused a physical injury to an on-duty police officer. There is no conceivable scenario where this behavior would not constitute an Assault in the 3<sup>rd</sup> Degree in Washington.

For these reasons the trial court properly counted this conviction in Defendant’s offender score. Defendant’s arguments to the contrary are

either incorrect, or fail to take into account the differences in how the two legal codes are structured. This court should deny Defendant's assignments of error and affirm his sentence.

DATED this 20<sup>th</sup> day of September, 2014.

Respectfully Submitted,

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# GRAYS HARBOR COUNTY PROSECUTOR

**September 20, 2014 - 12:47 PM**

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