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No. 60248-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CIPRIANO B. NONOG,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 DEC 17 PM 4:57

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

The Honorable James D. Cayce

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

Cipriano Nonog appeals his conviction for interfering with domestic violence reporting, contending the information was fatally defective because it omitted an essential element of the crime, i.e., the particular domestic violence crime he allegedly committed. The conviction must also be reversed because the jury was instructed on a statutory alternative means of committing the crime that was not supported by substantial evidence. Finally, the sentencing court erred by including a prior California conviction for first degree burglary in the offender score, where the State did not prove the conviction was comparable to a Washington felony.

B. ASSIGNMENTS OF ERROR

1. The information violated the "essential elements" rule, because it omitted an essential element of the crime of interfering with domestic violence reporting.

2. The conviction for interfering with domestic violence reporting violated the alternative means doctrine, because the jury was instructed on a statutory means of committing the crime that was not supported by substantial evidence.

3. The sentencing court erred by including a prior California conviction for first degree burglary in the offender score, where the

State did not prove the conviction was comparable to a Washington felony.

4. On the judgment and sentence, count one contains a statutory reference that does not conform to the jury's verdict.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The "essential elements" rule requires the information set forth every essential element of the crime. The particular domestic violence crime allegedly committed is an essential element of the crime of interfering with domestic violence reporting. Did the information violate the essential elements rule where it did not set forth the particular domestic violence crime allegedly committed?

2. The alternative means doctrine requires the jury be instructed only on those means of committing the crime that are supported by substantial evidence. Was the alternative means doctrine violated where the jury was instructed on an alternative means of committing the crime of interfering with domestic violence reporting that was not supported by substantial evidence?

3. Before a sentencing court may include a prior out-of-state conviction in an offender score, the State must prove the conviction is legally and factually comparable to a corresponding Washington felony. The California crime of first degree burglary is not legally

comparable to the Washington crime of burglary. The State presented no documents to prove the prior conviction was factually comparable to the Washington crime of burglary. Did the sentencing court err by including the California conviction in the offender score?

4. Must the judgment and sentence for count one be corrected, where it indicates Mr. Nonog was found guilty under a statutory alternative that does not conform to the jury's verdict?

D. STATEMENT OF THE CASE

The State charged Mr. Nonog with three counts of felony violation of a domestic violence no-contact order, one count of residential burglary, and one count of interfering with domestic violence reporting. CP 10-12. The charges for residential burglary and interfering with domestic violence, and one of the charges for felony violation of a no-contact order, arose from an incident that allegedly occurred on March 30, 2006. Id. The other two charges for violation of a no-contact order arose from incidents that allegedly occurred on April 8 and April 16, 2006. Id.

At the jury trial, Ninonette Estandian testified that on March 30, 2006, she came home to find her ex-boyfriend, Mr. Nonog, inside her house. 6/13/07RP 3; 6/14/07RP 11. Mr. Nonog and Ms.

Estandian have two children together. 6/13/07RP 3. There was a no-contact order in effect between Ms. Estandian and Mr. Nonog at the time. 6/13/07RP 4; Exhibit 1.

Ms. Estandian testified she asked Mr. Nonog what he was doing there, then she told him she was going to call 911. 6/14/07RP 13. But before she could call 911, Mr. Nonog tore the telephone cord out of the wall. 6/14/07RP 13. Ms. Estandian then attempted to call 911 on her cell phone, but Mr. Nonog grabbed the phone and threw it against the wall. 6/14/07RP 14. Finally, Ms. Estandian borrowed the phone of her friend, Calvin Brown, who was also present in the house, and called 911. 6/14/07RP 15. By the time the police arrived, Mr. Nonog had gone. 6/14/07RP 15, 19. The State charged Mr. Nonog with one count of felony violation of a no-contact order, one count of residential burglary, and one count of interfering with domestic violence reporting arising from this incident. CP 10-12.

Ms. Estandian also testified that on April 8, 2006, as she pulled into the driveway of her house, Mr. Nonog came out of the house and approached her car. 6/14/07RP 21. She locked herself in her car and called 911, and Mr. Nonog walked away. 6/14/07RP 22. Finally, Ms. Estandian vaguely remembered a third incident

when Mr. Nonog came to her house while she was there, but she could not remember the date or what happened during the incident. 6/14/07RP 23-24. The State charged Mr. Nonog with two additional counts of felony violation of a no-contact order based on these two alleged incidents. CP 10-12.

The jury found Mr. Nonog guilty of the three charges arising from the March 30, 2006, incident. CP 65, 66, 68, 70, 79-81. The jury was unable to reach a verdict regarding the charge arising from the April 8, 2006, incident. CP 61; 6/20/06RP 3. The jury found Mr. Nonog not guilty of the charge arising from the third alleged incident. CP 67.

At sentencing, the court included a prior California conviction for first degree burglary in Mr. Nonog's offender score. 71, 76.

E. ARGUMENT

1. THE INFORMATION FOR COUNT FOUR WAS FATALLY DEFECTIVE BECAUSE IT DID NOT CONTAIN ALL ESSENTIAL ELEMENTS OF THE CRIME OF INTERFERING WITH DOMESTIC VIOLENCE REPORTING

a. A charging document is constitutionally adequate only if it contains all essential elements of the crime. It is a fundamental principle of criminal procedure, embodied in the state¹

¹ Article 1, section 22 of the Washington Constitution guarantees that "In criminal prosecutions, the accused shall have the right to appear and . . . to

and federal² constitutions, that the accused in a criminal case must be formally apprised of the nature and cause of the accusations before the State may prosecute and convict him of a crime. The judicially approved means for ensuring constitutionally adequate notice is to require charging documents set forth the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This “essential elements rule” has long been settled law in Washington and is based on the federal and state constitutions and court rule. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

All essential elements of the crime must be included in the information so as to apprise the accused of the charges and allow him to prepare a defense, and so that he may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must state *all* essential elements of the crime charged, both statutory and non-statutory. Kjorsvik, 117 Wn.2d at 102.

demand the nature and cause of the accusation against him (and) to have a copy thereof.”

² The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation.” In addition, the Fourteenth Amendment

The essential elements rule requires not only that the information set forth every element of the offense, but also that it allege sufficient facts to support each element. Leach, 113 Wn.2d at 689. “This core holding of Leach requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime.” Kjorsvik, 117 Wn.2d at 98. Every material element of the charge, along with all essential supporting facts, must be set forth in the information with clarity. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000) (citing CrR 2.1(a)(1) and Kjorsvik, 117 Wn.2d at 97). The charging document must provide the defendant with “a plain, concise and definite written statement of the essential facts constituting the offense charged.” CrR 2.1(a)(1). The information must enable a person of common understanding to know what is intended. RCW 10.37.050(6); State v. Long, 19 Wn. App. 900, 903, 578 P.2d 871 (1978).

When a defendant challenges the sufficiency of a charging document, the standard of review on appeal depends on whether the defendant first raised the challenge before or after the verdict. Taylor, 140 Wn.2d at 237. Where the challenge is brought prior to

provides “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

verdict, the charging language is strictly construed. Id. Where the challenge is raised for the first time on appeal, however, the reviewing court will construe the charging document liberally and find it sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. If the court concludes the information contains the essential elements, it will then ask whether any inartful language in the document resulted in a lack of notice that caused actual prejudice. Id. at 105-06.

If, on the other hand, the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425. The Washington Supreme Court has repeatedly insisted that a charging document is constitutionally adequate only if all essential elements of a crime are included, regardless of whether the accused received actual notice of the charge. Vangerpen, 125 Wn.2d at 790; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

Where the information does not contain the essential elements, the remedy is reversal and dismissal of the charges

without prejudice to the State's ability to re-file charges.

Vangerpen, 125 Wn.2d at 792-93.

b. The information omitted an essential element of the charge of interfering with domestic violence reporting by failing to allege the specific domestic violence crime committed. In count four of the information, the State charged Mr. Nonog with the crime of interfering with domestic violence reporting. CP 11-12. The statutory elements are:

(1) A person commits the crime of interfering with the reporting of domestic violence if the person:

(a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and

(b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

(2) Commission of a crime of domestic violence under subsection (1) of this section is a necessary element of the crime of interfering with the reporting of domestic violence.

RCW 9A.36.150.

As the statute provides, commission of a specific underlying domestic violence crime is an essential element of the crime of interfering with domestic violence reporting. RCW 9A.36.150(2). In order to conform to the essential elements rule, therefore, the information must allege the specific underlying domestic violence

crime committed. State v. Clowes, 104 Wn. App. 935, 942, 18 P.3d 596 (2001).

In Clowes, as here, the defendant was charged and convicted of interfering with the reporting of domestic violence pursuant to RCW 9A.36.150. Id. at 939. The information alleged:

That said defendant, KYLE D. CLOWES, in the County of Mason, State of Washington, on or about the 29th day of May, 1999, did commit a crime of Domestic Violence and prevented or attempted to prevent the victim of or a witness to that Domestic Violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official, contrary to RCW 9A.36.150[.]

Id. at 941.

Because Clowes challenged the sufficiency of the information for the first time on appeal, this Court construed the document liberally. Id. at 942. Even under a liberal construction, however, this Court concluded the information was constitutionally inadequate, as it did not specify the underlying domestic violence crime committed. Id. Although the information alleged Clowes “did commit a crime of Domestic Violence,” it did not specify the particular domestic violence crime, and thus this Court concluded the information lacked an essential element. Id.

The information in this case contains the same infirmity as in Clowes. The information alleged for count four:

That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or about March 30, 2006, having committed a crime of domestic violence as defined by RCW 10.99.020, did intentionally prevent or attempt to prevent Nanette Estandian, the victim of that crime, from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official;
Contrary to RCW 9A.36.150, and against the peace and dignity of the State of Washington.

CP 11-12. The information alleged only that Mr. Nonog “committed a crime of domestic violence as defined by RCW 10.99.020,” but did not specify the particular domestic violence crime committed. Thus, as in Clowes, even if the information is construed liberally, this Court must conclude it omitted an essential statutory element of the crime. 104 Wn. App. at 942.

Mirroring the language of RCW 9A.36.150(1)(a), the information alleged Mr. Nonog “committed a crime of domestic violence as defined by RCW 10.99.020,” but this statutory language was insufficient to apprise Mr. Nonog of the nature of the charge.

As Leach explained:

‘Because statutory language may not necessarily *define* a charge sufficiently to apprise an accused with reasonable certainty of the nature of the accusation against that person, to the end that the accused may prepare a defense and plead the judgment as a bar to

any subsequent prosecution for the same offense, mere recitation of the statutory language in the charging document may be inadequate.’

Kjorsvik, 117 Wn.2d at 98 (quoting Leach, 113 Wn.2d at 688).

Thus, the Supreme Court has repeatedly reiterated, it is sufficient to charge in the language of a statute *only if* the statute defines the offense with certainty. Kjorsvik, 117 Wn.2d at 98-99; Leach, 113 Wn.2d at 686, 689.

The statutory language in this case did not define the offense with certainty, as the reference to “a crime of domestic violence as defined by RCW 10.99.020” did not provide notice of the particular domestic violence crime involved. To the contrary, RCW 10.99.020(5) is a non-exclusive list of 23 specific crimes, any one of which can amount to a crime of “domestic violence” if it is “committed by one family or household member against another.” Thus, a mere reference to that statute in the information was insufficient to apprise Mr. Nonog of the *particular* domestic violence crime he allegedly committed.

Moreover, even if allegations set forth in other counts of the information contained the required factual details that are missing in count four, that does not cure the constitutional defect. Clowes, 104 Wn. App. at 942. As the Clowes Court explained,

[a]s we have previously ruled, we will not fill voids in a defective count with facts located elsewhere in the information. Here, as in Gill, there is no basis for the State's assertion that elements can be plucked out of one count in a charging document and dropped into another.

Id. (citing State v. Gill, 103 Wn. App. 435, 442, 13 P.3d 646 (2000)).

Thus, in Clowes, because the allegations in count two did not specify the underlying domestic violence crime, the information was constitutionally deficient, even though count one contained that missing factual detail. Id. at 942.

Applying the essential elements rule, the Clowes Court did not address prejudice and concluded the only remedy was to dismiss the charge without prejudice to recharge and retry the defendant. Id. For the same reasons as in Clowes, that remedy applies here.

2. THE CONVICTION FOR INTERFERING WITH DOMESTIC VIOLENCE REPORTING MUST BE REVERSED, AS THE JURY WAS INSTRUCTED ON ALL THREE STATUTORY MEANS OF COMMITTING THE CRIME BUT THE STATE PRESENTED SUBSTANTIAL EVIDENCE OF ONLY ONE MEANS

a. The threshold test on review of an alternative

means case is whether sufficient evidence exists to support each of the alternative means presented to the jury. Criminal defendants in Washington have a fundamental constitutional right to a unanimous

jury verdict. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). It is well established, however, that when the crime charged can be committed by more than one means, there must be jury unanimity as to *guilt* for the single crime charged, but unanimity is not required as to the *means* by which the crime was committed so long as substantial evidence supports each of the relied-upon alternatives. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). In an alternative means case, therefore, the threshold test on review is whether sufficient evidence exists to support each of the alternative means presented to the jury. State v. Randhawa, 133 Wn.2d 67, 74, 941 P.2d 661 (1997).

Alternative means crimes are those that provide the proscribed criminal conduct may be proved in a variety of ways. State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007) (citing State v. Arndt, 87 Wn.2d 374, 384, 553 P.2d 1328 (1976)). Where a defendant is accused of committing an alternative means crime, the jury should be instructed on only those means for which there is substantial evidence. State v. Franco, 96 Wn.2d 816, 824, 639 P.2d 1320 (1982) (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)). Two purposes of the alternative means doctrine are to

prevent jury confusion about what criminal conduct has to be proved beyond a reasonable doubt, and to prevent the State from charging every available means authorized under a single criminal statute, lumping them together, and then leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict. Smith, 159 Wn.2d at 789.

b. This was an alternative means case. As stated, alternative means crimes are those in which the criminal statute provides the proscribed criminal conduct may be proved in a variety of ways. Smith, 159 Wn.2d at 784; Arndt, 87 Wn.2d at 384. “As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed.” Smith, 159 Wn.2d at 784. The Legislature’s decision to codify the various ways in which a crime can be committed indicates its intent to treat those ways as alternative means. See id. at 789 n.8.

The crime of interfering with domestic violence reporting is just such an alternative means crime. RCW 9A.36.150 provides in relevant part:

- (1) A person commits the crime of interfering with the reporting of domestic violence if the person:
 - (a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and

(b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

Thus, the statute sets forth three alternative means of committing the crime: by preventing or attempting to prevent the victim of or a witness to a domestic violence crime from (1) calling 911; (2) obtaining medical assistance; or (3) making a report to any law enforcement official. RCW 9A.36.150(1)(b).

Here, the jury was instructed on all three alternative means of committing the crime. Instruction number 19 provided:

A person commits the crime of interfering with the reporting of domestic violence if the person commits a crime of domestic violence and prevents or attempts to prevent the victim or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

Residential burglary - Domestic Violence and Domestic Violence Violation of a Court Order are crimes of domestic violence when committed by one family or household member against another.

CP 53. The three alternative means provided in this jury instruction mirror the three means set forth in the interfering with the reporting of domestic violence statute, RCW 9A.36.150(1)(b). Thus, the State was required to present substantial evidence of each alternative means. Kitchen, 110 Wn.2d at 410-11.

c. The State did not present substantial evidence of at least one of the relied-upon alternatives. The substantial evidence test is satisfied only if the reviewing court is convinced that a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 410-11.

Here, the jury was instructed a person commits the crime of interfering with the reporting of domestic violence if he or she prevents or attempts to prevent the victim of a domestic violence crime from “obtaining medical assistance.” CP 53. However, the State presented no evidence to support this alternative means. Ms. Estandian testified that after she encountered Mr. Nonog inside her house, she told him she was “going to call 911.” 6/14/07RP 13. Before she could make that call, however, Mr. Nonog tore the phone line out of the wall. 6/14/07RP 13. Then, when Ms. Estandian attempted to call 911 on her cell phone, Mr. Nonog grabbed the phone and threw it against the wall. 6/14/07RP 14. She testified that as she tried to make the call on her cell phone, Mr. Nonog grabbed her wrist and arm in an attempt to get the phone from her, but that she suffered no injury from this brief struggle. 6/14/07RP 14. There was no further testimony that Ms.

Estandian suffered any injury during the incident or needed any medical assistance, or that Mr. Nonog prevented or attempted to prevent her from obtaining medical assistance. Thus, because the State did not present substantial evidence of this relied-upon alternative, the conviction must be reversed. Kitchen, 110 Wn.2d at 410-11.

3. THE TRIAL COURT ERRED IN INCLUDING THE CALIFORNIA PRIOR CONVICTION FOR FIRST DEGREE BURGLARY IN MR. NONOG'S OFFENDER SCORE

At sentencing, the State asserted and the trial court concluded Mr. Nonog's offender score included one prior California conviction from 1993 for first degree burglary. CP 76; 6/29/07RP 2-3. This conclusion was erroneous, as the State did not prove the California conviction was comparable to a Washington felony.

a. A sentencing court may not include a prior out of state conviction in an offender score absent sufficient proof the offense is comparable to a Washington felony. A defendant's offender score establishes the range a sentencing court may use in determining the sentence. RCW 9.94A.530; RCW 9.94A.712(3). The court calculates the offender score based upon its findings of the defendant's criminal history, which is a list of the defendant's prior convictions. RCW 9.94A.030(14); RCW 9.94A.525. With one

exception,³ the offender score includes only prior convictions for felony offenses. RCW 9.94A.525; State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994).

Where the prior convictions are from another state, the SRA requires the court to translate the convictions "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The Washington Supreme Court has adopted a two-part test to determine whether an out of state conviction may be included in the offender score. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the court compares the legal elements of the out-of-state crime with the comparable Washington felony offense. If the elements are comparable, the out of state conviction is equivalent to a Washington felony and may be included in the offender score. Lavery, 154 Wn.2d at 254. But where the elements of the out of state crime are different or broader, the sentencing court must examine the defendant's conduct as evidenced by the undisputed facts in the record to determine whether the conduct violates the comparable Washington statute. Morley, 134 Wn.2d at 606;

³ Where the current conviction is for a felony traffic offense, the SRA authorizes the court to include serious misdemeanor traffic offenses in the

Lavery, 154 Wn.2d at 255. The State bears the burden of proving the existence and comparability of the out-of-state offense. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

b. The sentencing court erred in concluding the prior California conviction for first degree burglary was comparable to a corresponding Washington felony.

i. The offense is not legally comparable to the Washington crime of residential burglary. The relevant inquiry in the first step of the comparability analysis is whether the elements of the California offense are comparable to the elements of a Washington felony in effect at the time of the offense. Morley, 134 Wn.2d at 605. "If the elements of the foreign offense are broader than the Washington counterpart," that is, if the out-of-state statute criminalizes more conduct than the comparable Washington statute, the elements are not legally comparable. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007); Morley, 134 Wn.2d at 606.

In this case, the State asserted, and the trial court accepted the State's assertions, that the California prior conviction for first

offender score. See RCW 9.94A.525(11).

degree burglary was comparable to the Washington felony of residential burglary. 6/29/07RP 3. Under RCW 9A.52.025(1), “[a] person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” Thus, unlawful entry is an element of the crime of residential burglary in Washington. Id.; State v. Thomas, 135 Wn. App. 474, 486, 144 P.3d 1178 (2006).

The elements of the California crime of first degree burglary, set forth in California Penal Code §§ 459 and 460 are broader and thus not legally comparable to the Washington crime of residential burglary. At the time of Mr. Nonog’s conviction for burglary, California’s burglary statute read,⁴

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, . . . floating home, . . . railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, . . . any house car, . . . inhabited camper, . . . vehicle . . . when the doors are locked, aircraft . . . , or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

⁴ Neither the Washington nor the California burglary statutes at issue have materially changed since 1993. Copies of the California statutes are attached as Appendix A.

Cal. Penal Code § 459. Burglary in the first degree is defined as “[e]very burglary of an inhabited dwelling house, vessel . . . which is inhabited and designed for habitation, floating home, . . . or trailer coach, . . . or the inhabited portion of any other building.” Cal. Penal Code § 460. Thus, in order to be guilty of the California crime of first degree burglary, a person need not enter or remain unlawfully in the property, as long as he or she enters with intent to commit larceny or any felony. Thomas, 135 Wn. App. at 486.

Because unlawful entry is not an element of the California crime of burglary, but is an element of the Washington crime, the California statute is broader and the two crimes are not legally comparable. In Thomas, the State conceded and this Court concluded the Washington and California crimes of burglary are not legally comparable. Id. In light of Thomas and a comparison of the elements in the criminal statutes, this Court must conclude Mr. Nonog’s California conviction for first degree burglary is not legally comparable to a Washington felony.

ii. The State did not prove the offense is factually comparable to a Washington felony. As discussed, in order to convict Mr. Nonog of burglary, California was not required to prove he entered or remained in a building unlawfully. Cal.

Penal Code § 459. But the State was required to establish this fact in order to prove the offense was factually comparable to a Washington felony. Because the State presented no evidence demonstrating that a California jury found Mr. Nonog unlawfully entered a building, or that he had admitted this fact in the course of pleading guilty to the offense, the State did not prove factual comparability.

To prove factual comparability, the State must prove the defendant's actual conduct underlying the prior conviction would violate the comparable Washington felony statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. The sentencing court is limited to considering only those documents that show conclusively the necessary facts were proved to a jury beyond a reasonable doubt or admitted by the defendant in the course of a guilty plea. Lavery, 154 Wn.2d at 258; State v. Ortega, 120 Wn. App. 165, 172, 84 P.3d 935 (2004).

The sentencing court may look at the underlying record to assess whether the conduct would have violated the comparable Washington criminal statute. But that inquiry is strictly limited. The court may examine only those documents that *conclusively* demonstrate the relevant facts were proved to a jury beyond a

reasonable doubt or admitted by the defendant in a guilty plea. Lavery, 154 Wn.2d at 258; State v. Bunting, 115 Wn. App. 135, 142-43, 61 P.3d 375 (2003). The elements of the foreign crime remain the cornerstone of the analysis, as “[f]acts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial.” Bunting, 115 Wn. App. at 141 (quoting Morley, 134 Wn.2d at 606).

To support its allegations regarding Mr. Nonog’s criminal history, the State presented only a document attached to its presentence statement entitled “Appendix B to Plea Agreement: Prosecutor’s Understanding of Defendant’s Criminal History.”⁵ Sub #60 at 14. The document merely lists the prior convictions the State believed to exist. The State did not present any documents of record from the California conviction, such as a copy of the judgment and sentence, charging document, guilty plea statement, or jury instructions. Thus, the State presented no evidence that the relevant facts were ever proved to a jury beyond a reasonable doubt or admitted by Mr. Nonog in the course of a guilty plea. This Court must conclude, therefore, the State failed to meet its burden of proving the 1993 California conviction for first degree burglary

⁵ A copy of this document is attached as Appendix B. A supplemental designation of clerk’s papers has been filed for the document.

was comparable to a Washington felony and therefore could be included in Mr. Nonog's offender score.

c. Mr. Nonog may challenge the offender score for the first time on appeal. Where a sentence is erroneous due to the miscalculation of the offender score, the defendant is entitled to be resentenced. Ford, 137 Wn.2d at 485. Generally, such erroneous sentences may be challenged for the first time on appeal. Id. at 477. Here, because Mr. Nonog did not waive his right to challenge the offender score calculation, he may raise the issue on appeal. In the alternative, by failing to object to the State's assertions about comparability, Mr. Nonog's attorney provided ineffective assistance of counsel that prejudiced Mr. Nonog, requiring remand for resentencing.

i. Mr. Nonog did not waive his right to challenge the State's unsubstantiated assertions about comparability. In general, where the sentencing court's offender score determination is challenged for the first time on appeal, the case law provides three approaches to analyzing the issue, assuming the defendant did not plead guilty. State v. Bergstrom, ___ Wn.2d ___, 169 P.3d 816, 2007 Wash. LEXIS 797, at *7 (2007). First, where the State alleges the existence of the prior conviction

at sentencing and the defense fails to “specifically object” before imposition of the sentence, the case is remanded for resentencing and the State is permitted to introduce new evidence. Id. (citing State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002)). Second, if the defendant does specifically object during the sentencing hearing but the State fails to produce any evidence of the defendant’s prior convictions, the State may not present new evidence at resentencing. Bergstrom, 2007 Wash. LEXIS 797, at *8 (citing Ford, 137 Wn.2d at 476; In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 877-78, 123 P.3d 456 (2005)). Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State’s representation of the defendant’s criminal history, the defendant waives the right to challenge the criminal history after sentence is imposed. Bergstrom, 2007 Wash. LEXIS 797, at *9 (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)).

This case falls into the first category identified in Bergstrom. At sentencing, the defense did not object to the State’s unsubstantiated assertion that the California conviction for burglary was comparable to the Washington felony of residential burglary,

but nor did the defense “agree” the prior conviction was comparable. At the sentencing hearing, the court and the parties discussed the offender score calculation:

[DEFENSE COUNSEL]: Your Honor, I was speaking to [the deputy prosecutor] about that. She tells me that she has obtained a copy of the criminal code for the California incident, and that it essentially is the same as the penal code here for residential burglary. Because it doesn't change the scoring, it doesn't change what he is looking at in terms of time. I'm willing to defer to the Court on that matter.

THE COURT: Okay. I will defer to counsel. If you look at it later and think that there is a potential issue, we could revisit it.

[DEPUTY PROSECUTOR]: And I will, as an officer of the Court, tell the Court that I have looked at the penal code from California, it does seem to overlap our residential burglary statute, and as such, I believe his prior residential burglary multiplies by two, which makes his score a four.

THE COURT: Okay.

6/29/07RP 3. The court accepted the State's erroneous assertion that the California conviction for first degree burglary was legally comparable to the Washington crime of residential burglary, and included the California conviction in the offender score. CP 71, 76; 6/29/07RP 6-7. Because the court determined the California conviction was legally comparable, neither the court nor the parties addressed factual comparability, and as noted above, the State presented no evidence to support a determination of factual comparability. 6/29/07RP 3.

It is well-established that a defendant cannot waive his right to challenge a trial court's erroneous legal conclusions about the offender score. Cadwallader, 155 Wn.2d at 875; Goodwin, 146 Wn.2d at 874. Thus, Mr. Nonog did not in any manner waive his right to challenge the trial court's erroneous legal conclusion that the California crime of first degree burglary is comparable to the Washington crime of residential burglary.

Moreover, in the context of a challenge to the comparability of a prior out-of-state conviction, the defendant can be deemed to have waived his right to raise the challenge only if he "affirmatively acknowledged" at sentencing that the prior conviction was properly included in the offender score. Ford, 137 Wn.2d at 483 n.5; State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). There must be an "affirmative agreement beyond merely failing to object." Ford, 137 Wn.2d at 483. Thus, in Ross, counsel for defendant Hunter expressly "conceded" the prior out-of-state conviction was properly included in the offender score. 152 Wn.2d at 226. Counsel for defendant Legrone included two prior foreign convictions as part of his own offender score calculation proffered to the court. Id. at 227. Under these circumstances, the Ross court concluded, the defendants "affirmatively acknowledged" the comparability of the

prior out-of-state convictions. Id. at 230; see also Ford, 137 Wn.2d at 483 n.5 (concluding that where defense counsel included out-of-state conviction in his own offender score calculation, such conviction was “properly included without further proof of classification.”).

In this case, defense counsel did not “affirmatively agree” the California burglary conviction was comparable to the Washington crime of residential burglary. At the sentencing hearing, counsel merely “deferred” to the court’s determination of legal comparability; she did not concede comparability. 6/29/07RP 3. Further, although counsel initially proffered her own calculation of the offender score, her calculation was based on the conclusion that the prior conviction should not count as two points. 6/29/07RP 2. But if the prior conviction were comparable to the Washington crime of residential burglary, as the State asserted, it would count as two points in Mr. Nonog’s offender score for the current residential burglary offense. RCW 9.94A.525(15). Thus, counsel did not “affirmatively agree” with the State that the California burglary conviction was comparable to the Washington crime of residential burglary.

Because counsel did not “affirmatively agree” with the State’s assertions regarding comparability, but merely failed to object to them, the sentence must be vacated and remanded for resentencing and the State permitted to introduce new evidence. Ford, 137 Wn.2d at 485-86.

ii. Defense counsel provided ineffective assistance by failing to hold the State to its burden of proving comparability, which prejudiced Mr. Nonog. In the alternative, Mr. Nonog is entitled to be resentenced, because defense counsel was constitutionally ineffective by failing to hold the State to its burden of proving the California burglary conviction was comparable to a Washington felony.

To prevail on a claim of ineffective assistance of counsel, defendant must overcome the presumption of effective representation and demonstrate that (1) his lawyer’s performance was so deficient that he was deprived of “counsel” for Sixth Amendment purposes and (2) there is a reasonable probability the deficient performance prejudiced his defense. Thiefault, 160 Wn.2d at 414 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

In Thiefault, the trial court included a prior Montana conviction for attempted robbery in Thiefault's offender score. 160 Wn.2d at 413. The court conducted a comparability analysis and found the conviction was legally comparable to its Washington counterpart. Id. Thiefault's attorney did not object to the trial court's comparability determination. Id.

On appeal, the court concluded the Montana offense was broader than the corresponding Washington felony, in part because the Montana statute required a lesser *mens rea*. Id. at 415, 417. Further, the court concluded the State's evidence was insufficient to prove the offense was factually comparable. Id. at 417. The State had produced the following documents of record for the Montana offense: a motion for leave to file information, an affidavit from a prosecutor, and the judgment from the Montana conviction. Id. at 416 n.2. The State did not produce the actual information or a guilty plea agreement. Id. The court concluded the evidence was insufficient to establish factual comparability, because it did not include facts Thiefault admitted in the course of pleading guilty to the Montana offense. Id. at 417. Thus, Thiefault's attorney should have objected to the court's comparability analysis, and provided

deficient representation under Strickland's first prong when he did not. Id.

The Supreme Court disagreed with the Court of Appeals' conclusion, however, that defense counsel's deficient representation did not prejudice Thiefault. Id. In concluding Thiefault did not establish prejudice, the Court of Appeals had reasoned that the superior court would likely have given the State the opportunity to obtain evidence properly establishing the facts underlying Thiefault's Montana conviction had his attorney argued the convictions were not comparable. Id. at 416. The Court of Appeals had further reasoned that Thiefault did not demonstrate there was a reasonable probability the facts underlying the Montana conviction would not have satisfied the Washington crime. Id. In rejecting this reasoning, the Supreme Court explained, "[a]lthough the State may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable." Id. at 417. Thus, the court vacated the sentence and remanded to the superior court to conduct a factual comparability analysis of the prior conviction. Id.

Due to counsel's failure to object at sentencing, the Supreme Court allowed the State a second opportunity to prove comparability on remand. Id. 417 n.4. The court explained that because counsel did not object to the erroneous legal comparability ruling, the State did not have to establish, and the parties did not fully litigate, factual comparability. Id. Thus, the State was allowed to produce new evidence at resentencing in an attempt to establish factual comparability. Id.

The circumstances of Mr. Nonog's case are indistinguishable from those in Thiefault. As discussed above, and as established by the case law, the California crime of first degree burglary is broader than its Washington counterpart, because in California the State need not prove unlawful entry. Further, the State's evidence here was insufficient to prove the offense was factually comparable. In fact, the State produced *no* evidence to establish factual comparability. Thus, as in Thiefault, Mr. Nonog's attorney provided deficient representation under Strickland's first prong when she did not object to the trial court's comparability analysis.

Moreover, Mr. Nonog was prejudiced by his attorney's deficient representation. As discussed above, and as recognized by the Thiefault court, the State satisfies its burden of proving

factual comparability only if it produces evidence that establishes the relevant facts were proved to a jury beyond a reasonable doubt or admitted by the defendant in the course of a guilty plea.

Thiefault, 160 Wn.2d at 415 (“In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt.”) (citing Lavery, 154 Wn.2d at 258; State v. Farnsworth, 133 Wn. App. 1, 22, 130 P.3d 389 (2006); Ortega, 120 Wn. App. at 171-74).

This burden on the State is difficult to meet and thus, as in Thiefault, it is likely that even if Mr. Nonog had objected at sentencing, the State would not have been able to produce documentation sufficiently establishing the necessary facts. In Thomas, for instance, in order to prove a prior California conviction for burglary was factually comparable to the Washington crime of burglary, the State presented charging documents that alleged Mr. Thomas entered the buildings “unlawfully,” and a judgment and sentence that stated Thomas pled guilty to the offense “as alleged in the complaint.” Thomas, 135 Wn. App. at 484-85. This Court held even these documents were not sufficient to show Thomas conceded all of the allegations in the indictment when he pled guilty to the offense. To the contrary, the documents showed only that

Thomas conceded the facts necessary to prove the elements of the crime, because “[w]here facts alleged in the charging documents are not directly related to the elements, a court may not assume those facts have been proved or admitted.” Id. at 486; see also Bunting, 115 Wn. App. at 143 (“Official Statement of Facts,” complaint and indictment from prior Illinois conviction insufficient to prove Bunting conceded facts alleged therein when pleading guilty to prior offense).

Because defense counsel provided deficient representation by failing to hold the State to its burden of proving Mr. Nonog's prior California burglary conviction was comparable to the Washington crime of burglary, and because counsel's deficient representation prejudiced Mr. Nonog, his sentence must be vacated and remanded for resentencing and the State given another opportunity to prove comparability. Thiefault, 160 Wn.2d at 417.

4. THE ERRONEOUS STATUTORY REFERENCE IN
COUNT ONE ON THE JUDGMENT AND
SENTENCE MUST BE CORRECTED

The judgment and sentence for count one, felony violation of a no-contact order, states Mr. Nonog was found guilty of the crime under RCW 26.50.110(1), (4) and (5). CP 70. This statutory

reference is erroneous, as Mr. Nonog was found guilty only under subsection (5) of the statute and not subsection (4).

RCW 26.50.110(4) provides a person is guilty of the felony crime of violating of a no-contact order if he or she violates the no-contact order by committing an assault. RCW 26.50.110(5) provides a person is guilty of the felony crime if he or she violates a no-contact order and has at least two previous convictions for violating the provisions of no-contact order.

Here, although the State charged Mr. Nonog with violating both subdivisions of the statute, CP 10, the jury was instructed it could find Mr. Nonog guilty of the crime only if it found he had two prior convictions for violating the provisions of a no-contact order. CP 44-45. The jury was not instructed on the assault alternative. Id. Thus, the judgment and sentence must be corrected to properly reflect the jury's findings.

F. CONCLUSION

Because the information omitted an essential element of the crime of interfering with domestic violence reporting, and because the jury was instructed on an alternative means of committing the crime that is not supported by substantial evidence, that conviction must be reversed. Because the trial court erred in including Mr.

Nonog's prior California conviction for burglary in his offender score, or, alternatively, because counsel was deficient for failing to object to the trial court's comparability analysis, which prejudiced Mr. Nonog, his sentence must be vacated and remanded for resentencing.

Respectfully submitted this 17th day of December 2007.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX A

DEERING'S CALIFORNIA CODES ANNOTATED
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*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
*** THROUGH 2007 CH. 750, APPROVED 10/14/07 ***

PENAL CODE
Part 1. Of Crimes and Punishments
Title 13. Of Crimes Against Property
Chapter 2. Burglary

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Pen Code § 459 (2007)

§ 459. Burglary

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in *Section 21 of the Harbors and Navigation Code*, floating home, as defined in subdivision (d) of *Section 18075.55 of the Health and Safety Code*, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in *Section 635 of the Vehicle Code*, any house car, as defined in *Section 362 of the Vehicle Code*, inhabited camper, as defined in *Section 243 of the Vehicle Code*, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by *Section 21012 of the Public Utilities Code*, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

HISTORY:

Enacted Stats 1872. Amended Code Amdts 1875-76 ch 56 § 1; Stats 1913 ch 144 § 1; Stats 1947 ch 1052 § 1; Stats 1977 ch 690 § 3; Stats 1978 ch 579 § 22; Stats 1984 ch 854 § 2; Stats 1987 ch 344 § 1; Stats 1989 ch 357 § 2; Stats 1991 ch 942 § 14 (AB 628).

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*** THROUGH 2007 CH. 750, APPROVED 10/14/07 ***

PENAL CODE
Part 1. Of Crimes and Punishments
Title 13. Of Crimes Against Property
Chapter 2. Burglary

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Pen Code § 460 (2007)

§ 460. Degrees

(a) Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of *Section 18075.55 of the Health and Safety Code*, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.

(b) All other kinds of burglary are of the second degree.

(c) This section shall not be construed to supersede or affect *Section 464 of the Penal Code*.

HISTORY:

Enacted Stats 1872. Amended Code Amdts 1875-76 ch 56 § 2; Stats 1923 ch 362 § 1; Stats 1955 ch 941 § 1; Stats 1976 ch 1139 § 206.5, operative July 1, 1977; Stats 1978 ch 579 § 23; Stats 1982 ch 1290 § 1, ch 1297 § 1; Stats 1989 ch 357 § 3; Stats 1991 ch 942 § 15 (AB 628).

APPENDIX B

**APPENDIX B TO PLEA AGREEMENT
PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY
(SENTENCING REFORM ACT)**

Defendant: CIPRIANO NONOG

FBI No.: 458698VA7

State ID No.: WA17901913

DOC No.: 856952

This criminal history compiled on: April 20, 2006

- None known. Recommendations and standard range assumes no prior felony convictions.
 Criminal history not known and not received at this time. WASIS/NCIC last received on 04/10/2006

Adult Felonies

Offense	Score	Disposition
03-1-06068-9 harassment (felony) 54765	04/21/2003	S WA King Superior Court - Guilty 06/06/2003 felony 6m jail ct 1. 12m comm custody, 6m jail ct 2 (non-felony) conc w/ct 1.
burglary 1st	07/04/1993	S CA Kern Superior Court - Convicted 08/12/1993 365 days jail/36 months probation

Adult Misdemeanors

Offense	Score	Disposition
03-1-06068-9 assault 4th degree	04/21/2003	WA King Superior Court - Guilty 06/06/2003 felony 6m jail ct 1. 12m comm custody, 6m jail ct 2 (non-felony) conc w/ct 1.
C00427279 WS reckless driving	03/02/2002	WA Issaquah District Court - Guilty
14440 KI dwls 3rd degree	09/13/2001	WA Kirkland Municipal Court - Guilty
14440 KI refuse to give info/cooperate	09/13/2001	WA Kirkland Municipal Court - Guilty
7995 KI dwls 3rd degree	02/12/1998	WA Kirkland Municipal Court - Guilty
BC0111826 BE dwls 3rd degree	03/24/1997	WA Bellevue District Court - Guilty
B-C103145 BE viol of protection order dv	10/22/1995	WA Bellevue District Court - Guilty
B-C101812 BE violation of an order of prof	10/01/1995	WA Bellevue District Court - Guilty
B-C102701 BE viol of protection order dv	09/06/1995	WA Bellevue District Court - Guilty

Juvenile Felonies - None Known

Juvenile Misdemeanors - None Known

Comments

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

STATE OF WASHINGTON,)	
)	NO. 60248-9-I
Respondent,)	
)	
v.)	
)	
CIPRIANO NONOG,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 17TH DAY OF DECEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] CIPRIANO NONOG 856952 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2007.

X _____ 

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 DEC 17 PM 4:57